COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Thomas v. Rio Tinto Alcan Inc.,*
2024 BCCA 62

Date: 20240226
Docket: CA48066

2024 BCCA 62 (CanLII)

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

Appellants
(Plaintiffs)

And

Rio Tinto Alcan Inc., His Majesty the King in right of the Province of British Columbia and the Attorney General of Canada

Respondents
(Defendants)

And

Nadleh Whut'en, Heiltsuk Tribal Council, Chippewas of Saugeen First Nation and Chippewas of Nawash Unceded First Nation, and Council of the Haida Nation

Interveners

Before: The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated January 7, 2022 (*Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15, Vancouver Docket S116524).

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Appearing for the Intervener, Heiltsuk Tribal Council:	L.C. Fong, K.C. R.E.S. Tillman
Place and Date of Hearing:	Vancouver, British Columbia June 19–23, 2023
Place and Date of Judgment:	Vancouver, British Columbia February 26, 2024

Written Reasons of the Court

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Summary:

In the 1950s, British Columbia enacted legislation to authorize Rio Tinto Alcan ("RTA") to build the Kenney Dam to facilitate the production of hydropower for the smelting of aluminum. The appellants brought a claim in nuisance against RTA asserting that the storage and diversion of water from the Nechako River arising from the construction and operation of the Kenney Dam infringed their Aboriginal right to fish in the Nechako River. The appellants did not request a declaration of Aboriginal title, but they did seek a finding of Aboriginal title to the extent it was necessary to ground the nuisance claim. They further sought declarations that British Columbia and Canada were obligated to require RTA to cease operating in a manner that continues to cause nuisance.

RTA relied primarily on the defence of statutory authority. The appellants responded that if established, the defence of statutory authority was constitutionally inapplicable to them.

Following a lengthy trial, the judge held that the two First Nations have a constitutionally entrenched Aboriginal right to fish the Nechako River watershed for food, social, and ceremonial purposes, but this right had been significantly impaired due to the regulation of the river and the decline of the fish population. He found there was a sufficient basis to found the appellants' right to fish and to ground an action in nuisance. However, he concluded the defence of statutory authority applied and that RTA could not be held liable in nuisance. He declined to make any findings of Aboriginal title. The trial judge granted a remedy against Canada and British Columbia, stating that each have an ongoing duty and obligation to protect the appellants' Aboriginal right to fish.

On appeal, the appellants challenge the trial judge's conclusions that the defence of statutory authority applies, and, if it does apply, they say he erred in failing to find that the defence was constitutionally inapplicable to the appellants. They also allege he erred by declining to make a finding of Aboriginal title and by granting limited declaratory relief.

Held: Appeal allowed in part, solely with respect to the declaratory relief. The appellants have not established that the trial judge erred in dismissing the common law nuisance claim against RTA or in declining to make a finding of Aboriginal title. However, the trial judge did err in principle in resolving the claim for declaratory relief. He took an unduly narrow approach to the scope of declaratory relief that was available to him in light of his findings of a proven Aboriginal right to fish and the ongoing impairing effects on the storage and diversion of water from the Nechako River. The resulting declaration was too restrictive, generalized, and of no real practical utility to the appellants.

As this error was material and had an impact on the scope of the declaration, a variation of the declaration is warranted. The federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by

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consulting the plaintiffs whenever governments' actions or conduct in managing the annual water allocation and flow regime for the Nechako River, pursuant to RTA's water licences and agreements, raises the potential for a novel adverse impact on the right, and also a duty to ensure that governments' ongoing and future participation in managing the annual water allocation and flow regime for the Nechako River, pursuant to RTA's water licences and agreements, is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982.

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Reasons for Judgment of the Court:

Introduction

[1] This appeal involves a claim for common law nuisance based on interference with Aboriginal fishing rights. It presents issues about how the defence of statutory authority applies to a nuisance claim, including whether the *Constitution Act, 1982*, may limit the availability of the defence in certain circumstances. It also raises questions about the availability and nature of declaratory relief against the federal and provincial governments where a nuisance is found to have ongoing impact on an established right.

[2] In the 1950s, the province of British Columbia ("British Columbia") authorized the respondent Rio Tinto Alcan ("RTA") to build the Kenney Dam ("Kenney Dam") to facilitate the production of hydropower for the smelting of aluminum. Water is stored, diverted for use, and released from the resulting 233-kilometre long reservoir in a manner that impacts several waterways, including the Nechako River and Kemano River.

[3] The construction and operation of the Kenney Dam and the reservoir has had a dramatic impact on the Nechako River. As a result, in September 2011, the appellants brought a claim in nuisance against RTA. In that claim, the two First Nations asserted an Aboriginal right to fish in the Nechako River watershed. They also asserted Aboriginal title to the lands and beds of the lakes or rivers in which they traditionally fished, although they did not seek a formal declaration to that effect.

[4] In response, RTA relied on the defence of statutory authority, claiming that British Columbia explicitly and validly authorized the construction and operation of the Kenney Dam and reservoir. On that basis, RTA argued it should be shielded from any liability flowing from the inevitable consequences to the Nechako River and its fisheries.

[5] Following RTA's application in August 2016, the federal government ("Canada") and British Columbia were added as defendants to the claim.

[6] As part of the relief sought, the appellants asked for an injunction to compel RTA, Canada, and British Columbia, to restore a more natural hydrograph in the Nechako River, with a view to preventing further damage to the fishery and restoring the historic abundance of the Nechako White Sturgeon and salmon.

[7] At trial, the evidentiary record from the parties was voluminous, including a 100-page Agreed Statement of Facts ("ASF") that was accepted by the trial judge. There were over 3,000 pages of final written submissions. Following the 189-day trial, the trial judge issued reasons for judgment, totaling over 220 pages (indexed at 2022 BCSC 15; referred to throughout as "RFJ").

[8] The appellants' lawsuit against RTA was based on the common law tort of nuisance and grounded in their assertions of an Aboriginal right to fish in the Nechako River watershed and Aboriginal title to the lands and beds of the lakes or rivers in which they traditionally fished. Although the appellants advanced an alternative claim in public nuisance, the trial judge decided the case on the basis of the legal framework that applies to private nuisance.

[9] The trial judge held that the two First Nations have a constitutionally entrenched Aboriginal right to fish the Nechako River watershed for food, social, and ceremonial purposes, but this right had been significantly impaired due to the regulation of the river and the decline of the fish population.

[10] As a matter of law, the trial judge found that the appellants' interest in and occupancy of certain reserves were sufficient to found an action against RTA in private nuisance arising from any substantial and unreasonable interference with their use or enjoyment of the reserve lands. In addition, he found that the appellants' Aboriginal right to fish was also sufficient to found an action in nuisance in the appropriate circumstances.

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[11] Overall, the trial judge accepted that RTA's regulation of the Nechako River watershed had negative effects on the abundance and health of the fish population in the watershed and that the resulting decline in the fish population and fishery had "hugely negative impacts" on the appellants as Indigenous communities. This impact was greatly disproportionate to any burden placed on the non-Indigenous population of the region. Specifically, he found that the regulation had caused or materially contributed to the decline in the Nechako White Sturgeon and salmon. In those circumstances, RTA would be liable in private nuisance, unless it was immunized by defences based on statutory authority or limitations legislation.

[12] The trial judge found the defence of statutory authority applied in this case and RTA could not be held liable in nuisance. RTA had complied with the regulatory requirements imposed by British Columbia in installing and operating the Kenney Dam and its reservoir. Any harm resulting to the fish and fishery in the Nechako River was considered the "inevitable result" of the regulatory requirements. The appellants were unsuccessful at trial in advancing the argument that the defence was "constitutionally inapplicable" on the basis that the conduct infringed Aboriginal rights. Accordingly, the claims against RTA were dismissed (RFJ at paras. 542–543, 603).

[13] The trial judge declined to make any formal findings on Aboriginal title to the appellants' claimed traditional fishing sites and to the submerged lands and waters of the Nechako River, Stellako River or Fraser Lake. He also declined to make any findings of Aboriginal rights comparable to the common law riparian rights available in or before the 19th century.

[14] The trial judge was prepared, however, to make a declaration that the appellants have an Aboriginal right to fish for food, social, and ceremonial purposes in the Nechako River watershed and that the provincial and federal governments have an obligation to protect that right. He granted this remedy against Canada and British Columbia, declaring that each of them has an ongoing duty to protect the appellants' Aboriginal right to fish.

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[15] On appeal, the appellants challenge the trial judge's conclusion that the defence of statutory authority applied and, if it did apply, they say he erred in failing to find that the defence was constitutionally inapplicable. The appellants also submit the trial judge erred in failing to make a finding of Aboriginal title on their behalf, and further erred in granting limited declaratory relief.

[16] In seeking to uphold dismissal of the nuisance claim, RTA challenges the trial judge's findings that the appellants' Aboriginal right to fish was sufficient to ground a claim in private nuisance, that they established the necessary element of causation, and that the claims concerning the White Sturgeon were not statute-barred. If nuisance has been established, RTA relies on the trial judge's conclusion that the defence of statutory authority applies.

[17] For the reasons that follow, the appellants have not established that the trial judge erred in dismissing the common law nuisance claim against RTA or in declining to make a finding of Aboriginal title. However, we have concluded the trial judge did err in principle in resolving the claim for declaratory relief. As this error was material, we allow the appeal for the sole purpose of varying the declaratory relief granted by the trial judge.

Background

[18] The *Industrial Development Act*, S.B.C. 1949, c. 31 ("*IDA*") gave the authority to the Lieutenant Governor-in-Council to sell Crown land, grant a water licence to any person who proposed to establish an aluminum industry in the province, and to make other arrangements for the operations of the aluminum industry in British Columbia. The *IDA* also authorized British Columbia to execute formal contracts to accomplish these purposes (RFJ at para. 71).

[19] Section 3 of the *IDA* stated:

> 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.

[20] Section 3(3) explicitly contemplated that the aluminum industry's establishment and operation may result in fisheries being "injuriously affected". It required that any formal agreement made by the government provide protection to such fisheries "as may be considered advisable".

[21] On December 29, 1950, British Columbia and RTA entered into an agreement (the "1950 Agreement", authorized by Order in Council 2883/1950), which granted RTA the right, licence(s), and permit(s) under the *Water Act*, 1939, c. 63, to store, use by diversion, and occupy all Crown lands that were pertinent to developing and operating the water power. The infrastructure that the 1950 Agreement authorized subsequently became the Kenney Dam, Nechako Reservoir, and Skins Lake Spillway.

[22] Pursuant to the *IDA,* a Conditional Water Licence ("CWL") was appended to the 1950 Agreement. The CWL, issued to RTA by the Comptroller of Water Rights on behalf of the province, authorized RTA to store, divert, and use water from the

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Nechako and Nanika River watersheds and to construct, maintain and operate works for the generation and supply of power at Kemano as set out in the 1950 Agreement.

[23] With respect to the quantity of water stored and diverted, the CWL stated:

> (d) The purposes for which water is to be used are storage and power as set forth in the Agreement between the Government and the Licensee …;
>
> (e) The maximum quantity of water which may be stored is 35,000,000 acre feet. The maximum rate of diversion is 9,500 cubic feet per second.
>
> …
>
> (k) The Licensee shall not store, divert or use any water in any reservoir to be created under this license until the plans for the construction of such works have been submitted to the Comptroller and approved by him.

[24] The Provincial Minister of Lands and Forests also issued a permit under the *Water Act*, authorizing the occupation of Crown land covered by the Nechako Reservoir (RFJ at para. 74).

[25] Neither the 1950 Agreement nor the CWL contained any provision for specific flows to be released into the Nechako River for any purpose, fisheries or otherwise. Under this CWL, RTA always had the option to release waters to the river voluntarily, subject to any legal requirements (RFJ at para. 75; ASF at paras. 81, 84(d)).

[26] These authorizations were all provincial instruments and did not require the involvement of Canada. However, due to its concerns about the impact of the development on fish, the Department of Fisheries and Oceans ("DFO") negotiated directly with RTA regarding specific release flows.

[27] Eventually, an informal arrangement was reached for RTA to release flows from the Skins Lake Spillway (as Canada had requested) up to a rate of 100 cubic feet per second; Canada would not request releases at any higher amounts; and Canada would inform the provincial Comptroller of Water Rights of its approval of RTA's construction plans. There was no requirement under the 1950 CWL for RTA

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to receive approval from the DFO prior to proceeding with construction of the Kenney Dam and diversion (RFJ at para. 83).

[28] From 1950 to the end of the 1970s, RTA held the same authorization provided in the 1950 CWL to store and divert water. The arrangement between RTA and Canada with respect to the flows also remained the same until matters changed in 1980 (RFJ at para. 106).

[29] Litigation in the 1980s among RTA, Canada, and British Columbia, eventually gave rise to the 1987 Settlement Agreement, which established the flow regime for the Nechako River that is in force today (RFJ at para. 529).

[30] The 1987 Settlement Agreement specified RTA's obligations to release water as well as the Short-Term Water Allocation and Long-Term Water Allocation governing RTA's water release obligations that have been in place since then. Those allocations set out the quantity of water to be released from the Nechako Reservoir for each month of the year (RFJ at paras. 141–146).

[31] On December 29, 1987, British Columbia issued an Amended CWL and an Amended Permit Authorizing the Occupation of Crown Land No. 3349 to RTA. The Amended CWL set out the following regarding storage, diversion, and releases:

> (e) The maximum quantity of water which may be stored is a total of 23 850 cubic-hectometres, of which 7100 cubic-hectometres are live storage. The maximum rate of diversion and use through the facilities is 269 cubic-metres per second.
>
> …
>
> (m) In order to provide flows necessary for the protection of sockeye and chinook salmon, the Licensee is authorized to make releases into the natural channel of the Nechako River, in accordance with the Settlement Agreement.

[32] The 1987 Settlement Agreement also led to the creation of a Technical Committee, which was charged with directing the flows to be released by RTA from the Nechako Reservoir through the Skins Lake Spillway. The Committee includes representatives from both levels of government, RTA, and an independent expert

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selected for technical expertise. Both levels of government are involved directly in setting the flow (RFJ at paras. 149–153, 531).

[33] As well, the 1987 Settlement Agreement provided for the creation of the Nechako Fisheries Conservation Program ("NFCP"), which the Technical Committee was charged with implementing and was subject to oversight by a Steering Committee. That committee consisted of three members appointed separately by each of the parties to the 1987 Settlement Agreement. Decisions of the Steering Committee are to be unanimous; if there are disagreements, they may be determined by arbitration (RFJ at para. 149).

[34] The Summer Temperature Management Program ("STMP") was also mandated as part of this settlement agreement and incorporated into the Amended CWL. The objective of the STMP is to prevent mean daily water temperatures from exceeding 20ºC in the Nechako River during sockeye migration in July and August. The Technical Committee oversees RTA's implementation of the STMP (ASF at paras. 474–476).

[35] RTA brought an action against British Columbia that was settled by way of a 1997 Settlement Agreement. Pursuant to that agreement, British Columbia issued RTA its Final Water Licence ("FWL") which provides for the same storage levels, but lowers the maximum rate of diversion:

> (e) (1) The maximum quantity of water which may be stored is 23,850 cubic-hectometres, of which 7100 cubic-hectometres are live storage.
>
> (2) The maximum rate of diversion and use for power purpose is 170 cubic-metres per second.
>
> …
>
> (k) In order to provide flows necessary for the protection of sockeye and chinook salmon, the Licensee is authorized to make releases into the Nechako River in accordance with the "Short Term Annual Water Allocation" as defined in the 1987 Settlement Agreement …

[36] The water licences issued to RTA explicitly authorized and continue to authorize the diversion of water from the Nechako River (RFJ at para. 530).

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Issues on Appeal

[37] The issues raised on appeal primarily relate to the trial judge's findings on the common law nuisance claim, the application of the defence of statutory authority, his refusal to make a finding of Aboriginal title, and the declaratory relief he issued against the governments.

[38] More specifically, we identify the issues on appeal as follows:

a) whether the defence of statutory authority applied and was proven here;

b) if the defence applied, whether it was "constitutionally inapplicable" to the appellants;

c) whether the trial judge erred in failing to make a finding of Aboriginal title to ground the nuisance claim; and,

d) whether there was an error in the trial judge's understanding of the extent to which declaratory relief was available against Canada and British Columbia.

[39] At the outset, we wish to note that throughout these reasons, we use the term "Aboriginal" to refer to the rights and title at issue. We recognize that "Indigenous" is the more appropriate term. We intend no disrespect in our use of this terminology. Our reliance on the term "Aboriginal" is meant to reflect the wording in the earlier case law, the trial judge's reasons, and the written submissions of the parties.

Common Law Nuisance Claim

[40] The principal issue on appeal is whether the trial judge erred in concluding that RTA was entitled to rely on the defence of statutory authority to defeat the claim of nuisance brought against them. RTA submits, however, that it is unnecessary to resolve that issue because the trial judge erred in concluding that RTA's conduct amounted to actionable nuisance.

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[41] RTA argues that the appellants lacked standing to bring the action, that if they had standing, the necessary element of causation of loss had not been established, and that in any event, certain claims were statute-barred. Only if these arguments fail and nuisance is established is it necessary to address the defence of statutory authority.

[42] Accordingly, we address the issues raised regarding the common law nuisance claim in the following order:

a) whether the appellants' constitutionally protected right to fish could found an action in private nuisance;

b) if so, whether the necessary causation of loss had been established to ground a nuisance claim;

c) whether the limitations legislation meant that the claims relating to fresh damage to the White Sturgeon are statute-barred; and

d) if nuisance had been proven, whether the defence of statutory authority was proven.

Did the trial judge err in finding that the right to fish could found an action in private nuisance?

[43] The issue before the trial judge was whether Aboriginal rights could, at law, found the appellants' action in nuisance.

[44] On appeal, the issue is whether the trial judge applied the correct legal test in his analysis of nuisance and the permissible scope of the tort, which resulted in his finding that Aboriginal fishing rights could give rise to a claim in the tort of nuisance. This is to be reviewed on a correctness standard (*British Columbia (Minister of Public Safety) v. Latham*, 2023 BCCA 104 at paras. 49–50, leave to appeal to SCC ref'd, 40693, 40703 (21 December 2023) [*Latham*]).

[45] The essence of any nuisance claim involves the interference with property rights (RFJ at para. 345, citing *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756 at para. 9, 1979 CanLII 2776 (B.C.C.A.) [*Royal Anne*]).

[46] RTA and British Columbia objected to the appellants' nuisance claims on a number of grounds. RTA argued that the appellants' constitutionally protected rights are not actionable against a private entity such as RTA but only actionable against the Crown (RFJ at para. 350). RTA also challenged the position that Aboriginal rights confer a proprietary interest in land sufficient to ground a claim in nuisance. British Columbia's position was that Aboriginal fishing rights do not have 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 (at para. 351). Canada took no position on the issue as there was no nuisance claim against Canada.

[47] The trial judge correctly set out the legal framework for nuisance (RFJ at paras. 345, 347).

[48] He first considered whether Aboriginal rights are actionable against non-governmental entities. He observed that *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] expressly affirmed the possibility of tort liability on the part of third parties based on the legal rights of Indigenous peoples.

[49] The trial judge then considered whether *sui generis* Aboriginal interests could found an action in nuisance and noted that this Court in *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154, leave to appeal to SCC ref'd, 36480 (15 October 2015) [*Saik'uz 2015*] endorsed three separate bases on which the nuisance claim in this case might be founded; namely, (1) the appellants' interest in their reserves, (2) their Aboriginal right to fish, and (3) their Aboriginal title (if established) (RFJ at para. 362).

[50] RTA conceded that the appellants' reserve interests can found a claim in nuisance. The trial judge had "no hesitation in concluding that, as a matter of law, the [appellants'] interests in and occupancy" of the two reserves in question was

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"sufficient to found an action in private nuisance arising from any substantial and unreasonable interference with their use or enjoyment of the reserve lands" (RFJ at para. 366). He reached the same conclusion, in *obiter*, with respect to Aboriginal title (at para. 367).

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[51] The judge then turned to the "more controversial" issue of whether the Aboriginal right to fish bestowed standing to sue in nuisance (RFJ at para. 368).

[52] He declined to engage in the parts of the issue that constituted more of an academic debate, recognizing that *R. v. Sparrow*, [1990] 3 S.C.R. 1075, 1990 CanLII 104, shows that Aboriginal fishing rights are not easily analogized to other rights (RFJ at para. 375). He agreed with the submissions of the appellants, who argued that this was the appropriate case to extend the common law to recognize that a claim in nuisance must be sustainable when there is an unreasonable interference with the Aboriginal right itself or the land to which that right is intimately related (at para. 376).

[53] He then concluded that the appellants' Aboriginal right to fish was legally sufficient to found an action in private nuisance, regardless of whether that right was exercised in the waters within or adjacent to the reserve lands and whether or not they held title to those lands and waterbeds (RFJ at para. 377). He rejected the submissions from RTA and British Columbia which objected to developing the law in such a manner (at paras. 379–382).

[54] Ultimately, he concluded that the appellants' occupation of their reserve lands was sufficient to ground their nuisance claim, and, independently, that *sui generis* Aboriginal rights to fish could found an action in nuisance in the appropriate circumstances (RFJ at para. 383).

Positions of the parties

[55] RTA submits that the trial judge erred in law by holding that Aboriginal rights can ground a private cause of action in nuisance. It argues that the judge "fundamentally changed the common law of tort and property" in holding that

Aboriginal rights are actionable directly against third parties, rather than allowing for the reconciliation of those rights through negotiation, and if necessary, litigation against the Crown.

[56] RTA says that the trial judge effectively created a novel “super tort” grounded in Aboriginal rights, one that is both newly actionable and able to pierce directly otherwise valid common law defences. Furthermore, the finding that an Aboriginal right to fish could be “broadly” actionable in private nuisance is contrary to the principle that, at its core, nuisance is a tort committed against the land itself rather than against any person. Relying on *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 1989 CanLII 36 and *R. v. Salituro*, [1991] 3 S.C.R. 654, 1991 CanLII 17, RTA submits that the judge’s finding is contrary to the principle that extensions to the common law must follow relevant principles and be exercised with judicial restraint.

[57] The appellants disagree with RTA’s argument that only a proprietary right can give rise to liability in nuisance, and that because the appellants neither own the fishery nor the fish, their Aboriginal right cannot ground a nuisance claim. They say that what is relevant is whether their interests are of the kind that the tort is designed to protect and that interests, short of ownership, can sustain a claim.

[58] They submit that the tort provides broad protection against interference or disturbance in the exercise or enjoyment of a right that is inherently and intimately connected with land, an example being *profits à prendre*. They argue that their right to fish is a site-specific interest that encompasses “access to the fishery as well as preservation of the fish” (*Pasco v. Canadian National Railway Co.* [1986] 1 C.N.L.R. 35, 1985 CanLII 320 at para. 31 (B.C.S.C.)).

Discussion

[59] As a preliminary issue, RTA appears to argue that from a pleadings perspective, the appellants’ claims in private nuisance do not disclose an action known at law and were thus bound to and should have failed.

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[60] The difficulty with this argument is that it was specifically rejected in *Saik'uz 2015*. First of all, with respect to Aboriginal rights, Justice Tysoe, writing for the Court, concluded that the chambers judge had erred in holding that no reasonable causes of action existed until Aboriginal rights and title were proven or accepted. He stated that it was not plain and obvious that the notice of civil claim disclosed no reasonable cause of action with respect to the claims for private nuisance, public nuisance, and breach of riparian rights, to the extent they are based on Aboriginal title and rights (*Saik'uz 2015* at para. 79).

[61] Secondly, with respect to the claims based on the appellants' interest in the reserve lands, Tysoe J.A. said it was not "plain and obvious" that they do not qualify as claimants in private nuisance under the narrower view that a plaintiff must have the right of exclusive possession to maintain an action in private nuisance (*Saik'uz 2015* at para. 87). In reaching that conclusion, Tysoe J.A. pointed to s. 2 of the *Indian Act,* R.S.C. 1985, c. I-5, which defines "reserve" as "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". He said that this would "give the band the right to exclusive possession of the reserve lands, which is sufficient to found a claim in private nuisance" (at para. 88).

[62] As we later explain, the effect of *Saik'uz 2015* is limited on this appeal in that it only decided it was not plain and obvious that the appellants' claims would fail. However, it is of assistance as we conduct our own review of the judge's analysis and in light of his findings that were made on a full evidentiary record at trial.

[63] At a minimum, since this Court found the claims were not bound to fail, the appellants' claims should have been and were in fact considered by the trial judge in the context of the findings he made both with respect to the existence of the constitutional right to fish and their use of reserve lands.

[64] The question then becomes whether the appellants' claims in nuisance can be decided within the existing legal framework, or, as RTA asserts, were wrongly decided by the judge who impermissibly expanded the scope of the tort.

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[65] A “dearth” of similar cases presents “no great obstacle” to a claim, since “nuisance is one of those areas of the law where the courts have long been engaged in the application of certain basic legal concepts to a never-ending variety of circumstances…” (*Fearn v. Board of Trustees of the Tate Gallery*, [2023] UKSC 4 at para. 14, citing *Bank of New Zealand v. Greenwood,* [1984] 1 NZLR 525 at 530).

[66] Accordingly, we agree with the trial judge that “whether the conventional nomenclature of nuisance law (such as ‘proprietary rights’) is technically descriptive of Aboriginal rights” cannot be determinative of whether those rights suffice to ground a claim (RFJ at paras. 376–377).

[67] RTA submits that only a proprietary right can give rise to liability in nuisance, and because the appellants neither own the fishery nor the fish, their Aboriginal right cannot ground a nuisance claim.

[68] We consider this approach overly restrictive and are of the view that a broader perspective is required. The judge explained that the “infrastructure of Aboriginal law” developed by the Supreme Court of Canada contained a number of features, including that Aboriginal rights are unique in nature (*sui generis*), and “do not necessarily coincide with traditional common law rules respecting property” (RFJ at para. 237).

[69] Given that nuisance is a field of liability focused on the harm suffered rather than on the prohibited conduct, the analysis must consider whether the appellants’ constitutionally protected interests are those which the tort of nuisance is designed to protect.

[70] The appellants correctly set out these points in their Reply Factum at paras. 73–74:

- Interests in land short of ownership can sustain a claim in nuisance.
- The tort of nuisance provides broad protection against “interference with, disturbance of or annoyance to a person in the exercise or enjoyment of

… ownership or occupation of land or of some easement, quasi-easement or other right used or enjoyed in connection with land" such as (but not limited to) *profits à prendre*.

- Fishing rights in the nature of a *profit à prendre* have grounded nuisance claims, including where the Court expressly recognized that only "when the fish are caught" is there "a right to property in the fish".

[71] Furthermore, in *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6, albeit in the context of considering whether an action was bound to fail, the Yukon Court of Appeal recognized that a nuisance may arise when interference with a *profit à prendre* prevents the plaintiff's interest "from being used and enjoyed in a meaningful way" (at para. 101, citing 2021 YKSC 3 at paras. 206–207, leave to appeal to SCC ref'd, 40053 (4 August 2022)).

[72] It is of assistance to summarize certain of the trial judge's findings of fact to which the legal framework must be applied:

- The Saik'uz and Stellat'en are taught methods as children to catch salmon and Nechako White Sturgeon that have been employed "at various specific family 'owned' locations on the Nechako River, Fraser Lake and the Stellako River" (RFJ at para. 249).
- Specific spiritual and ritual practices related to fishing play a role in the intergenerational transmission of culture (at para. 249).
- Fishing sites are exclusive and require permission for fishing to occur at other sites traditionally occupied by other families (at para. 249).
- The appellants have proven their Aboriginal right to fish in their respective areas of the Nechako watershed (at para. 253).

[73] Specifically, in relation to Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1 the judge found:

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- Both appellant First Nations have occupied the Nechako watershed since time immemorial and their status as Indigenous Peoples within the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*") is unquestionable (RFJ at para. 280).

- It was a cultural pattern for the Dakelh to locate villages at or near the sites of fishing weirs/barricades (at para. 303).

- There was a fishing pier at Noonla, 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 (at para. 303).

- For generations, a Saik'uz *sadeku* had occupied Noonla for regular fishing purposes (at para. 303).

- 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*) (at para. 315).

[74] RTA challenges the trial judge's finding that because Aboriginal rights are intimately connected to particular pieces of land, a claim in nuisance is sustainable whenever there is an unreasonable interference with that right. It argues that an "intimate connection" to land or site-specificity does not suffice to give rise to a claim in nuisance for interference with the fish.

[75] For their part, the appellants submit the judge was correct, and they point to other courts and tribunals that have provided remedies for site-specific fishing rights in other contexts, despite the lack of a proprietary interest in the fish themselves. In *Siska Indian Band v. Her Majesty the Queen in Right of Canada*, 2021 SCTC 2, the First Nation was awarded compensation by Canada for impacts on their fishing rights because of damages to traditional fishing sites (at para. 216). Furthermore, in

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Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155 [*Ahousaht*], this Court expressly left open the possibility that compensation could be ordered for unjustified infringement of the Aboriginal fishing rights at issue in that case, with no proprietary interest in the fish themselves being seen to be a pre-requisite in either situation (at para. 299).

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[76] We agree that it was not necessary for the trial judge to enter “the academic debate”, but rather to focus on the fact that *Sparrow* and other authorities recognize that Aboriginal fishing rights are “not easily analogized to other rights” (RFJ at para. 375).

[77] We agree with the judge when he accepted the appellants’ submission that the *sui generis* nature of Aboriginal rights, their importance to reconciliation and providing cultural security and continuity, and the fact that Aboriginal rights are intimately related to a particular piece of land were sufficient to sustain a claim in nuisance (RFJ at paras. 376–377).

[78] In particular, we consider that the parameters of the current framework of the law of nuisance as discussed in *Latham* at paras. 33–50, are sufficiently broad to encompass the Aboriginal fishing rights specifically advanced and found to exist in this case.

[79] That is because the appellants’ constitutionally protected right to fish for food, social and ceremonial purposes in their respective areas of the Nechako watershed was found to include the right to harvest resources that are associated with or adjacent to their reserve lands, to which they have exclusive occupation. In the circumstances of this case, it bears emphasizing that the right to fish is being exercised by members of Indigenous groups at a traditional fishing site adjacent to their reserves and involves:

- standing on the shore; and/or
- fixing nets in the water or to the river/lake bed; and/or

- erecting weirs/barricades in the river at locations adjacent to or in the vicinity of their reserve lands.

[80] Considered in this historical and cultural context and within the expanding recognition of the need for reconciliation, and cultural security and continuity for Indigenous peoples, we do not accept the distinctions that RTA raises to contest the appellants' standing.

[81] RTA also suggests that the trial decision expands the boundaries of the tort to the point where a "super tort" has been created where "large swathes of Canadian society [are made] potential trespassers and nuisance makers", resulting in a change which risks "upsetting complex, multi-faceted resource management decisions".

[82] RTA raised this same argument at trial, but the trial judge rejected the submission as "simply hyperbole". In rejecting this argument, he made two key points: (1) frivolous or unmeritorious claims would be deterred because causation of harm is difficult to prove, its litigation can be lengthy and expensive, and there are powerful defences available to respond; and (2) any incremental extension of the common law in those cases would only apply to Aboriginal claimants because it was only the unique, *sui generis* rights being recognized and protected (RFJ at paras. 378–380).

[83] We agree with this reasoning. Furthermore, what is at issue in this case is what the appellants allege to be an extreme and singular interference with their fishing rights that they had tried to have addressed for decades. The trial judge was correct to find that in the circumstances of this case, his findings of fact considered within the applicable legal framework led to the conclusion that the appellants had sufficient standing to advance a claim in private nuisance against RTA.

[84] We do wish to comment, however, on what the trial judge stated at para. 377:

> … 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 <u>regardless of whether that right is exercised in the waters within or adjacent</u>

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> 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.
>
> [Emphasis added.]

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[85] In the circumstances of this case, the judge found there was a connection between the Aboriginal right to fish and the reserve lands and waterbeds in question. Given this finding, whether the judge correctly held that a s. 35 Aboriginal right can ground a claim in nuisance of and by itself, without any connection to land, even in the broadest sense, does not need to be decided. This is because any analysis would necessarily be contextual and grounded on the evidentiary record in a given case.

[86] With this caveat, given the trial judge's factual findings, even if his conclusions regarding standing were considered to be an extension of the common law, we nonetheless agree with him that it was appropriate because this "incremental extension": (a) will not result in indeterminate liability; (b) protects unique constitutional rights; and (c) is justified by the need to prevent "yet another … challenge to Indigenous cultural security and continuity" (RFJ at paras. 378, 380–381).

[87] Accordingly, we would not interfere with the judge's conclusion that the appellants had standing to bring their nuisance claim.

Did the trial judge err in finding that regulation of the Nechako River caused or contributed to pre-spawn mortality in sockeye salmon, and caused "fresh damage" to White Sturgeon within the limitation period?

[88] We now turn to RTA's claims that there are palpable and overriding errors of mixed fact and law in the trial judge's conclusions that RTA interfered with the appellants' Aboriginal right to fish by: (1) causing or contributing to pre-spawn mortality in sockeye salmon, and (2) causing "fresh damage" to the White Sturgeon within the limitation period.

[89] Specifically, RTA says the trial judge erred in the following manner (RTA Factum at para. 169):

> (a) Despite wide-scale declines in sockeye runs across British Columbia, Sockeye were nonetheless amongst the best performing stocks in BC, which refuted the trial judge's inference that [RTA's] operation materially contributed to any loss suffered by the appellants. The evidence that [RTA] may have contributed to a risk of harm was not enough to establish causation in the face of this conflicting evidence, and particularly without evidence that Sockeye pre-spawn mortality was elevated compared to what was experienced on other rivers or otherwise.
>
> (b) For Sturgeon, the trial judge's finding of "fresh damage" within the limitation period improperly inferred continuing harm, given the conflicting evidence that the Sturgeon population remained flat or improved within the limitation period, and that ongoing recruitment issues were due to decades-old physical changes to the river that were likely irreversible. The judge also failed to identify any continuing effect on the appellants' right to fish from [RTA's] operation: the appellants lost the ability to fish for Sturgeon about 15 years before the limitation period started.

[90] The judge correctly set out the basic principles respecting causation for the tort of nuisance (RFJ at para. 386). None of the parties take issue with the applicable legal framework. The issue is the application of that framework to the evidentiary record.

[91] Appellate courts generally do not interfere with inferences made by trial judges. Still, RTA says the trial judge made manifest errors in principle that undermine his findings, and he failed to apply the law concerning inferences. It says he made findings that are speculative, "relying on several unexplained leaps from the evidence tendered to the ultimate finding reached". In doing so, RTA argues that the judge's reasons fail to reconcile a substantial body of contrary evidence that should have led him to conclude that the relevant inferences could not be made.

[92] The appellants' position is that RTA is seeking to overturn the trial judge's weighing of the evidence which includes scientific and expert evidence, and his findings of harm to sockeye and sturgeon. They submit that no palpable and overriding error has been identified. The findings were not speculative and there was a considerable body of evidence both from lay and expert witnesses to support his conclusions. They say RTA's submissions are based on single decontextualized pieces of evidence or on suggestions that other evidence may have been more

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probative and that it is "a perilous and improper undertaking to ask this Court on appeal to weigh individual pieces of evidence".

Trial judge's reasons

[93] In light of what RTA alleges are errors with respect to causation, we review in some detail the portions of the judge's reasons that are relevant to this issue.

[94] He found that this was a case "where there are almost certainly multiple contributing causes to the reduction of the fishery within the waters of the [appellants'] traditional territories" (RFJ at para. 387).

[95] At trial, RTA argued that any contribution it may have made to the diminution of fish stocks is at best "relatively minor among other causes" and that it cannot be faulted if the interference with the appellants' fishing rights "would have come to pass anyway" (RFJ at para. 388).

[96] The trial judge reviewed in considerable depth the effects of regulation including geomorphology and habitat and the expert evidence led by both parties on this issue. The defendants at trial acknowledged that the natural hydrograph of the Nechako River had been changed by the installation and operation of the Kenney Dam and reservoir, resulting in geomorphological changes within the river, reduced channel migration, and increased vegetation encroachment (RFJ at para. 397). The defendants further acknowledged that re-establishing the natural processes or flow regime would require substantial time—years or even several decades. However, in their view, any physical change to the river occurred decades ago and was thus outside the applicable limitation period to bring a nuisance claim. RTA also claimed that the appellants had failed to establish that the geomorphological changes in the river had actually caused the declining fish populations to constitute an unreasonable interference with their fishing rights.

[97] The judge concluded that there was "powerful logic" to the suggestion that the "substantial alteration" to the Nechako River's natural flow regime had led to significant changes in the river condition and habitat, which then had negative

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effects on the abundance and health of the fish population in the Nechako watershed (RFJ at para. 399).

[98] He then closely reviewed what he considered to be the salient evidence, including the expert evidence (which included references to various scientific works and studies) concerning each of the species of fish in question.

[99] With respect to the Nechako White Sturgeon, he observed that the regulation of the Nechako River was the root cause of the recruitment failure of the sturgeon:

> [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.

[100] The appellants submitted that all three experts agreed that the Kenney Dam and diversion was the cause of the recruitment failure, so it was unnecessary for them to establish the exact mechanism of factors through which the diversion was impeding the sturgeon recruitment (RFJ at para. 420). The trial judge agreed, finding as a fact that there was overwhelming evidence that the recruitment failure of the sturgeon was the result of river regulation, namely the installation and operation of the Kenney Dam and the related reservoir (at para. 421). This was sufficient to "fix RTA with liability" for the nuisance, assuming that the other requirements were present and the asserted defences did not apply.

[101] With respect to resolving the differences between the experts, the trial judge said:

> [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

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> 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.

[102] With respect to chinook salmon, the trial judge also reviewed in some detail various reports and studies including those prepared by the DFO and the NFCP which, to reiterate, were established to implement the 1987 Settlement Agreement and incorporated into the Amended CWL that was issued that same year.

[103] He observed that “the evidentiary foundation for finding that regulation of the Nechako River is continuing to suppress Chinook productivity is rather thin” (RFJ at para. 438). He then concluded that on the whole of the evidence, while the installation and operation of the Kenney Dam and reservoir initially had a “devastating effect” on the Nechako chinook spawning, the fish had proved to be “remarkably resilient” and their population had rebounded to pre-dam levels (at para. 441). He agreed it was entirely possible that restoring a “somewhat more natural flow regime” in the Nechako River might improve the health of the chinook population even more, but he was not satisfied that such an outcome was more probable than not (at para. 441). He left that possibility open when deciding the appropriate remedies and when considering the escapement statistics in the context of the limitation defences.

[104] He recognized that the initial devastation to the chinook salmon would “obviously” not have occurred but for the construction of the Kenney Dam, and that it was “entirely possible” that the chinook population might have grown further if the natural hydrograph had remained intact (RFJ at para. 469). However, the trial judge said there was insufficient evidence to “convert that possibility into a finding of fact even on the unscientific and less demanding balance of probabilities standard of proof” (at para. 469).

[105] The judge then turned to the evidence and submissions relating to sockeye salmon, observing the following:

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- Sockeye salmon migrate between the Pacific Ocean and the rivers in which they were spawned (RFJ at para. 442).

- Various runs of sockeye salmon use the Nechako River as a migration corridor on their way to spawning grounds in the Stuart and Nautley watersheds (at para. 443).

- The DFO's *Wild Salmon Policy* groups the sockeye into four conservation units known colloquially as the Early Stuart, the Nadina, the Late Stuart, and the Stellaquo populations (at para. 443).

- Unlike the chinook, the sockeye salmon only spend a matter of days in the Nechako River during their migration to and from the ocean. However, the appellants claimed 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" (at para. 444).

- The reduction in flow and the resulting increase of potentially lethal temperatures for sockeye was the genesis of the STMP (at para. 445).

- Section 2.1A(b) of the 1987 Settlement Agreement obligated RTA to release a certain Annual Water Allocation through the Skins Lake Spillway (at para. 445).

- Schedule "C" to the 1987 Settlement Agreement specified the default volume of water releases required for each month of the year (at para. 446).

- The specified volumes for July and August indicated that the specified volume was to be supplemented by additional flows "as are determined to be required for cooling purposes" (at para. 446).

- In May 1989, the Technical Committee of the NFCP determined the temperature criteria for cooling purposes as (1) eliminating all occurrences

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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) (at para. 447).

- These temperature restrictions were to be monitored between July 10 and August 20 of each year (at para. 447).

[106] The trial judge's review of the evidence in relation to the sockeye salmon was extensive. He referred to certain studies performed by the DFO and the expert opinions of Mr. Alan Cass for the appellants and Dr. Steven Cooke on behalf of RTA, both of whom had relied on the "ground-breaking research" of Dr. Erika Eliason from the University of British Columbia which identified stock-specific thermal tolerances of Fraser River sockeye, including those migrating through the Nechako River.

[107] Dr. Eliason was not called as a witness at trial, but the judge considered her work, including her Ph.D. thesis and subsequent articles. He noted Dr. Eliason's work subjecting wild fish to swimming tests and recording oxygen consumption at different speeds and water temperatures. Her results indicated "100 percent aerobic scope was available to the Stellako, Nadina, and Late Stuart sockeye at 16.8°C and the 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" (RFJ at para. 453). While her conclusion was that it was "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" (at para. 453).

[108] The trial judge also considered the findings of the Cohen Commission which was unable to identify any single cause that would explain the "alarming two-decade decline in sockeye productivity" (RFJ at para. 466). He went on to observe the following about the contributing factors causing the decline in salmon:

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> [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.

[109] The trial judge recognized there was "no doubt" that the installation and operation of the Kenney Dam and reservoir had substantially reduced the natural flow levels and volume of water in the Nechako River, but that alone did not mean that the river's water temperature was higher given it was also influenced by prevailing weather conditions and their impact on ambient temperature and the ground (RFJ at para. 458). He said the rationale for having the STMP in place was because the altered hydrograph would otherwise result in higher water temperature during the spawning migration (at para. 459). Hence, the question at trial was whether the STMP had sufficiently neutralized any increase in water temperature and associated risk to the health of the sockeye that would otherwise have occurred.

[110] He then concluded:

- There are scientific uncertainties about the effects of temperature upon migrating salmon (RFJ at para. 460).
- High temperatures during upriver migration increase the likelihood of pre-spawn mortality (at para. 461).
- A mean daily temperature of 20°C might involve exposure at 21 or 22°C for several hours during the relevant 24-hour period (at para. 462).

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- A temperature threshold of 20°C is inadequate to protect sockeye during their migration through the Nechako River. A threshold of 19°C, if not 18°C, would be much more effective in that regard (at para. 463).

- Temperature fluctuations exceeding 19°C have regularly occurred in the Nechako River during the spawning migration and have substantially contributed to the pre-spawning mortality of many migrating sockeye (at para. 464).

- Factors other than temperature have substantially contributed to the mortality of migrating sockeye that would otherwise be harvested by the appellants (at para. 465).

- The extent by which premature mortality of migrating sockeye has exceeded what would have occurred in a natural hydrograph is not insignificant even if it cannot be determined with precision (at para. 470).

- Regulation of the river is a contributory cause to the overall decline of that sockeye population (at para. 470).

[111] Finally, in considering whether liability in nuisance had been established, the trial judge stated:

- RTA will be liable to the appellants for the tort of private nuisance if the decline in Nechako White Sturgeon and salmon amounts to an interference with the plaintiff's Aboriginal right to fish that is both substantial and unreasonable unless it is immunized by a legal defence raised (RFJ at para. 471).

- The reduction of salmon and Nechako White Sturgeon have had profound impacts upon the appellant First Nations (at para. 472).

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- There was uncontroverted evidence of the impact of the decline of the fishery resulting in the loss of an available food resource and the loss of culture and community (at para. 473).

Expert evidence

[112] RTA says that it does not specifically challenge the trial judge's acceptance of the appellants' expert evidence over that of its expert. In fact, RTA submits that even accepting the evidence of the appellants' expert Mr. Cass, the judge nonetheless erred in his causation analysis.

[113] Appellate courts are reluctant to interfere with a trial judge's assessment of expert opinion evidence and the weight given to an expert report; considerable deference is owed to the role of the judge below (*SCP 173 Realty Limited v. Costa Del Sol Holdings Ltd.*, 2023 BCCA 312 at para. 44). Absent manifest errors, an appellate court should not interfere with a trial judge's findings and conclusions about expert evidence (*Nelson v. British Columbia (Provincial Health Services Authority)*, 2017 BCCA 46 at para. 26). However, it may intervene where a trial judge has made a palpable and overriding error of fact, or an error of law (*Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 36, 39; *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 104). Palpable "means the error is obvious" and overriding "means that it goes to the core of the outcome of the case" (*Naimi v. Yunusova,* 2023 BCCA 124 at para. 30).

The drawing of inferences

[114] RTA's first challenge to the conclusion reached on causation focuses on what it characterizes as improper drawing of inferences and speculation.

[115] While causation can be inferred, inferences must be "based on proven facts and cannot be simply guesswork or conjecture" (*Borgfjord v. Boizard*, 2016 BCCA 317 at para. 55, leave to appeal to SCC ref'd, 37210 (9 February 2017)). In *Graham v. Rogers,* 2001 BCCA 432 (at para. 53), this Court relied on how the House of Lords delineated the difference between inference and speculation or conjecture in

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Caswell v. Powell Duffryn Associated Collieries, Ltd. [1940] A.C. 152 at 169–170 (H.L.):

> ... Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. … But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[116] In *Fisher v. Victoria Hospital*, 2008 ONCA 759, the Court explained that a "robust and pragmatic approach" cannot be used as a substitute for evidence or for reviewing and making findings about relevant evidence (at para. 58). Such an approach does not permit drawing inferences about either the ultimate issue of causation or links in the chain of causation without reviewing the relevant evidence and without making findings about the range of available inferences (at para. 59).

[117] Caution should also be applied when extrapolating from correlative evidence to find causation, to avoid reversing the burden of proof. As the Court stated in *Benhaim v. St-Germain,* 2016 SCC 48:

> [75] ... Without an evidentiary bridge to the specific circumstances of the plaintiff, statistical evidence is of little assistance… What inferences follow from such evidence — whether the generalization that a statistic represents is instantiated in the particular case… — is a matter for the trier of fact. This determination must be made with reference to the whole of the evidence.

[118] Furthermore, while a trial judge "is not bound to accept uncontradicted and cogent evidence", it is "incumbent on the judge to provide reasons for rejecting such evidence" (*Jampolsky v. Insurance Corporation of British Columbia*, 2015 BCCA 87 at para. 40).

The decline in sockeye salmon

[119] On appeal, RTA alleges these errors with respect to the trial judge's inferences about sockeye salmon:

- the inference of causation was "flatly inconsistent" with the evidence about the pre-spawning mortality of the migrating sockeye, and the judge provided no explanation for the conclusion other than being "satisfied";

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- the available evidence could not support this inference without improperly resorting to speculation, therefore, the inference reflects a palpable and overriding error because causation should not have been found in the face of contradictory evidence; and,
- the inference was based on three findings of fact, but these left two major gaps in the inferential reasoning, namely that the evidence did not establish the extent to which the river was warmer at relevant times due to RTA's operation, and that any temperature change due to RTA's operation was materially harming sockeye.

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[120] The issue is whether RTA has demonstrated palpable and overriding error in the trial judge's causation analysis within the context of what it asserts to be improper inferential reasoning and speculation. Part of the context that is relevant to considering this issue is, as we have observed above, that the trial occurred over two and a half years, the evidentiary portion concluded after 151 sitting days, and the resulting reasons for judgment were in excess of 225 pages, including appendices.

[121] With respect to the effect of RTA's regulation on water temperature, the appellants say that material contribution beyond *de minimis* does not require other causes to be eliminated nor that any precise percentage of RTA's cause be fixed (*Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at paras. 136–138 [*Waterway*]). The appellants point to excerpts from the record that describe: (1) the effect of RTA's regulation on temperature; (2) that flow affects temperature; (3) the harmful temperature effect on sockeye; (4) the mortality of salmon; and (5) other factors, including climate change.

[122] Both explicitly and by implication, RTA's submissions on causation take issue with the sufficiency of the judge's reasons. Appellate courts "must not parse a trial judge's reasons in a search for error" (*R. v. G.F.,* 2021 SCC 20 at para. 69). As noted in *G.F.*, the Court "has repeatedly and consistently emphasized the

importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient" (at para. 69).

[123] When the trial judge's reasons regarding causation and the sockeye salmon are read contextually and as a whole, we conclude that RTA's submissions amount to little more than an attempt to finely parse the reasons in a search for error.

[124] Respectfully, we consider RTA's submissions on its challenges to the judge's conclusions regarding the sockeye stocks to be no more than an attempt to "cherry pick" and divorce certain isolated pieces of evidence and argument from a functional and contextual reading of the extensive causation analysis.

[125] We set out in some detail below excerpts from the causation analysis and the parties' extensive factums to give the context through which the "minutiae" of RTA's submissions regarding causation and the sockeye should be viewed on appeal.

[126] RTA submits that there was no direct evidence at trial that its operation was killing sockeye salmon. For example, it says, there was no evidence that the sockeye's mortality was elevated in the Nechako River compared to expectations or the experience on other rivers, no evidence that more were dying in years where the Nechako River was warmer, and no physical evidence that dead sockeye had been killed due to temperature.

[127] While RTA acknowledges that sockeye have declined, it says those declines have been mirrored across the entire Fraser River watershed, and the causes of this decline are manifold. It says, as the trial judge observed at paras. 466–467 of the RFJ, that the ocean environment, climate change, overfishing, and natural events such as landslides have all been identified as major contributors.

[128] Accordingly, RTA argues that the mere fact of a decline in sockeye stocks in no way implicates RTA's operations and they point to the fact that, at a population level, sockeye were in fact performing better than most stocks, according to assessments undertaken by two federal regulatory agencies. RTA refers to the evidence that the Nadina run of sockeye, which was the target of the STMP because

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they transit the Nechako River in warmer months and for a longer distance than other Nechako runs, performed especially well under these risk assessments: only three of the 24 sockeye stocks evaluated under the DFO's Canada Wild Salmon Policy were assessed to be at lower risk than the Nadina run, and, the risk assessment from the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") placed the Nadina run in its lowest risk classification. The Stellako sockeye, the other population that spends the most time in the Nechako, were also performing well, in the same DFO risk classification as the Nadina run, and in COSEWIC's middle risk category.

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[129] RTA submits that if its operation was materially impairing sockeye, that impairment should have led to materially different productivity compared to the experience in other locations in the province that were not affected by its operation. Yet not only was there no evidence that the sockeye losses suffered in the Nechako River were materially worse than those experienced elsewhere in rivers unaffected by RTA, but the available evidence suggested that the opposite was the case.

[130] A few examples from the evidence are illustrative of the appellants' response to RTA's submissions on this issue.

[131] The appellants say that it was an uncontroversial fact at the trial that decreases in flows that resulted from the Kenney Dam and diversion have the effect of increasing temperatures in the Nechako River. The admissions in the ASF also amply demonstrate the highly technical nature of the evidence, which the trial judge reviewed in considerable detail in the reasons.

[132] The appellants point out that RTA's arguments overlook the findings that the water temperature fluctuates within a 24-hour period and across days, therefore RTA's submissions demand a level and kind of evidence that is unavailable. Further, the appellants say that RTA side steps the judge's finding that the STMP was being managed to a temperature too high for the safety of the salmon and those exceedances have occurred regularly. The appellants refute RTA's suggestion that the trial judge could not have found that RTA affected the temperature at relevant

times because there was no evidence to estimate temperature effects. They submit that there was evidence to allow the judge to find (as he did) that the reduction in flows had a temperature effect and harm to the sockeye.

[133] And, furthermore, with respect to the harmful effect which temperature has on sockeye, the appellants said there was ample evidence to establish that even small increases in temperature can be detrimental during the mid-summer period when sockeye migrate through the Nechako River and the few days they spend in the river are critical to their ability to return to the spawning ground and to reproduce. In addition, they say the sockeye are extremely sensitive to water temperature; it was uncontroversial at trial that when temperatures rise, the aerobic scope was affected and the sockeye became more vulnerable to disease, exhaustion, and death prior to reproduction.

[134] Suffice it to say that based on their review of portions of the evidentiary record, the appellants then conclude the trial judge could not and was not required to precisely quantify the contribution of RTA's operation to harmful river temperatures, but rather he was required (and did find) that RTA's operations had affected the temperature, and that the sockeye are being affected by those temperatures year after year. Their position is that the trial judge's approach was logical, robust, and consistent with the case law on causation.

[135] RTA's summary of certain of the applicable principles to which we have referred is only of assistance to a point. That is because the deferential standard of review applies to ultimate conclusions and inferences of causation as well as underlying findings: "The judge's decision to infer or not infer causation is a finding of fact which attracts deference on appeal" (*Waterway* at para. 130, citing *Benhaim* at para. 38).

[136] Furthermore, it is the role of the trial judge to weigh the evidence; "[t]he fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made…" (*Waterway* at para. 131, citing *Salomon v. Matte-Thompson,* 2019 SCC 14 at

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para. 33). A trial judge is not obliged to cite every piece of evidence and describe the weight they ascribe to it (*Van de Perre v. Edwards*, 2001 SCC 60 at para. 15). A trial judge is presumed to have reviewed the evidence in its entirety and to have based their factual findings on this review; this presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of “palpable and overriding” error (*Housen* at para. 72).

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[137] In our view, RTA has failed to demonstrate that in his causation analysis regarding the sockeye, the trial judge committed obvious errors which go to the outcome of his analysis.

The White Sturgeon and fresh damage during the limitation period

[138] At trial, RTA invoked the *Limitation Act,* R.S.B.C. 1996, c. 266, to argue that the appellants’ claims were either extinguished at law or time-barred on a number of grounds (RFJ at para. 605). On appeal, however, the issue is confined to the claim involving the Nechako White Sturgeon.

[139] RTA argued at trial that the appellants’ claim regarding the sturgeon involves “injury to property” for the purposes of s. 3(2)(a) of the *Limitation Act* and is thus governed by a two-year limitation period. Whatever damage may have been caused by its activities occurred and crystallized long before September 29, 2009, that is two years before this proceeding was commenced, and no “fresh damage” has occurred since. There had 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 sturgeon, and indeed an actual increase in total population since 2009, the fishery of the Nechako White Sturgeon having been entirely closed in any event since 1994 (RFJ at para. 608).

[140] The appellants argued that the acts which constituted the tort of nuisance could be, and in this case were, repeated and ongoing damage in respect of which a fresh cause of action arose each day that the tortious activity and the damage continued. The harm suffered by them “is not a one-time event that occurred in 1952 when the Kenney 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 appellants cannot harvest them in the same numbers that they once did (salmon), or at all in the case of the White Sturgeon (RFJ at para. 606).

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[141] However, the trial judge instead found that even though precise quantification was challenging, there was sufficiently substantial damage to sustain the claim in tort. Even though the regulated flow of the river may be the same from year to year, the resulting damage occurs anew each year. In the case of the sockeye salmon, he found their pre-spawning mortality attributable to the river temperature occurs every year to different generations of fish; for the Nechako White Sturgeon, he noted that "something about the regulation of the river" was destroying the eggs, hatchlings, and/or juveniles (RFJ at paras. 611–612).

[142] On appeal, there is no issue as to the applicable limitation period. Rather the challenge to the trial judge's findings centers around his application of the legal standard to the circumstances of this case. Absent palpable and overriding error, the standard of review is deferential.

[143] RTA argues that the trial judge committed palpable and overriding errors for two reasons (RTA Factum at para. 206):

> (a) First, absent quantification of the magnitude of the harm, the judge's finding that there was sufficient ongoing harm to wild sturgeon was speculation. And while it was not disputed that RTA's operation caused the sturgeon decline decades before, there was considerable evidence, as found by the judge that the decline was caused by likely irreversible physical changes to the Nechako;
>
> (b) Second, the judge's analysis incorrectly focused on whether there was ongoing harm to wild sturgeon, rather than whether there was an ongoing interference with the appellants' right to fish. On the proper analysis, there was no fresh damage: the appellants lost the ability to fish for sturgeon in 1994 due to a regulatory closure and the judge did not find RTA caused any change in the appellants' ability to fish in the limitation period.

[144] The framework which applies to the meaning of "fresh damage" is not in dispute. To establish a claim regarding an ongoing or continuing nuisance, the plaintiff bears the onus to demonstrate it suffered "fresh damage" within the limitation

period; this includes presenting “such evidence that a proper inference can be drawn that damage to [their] property has occurred as a result of a fresh [cause of action]” (*McGillivray v. Dominion Coal Co. Ltd*. (1962), 35 D.L.R. (2d) 345 at 347, 1962 CanLII 484 (N.S.S.C.)).

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[145] In our view, the application of the relevant principles to the circumstances of this case do not demonstrate any palpable and overriding errors by the trial judge and amounts to another attempt by RTA to decontextualize the reasons in a search for reviewable error.

[146] *ML Plaza Holdings Ltd. v. Imperial Oil Limited*, 2006 BCSC 352, aff’d 2006 BCCA 564, leave to appeal to SCC ref’d, 31849 (3 May 2007), provides a helpful example of the application of the “fresh damage” framework. The case involved the operation of a service station on property in a shopping mall and the contamination of soil which was caused by underground storage tanks. It was clear from the chronology that any escape of hydrocarbons that contaminated the site must have occurred before the service station was closed and the tanks were removed in 1992. In 1999, the plaintiff who was seeking to redevelop the lands brought a claim against Imperial Oil on the basis that there had been continuing damage by the expansion of the area of contamination by the movement of the hydrocarbons through the soil. The trial judge dismissed the claim.

[147] On appeal, Justice Donald first summarized the judge’s findings and analysis on the continuing nuisance (*ML Plaza Holdings Ltd. v. Imperial Oil Limited,* 2006 BCCA 564 [*ML Plaza CA*]). The trial judge had not been persuaded that the plaintiff had established on a balance of probabilities that there was any “fresh” or “additional” damage sustained in the two-year period prior to commencing the action. To prove the continuing nuisance, the trial judge said the plaintiff would have to prove that: 1) the hydrocarbon contamination (plume) was expanding two years prior to commencing the action; and 2) that the contamination from the expanding plume resulted in “additional damage” (i.e., some tangible consequence). Finally, the trial judge found that the plaintiff had failed to prove that whatever hydrocarbon

contamination was in place at the relevant time had any tangible consequence on the plaintiff, in the sense of resulting in any block to any redevelopment plans or diminution in the value of the plaintiff's property. Justice Donald said that these were all findings of fact supported by the evidence and there were no grounds on which they could be disturbed in this Court (*ML Plaza CA* at para. 10).

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[148] In dismissing the appeal, the Court summarized certain of the authorities relied on by RTA, but found that the judge was correct in her application of the authorities and on her findings of fact that all the damage caused was out of time:

> [11] … [ML Plaza] relies on the proposition stated in *Salmond on Torts*, 15th ed., quoted with approval in *Roberts*, that "a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land". This quotation occurs in the conclusions of Martland J., speaking for the Court, at pp. 491–92, which it is helpful to set out in full:
>
>> The present action is one for nuisance. The construction of the lagoon, in itself, was lawful, being within the respondent's statutory powers. A cause of action did not arise until damage occurred. Furthermore, the nuisance continued. The respondent operated and maintained the lagoon over a period time, causing continuing damage. The wrong complained of was not one which was complete, once and for all, once the lagoon was constructed.
>>
>> I adopt the proposition of law stated in *Salmond on Torts*, 15th ed., at p. 791, as follows:
>>
>>> When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action.
>>
>> This is in accord with the decision of the House of Lords, in the *Darley* case (*supra*), and with what was said by Davis J., in this Court, in *Dufferin Paving and Crushed Stone Ltd. v. Anger* [[1940] S.C.R. 174.], at page 181:

> > Where damage is the cause of action or part of the cause of action, a statute of limitation runs from the date of the damage and not of the act which caused the damage. If there be fresh damage within the statutory period, an action in respect of those damages will not be barred (*Crumbie v. Wallsend Local Board,* [1891] 1 Q.B. 503, following the decision in the House of Lords in *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App. Cas. 127).
>
> For these reasons, I am of the opinion that the learned trial judge was correct in concluding:
>
> > In the instant case an original cause of action arose each day the nuisance remained unabated. The plaintiff is entitled to recover damages for the one-year period immediately prior to the issuance of the statement of claim, i.e., from September 20, 1964.
>
> [12] In *Roberts*, the defendant continued to operate the sewage lagoon that discharged polluted water onto the plaintiff's land. The action succeeded, but as I read it, only for "fresh damage" resulting from flooding of polluted water within the limitation period. Damage resulting from earlier flooding was barred. This is confirmed by the citation, with approval, of *Dufferin Paving* where the plaintiffs' action failed for vibration damage to their house caused by the defendant's heavy trucks passing in the street because the damage was caused outside the limitation period, notwithstanding that the truck traffic and vibrations continued within the limitation period, <u>without causing significant further damage</u>.
>
> [13] On the facts here, there could be no further escape of hydrocarbons into the soil after the tanks were removed in 1992. In the context of the quote from *Salmond*, <u>"the state of things causing the nuisance" has been removed</u>. While "the state of things" is capable of some ambiguity, it must be taken to mean the activity causing the nuisance if the proposition is to be consistent with the judgments in *Dufferin Paving* and *Roberts*. In my view, therefore, the trial judge was correct in her application of the authorities and on her findings of fact that all the damage caused was out of time.
>
> [Emphasis added.]

[149] We would add that in *Dufferin Paving and Crushed Stone Ltd. v. Anger,* [1940] S.C.R. 174 at 181, 1939 CanLII 9, the Court observed that any further damage caused within the limitation period was *de minimis*.

[150] RTA essentially adopts the same approach on this "no fresh damage" issue as it does with the sockeye salmon. Its detailed submissions invite us to make different findings of fact than did the judge and/or find reviewable error arising from

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alleged misapprehensions of the evidence and improper inferences based on speculation.

[151] The trial judge's reasons, when read contextually and as a whole, support his findings that:

- the installation and ongoing operation of the Kenney Dam and diversion with consequent regulation of the Nechako River's flows is the cause of sturgeon recruitment failure (RFJ at para. 421);
- the ongoing flow regulation continues to have geomorphological impacts and to cause harm to the sturgeon (at paras. 418–421, 611–612); and
- based in part on what he termed "unanimous" expert evidence the recruitment failure was ongoing; that is while sturgeon spawn each year their eggs, hatchlings and /or juveniles do not survive (at paras. 404, 608, 611–612).

[152] Based on the trial judge's findings, it cannot be said, in our view, that in the two years prior to the commencement of the action:

- the harm caused by RTA's operations was "complete";
- the "state of things causing the nuisance had been removed" or is "wholly past"; and
- there was no "significant further damage" caused or that any damage was de minimis. In fact, the judge was entitled to find that there was additional damage in the sense of "tangible consequences" during this timeframe.

See para. 148 above.

[153] We would also not accede to RTA's argument that the trial judge improperly focussed on whether there was ongoing harm to wild sturgeon, rather than whether there was an ongoing interference with the appellants' right to fish. Harm to the

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former necessarily includes interference with the broader right to fish, which includes sturgeon. As the appellants submit in their factum, interference and accommodation can be addressed on a species-specific basis where there is an any-species right (*Ahousaht* at paras. 226, 271).

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[154] For all of these reasons, we conclude that the judge did not err in holding that a claim of nuisance was available to the appellants, subject to the defence of statutory authority.

Defence of Statutory Authority

[155] The principal ground of appeal raised by the appellants specific to the nuisance claim relates to the availability of the defence of statutory authority. The appellants submit that the trial judge made two errors in his interpretation and application of this defence by: (1) misinterpreting the requirements of the inevitable result part of the defence; and (2) deciding that the defence was applicable, notwithstanding that the statutory scheme unjustifiably infringes the appellants' s. 35 rights and is therefore unconstitutional.

Did the trial judge err in finding that the defence of statutory authority applied to RTA's operations?

[156] The trial judge recognized that there were "four main cases" that governed the defence of statutory authority in this province (RFJ at para. 523):

1. *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, 1989 CanLII 15;
2. *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706;
3. *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416, leave to appeal ref'd, 29391 (8 May 2003); and,
4. *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal to SCC ref'd, 34224 (20 October 2011).

[157] He summarized the principles that relate to the statutory authority defence (RFJ at para. 524). It is the application of these principles to RTA's operations that is the focus of this ground of appeal. Accordingly, we shall return to the framework the

judge outlined and the development of the defence arising from the key authorities when we consider and analyse the parties' submissions below.

[158] At this juncture, it is sufficient to refer to his introduction to this section of the reasons:

> [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.

[159] The appellants do not challenge the trial judge's articulation of the framework that governs the defence. Rather they say he misinterpreted the requirements of the "inevitable result" test, applied it incorrectly, and erred by concluding that the defence had been established in the circumstances of this case.

[160] They submit that the judge's finding that the harm amounting to a nuisance is the inevitable result of RTA's statutory authority, while declining to determine whether there exist feasible alternatives within the authorized flow release range that would avoid the nuisance, is an error of law.

[161] We referred above to *Susan Heyes*; in that case, this Court reaffirmed that the existence of nuisance is a question of fact and thus the trial judge's findings and inferences of fact are approached with considerable deference (*Susan Heyes* at para. 48). We recognize, however, that in both *Susan Heyes* and *Sutherland*, this

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Court did not specifically address whether this standard applied to findings regarding the defence of statutory authority.

[162] We agree with RTA that this issue is properly characterized as a question of mixed fact and law because it concerns whether the trial judge properly applied the law in the context of the facts before him (*Housen* at paras. 26–27). Whether the trial judge "misinterpret[ed] the requirements" of the inevitable result test, as the appellants allege, necessarily engages his factual findings that include those relating to causation, his interpretation of RTA's authorizations, and his assessment of the evidence of feasible alternatives.

[163] In our view, the trial judge's conclusions regarding RTA having established the existence of the defence raise questions of mixed fact and law, which, absent palpable and overriding error, engage a discretionary standard of review.

Trial judge's reasons

[164] The trial judge reviewed the salient background relating to the "authorized work", namely the statutes, water licences, and settlement agreements. He concluded that the defence of statutory authority applied, noting that the Kenney Dam was constructed in accordance with plans approved by both levels of government and the water licences expressly authorized the diversion of water from the Nechako River, its storage in the reservoir, and its use for hydroelectric production. Further, he found that RTA had always operated within the parameters of its authorizations and rarely diverted more than the limit specified in its water licences. The only time that occurred was due to flooding concerns in Vanderhoof, and in each of those cases, the exceedances were authorized expressly by the Comptroller of Water Rights. Any resulting harm to the fish/fishery in the Nechako River was the inevitable result of those regulatory requirements (RFJ at paras. 532, 661).

[165] With respect to the issue of inevitable result and practical feasibility, the trial judge agreed with RTA that it was not necessary for him to address this question because RTA had been given specific authority and direction for the construction

and operation of the Kenney Dam and the related reservoir, the diversion of water, and the timing and release of the volume of water into the Nechako River (RFJ at para. 535).

[166] He nonetheless conducted an analysis of the suggested feasible alternatives identified in *Saik'uz 2015*, finding that: (1) RTA's "design and construction plans for the Kenney Dam were specifically approved by both levels of government" (RFJ at para. 530), a fact not before this Court in 2015; (2) both levels of government "agreed that a water release facility at the Kenney Dam was unnecessary" (at para. 535); and (3) it was "neither prudent nor practically feasible for a water release facility to have been incorporated into the Kenney Dam" (at para. 536).

[167] He then commented on the role of the Technical Committee, observing that the flow regime imposed by way of the 1987 Settlement Agreement is mandatory and comprises the specified flow rates for each month (or as otherwise directed by the Technical Committee) (RFJ at para. 538). Even though variances at RTA's request are possible, the approval and direction of the Technical Committee is still required; therefore, it is that Committee which governs the flow regime and any inevitable result of its directions is a matter for the Committee to rectify, "assuming practically feasible options exist" (at para. 538).

[168] The judge rejected the appellants' argument that a feasible alternative would be for RTA to change its business practices to accommodate an increased flow of water into the Nechako River, noting that RTA is not obliged to change its operations or practices (even if harmful impacts occur) so long as RTA is acting within the constraints of its lawfully authorized activity (RFJ at para. 542).

Legal framework

[169] As we have noted, no challenge is taken to the trial judge's summary of the legal principles with which we also agree. He committed no reviewable error in proceeding with this framework as he did. For ease of reference, we set out that summary below:

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> [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*).

[170] As was observed in *Saik’uz 2015*, the defence of statutory authority developed over time and there was disagreement in the jurisprudence over how it should be applied and in what circumstances. These differences were most pronounced in the 1989 decision from the Supreme Court of Canada in *Tock* which, for the most part, were resolved ten years later in 1999 in the Court’s unanimous

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decision in *Ryan.* In 2002*,* this Court in *Sutherland* provided its analysis of the defence as derived from both *Tock* and *Ryan*. The trial judge's summary of the applicable framework to the defence was largely adopted from *Sutherland.* It bears emphasizing that in *Sutherland,* leave to appeal to the Supreme Court of Canada was refused.

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[171] We will now set out further details about these three salient authorities because the framework developed in this jurisprudence is, in our view, determinative of the issue.

1989: Tock v. St. John's Metropolitan Area Board

[172] In *Tock,* the Supreme Court of Canada addressed the issue of whether the defence of statutory authority applied to absolve a municipality of liability in nuisance. The Court unanimously agreed to allow the appeal, but the reasons for doing so varied.

[173] *Tock* resulted in three separate opinions among the six justices, leaving no clear majority on the scope of the defence. Three justices (Justice Wilson, writing for herself, Justices Lamer and L'Heureux-Dubé) favoured limiting the defence to cases involving either mandatory duties or statutes that specify the manner of performance, noting that the availability of the defence depends on the language of the statute and what it in fact orders, authorizes, or permits. Two justices (Justice La Forest, writing for himself, and Chief Justice Dickson) took the view that the defence should be reformulated in more functional terms and rejected the notion that the distinction of whether a statute is permissive or mandatory is, without more, determinative. Only Justice Sopinka (writing for himself) supported maintaining the status quo and making the defence available regardless of whether the statutory authorization was mandatory or permissive.

[174] Justice Sopinka found that there was not a strong basis or unanimity for departing from the existing state of the law. He supported the traditional approach to the defence, relying heavily on the passage from the House of Lords in *City of Manchester v. Farnworth*, [1930] A.C. 171 [*Manchester*] to which the trial judge here

referred and which had been adopted by the Court in *City of Portage la Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, 1966 CanLII 101, as well as other appellate courts, including this Court in *Royal Anne* at 760.

[175] Justice Sopinka was of the view that there was no question that legislation — either expressly or implicitly — may authorize an interference with private rights and cause a nuisance. The language in the case law was such that the defence is established whether the nuisance is authorized expressly or by implication. The distinction between mandatory or permissive legislation did not appear to be relevant under this traditional view because the work would still be authorized by statute (*Tock* at 1225):

> A work is authorized by statute whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute. The distinction between mandatory and permissive, which Wilson J. makes to eliminate, in the latter case, the defence of statutory authority, has not been accepted in Canada or, apparently, in England. (See *Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.), and *Tate & Lyle Industries Ltd. v. Greater London Council*, [1983] 1 All E.R. 1159 (H.L.)).

[176] With respect to the "inevitable consequences", he explained that this term was "the expression of the factual conclusion that the necessary causal connection exists between the work authorized and the nuisance" (*Tock* at 1225). If the necessary connection exists, then it follows that the legislature authorized that which is the inevitable consequence from the work described in the statute.

1999: Ryan v. Victoria (City)

[177] *Ryan* was a claim pled in negligence, and alternatively in public nuisance. The issue before the Court was the effect of statutory authority on the civil liability of railways. The appellant was a motorcyclist who was injured while trying to cross railway tracks on an urban street in Victoria. His front tire became trapped in a "flangeway" gap that was running alongside the inner edge of the tracks. At the time, the flangeways on the street were about one-quarter of an inch wider than the front tire of the appellant's motorcycle. The motorcyclist sued the City of Victoria and the railway companies which owned and operated the tracks. The railways denied

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liability on the basis that the tracks were authorized by and in compliance with statutory authority.

[178] Regulations from the Canadian Transport Commission provided that flangeways at crossings could be anywhere from 2.5 to 4.75 inches wide. The same dimensions were adopted in the railways' own standard practice. It was common ground that the flangeways on the street always remained within that prescribed range (*Ryan* at para. 8). The decision to construct a flangeway at a particular width within that range was a matter left to the discretion of the railways (at para. 50). The trial judge found that at the time of the accident, the flangeways had been reduced to the minimum width of 2.5 inches required under the regulations (at para. 9). He found the railways liable in nuisance, but this Court set aside that finding on the basis that they were protected by the defence of statutory authority in that "the flangeways were an inseparable consequence of requiring the tracks to be laid at street grade flush with street level and the roadway paved between the rails" (at paras. 12, 18).

[179] The Supreme Court of Canada allowed the appeal and restored the trial judgment. In its unanimous decision, the Court attempted to resolve the uncertainty which arose from *Tock* by adopting the traditional, that is the "*Manchester*" approach supported by Sopinka J.:

> 54 Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. See *Lord Mayor, Aldermen and Citizens of the City Manchester of v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications),* [1987] 2 S.C.R. 289. An unsuccessful attempt was made in *Tock*, *supra*, to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.
>
> 55 In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue

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> and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:
>
> > The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.
>
> [Emphasis added.]

2002: Sutherland v. Vancouver International Airport Authority

[180] *Sutherland* involved a claim brought by a number of plaintiffs against the Vancouver International Airport Authority due to the noise nuisance caused to the nearby residents by the use and operation of the north runway at the airport. The issue was whether the location, construction and operation of the airport's north runway was authorized by statute such that it rendered the defendants immune from the lawsuit (at para. 36). This Court found the trial judge had erred in holding that the defendants had not met the onus of establishing the defence of statutory authority.

[181] This Court undertook a detailed analysis of the various statutes, orders-in-council, and subordinate legislation to find that there was ample statutory authority for location, construction, and operation of the north runway. There were precise details in the regulations and the airport manual as to the location and specifications for each of the runways at the airport. There was also authority designating the airport authority to use the leased lands as a major international airport and requiring the airport authority to manage, operate, and maintain the airport at a level that met the capacity demands at the airport.

[182] There was no express authority in the legislation or subordinate legislation for the noise nuisance, so the question was whether such an authority was implicit in the statutory scheme (at para. 77). There was no doubt that the statutory scheme authorized the construction of the north runway in the location it occupied; the lease required the airport authority to construct the north runway as specified in the Environmental Assessment Review Panel report and the ground lease identified the

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precise location and configuration (at para. 78). In addition, the airport operations manual further identified the location, its operation, and configuration. The airport certificate provided statutory authority to operate an airport in a specific location. The operation of the north runway was also equally clear (at para. 96).

[183] This Court found it was an error to interpret the lease as providing discretion of whether to build the north runway. The lease expressly required the airport authority to "plan, design and construct the third runway" as defined. It was therefore required to build the runway and if it failed to do so, rent would become payable and it would also be in breach of contract (at para. 89). Further, the Court decided it was an error for the trial judge to inquire into other possible locations for the new runway. The inevitable result test should have applied to the north runway in its authorized location and where it was in fact built because the location was specifically authorized (at para. 104). The decision of where to locate the runway was not a legal issue but a matter for public policy considerations (at para. 107), and it was irrelevant to consider because once the factual connection existed between the nuisance and the authorized work, it followed that the nuisance was authorized by statute (at paras. 113–14). As such, the defendants had met the test to be able to rely on the defence.

[184] We shall return to *Sutherland* below.

Discussion

Was the activity or work at issue authorized by statute?

[185] The first part of the two-step defence of statutory authority is whether the activity or work is authorized by statute. In *Tock* at 1225, Sopinka J. stated "[a] work is authorized by statute whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute". As discussed above, he rejected the distinction between public works that are required and those that are permitted. Hence, at the first stage of the test, it does not matter whether the statute uses mandatory or permissive language, it will still be considered to be "authorized" if the

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work or activity is being carried out in compliance with the statute. The first stage of the test was satisfied in this case.

[186] The statutory and subordinate legislative authorizations that are summarized above provide ample bases for establishing that RTA had the necessary authorizations for the storage, diversion, and use of water in relation to the Kenney Dam and Nechako Reservoir.

[187] The judge found that the *IDA* authorized RTA's work and no challenge is taken on appeal regarding this finding.

[188] The FWL established that the storage, diversion, and releases/flow were authorized by the statutory scheme as set out in the Settlement Agreements and water licences. From the evidence and the findings of the trial judge, RTA operated and stored water within the parameters set out; these were permissive in that RTA could store and divert water up to the maximum amounts set out in the FWL.

[189] RTA was also authorized to provide flows and releases necessary for the protection of the sockeye and chinook salmon. The 1987 Settlement Agreement required RTA to release minimum flows, but the agreement did not prevent RTA from releasing more than that amount. As we have noted above and will return to below, however, it is the Technical Committee, not RTA, that makes the ultimate decision regarding the flows. The trial judge found that the flow regime, as directed by the Technical Committee, is mandatory and that it is the Technical Committee that governs the flow regime. Furthermore, whatever may be the inevitable result of the Technical Committee's directions is a matter for it to rectify, assuming practical feasible alternatives exist (RFJ at para. 538).

Was the nuisance the "inevitable result" of exercising the statutory authority?

[190] Since the works and activity in this case were authorized, the question under the second part of the defence is whether the nuisance (the significant effects and

harm to the fish/fisheries) was the inevitable result of RTA carrying out the work and thus explicitly or implicitly authorized by the statute and regulatory scheme.

[191] Assessing the inevitable result at this stage means that if there is a necessary causal connection between the authorized work and the nuisance, then the legislature is said to have authorized the inevitable consequence of the work described in the statute (*Tock* at 1225–1226; *Sutherland* at para. 101; *Susan Heyes* at para. 79).

[192] The appellants say that RTA enjoyed a discretion within the limits set by the statutory authorization. RTA accepts there is a range within which the activity can be conducted, but it submits this does not change the analysis.

[193] To address this issue, we consider whether this case is more analogous to *Sutherland* or *Ryan*. Is it comparable to *Ryan*, as the appellants submitted, because of the range of discretion involved and constraints placed on RTA's common law obligations to take all reasonable steps to minimize foreseeable harm? Or is it similar to *Sutherland*, which RTA submits is dispositive, because it involved explicit authorization for the construction and operation of the works at issue? Since there was a factual connection between the nuisance and the authorized work in *Sutherland*, RTA argues that it follows that the nuisance in the present case was authorized by statute and the subordinate legislation. It cautions against differentiating between mandatory and permissive authorizations because it says that this distinction does not apply in light of *Ryan*.

[194] In our view, this is an oversimplification of what was decided in *Ryan*, which is distinguishable from *Sutherland* on two key points: (1) the defendants had a range of discretion within which to construct the works; and (2) the statutory authority defence was found not to apply in *Ryan*.

[195] Both decisions, however, reflect how the courts still consider the wording of statutory authorizations (whether mandatory or permissive) in assessing the application of the defence to the circumstances of each case. The appellants and

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RTA's positions on this issue essentially diverge on the discretion involved in *Ryan* and the specific requirements applicable in *Sutherland*. However, it was not the permissive language that barred the availability of the defence in *Ryan*, but the fact that other alternatives were available.

[196] The language of the FWL appears to provide for a range within which RTA can operate (store, divert, and use the water) while still being in compliance with the limits set out in the licence. It provides that the maximum quantity of water that may be stored is 23,850 cubic-hectometres; and, the maximum rate of diversion and use for power purposes is 170 cubic-metres per second. The judge found that RTA had always operated within the parameters of its authorizations and never diverted more than the limit specified in the water licences, unless it received special permission to do so (RFJ at para. 532).

[197] RTA does not consider itself obliged to explore alternatives because it says the statutory authority, which includes the subsidiary laws (see *Sutherland* at paras. 69–76), is sufficient to protect it if a nuisance results from operating at the maximum.

[198] The appellants point to cases where courts have grappled with situations where government permission authorizes a range of action within which degrees of impact from the action vary from less severe to actionable nuisance. Referring, *inter alia*, to *Manchester* and *Ryan*, they say the courts have been clear that while the conduct may be legally permissible within the range permitted by government regulation, it may still run afoul of private law protections against nuisance. They say the statutory restrictions are not the full extent of the defendant's legal obligations given that tort law remains unless the legislature intended to displace it.

[199] The appellants argue that there is an ongoing obligation on RTA to operate the Kenney Dam in a way that avoids the losses to the fisheries. In addition, the *IDA* itself demonstrates that the statutory authority always envisioned a balance to protect fisheries, which has not been achieved.

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[200] RTA says that the appellants' theory regarding permissive authorizations suggest that if there is discretion not to undertake the authorized activity, it is then a feasible alternative not to pursue the activity that has been specifically authorized.

[201] The trial judge here, however, declined to engage in determining whether there were possible feasible alternatives for the construction and operation of the Kenney Dam and the reservoir in respect of the timing or volume of water to be released into the Nechako River (RFJ at para. 535). He did, however, discuss "as a cautionary measure" three possibly feasible alternatives that were suggested in *Saik'uz 2015* and in light of RTA's evidence about the operational and practical constraints applicable to the reservoir regulation (at paras. 536–542). He rejected those alternatives, finding that RTA operating within the parameters of the licences issued over time including the FWL was the inevitable cause of harm to the fish/fishery.

[202] At this juncture we wish to comment on *Saik'uz 2015*. The appellants submit that the judge erred in "declining to determine whether there exist feasible alternatives", which they say is a "direct refutation" of that decision.

[203] We disagree. As we discussed with respect to the issue of standing, the decision in *Saik'uz 2015* was to the effect that RTA's motion to strike the action should not have been granted because there were matters that needed to be "explored through the discovery process and at trial in order to determine whether the alleged nuisance [was] the inevitable result of what was authorized by the statutory authority" (*Saik'uz 2015* at para. 102).

[204] Now that the trial has occurred, the judge's conclusion as to the availability of the statutory authority defence must be assessed within the context of his findings at trial.

[205] We would add that *Saik'uz 2015* does not refer to the role of the Technical Committee, a factor which was instrumental in the trial judge's analysis of the defence (RFJ at para. 538), to which we shall return below.

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[206] We are of the view that the framework outlined and applied in *Sutherland* should apply in this case.

[207] While clearly authoritative for its formulation of the underlying principles, *Ryan* has several features which can be distinguished from those in this case.

[208] First, the claim was primarily framed and decided in negligence even though the railways were also found liable in public nuisance.

[209] The regulations at issue in *Ryan* applied nationally and provided discretion that could be exercised respecting flangeways at crossings. The decision to construct a flangeway at a particular width within that range at a given crossing was a matter left to the discretion of the railways. The railways had independent and exclusive control over the exercise of that discretion. This is qualitatively different from the case at bar, in which the Technical Committee directs the flow regime to which RTA must adhere within the 'discretionary range'.

[210] It is of assistance to refer to the Court's analysis in *Ryan* finding that the defence of statutory authority was not established in the circumstances of that case:

> 56 Turning to the facts of this case, the question raised by the traditional test <u>is whether the hazard created on Store Street was an "inevitable result" of exercising statutory authority; that is, whether it was "practically impossible" for the Railways to avoid the nuisance which arose from the flangeways</u>. As noted previously in the context of negligence, the regulations relied upon by the Railways prescribed a minimum width of 2.5 inches for flangeways. <u>The Railways' decision to exceed that minimum by more than one inch was a matter of discretion and was not an "inevitable result" or "inseparable consequence" of complying with the regulations.</u> The same may be said of the Railways' decision not to install flange fillers when such products became available after 1982. The flangeways created a considerably greater risk than was absolutely necessary. Accordingly, the Court of Appeal erred in permitting the Railways to assert the defence of statutory authority against the claim for nuisance.
>
> [Emphasis added.]

[211] The Court in *Ryan* addressed the "inevitable result" in a limited way (at para. 56). Specifically, it did not discuss what "practical feasible alternatives" were available to the railways in the circumstances, presumably because the decision to

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exceed the minimum prescribed in the regulations was a matter of discretion and not the inevitable result of complying with the regulations. However, the Court recognized this was part of the traditional test, quoting Sopinka J.'s statement that "[t]he defendant must negative that there are alternate methods of carrying out the work" (at para. 55, citing *Tock* at 1226).

[212] The statutory context in both *Tock* and *Ryan* was crucial to the inevitable result analysis.

[213] Both *Tock* and *Ryan* involved statutes and a regime of statutory authority that were not directed to the specific work, activity or conduct that was the subject of complaint. In *Tock*, it was the *Municipalities Act*, S.N. 1979, c. 33 (see *Tock* at 1205–1206). In *Ryan*, it was various versions of the *Railway Act* and Regulations (see *Ryan* at paras. 13–14).

[214] In contrast, the statutory regime in this case was enacted specifically in relation to RTA's construction of the Kenney Dam <u>and</u> to its operations over many years.

[215] Moreover, as found by the trial judge, when the RTA scheme was initially put in place (RFJ at para. 529):

> […]
>
> - 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.
>
> […]

[216] There are references in the ASF (for example in the section dealing with the Kenney Dam's construction at paras. 226–268) that set out certain concerns raised regarding the fisheries. The construction proceeded nonetheless. The statutory scheme, as it developed over time, has authorized RTA to conduct its operations for the better part of 70 years despite the recognized harm to the fisheries. There has

also been litigation regarding the fisheries. During this entire period, RTA remained authorized to conduct its operations.

[217] The potential nuisance which later materialized was explicitly or, at least implicitly, recognized in the scheme as developed over the years. The 1987 Settlement Agreement preserved the right of the DFO to compel more flows to the Nechako River for the protection of fish and habitat. It also established the Technical Committee which was given the mandate to set the flow regime to which RTA has adhered. The Technical Committee must also approve any variations RTA seeks to the mandated flow regime.

[218] As a result of the 1987 Settlement Agreement, the legislative scheme gives RTA no real discretion as to the flow regime. RTA participates on the Technical Committee, but it cannot, of its own accord, change that regime. This factor represents a fundamental difference between the statutory scheme in this case and those in *Tock* and *Ryan*. The schemes in those cases did not limit the discretionary range available to the defendant based on directions that were mandated and specific to the actions that cause the nuisance. Nor did those schemes implicitly or explicitly contemplate the very nuisance that materialized at a later date.

[219] Three years after *Ryan*, this Court decided *Sutherland*. Since the trial judge in this case essentially followed the *Sutherland* framework in his consideration of the defence, it is necessary to review the decision in further detail.

[220] The statutory scheme is summarized in *Sutherland* at paras. 36–51 and included not only statutes of general application such as the *Aeronautics Act*, R.S.C. 1985, c. A-2, the *Public Lands Grants Act*, R.S.C. 1985, c. P-30, and the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5, but also “various pieces of subordinate legislation” that were specifically directed to the Vancouver International Airport Authority and the designation and operation of the proposed new runway including a proposed ground lease (*Sutherland* at paras. 42–51). The ground lease did not specify where the new runway was to be constructed. Like this case and unlike, for example, *Manchester*, the legislative scheme contemplated the precise

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nuisance that materialized, that is, noise to the neighbouring properties (at para. 107).

[221] Of significance in *Sutherland*, which is not an issue on this appeal, was the first part of the statutory authority defence test: “was the activity or work at issue authorized by statute?”

[222] After a comprehensive analysis, Chief Justice Finch, for the Court, concluded that “there is ample statutory authority for the operation of the North Runway” (*Sutherland* at para. 100).

[223] In considering the second step of whether the noise nuisance was the inevitable result (and therefore “implicitly authorized” by statute), this Court said it was an error for the trial judge to “embark on an inquiry” into other possible locations that could have avoided the noise nuisance because the statute had authorized the precise location and configuration of the runway (*Sutherland* at para. 104). Instead, this Court found that the inevitable result test should have been applied to the runway in its authorized location and where it was in fact built. The issue of location, as discussed earlier, was a matter of public policy rather than a legal issue.

[224] This Court emphasized:

> [114] Once the necessary factual connection exists between the nuisance and the authorized work, it follows that the nuisance was authorized by statute. A power to expropriate forms no part of that inquiry (see *Dunne v. The Company of the Sutherland v. Vancouver International Airport Authority Proprietors of the Birmingham Canal Navigation* (1872) VIII. L.R. 42 (Ex.Ch.). Whether compensation could have been paid is not relevant to whether there was a nuisance, or whether the nuisance is inevitable…
>
> [117] The plaintiffs’ answers to the inevitable result test, namely, relocation, compensation or expropriation, do not fit within the legal framework laid down by the Supreme Court of Canada. In my opinion, there was clear statutory authority for the location, construction and operation of the North Runway, and the noise nuisance suffered by the plaintiffs was the inevitable result.
>
> [Emphasis added.]

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[225] The appellants here say that the judge, in performing the inevitable result analysis, erred in not conducting a practically feasible inquiry, which is part of the framework from Sopinka J. in *Tock* that was endorsed in *Ryan* at para. 55.

[226] *Sutherland* concluded that the plaintiffs' answers to the inevitable result test did not fit within the "legal framework laid down by the Supreme Court of Canada" (at para. 117), with this Court stating:

> [118] … By that, I understand that the onus is upon the defendant asserting the defence to establish: clear and unambiguous statutory authority for the work, activity or conduct complained of, in the place where that work, activity or conduct takes place, and express or implied authority to cause a nuisance as the only reasonable inference from the statutory scheme …

[227] The first part of the statement is clearly a reference to step one of the defence —establishing whether the work was authorized by statute. We interpret the latter phrase "and express or implied authority to cause a nuisance as the only reasonable inference from the statutory scheme" to refer to the inevitable result aspect of the defence; that is, where "the statutory scheme" clearly contemplated the precise "work, activity or conduct complained of" either expressly or impliedly.

[228] The statutory scheme in *Sutherland* considered and included measures to address the noise nuisance arising from the new runway's location. The noise nuisance was the inevitable consequence of what the statutory scheme authorized, so Parliament was taken to have authorized the nuisance too (at para. 118). That being the case, there was no need for the defendants to establish that there were practical reasonable alternatives to proceeding in a manner different from what they were expressly authorized to do. In fact, it was principally the plaintiffs who proposed what were submitted to be the feasible alternatives. Thus, the "necessary factual connection exist[ed] between the nuisance and the authorized work, [and] it follow[ed] that the nuisance was authorized by statute" (at para. 114). As such, it was a complete defence for the defendants.

[229] In *Susan Heyes*, this Court distinguished *Sutherland*:

> [113] The appellants say cut and cover construction in this case is analogous to the runway in *Sutherland C.A.*, and the trial judge here fell into the same error as the trial judge in that case.
>
> [114] This argument ignores a significant distinction between the two cases. In *Sutherland C.A.*, the runway location that caused the nuisance was expressly authorized by the statutory framework. Thus, there was no latitude for judicial consideration of other options that might have avoided the nuisance. Noise nuisance was an inevitable consequence of the statutorily authorized location. By contrast, the construction method of the Canada Line was not statutorily authorized. Instead, s. 4(1) of the *GVTAA* gave TransLink a broad discretion in deciding how to build it.
>
> [Emphasis added.]

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[230] This Court then considered the issue of practically feasible alternatives concluding:

> [146] … the appellants have satisfied the burden on them to establish the defence of statutory authority. Section 4(1)(e) of the *GVTAA* provided statutory authority to build the Canada Line. Nuisance was an inevitable result of exercising that authority because there was no practically feasible alternative to the SNC-Lavalin/Serco proposal, which included cut and cover construction, and, in any event, because there was no construction method that provided a non-nuisance alternative in building the Canada Line.

[231] In our view, the trial judge correctly followed the approach in *Sutherland*. First, he summarized a number of factors relating to the authorized work, and these factors then informed the context for his analysis on the inevitable result (at para. 529).

[232] The judge's reasoning was consistent with *Sutherland* because in this case:

- the statutory authority was unambiguous;
- it specifically authorized the work, activity or conduct complained of in the place where that work, activity or conduct took place;
- although the nuisance which materialized over time was only considered a possibility at the outset, it was explicitly contemplated by the authorizing scheme, and that scheme was modified after the nuisance became apparent by incorporating the 1987 Settlement

Agreement without requiring RTA to operate itself in a manner that avoided the harm; and,

- although the FWL incorporates discretion and ranges regarding the flow regime, it is the Technical Committee not RTA which has the mandate to regulate that regime and RTA is obligated to comply.

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[233] The trial judge then followed the structure and analysis set out in *Sutherland* to assess the inevitable result part of the test as it related to the authorized work (the Kenney Dam) and activity (the storage and diversion of water).

[234] The judge agreed with RTA that it was not necessary for him to address whether there existed possible feasible alternatives because it had been given specific authority and direction for the construction and operation of the Kenney Dam and the related reservoir, the diversion of water, and the timing and release of the volume of water into the Nechako River (RFJ at para. 534).

[235] We highlight certain points that appear to have informed the trial judge's conclusions. First, he found that British Columbia knew full well that the construction of dams and reservoirs would have a substantial impact upon rivers and lakes within the region and hence potentially upon the fish/fishery in such waters, yet it required no protection whatsoever for the fish as part of the review/approval of the design, construction, or regulation of the works. Second, the role of the Technical Committee, which was part of the 1987 Settlement Agreement and incorporated in the FWL, removes any discretion by RTA regarding the flow regime.

[236] The judge, as this Court did in *Sutherland*, nonetheless conducted an analysis of the suggested feasible alternatives, but it was based on the suggestions from this Court in *Saik'uz 2015* (RFJ at paras. 530, 535–536).

[237] Our view is that the question of practical feasible alternatives does not arise here.

[238] Similar to *Sutherland*, the statutory scheme at issue in this case, including the subordinate legislation, contemplated a nuisance flowing from the prescribed works. When the scheme was first established, and as it developed over the years, the Legislature understood that impact to the fisheries was the inevitable result of RTA operating as prescribed. It nonetheless authorized and continued to authorize the works. By doing so, it must be taken to have authorized the nuisance itself. In these circumstances, it was “practically impossible” for RTA “to avoid the nuisance” when operating as prescribed (*Tock* at para. 56). If the defence of statutory authority could not be successfully invoked in a legislative scheme and factual context such as exists here, it is difficult to contemplate a situation where it could be.

[239] Accordingly, we are of the view that the appellants have failed to identify and establish a reviewable error in the trial judge’s conclusion that RTA had met the onus of establishing the defence of statutory authority and would not accede to this ground of appeal.

<u>Constitutional Inapplicability</u>

[240] We next turn to the issue of constitutional inapplicability as it relates to the defence of statutory authority.

[241] The appellants submit further that even if the statutory authority defence meets the common law standard, it is nonetheless inapplicable in this case because the statutory regime unjustifiably infringes the appellants’ s. 35 rights and is therefore unconstitutional.

[242] This argument requires consideration of the interplay, if any, between a nuisance claim brought under the common law and the constitutionally protected rights in s. 35 of the *Constitution Act, 1982*. The appellants submit that the Crown’s ongoing conduct in permitting the diversion and storage of water of the Nechako River infringes the appellants’ established right to fish in the watershed, and therefore cannot be relied on as a defence to their private law nuisance claim. They state that they are not challenging the validity of the authorizations, but rather the

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applicability of those authorizations to the extent that they affect their Aboriginal fishing rights.

[243] The intervener, Nadleh Whut'en, supports this argument. Nadleh Whut'en submits that while ordinarily a party raising the defence is required to establish that the act causing the nuisance was both authorized by statute and the inevitable result of the statutorily-authorized action, when a claim in nuisance alleges interference with a s. 35 right, a third factor must be considered: whether the authorization relied upon is inconsistent with s. 35 Aboriginal rights. If that third factor is met, their position is that the defence must be unavailable.

[244] The question then becomes whether, as a matter of law, the defence of statutory authority to a nuisance claim is unavailable to a defendant if the authority upon which the defendant relies infringes a s. 35 right. The appellants have framed the issue as whether the statutory authorization is constitutionally inapplicable to the appellants because of its infringing effect on the appellants' s. 35 rights, unless the Crown can justify the infringements.

[245] The trial judge rejected this submission. He found that the framework of constitutional inapplicability was not available on the facts of this case because the statutory authorizations at issue did not apply to the appellants but rather to RTA (RFJ at para. 569). He agreed with RTA that the appellants were in effect challenging the validity of the instruments that authorized RTA's "impoundment and regulation of the River flows" (at para. 570). Notably, in *Saik'uz 2015*, the appellants said they were not seeking to set aside or challenge the validity of the water licences and related instruments (at para. 570; see *Saik'uz 2015* at para. 114).

[246] The trial judge further agreed with the defendants that "equating the tests for nuisance and rights infringement blurs some distinct lines that exist to establish responsibility for alleged wrongs"; specifically, the responsible party in the nuisance test is the alleged tortfeasor, whereas the government is the responsible party in the test for rights infringement (RFJ at para. 572). In the trial judge's view, that distinction is "glossed over" by marrying the tests (at para. 572). As such, he said:

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"[i]f 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" (at para. 572).

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[247] The judge also found the appellants' position untenable because it would be unjust and inappropriate to deny the availability of the defence to a private entity in such circumstances:

> [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.
>
> [Emphasis added.]

Position of the appellants

[248] The appellants rely on the principle that statutes that unjustifiably infringe an Aboriginal right are constitutionally of no force or effect in relation to the holder of the right. Thus, statutes of general application could be said to be inapplicable to Aboriginal rights holders, though valid in relation to those not possessing s. 35 rights (see e.g., *Sparrow*; *R. v. Marshall*, [1999] 3 S.C.R. 456, 1999 CanLII 665; *R. v. Desautel*, 2021 SCC 17). In each case in which the issue of constitutional

applicability has arisen, the law has constrained the rights holder in a manner contrary to their s. 35 rights.

[249] The *IDA* does not on its face apply to the appellants. Pursuant to s. 1(1)(a), the statute applies to "any person who proposes to establish or expand an aluminum industry in British Columbia". As such, it applies to RTA, not the appellants.

[250] The theory of the appellants is that although the legislation does not constrain them directly, the effect of the legislation is to authorize activity that interferes with their ability to fish. Thus, the legislative scheme should be regarded as inapplicable to them, in the sense that it cannot be relied upon in a way that results in interference with their fishing rights.

[251] The appellants raise three arguments in support of their submission that the trial judge erred in his rejection of the constitutional inapplicability argument. First, they submit that his conclusion is incompatible with this Court's decision in *Saik'uz 2015*.

[252] Second, the appellants submit that third parties may be held liable for infringement of s. 35 rights, and accordingly, the trial judge was wrong to maintain a strict distinction between the private law action in nuisance and the public law consequences of Crown action.

[253] Finally, they submit that the judge's conclusion is inconsistent with the conclusion in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*] that once s. 35 rights have been established, it may be necessary for the Crown to reassess prior conduct in relation to projects that may infringe those rights.

Compatibility with *Saik'uz 2015*

[254] A central argument of the appellants is that the trial judge's conclusion is incompatible with this Court's judgment in *Saik'uz 2015*. To assess that argument, it is necessary to review what the Court actually decided in that judgment.

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[255] This lawsuit was commenced in September 2011. In 2013, RTA brought an application for summary dismissal of the action. RTA's position was that as long as s. 35 rights are claimed but not proven, Aboriginal peoples who claim rights have no cause of action against private parties for interference with those claimed rights.

[256] The chambers judge dismissed the application for summary judgment based on the defence of statutory authorization, but struck the pleadings on the basis that a claim in nuisance based on asserted but unproven claims to s. 35 rights had no reasonable chance of succeeding (*Thomas v. Rio Tinto Alcan Inc.*, 2013 BCSC 2303).

[257] On appeal of the order striking the appellants' pleadings, this Court began by reviewing the test for striking pleadings. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It is not determinative that the law has not yet recognized a particular claim; the court must err on the side of permitting a novel but arguable claim to proceed to trial (*Saik'uz 2015* at paras. 34–35, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42).

[258] This Court pointed out that the appellants had pleaded facts that, if true, would support Aboriginal title to lands along the banks of the Nechako River:

> [54] The Nechako Nations plead that they exclusively occupied portions of the Central Carrier territory, including the Nechako River and lands along its banks, at the time of British sovereignty. If this alleged fact is true, the Nechako Nations would have Aboriginal title to those lands. Although this is not ownership in fee simple, Aboriginal title would give the Nechako Nations the right to possess the lands. It is therefore not plain and obvious that the Nechako Nations do not have sufficient occupancy to found an action in private nuisance.
>
> [Emphasis added.]

[259] The Court said this in respect of the claim based on the Aboriginal right to fish:

> [56] The Nechako Nations plead the diversion of water by Alcan at the Kenney Dam has led to negative impacts on the fisheries resources of the Nechako River system. The alleged impacts are not trivial and are arguably

> unreasonable. Accordingly, on the basis of the pleaded facts, it is not plain and obvious that the Nechako Nations do not have a reasonable cause of action in private nuisance.
>
> [57] … The Aboriginal right to harvest fish pled by the Nechako Nations may be sufficient to demonstrate that they have suffered special damage as a result of the diversion of the Nechako River at the Kenney Dam. Hence, on the basis of the pleaded facts, it is not plain and obvious that the Nechako Nation do not have a reasonable cause of action in public nuisance.
>
> …
>
> [60] Based on the above analysis, the claims of private nuisance, public nuisance and interference with riparian rights, to the extent they are based on Aboriginal title and other Aboriginal rights, should not have been struck because it is not plain and obvious that, assuming the facts pleaded to be true, the notice of civil claim discloses no reasonable cause of action in respect of those claims. …
>
> [Emphasis added.]

[260] What the Court decided in *Saik'uz 2015* was that the claims of the appellants should proceed to trial because it was not plain and obvious that they would fail. As noted earlier, concluding that claims should be permitted to go to trial does not stand in the way of a judgment after trial dismissing the claims.

[261] The Court referred to but did not try to resolve the question of whether the statutory authorizations were constitutionally inapplicable to the appellants. The appellants say that the trial judgment is incompatible with paras. 114 and 116 of the judgment in *Saik'uz 2015*. However, when those paragraphs are read in context with para. 115, it is apparent that the Court was simply concluding that it was not an abuse of process to make the argument:

> [114] In my opinion, both *Moulton Contracting* and *Sam* are distinguishable from the present situation. The Nechako Nations are not challenging the validity of the Final Water Licence (and related instruments) in their pleadings. Rather, the Nechako Nations are taking the position that the Final Water Licence and related instruments and legislation are constitutionally inapplicable to take away or diminish their Aboriginal or proprietary rights, with the result, they say, that Alcan cannot rely on the defence of statutory authority. I do not regard this position as constituting a collateral attack on the Final Water Licence.
>
> [115] Nor is the position taken by the Nechako Nations the equivalent of taking a self-help remedy that would be an abuse of process because it would bring the administration of justice into disrepute. In my view, it is not an abuse of process for the Nechako Nations to argue that the defence of

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> statutory authority is inapplicable to defeat their claim as a result of the constitutional protection given to Aboriginal rights. Whether such an argument is successful remains to be seen.
>
> [116] I agree with the Nechako Nations that the current situation is more analogous to the circumstances in *Garland v. Consumers' Gas Co*., 2004 SCC 25, and *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62. In *Garland*, the plaintiff sought the return of interest paid to a utility, whose rates and payment policies were governed by the Ontario Energy Board. In *TeleZone*, an unsuccessful applicant for licences issued by Industry Canada sued for breach of contract, negligence and unjust enrichment. In each case, the Supreme Court of Canada did not give effect to the argument the claims constituted impermissible collateral attacks and held the claims were private law matters that should be allowed to proceed. Similarly, in the present case, the claim is primarily a private law matter in which the Nechako Nations are claiming in nuisance and for breach of riparian rights. The impugned pleadings do not assert that the Final Water Licence is invalid and are being relied upon to resist the application of the defence of statutory authority in a private law matter.
>
> [Emphasis added.]

[262] In our view, nothing in this Court's judgment in *Saik'uz 2015* determines the question of whether RTA may rely on the defence of statutory authority, or whether the defence is constitutionally inapplicable. These issues were left for trial.

[263] The determination of the validity of the constitutional inapplicability argument depends upon whether the protection arising from s. 35 may be used to take away a common law defence to a private law claim in nuisance.

[264] The appellants submit that there is no reason s. 35 rights cannot be relied on for a claim against a private party. They rely on an interpretation of the seminal case of *Haida* for that proposition. It is to that interpretation that we turn.

Section 35 rights and third parties

[265] The appellants take issue with the trial judge's reliance on what he termed at para. 572 as "distinct lines that exist to establish responsibility for alleged wrongs". As discussed above, the trial judge's conclusion was that the appellants' remedy should lie against the Crown if the undertaking at issue and authorized by the Crown has unjustifiably harmed the appellants. The reason for this was because in a test for rights infringement, the government is the responsible party (RFJ at para. 574).

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[266] The appellants point out that remedial orders for unjustified infringement of s. 35 rights frequently impact third parties. That is, however, a very different proposition from the assertion that the establishment of s. 35 rights creates a cause of action against non-governmental parties.

[267] It is indisputable that a remedy against the Crown may affect third parties. The appellants cite several cases where the result of the infringement by the Crown impacted third parties, including *Tsilhqot'in*, *Ahousaht,* and *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, leave to appeal ref'd, 34403 (23 February 2012) [*West Moberly 2011*].

[268] None of these judgments arose from a private law action against a third party. In each case, the remedy was against the Crown, although the effect of the remedy had a knock-on effect on private parties relying on Crown authority.

[269] In *Tsilhqot'in*, the Court held that a substantial area of what had been formerly characterized as Crown land was held by the Tsilhqot'in by Aboriginal title. Timber licences had been issued by the provincial government over this land. The Court characterized the effect of this as a "meaningful diminution in the Aboriginal group's ownership right [that] will amount to an infringement that must be justified in cases where it is done without Aboriginal consent" (*Tsilhqot'in* at para. 124).

[270] Nothing in the judgment in *Tsilhqot'in* suggests that the establishment of Aboriginal title gave rise to a cause of action against the timber licensees. Indeed, it was clear that even the ongoing viability of the licences depended on whether the Crown could justify granting the licences, notwithstanding the infringement of the Tsilhqot'in's Aboriginal title:

> [127] … Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

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[271] The judgment in *Tsilhqot'in* turned on principles of public law. No order was sought against third parties based on infringement of s. 35 rights, and the Court did not make any order against third parties (*Tsilhqot'in* at para. 153).

[272] The *Ahousaht* judgment has more direct resonance to the claim at bar because it was based on the establishment of Aboriginal fishing rights. Again, the case was not brought against third parties and no order was sought or obtained against third parties, although the effect of the judgment was understood throughout to have a negative impact on non-Aboriginal commercial and recreational fishers because of the priorities set by the regulatory regime.

[273] The trial judge had held that certain requirements of the DFO that infringed the Ahousaht's Aboriginal fishing rights were justified, but other requirements, including the priority given to recreational fishing over the Ahousaht's commercial fishing rights, were not. The appellants rely on the judgment of this Court affirming the trial judge's conclusions, but also holding that there were additional fishery requirements that had not been justified by the Crown (RFJ at paras. 213–227, 251, 276–279).

[274] Nothing in these passages suggests that the infringing act of the federal Crown in not according the Ahousaht the priority to which they were due created any direct rights against the recreational fishers who had had the benefit of the infringing act.

[275] The order of the Court was declaratory in nature. No order was sought or made against third parties.

[276] The issue in *West Moberly 2011* was whether the provincial Crown had adequately consulted and reasonably accommodated the Treaty 8 hunting rights of the West Moberly people before issuing a permit to a third party. The trial judge held that they had not, and stayed the permit to allow further consultation. The judge's decision was affirmed by this Court. No order was made against the third party, but the stay of the permit undoubtedly impacted the third party.

[277] In all of these cases, the claim was brought for declaratory and consequential relief against the Crown. No private law claim was made and no order was made against third parties affected by the Crown's infringing or potentially infringing act.

[278] Finally, the appellants rely on this passage from Tysoe J.A. in *Saik'uz 2015*:

> [77] … In *Haida*, Chief Justice McLachlin clarified (at para. 56) that 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.

[279] The passage from *Haida* to which Tysoe J.A. referred appears in the discussion concerning whether third parties owed a duty to consult and accommodate Aboriginal rights claimants. The Court answered that question in the negative, explaining that, "The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests" (*Haida* at para. 53).

[280] After addressing and rejecting other theories for third party obligations of consultation and accommodation, the Court in *Haida* concluded as follows:

> [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.

[281] It is apparent that the Court in this passage is addressing liability for common law causes of action, not liability for infringement of s. 35 rights. Nothing in *Haida* supports the theory that third parties can be directly liable for infringement of Aboriginal rights.

[282] Aboriginal rights may, however, ground a common law claim in tort. That was the context for this Court's comments in *Saik'uz 2015*, as illustrated by the Court's statement that:

> [57] … It is necessary in an action for public nuisance for the plaintiff to prove special damage. … The Aboriginal right to harvest fish pled by the

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> Nechako Nations may be sufficient to demonstrate that they have suffered special damage as a result of the diversion of the Nechako River at the Kenney Dam. Hence, on the basis of the pleaded facts, it is not plain and obvious that the Nechako Nation do not have a reasonable cause of action in public nuisance.

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[283] The trial judge here ultimately held that in this case, the appellants' Aboriginal right to fish did ground the claim in nuisance. Given the connection between the Aboriginal right to fish and the reserve lands and waterbeds in question, that conclusion was sufficient to raise the defence of statutory authority, on which this appeal turns.

[284] This jurisprudence is consistent with the trial judge's conclusion that if the appellants' s. 35 rights are being infringed by the ongoing authorization of the Crown concerning the storage of water from the Nechako, the appellants' remedy lies against the Crown, not the third party RTA.

Reassessment by the Crown

[285] The appellants' third argument respecting constitutional inapplicability argument is based on *Tsilhqot'in* at para. 92:

> 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.

[286] The appellants take the position that once their Aboriginal fishing rights had been established, it was incumbent on the trial judge to consider whether the legislation relied on by RTA for their statutory authority defence had been rendered inapplicable going forward to the extent that it unjustifiably infringed their constitutionally protected Aboriginal rights.

[287] We agree that now that the appellants' s. 35 rights have been established, it may be necessary for the Crown to reconsider its conduct in light of the changed

circumstances. However, should that obligation properly arise, it is an obligation of the Crown, not third parties.

[288] The impact of a determination of s. 35 rights on prior legislation is more challenging, and depends on the context in which the issue arises. In this case, the authorizing legislation is the *IDA*, enacted many decades before the events that give rise to the current dispute.

[289] The appellants have not, however, advanced their claim on the basis of historical infringement, but rather on the ongoing water storage and diversion authorized by that legislation and the resultant adverse effects. They have disclaimed any reliance on s. 35 to challenge the validity of RTA's licence. Can the statutory authority for that licence be said to be valid in relation to RTA's licence but "inapplicable" to the appellants?

[290] The appellants face a number of hurdles in attempting to establish that the statutory authorizations relied upon by RTA are constitutionally inapplicable to the appellants, and thus cannot be relied upon by RTA to defend a nuisance claim. The authorizations do not constrain the appellants as fishing and hunting regulations have in other cases. As noted, the appellants do not assert that the *IDA* constitutes an historical infringement and do not challenge the validity of RTA's licences.

[291] The trial judge concluded that if the statutory regime has harmed the appellants, their remedy lies against the Crown. Accordingly, we would not give effect to this ground of appeal as we see no error in this conclusion. It is unnecessary to consider the trial judge's comments in *obiter dicta* concerning infringement of the appellants' s. 35 rights given that constitutional inapplicability has no application to this dispute.

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Aboriginal Title

Did the trial judge err in failing to make a finding of Aboriginal title?

[292] No declaration of Aboriginal title was sought in this litigation; however, the appellants submit that the trial judge erred in failing to make a "finding" of Aboriginal title.

[293] The initial relief sought was entirely against RTA pursuant to the nuisance claim. It included a permanent injunction restraining RTA from conducting its operations in such a manner as to cause nuisance to the appellants and a mandatory injunction requiring RTA to abate the effect of the nuisance claimed.

[294] After the provincial and federal governments were added as defendants in 2016 (over the appellants' objections), the appellants' claim was amended to include a claim for a declaration that the governments have a fiduciary duty to require RTA to cease operating in a way that continues to cause nuisance to the appellants.

[295] The question of Aboriginal title entered the litigation indirectly. Historically, a claim in nuisance has generally required a proprietary interest on the part of the plaintiff. The appellants sought to meet that requirement on the basis of their s. 35 rights, either by reference to their Aboriginal right to fish in the Nechako River watershed, or their claim to Aboriginal title to the lands adjacent to the Nechako, or their interest in and occupancy of Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1.

Trial judge's reasons

[296] In their final submissions at trial, the appellants confirmed that a declaration of Aboriginal title was neither sought nor necessary, but that a finding of Aboriginal title "may be necessary to support the nuisance claim and/or the breach of riparian rights claim". The appellants then stated that "if this Court accepts that Aboriginal rights (as distinct from title) are legally sufficient to ground a nuisance claim, it will not be necessary for the Court to consider Aboriginal title".

[297] The appellants went on to state:

> The only reason that the Plaintiffs put forward an Aboriginal title claim is to establish what may be found to be a necessary "ownership" interest in land to ground a nuisance claim or to ground a riparian rights claim. Both of these are further and alternative arguments to the primary position, that the Plaintiffs are entitled to a remedy in nuisance based upon unreasonable interference with their Aboriginal fishing rights.

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[298] As we discussed earlier, the trial judge accepted the appellants' primary position that their Aboriginal right to fish "is a legally sufficient foundation for an action in private nuisance" (RFJ at para. 377). Thus, it was unnecessary on the appellants' submissions for him to consider Aboriginal title.

[299] The trial judge did go on to consider Aboriginal title. He explained that he would address issues and make findings of fact on matters that were not necessary to the outcome, in order to avoid the necessity of conducting a retrial should his conclusions be overturned on appeal (RFJ at para. 170). Thus, much of the analysis on title in the reasons for judgment is *obiter dicta* and unnecessary for the order under appeal, unless the conclusions of the trial judge that form the *ratio decidendi* are overturned.

[300] In his consideration of Aboriginal title, the judge recognized that no claim for Aboriginal title was sought by the appellants, but rather a "finding" of title (RFJ at para. 267). He reviewed the history of other unresolved claims to Aboriginal title in the area, and concluded that there was an insufficient evidentiary basis to determine exclusivity among overlapping claimants (at para. 276). Accordingly, the trial judge declined to make the requested finding of Aboriginal title (at para. 278).

[301] In keeping with his decision to address issues and make findings of fact on matters that were not necessary to the outcome of the trial, to avoid the necessity of retrial after appellate review, the trial judge went on to consider the evidence and make alternative findings with respect to Aboriginal title (RFJ at paras. 279–343).

[302] The judge summarized the evidence and held that if he was wrong in declining to make a finding of Aboriginal title because of overlapping claims, he would hold that Aboriginal title to the Noonla Indian Reserve #6 should be and is

vested in the Saik'uz First Nation, and Aboriginal title to the Stellaquo Indian Reserve #1 should be and is vested in the Stellaquo First Nation (RFJ at paras. 305, 316). He characterized this conclusion as a "limited and alternative finding of title" (at para. 317).

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[303] The trial judge then considered the appellants' claim for a finding of Aboriginal title to certain portions of the Nechako River, Stellaquo River and Fraser Lake, and the riverbeds surrounded by those reserves.

[304] After reviewing the evidence and the judgment of the Ontario Superior Court of Justice in *Saugeen First Nation et al. v. The Attorney General of Canada et al.*, 2021 ONSC 4181 [*Saugeen*], rev'd in part *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565, the judge concluded that the conflict between the exclusivity of Aboriginal title and the primacy of the public right of navigation might provide "a potentially insurmountable barrier to a finding of Aboriginal title" in any Aboriginal title claim to the bed of a navigable waterway (RFJ at para. 331).

[305] The trial judge then stated that he was not dismissing the appellants' alternative claim for waterbed title on the merits, but rather "deferring determination of that issue to a case where the question can be decided on a more complete evidentiary record" (RFJ at para. 334).

Issues on appeal

[306] On appeal, the appellants confirmed in their factum that their claim in nuisance "was grounded in their Aboriginal right to fish and, in the alternative, their Aboriginal title to places along the Nechako River and its tributaries used for fishing."

[307] The appellants accept the trial judge's finding that their Aboriginal right to fish provides the necessary foundation for a nuisance claim, but they take issue with his first alternative conclusion declining to make a finding of Aboriginal title because he considered that there was not the evidentiary record to determine exclusivity between overlapping claims.

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[308] The appellants frame this issue on appeal as whether the trial judge erred in failing to make what they characterize as "formal findings" of Aboriginal title. As well, the appellants assert that the trial judge erred "in holding that Aboriginal title is incompatible with a public right of navigation." They seek an order that a finding of Aboriginal title to the reserves and fishing sites should be made on appeal.

Discussion

Is a "finding" of Aboriginal title necessary?

[309] It bears emphasizing that this is a nuisance claim against RTA; and, the appellants did not seek a declaration of Aboriginal title.

[310] At trial, the appellants stated that it would not be necessary for the court to consider Aboriginal title if the trial judge accepted that Aboriginal rights were sufficient to ground the nuisance claim. The judge did conclude that Aboriginal rights were sufficient to ground the nuisance claim, and with the qualification referred to earlier in this judgment, this Court has upheld that conclusion. Thus, on the appellants' own case, no finding with respect to Aboriginal title was required.

[311] The trial judge went on to consider whether in any event, there was the necessary evidentiary record to determine exclusivity between overlapping claimants, and he concluded that there was not. This was an evidentiary determination to which deference to the trial judge is appropriate.

[312] The trial judgment becomes somewhat more complicated because of the decision to make alternative findings so that if the trial judge's decision was reversed on appeal, there would be findings of fact available for a reviewing court to consider.

[313] With that goal in mind, the judge reviewed the evidence and made findings concerning the appellants' interest in their reserves. These findings were couched in the following qualifying language:

> [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. …

[314] It is always helpful for a trial judge to make findings of fact that are available on the evidence. As the trial judge here pointed out, a full assessment of the facts may permit an appellate court to make a decision without the necessity of a retrial, which can be efficient for the parties and the administration of justice.

[315] Here, however, the trial judge went beyond a determination of the facts to attaching legal consequences to those facts which were inconsistent with his primary conclusions. If the evidentiary record was insufficient to determine exclusivity, an essential requirement for Aboriginal title, then to make a finding of Aboriginal title in *obiter dicta* is both inconsistent and, respectfully, unhelpful. It appears to have led to an issue being raised on appeal that does not arise from the order made and is unnecessary to resolve.

[316] The issue of Aboriginal title is unnecessary to resolve in this case because the appellants made a decision early in the litigation to sue RTA in nuisance and not to seek a declaration of Aboriginal title. The only relevance of Aboriginal title was to provide a foundation for the nuisance claim in the event that the appellants' fishing rights were considered insufficient to provide the necessary legal foundation for the claim.

[317] We have confirmed that given the connection between the Aboriginal right to fish and the reserve lands and waterbeds, the appellants' fishing rights were sufficient to ground the nuisance claim, and accordingly there was no need to consider the alternative claim for a finding of Aboriginal title sufficient to provide a foundation for the claim. Courts should be cautious about answering constitutional questions that are not essential for the determination of the case.

[318] As an illustration of this principle, in *R. v. Adams*, [1996] 3 S.C.R. 101, 1996 CanLII 169, the appellant defended a charge of fishing without a licence on grounds

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of both Aboriginal rights and Aboriginal title. The Supreme Court of Canada accepted that he had satisfied the test for Aboriginal rights. Since the appellant had relied primarily on the Aboriginal rights claim, which was successful, the Court held that it was unnecessary to consider the claim for Aboriginal title to the lands in the fishing area (*Adams* at para. 34).

[319] Here, the appellants relied primarily on their s. 35 fishing rights and the connection between these rights and their reserve lands to ground the nuisance claim. This argument was successful at trial and has been affirmed on appeal. There was no need to consider the alternative claim for Aboriginal title.

[320] As the trial judge went on to conclude that in any event, there was not a sufficient evidentiary record to determine the essential element of exclusivity, there was no basis on which Aboriginal title could have been found.

[321] We would not give effect to this ground of appeal.

Submerged lands

[322] Similar considerations apply to the question of title to submerged lands. No relief was sought in the pleadings concerning title to submerged lands. At trial, the appellants sought a "finding" of Aboriginal title to certain portions of the Nechako River, Stellako River and Fraser Lake.

[323] The trial judge declined to make such a finding because this position was "significantly weakened" by the general lack of evidence that the appellants exercised exclusive control over the waters. There were also conflicting expert opinions relating to *sadeku* ownership and control of rivers and riverbeds (RFJ at para. 330).

[324] The trial judge also pointed out that there was a significant issue as to whether such title can exist under Canadian law given the public right of navigation. He described the public right of navigation as "potentially insurmountable". He concluded that "[w]ithout some development in the law, there may be no path to

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Aboriginal title to submerged lands beneath navigable waterways" (RFJ at para. 333). Particularly due to the lack of evidence about the exclusive control of the waters, he declined to make any findings in *obiter* that would alter the definition of Aboriginal title to submerged lands because it could amount to a significant development in the law (at para. 333).

[325] On appeal, the appellants submit that on the record before the Court, the judge should have found that Aboriginal title had been made out to the submerged lands near the reserves.

[326] Once again, the relevance of this issue to the appellants' nuisance claim is unclear. The trial judge found that the effect of RTA's diversion and storage of water created a nuisance actionable against RTA. The dispositive question is whether RTA can rely on the defence of statutory authority.

[327] The Supreme Court of Canada has not determined the question of whether Aboriginal title can subsist in water or lands submerged by water. As the judge pointed out, the test for Aboriginal title appears to contemplate dry land that can be used and occupied. Whether submerged lands can be the subject of Aboriginal title is a significant issue that should be addressed in a case with proper pleadings that raise the issue squarely.

[328] Here, the pleadings, though amended as recently as 2019, do not seek any order with respect to submerged lands, any more than they seek an order with respect to Aboriginal title more generally. This is a nuisance claim. There was no reason to make any finding with respect to title to submerged lands, and the judge did not err in declining to do so.

[329] One issue that both the appellants and several interveners raise in connection with the trial judge's reasoning is his statement that the public right of navigation might provide "a potentially insurmountable barrier" to a finding of Aboriginal title to the bed of a navigable waterway.

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[330] The interveners, joined by British Columbia, point out that this question is squarely at issue in the *Saugeen* case, then pending before the Ontario Court of Appeal, and submit that it is unhelpful for a court in British Columbia to comment on the question in a case where it does not relate to any issue necessary to be decided by the court.

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[331] Since the trial judgment was released, and since argument was presented on appeal, the Ontario Court of Appeal has published reasons for decision addressing this issue (*Chippewas of Nawash Unceded First Nation v. Canada (Attorney General),* 2023 ONCA 565, leave to appeal to SCC sought, 40979 [*Chippewas ONCA*]). The Court concluded that whether Aboriginal title could be established to submerged lands was to be assessed in accordance with the test set out in *Tsilhqot'in*.

[332] The Ontario Court of Appeal concluded that Aboriginal title to submerged lands was not necessarily incompatible to the public right of navigation, but might be depending on the scope of the title determination and the consequences of such a determination. Once the precise scope of the Aboriginal title has been established, it can be determined whether such Aboriginal title is not cognizable due to common law public rights, or whether such Aboriginal title would have such a substantial effect on public navigation as to create an incompatibility between Aboriginal title and the public right (*Chippewas ONCA* at paras. 93–98). The Court remitted the issue back to the trial court to determine whether the Aboriginal title claim could be established to a more limited and defined area than that claimed by the plaintiffs (at para. 299).

[333] It is unnecessary for us to express an opinion on this issue, and we agree that it was unnecessary and unhelpful for the trial judge to comment on it. This important and complex question should be addressed in a case where the pleadings make it a live issue, as it is in the *Chippewas* case. Whether the public right of navigation stands in the way of Aboriginal title to submerged lands should be decided in a case where the issue has been properly raised.

[334] We see no error in the trial judge declining to make a finding of Aboriginal title to submerged lands. We add that any comments made by him on the *prima facie* strength of any such claim, either in the context of this case or otherwise, are of no precedential value.

[335] Accordingly, we would not give effect to this ground of the appeal.

Declaratory Relief Against the Crown

[336] Lastly, we turn to the issue of declaratory relief. This was the only remedy granted by the trial judge.

[337] Declaratory relief was granted against both Canada and British Columbia. The trial judge issued a declaration stating that each government has an "obligation" to protect the appellants' Aboriginal right to fish for food, social and ceremonial purposes in the Nechako River watershed. The appellants say the declaration is inadequate and the trial judge erred in declining to direct Canada and British Columbia to compel RTA to take specific steps to abate the nuisance. As such, the nature and the scope of the declaration are at issue on appeal.

[338] Granting (or declining) declaratory relief is discretionary and subject to a deferential standard of review. Generally, an appellate court will not interfere with a decision about declaratory relief absent a material error of law or principle, or a palpable and overriding error of fact (*Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at para. 26 [*Interfor*]).

[339] For the reasons set out below, we are satisfied the trial judge erred in principle in resolving the claim for declaratory relief. Furthermore, we consider the error to have been material and it warrants a variation of the declaration granted by him.

Pleadings specific to declaratory relief

[340] In addressing this aspect of the appeal, it is helpful to first review the pleadings specific to declaratory relief.

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[341] As previously noted, the appellants' original notice of civil claim against RTA was filed in September 2011. Canada and British Columbia were not named as parties. RTA applied to add them as defendants in 2016. The appellants resisted the application. Canada and British Columbia did not oppose the request, although one or both of them sought to attach conditions to their involvement in the litigation.

[342] The trial judge granted the application in August 2016, without conditions. In reasons for judgment indexed at 2016 BCSC 1474 [*Thomas 2016*], he set out his rationale for doing so. This included:

- the far-reaching implications of the interplay between Aboriginal rights and common law tort principles (at para. 17);
- the fact that Canada and British Columbia were already entitled to participate in the litigation as of right because of constitutional notice(s) filed by the appellants (at paras. 18–19);
- under the province's legislative scheme, British Columbia "[owned] the water" and was "entitled to insist upon inclusion in any lawsuit seeking injunctive relief respecting its property" (at para. 20);
- although not seeking a formal declaration of Aboriginal title, the appellants alleged Aboriginal title in their pleadings, rendering governments' involvement "necessary" in the public interest (at para. 21); and,
- it was government, rather than RTA, that has the "knowledge and expertise necessary to meaningfully respond" to any Aboriginal title assertions and Canada and British Columbia's involvement would allow for effective adjudication of that issue (at para. 23).

[343] The appellants were directed to amend their style of cause to add Canada and British Columbia as parties (*Thomas 2016* at para. 28). They were also given "liberty to make any other amendments to their Notice of Civil Claim that they

[considered] appropriate in light of the addition of the federal and provincial Crown as defendants" (at para. 28).

[344] In October 2016, the appellants filed an amended notice of civil claim pleading material facts specific to the involvement of both levels of government in regulating the flow regime in the Nechako River. The amended notice of civil claim did not include a claim for relief specific to government.

[345] In January 2017, Canada and British Columbia each filed a response to the amended notice of civil claim. The appellants filed a reply in February 2017 and repeated their October 2016 pleadings. In addition, they claimed that:

- the impacts of diverting water from the Nechako River constitute unlawful interference with their Aboriginal title (or parts thereof), and their right to fish for purposes integral to their pre-contact culture, including for food, social and ceremonial purposes;

- if Canada has authorized the diversion of water or failed to act with knowledge of the diversion's <u>ongoing adverse impacts to the appellants</u>, that authorization or inaction constitutes an unjustifiable infringement of the appellants' Aboriginal rights and title;

- British Columbia's authorization of the diversion of water and <u>any ongoing activities with adverse impacts</u> constitutes an unjustifiable infringement of the appellants' Aboriginal rights and British Columbia was not "constitutionally competent" to take away their Aboriginal rights or title; and,

- neither Canada nor British Columbia has "taken sufficient action" to protect the appellants from unjustifiable infringement of their Aboriginal rights and title.

[346] These alleged infringements were said to be unjustified because, among other things:

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- Canada and British Columbia failed to consult or receive the consent of the appellants when the Kenney Dam and related reservoir were constructed, or in relation to any subsequent authorizations to divert water from the Nechako River;

- Canada and British Columbia failed to "weigh the [A]boriginal perspective and interests at all, or adequately, in making [their] decisions"; and,

- they failed to consider that the decisions to authorize the diversion of water and subsequent authorizations to allow the diversion to continue "deprived the future generations of the [appellants] from continued benefit of the river".

[347] With leave, the appellants' notice of civil claim was amended a second time in February 2019.

[348] The application seeking leave to amend put Canada and British Columbia on notice that the proposed further amendments would "expand the relief claimed regarding abatement of the alleged nuisance [by RTA] and add an additional remedy in the form of declaratory relief against the Crown defendants" (emphasis added). According to the related application materials, the further amendments had three main objectives:

- if the appellants succeeded in proving an Aboriginal right, the "legal circumstances in which the Crown defendants must operate and exercise their authority in respect of the [Kenney] Dam and [the diversion of water from the Nechako River would] change … [t]he obligations imposed by the honour of the Crown [would] become fiduciary duties, with obligations to reassess the Crown's prior conduct in relation to the dam" (underlining added);

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- if a nuisance was proved, its abatement would require a new regime for the release of water in the Nechako River that would likely involve governments' participation in the "setting of flows"; and,

- if a mandatory injunction was not available at trial, declaratory relief would allow the trial judge to "compel the Crown to act in a particular way in order to comply with the law".

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[349] After leave was granted, the appellants filed their second amended notice of civil claim, adding a request for declaratory relief against Canada and British Columbia.

[350] In this notice, the appellants alleged that Canada had a historical and subsisting obligation or duty to protect the appellants' fishery and proprietary interests from damage arising out of "[Canada's] own acts or authorizations". These "acts or authorizations" included agreement to specific water flows in the Nechako River.

[351] The appellants also alleged that "Canada [had] failed to ensure that the water flows it purported to authorize or agree to were, or continue to be, effective" in protecting the appellants' interests, and had "failed to act or make reasonable efforts to alter the water flows to which it purported to agree".

[352] As against British Columbia, the appellants alleged that the provincial Crown failed to act in good faith to "reconcile its obligations to the [appellants] to reduce the impacts" of the diversion of water from the Nechako River or any permits issued by British Columbia.

[353] Under "Relief Sought", the second amended notice of civil claim requested:

> 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 [appellants] or that breaches the [appellants'] 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 [appellants] are not unreasonably interfered with; and

c. reinstate the functional flows that make up the natural flow regime of the Nechako River.

[Emphasis added.]

[354] The "Legal Basis" for declaratory relief was stated as follows:

64.1 Canada and BC, or one of them, has a fiduciary obligation arising out of:

a. their discretionary control over the [appellants'] Proprietary Interests; and

b. section 35(1) of the *Constitution Act, 1982*,

to protect the [appellants'] 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 [appellants'] Proprietary Interests.

65. Canada and BC, as the Crown federal and the Crown provincial, have failed, in exercising discretionary control over the water flows resulting from the Diversion, to act on their fiduciary and other obligations to the [appellants] as [A]boriginal peoples.

[Emphasis added.]

[355] In its response to the second amended notice of civil claim (filed in March 2019), Canada opposed the request for declaratory relief on the basis that the proposed declarations were: (1) unclear and vague; (2) improper to the extent that they sought to impose an "impermissible mandatory obligation" on Canada; and (3) "unnecessary insofar as they seek to restate the law".

[356] In its response (filed in February 2019), British Columbia similarly objected to the declaratory relief. It said the trial judge should decline to grant the proposed declarations on grounds that they:

…

(a) Are impermissibly vague;

(b) Lack utility;

(c) Are unnecessary;

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(d) Are inappropriate as not addressing questions that are before this Court;

(e) Could materially injure the rights of innocent third parties not before this Court;

(f) Would have an impermissible mandatory aspect: (i) unattached to any specific statutory authority, (ii) requiring the ongoing involvement and supervision of the Court;

(g) Could amount to an impermissible collateral attack on the Settlement Agreement;

(h) Could expose British Columbia to liability for interference with vested rights; and

(i) Would be contrary to the rules that govern the availability of equitable remedies, including the doctrines of laches and acquiescence.

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[357] After the trial commenced, the trial judge asked the appellants to “provide the precise wording” of any declaration they sought specific to government (RFJ at para. 631). They responded with this articulation (at para. 631):

> …
>
> 6. A declaration that the Crown in right of British Columbia and Canada <u>have a fiduciary duty to require [RTA] to</u>:
>
> > a. Cease operating the Diversion in a manner that continues to cause nuisance to the [appellants] or that breaches the [appellants’] 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 [appellants’] 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 [RTA] 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 [RTA] 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 [appellants] and shall consult with the [appellants] with respect to monitoring and decisions contemplated under paragraphs (a) – (d).
>
> …
>
> [Emphasis added.]

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Resolution of claim for declaratory relief at trial

[358] The trial judge’s substantive discussion of the claim against Canada and British Columbia is found in Part XV of the RFJ, under the heading: “Remedies and Orders Sought”. He summarized the appellants’ position this way:

> [621] Insofar as the two Crown defendants are concerned, the [appellants] 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.
>
> [Emphasis added.]

[359] The “proposed adaptive management regime” referred to in para. 621 is the “functional flow” regime proposed by Professor Eaton, a witness called in support of the appellants’ positions at trial (RFJ at para. 619). The trial judge acknowledged at the outset of his analysis on remedies that the federal and provincial governments have a constitutional obligation to protect Aboriginal rights and to act honourably in

doing so (at para. 643, citing *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, leave to appeal to SCC ref'd, 39292 (21 January 2021) [*West Moberly 2020*]). In the latter case, Chief Justice Bauman, writing on behalf of the majority, stated it was "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" (at para. 424).

[360] In this case, the trial judge found that the appellants "have an Aboriginal right to fish the waters of the Nechako watershed for food, social, and ceremonial purposes …" (RFJ at para. 644). By the end of the trial, RTA, Canada, and British Columbia each conceded the existence of an Aboriginal right to fish (at para. 242).

[361] As already explained, the trial judge 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" (RFJ at para. 647), and that this harm is "the inevitable result of the approvals, permits, agreements, and directions made by <u>both levels of government over the years</u>" (at para. 647, emphasis added).

[362] As we understand it, neither Canada nor British Columbia disputed the fact that the natural hydrograph of the Nechako River has been changed by the installation of the Kenney Dam and related reservoir (at paras. 390, 397). Indeed, the Supreme Court of Canada has previously accepted that such is the case (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 3 [*Rio Tinto 2010*]).

[363] The trial judge recognized that although he had applied the defence of statutory authority in favour of RTA, thereby absolving RTA of legal liability for common law nuisance, the "question remain[ed] whether the ongoing harm to the fishery trigger[ed] any obligation on the part of the Crown to require additional protection for the fish by increasing water flow from the reservoir into the Nechako River" (RFJ at para. 648, emphasis added). See also para. 614.

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[364] Consistent with the majority reasons in *West Moberly 2020*, the trial judge concluded that once the appellants had proved an Aboriginal right to fish, both Canada and British Columbia bore an "obligation" to protect that right "by taking all appropriate steps to protect the fish [in the Nechako River watershed] and to act honourably in doing so" (RFJ at para. 646).

[365] It is within the context of "ongoing harm" and future adverse effects that the appellants sought declaratory relief against Canada and British Columbia, asking that they be ordered to require RTA to "stop doing certain things and start doing others" (RFJ at para. 649).

[366] The trial judge declined to issue a declaration holding that to meet their new-found "obligation", Canada and British Columbia were duty-bound to "require" of RTA the specific actions sought by the appellants (including reinstating the Nechako River's "functional flow"), and he dismissed this aspect of their claim for declaratory relief (RFJ at para. 661). The order entered after trial reads this way:

> 2. the claim for 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 of the Nechako River in a manner that continues to cause the nuisance established at trial or that interferes with 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 [appellants] are not unreasonably interfered with, and
>>
>> c. reinstate the functional flows that make up the natural flow regime of the Nechako River
>
> is dismissed; …

[367] Dismissal of the specific terms sought by the appellants (as opposed to the request for a declaration, generally), reflected the trial judge's agreement with RTA, Canada and British Columbia that the declaration articulated by the appellants and, importantly, the specific duties it would impose on the two governments, rendered the declaration "essentially coercive in nature" (RFJ at para. 651), and required significant revision to achieve clarity (at para. 653). Moreover, the trial judge was

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concerned that through the proposed declaration, the appellants sought to "[compel] 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" (at para. 651).

[368] The trial judge was not prepared to grant this form of a declaration in the "absence of any concurrent liability on the part of the RTA" (RFJ at para. 651). He concluded that the proposed duties for Canada and British Columbia would likely invite "another round of complicated litigation between the parties" (at para. 651), namely, between RTA and both levels of government in light of the relationship between these entities, the agreements reached, and the overarching legal framework that governs their interaction.

[369] The trial judge was prepared, however, to grant a declaration that was more general in nature and that he considered would benefit the appellants in light of the "new reality" arising from his reasons (RFJ at para. 653). He found that neither the federal *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, nor the provincial *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, precluded him from doing so. On appeal, Canada and British Columbia appear to accept that these enactments do not prevent a declaration of the nature fashioned by the trial judge.

[370] We take the trial judge's reference to a "new reality" to be the appellants' now "constitutionally recognized Aboriginal right to fish the Nechako watershed for food, social, and ceremonial purposes" (RFJ at para. 661), and his conclusion that the regulation of water flows in the Nechako River has had, and continues to have, significant negative impact on this right and on the appellants as Indigenous communities (at paras. 493, 588, 661). At para. 493 of the RFJ, the trial judge described the impact as "substantial … one that is hugely disproportionate to the burden imposed on the non-Aboriginal population of the region".

[371] To this end, he granted the following declaration (RFJ at para. 653):

> 1. The [appellants] 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.

See also para. 661.

[372] As readily apparent from the wording, the trial judge declined to delineate in the declaration any specific duties that might flow from the "obligation to protect [the appellants'] Aboriginal right", or to direct Canada and British Columbia to conduct themselves in a particular way.

Error alleged on appeal

[373] The appellants say the granted declaration falls markedly short. In their factum, they allege the trial judge erred by refusing to "make an order that the Crown require a change in flow by [RTA] to address the nuisance, despite finding that the Crown has a duty to protect [their] Aboriginal rights".

[374] In fleshing out this error, the appellants contend the trial judge wrongly understood that his authority to grant their proposed terms was inextricably bound to (or dependent upon) a finding of common law liability against RTA. Such was not the case, and, pointing to the outcomes in cases such as *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, leave to appeal to SCC granted, 40024 (23 June 2022), judgment on reserve (8 November 2023), *Ahousaht*, and *Yahey v. British Columbia*, 2021 BCSC 1287, the appellants say that even without a finding of liability against RTA, the trial judge had the legal jurisdiction and a sufficient evidentiary foundation from which to grant declaratory relief against Canada and British Columbia that is directive in nature and would appropriately protect the "remedial nature and promise of s. 35(1) of the Constitution". The appellants say their pleadings contemplated relief against the federal and provincial Crown separate from liability for nuisance against RTA, and was grounded in the assertion of one or more Aboriginal rights and the Crowns' independent duty to protect those rights.

[375] The appellants contend in their factum that the bare declaration granted by the trial judge inadequately protects their Aboriginal right to fish from "ongoing significant, and imminent further harm by [RTA]". It is "merely a declaration that

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states what the law has been for years…", and, if allowed to stand, will result in a substantial injustice. What was required, here, was specific direction that Canada and British Columbia require RTA to stop operating and managing the Kenney Dam and related reservoir in a manner that causes a nuisance. The appellants say it is not enough for the two levels of government to acknowledge the finding of an Aboriginal right to fish and to commit (as they did at the trial and on appeal), to being mindful of that right in their future conduct (RFJ at para. 652). Something more substantial is needed in the form of court-ordered direction that delineates specific duties arising out of the prospective obligation, and directs Canada and British Columbia to follow through in the form of particularized measures. The appellants allege that without directive declaratory relief, there will be no substantive change to the situation involving the Nechako River and the detrimental impacts on the watershed and the appellants' protected interests.

[376] On appeal, the appellants seek to have the declaration granted at the trial set aside and replaced with:

> A declaration that the respondents the Attorney General of Canada and [His] Majesty the [King] in right of the Province of British Columbia each have a duty to diligently require [RTA] to:
>
> i) cease operating the Kenney Dam and diversion in a manner that continues to cause nuisance to the appellants, and
>
> ii) 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 Aboriginal rights of the appellants are not unreasonably interfered with or unlawfully infringed.
>
> [Emphasis added.]

[377] This latest proposed wording does not extend as far as the relief sought in the second amended notice of civil claim, or the specific wording advanced at the trial in response to a request from the trial judge. It has moved away from the language of "fiduciary duty" (replacing it with a duty to act "diligently"), and does not seek to have Canada and British Columbia require of RTA that it "reinstate the functional flows that make up the natural flow regime of the Nechako River". However, the appellants

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continue to seek declaratory terms that compel both governments to compel RTA to conduct itself in a particular way.

Declaratory relief — general principles

[378] Declaratory judgments offer an inherently flexible remedy, one which allows parties to "determine their rights before the breach of an obligation, and to prevent the violation of a right by ascertaining its scope in advance" (Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill L.J. 295 at 299 [Rowe & Shnier]).

[379] In this sense, declarations can be "highly useful instrument[s]" (Rowe and Shnier at 299) to address ongoing and future conduct that carries the potential to impact protected rights. Declarations are available even "where the precise content of all rights affected is unknown" (*West Moberly 2020* at para. 307).

[380] In exercising the discretion to grant a declaration, "courts maintain key aspects of our system of judicial decision-making, such as an adversarial process" (Rowe and Shnier at 299). In *S.A. v. Metro Vancouver Housing Corp*, 2019 SCC 4 [*Metro Vancouver Housing*], the Supreme Court of Canada affirmed the four pre-conditions to declaratory relief:

> [60] … (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

See also *Interfor* at para. 25; *West Moberly 2020* at para. 308.

[381] Meeting these pre-conditions does not invariably lead to a declaration. Instead, the presence of the pre-conditions renders the case one in which a declaration "may be" appropriate (*Metro Vancouver Housing* at para. 60; *West Moberly 2020* at para. 309). The actual granting of relief remains permissive.

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[382] To that end, before granting a declaration, a court must generally satisfy itself that the sought-after order has practical utility or would serve a “useful purpose” in the context of the facts of the case and the parties’ interests (*West Moberly 2020* at paras. 310–312; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11). “Detached facts and general pronouncements of law have little utility” (*West Moberly 2020* at para. 312).

[383] In demonstrating practical utility or a useful purpose, the applicant for declaratory relief need not establish that a declaration will have an actual effect on their rights; rather, “if there is a possible effect on rights… there is discretion to grant declaratory relief” (*West Moberly 2020* at para. 330, emphasis in original). As explained in Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2022) at § 12:3 [Roach]:

> … Those requesting declaratory relief need not wait for the actual violation as long as they can demonstrate that their rights have been placed in jeopardy, that a declaration would have a practical effect and that it would not usurp the policy-making role of the legislature.

[384] There must be a “cognizable threat to a legal interest” before the courts will use a declaration as a preventative measure (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 457, 1985 CanLII 74 [*Operational Dismantle*]; *West Moberly 2020* at para. 330).

Positions of the parties

[385] Although the trial judge did not address this issue in his analysis, no one has suggested on appeal that the *Metro Vancouver Housing* pre-conditions for declaratory relief did not exist in this case. Indeed, neither Canada nor British Columbia filed a cross-appeal challenging the trial judge’s authority to grant a declaration. Instead, the dispute on appeal is whether it was open to the trial judge to grant a declaration with the specific terms sought by the appellants.

[386] RTA argues that the trial judge correctly rejected the appellants’ proposed terms. RTA says that through a declaration, the appellants sought to impose a

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mandatory obligation on Canada and British Columbia to "require" (or compel) RTA to stop diverting water in the manner it has long been authorized to do.

[387] RTA contends that once the trial judge determined that the nuisance was the inevitable result of the authorizing infrastructure in which RTA operates, and not actionable at common law, it would have made no sense to then issue a declaration that, in its practical effect, wholly undermined these very conclusions. Doing so would render the dismissal of the claim in nuisance meaningless and allow the appellants to achieve indirectly what they could not do directly, namely, obtain injunctive relief that compels RTA to operate differently. It would also allow the appellants to force substantive changes to the statutory, regulatory and other instruments that permit RTA to operate as it does, without bringing an action that properly allowed for a challenge to the validity of those instruments. Throughout these proceedings, the appellants have expressly disavowed an intention to challenge the validity of RTA's water licences.

[388] Canada also says it was open to the trial judge to decline the appellants' proposed declaration. First, the appellants did not articulate a specific cause of action against the federal government or any proper legal basis for declaratory relief of the nature sought by them. Second, and in any event, Canada argues that the proposed declaration (as formulated at the trial and on appeal), is unavailable at law.

[389] British Columbia also supports the trial judge's ruling. In its factum, it says the "appellants did not seek relief against the Crown independent of their claim against [RTA], nor did the trial judge make any finding of liability against the Crown". The request for declaratory relief was "inextricably tied" to the appellants' claim against RTA, and, once the trial judge dismissed the claim in nuisance, that was the end of the matter. The proposed declaration, as framed by the appellants, must logically suffer the same fate.

[390] In any event, British Columbia says declaratory relief of the nature sought by the appellants is not available in the absence of a finding of "liability" against government. The trial judge did not find that British Columbia breached a duty.

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Comments about one or either of the government defendants having unjustifiably infringed the appellants' Aboriginal right to fish were made, at best, in *obiter* (see RFJ at paras. 576, 588, 590, 601, 647). The appellants did not plead a basis for injunctive-type relief other than nuisance. They chose not to bring an action for damages or other relief against government that was grounded in historical conduct.

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Discussion

[391] We disagree with the positions advanced by RTA, Canada, and British Columbia on this part of the appeal. Although it was open to the trial judge to reject the specific declaratory terms sought by the appellants, he nonetheless committed a material error in principle in resolving this part of the claim.

[392] In our view, the trial judge took an unduly narrow approach to the scope of declaratory relief that was properly available to him in the context of the appellants' pleadings, and, critically, in light of his findings of a proved Aboriginal right to fish and the ongoing impairing effects on that right of storing and diverting water from the Nechako River. The restrictive approach resulted in a declaration that, because of its generalized nature, is of no real practical utility to the appellants.

[393] As noted, the trial judge recognized that distinct from RTA's liability for common law nuisance, the appellants' case required him to consider whether the "ongoing harm to the fishery trigger[ed] any obligation on the part of [Canada and British Columbia] to require additional protection for the fish by increasing the water flow from the reservoir into the Nechako River" (RFJ at para. 648). He was correct to identify this question as one that properly arose on the pleadings.

[394] Contrary to the submissions of Canada and British Columbia, a fair reading of the appellants' second amended notice of civil claim and related materials supports the submission that their claim for declaratory relief against the two levels of government was not wholly dependent upon and exclusive to establishing liability against RTA. Respectfully, Canada and British Columbia's submissions on this point fail to consider the pleadings as a whole. They also fail to appreciate, as noted in *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Energy, Mines and Natural*

Gas), 2016 BCCA 163 at para. 90, leave to appeal to SCC ref'd, 37074 (10 November 2016), that "a measure of flexibility is required with respect to pleadings and prayers for relief when considering Aboriginal claims in particular". See also *Tsilhqot'in* at paras. 20, 23.

[395] The appellants' request for declaratory relief cited alleged historical failures by Canada and British Columbia to adequately protect the appellants' constitutionally entrenched interests. However, it was also grounded in the governments' ongoing and presently active participation in the regulation of water in the Nechako River. In our view, the appellants' pleadings and the trial judge's finding of resultant "damage" that newly manifests itself each year (RFJ at paras. 611–612), provided a sufficient factual and legal basis from which to consider declaratory relief against government that was prospective in nature, and independent of liability against RTA.

[396] Nor was it necessary for the trial judge to find liability against Canada and British Columbia before he had the authority to grant a declaration. The *Metro Vancouver Housing* pre-conditions for declaratory relief existed, here, and the law is clear that a declaration "is available without a cause of action and whether or not any consequential relief is available" (*Ewert v. Canada*, 2018 SCC 30 at para. 81, internal references omitted).

[397] Dismissing the private law claim against RTA did not mean there was no longer a "cognizable threat to [the appellants'] legal interest[s]" (*Operation Dismantle* at 457). To the contrary, ongoing and future impairment of the appellants' right to fish and associated harm to their Indigenous communities logically arose from the trial judge's non-*obiter* findings. These findings have not been displaced on appeal and they include determinations that:

- the appellants have a constitutionally protected Aboriginal right to fish the Nechako River watershed;

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- regulation of the Nechako River through the installation and operation of the Kenney Dam and related reservoir has negatively affected the abundance and health of the fish population in the watershed;
- the resulting decline in the fish population and Aboriginal fisheries has had "hugely negative impacts" upon the appellants as Indigenous communities;
- the water licences issued to RTA explicitly authorize the diversion of water from the Nechako River, the amount of water stored in the reservoir, and the use of that stored water 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 Technical Committee;
- RTA has always strictly complied with the water licences and the Technical Committee's flow regime and any resultant harm to fish and the fishery in the Nechako River is the inevitable result of these regulatory requirements; and,
- while the cause of the harm to fish and the fishery may be much the same from year to year (a regulated flow), the resulting damage occurs anew each year even though the precise quantification of that damage is challenging.

[398] The trial judge described the Technical Committee's flow regime as "mandatory" (RFJ at para. 538). He also found, as a fact, that it is 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" (at para. 538). As noted, the trial judge also found that "[b]oth governments are … directly involved in setting the flow" (at para. 531, emphasis added).

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[399] This finding (not challenged by way of a cross-appeal), finds support in the ASF. The ASF stipulates that the Technical Committee's "mandate includes the management of the [annual water allocation]" established by the 1987 Settlement Agreement. The annual water allocation is defined as "the quantity of water required to be released in accordance with the provisions of [the 1987 Settlement] Agreement during each [twelve-month] period commencing on the first day of April in each and every year..." (ASF at paras. 448, 455).

[400] According to the ASF (at para. 461):

> The 1987 Settlement Agreement establishes the Technical Committee's responsibility to ensure the [annual water allocation] from the Nechako Reservoir is released with the objective of achieving the flows set out in Schedule C to the 1987 Settlement Agreement <u>or as the Technical Committee may otherwise determine in accordance with the 1987 Settlement Agreement</u>. Schedule C also provides that additional cooling flows are to be released in July and August.
>
> [Emphasis added.]

[401] The ASF goes on to state that the Technical Committee has directive authority vis-à-vis RTA (at para. 465):

> From 1988 to present, the Technical Committee has made a number of decisions <u>directing</u> [RTA] with respect to the management and release of the [annual water allocation] from the Skin Lake Spillway, which it divides into three decision categories:
>
> a. spring releases (April, May and June);
>
> b. fall/winter releases; and
>
> c. exceptions.
>
> [Emphasis added.]

[402] The trial judge found that Canada's role on the Technical Committee involves continued and present-day active involvement in governance of the flow regime. British Columbia is in the same position. In addition, Canada has federal statutory powers that can affect the flow (for example, under the *Fisheries Act*, R.S.C. 1985, c. F-14), and British Columbia carries provincial authority over RTA's water licence. The trial judge found a clear nexus between both levels of government and the ongoing regulation of the Nechako River. He found that regulation of the flow regime

has adversely affected the appellants' right to fish, and, on the evidence, continues to do so. He also found that even under the existing regime, whether grounded in their role on the Technical Committee or otherwise, Canada and British Columbia retain "some ability to increase the flow of water into the Nechako River" (RFJ at para. 590). In other words, they have retained a measure of discretion.

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[403] It is within this specific context that the trial judge issued a declaration against Canada and British Columbia, correctly recognizing that the "new reality" provided a proper factual and legal basis for such a remedy (RFJ at paras. 589, 653). From his perspective, the findings he made in resolving the nuisance claim resulted in both Canada and British Columbia incurring an "obligation to protect the [appellants'] Aboriginal right to fish by taking all appropriate steps to protect the fish and to act honourably in doing so" (at para. 646).

[404] However, notwithstanding the existence of this obligation, in the "absence of … concurrent liability on the part of RTA" (RFJ at para. 651), the trial judge appears to have considered himself without the authority to craft a declaration that particularized any specific duties borne by government. On this point, we find that he erred in principle, and this error had a material impact on the scope of the declaration that he issued, as well as its practical utility.

[405] At law, and in light of his findings, the trial judge was not limited to a bare declaratory judgment that simply identified the appellants' right to fish and recognized a generic obligation to protect that right. Rather, in our view, it was open to him to grant a declaration with greater specificity as to how Canada and British Columbia are to give effect to this obligation. Specificity is preferred because broad declarations are likely to serve little purpose where they do not translate into substantive change (*Ahousaht* at para. 154; *Daniels* at paras. 52–57).

The effect of the findings in the Aboriginal rights context

[406] In *Desautel*, the Supreme Court of Canada reiterated that the Crown has a "special relationship" with Aboriginal peoples. This relationship engages "the honour of the Crown"; a foundational principle that requires "Aboriginal rights [to] be

determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues … It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples" (*Desautel* at para. 30, internal references omitted).

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[407] The relationship between the Crown and Aboriginal peoples is *sui generis* (in other words, unique), and fiduciary in nature. See, for example, the discussions in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 23–25, 1996 CanLII 216, and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 37–40.

[408] However, not every aspect of the relationship is fiduciary (*Southwind v. Canada*, 2021 SCC 28 at para. 61). The honour of the Crown may impose specific duties on government in the context of its relationship with Aboriginal peoples. And, some of those duties may properly be characterized as fiduciary duties. However, the duties that flow from the honour of the Crown (whether fiduciary or non-fiduciary), do "not exist at large"; instead, they arise in relation to "specific [Aboriginal] interests" (*Wewaykum Indian Band v. Canada*, 2002 SCC 79 at paras. 81–85 [*Wewaykum*]). Moreover, what a particular duty will entail when it does arise, is necessarily informed by the context: "What the honour of the Crown requires varies with the circumstances" (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 25 [*Taku*]).

[409] As one example, it is now well-established that prior to Aboriginal title or an Aboriginal right being determined, the honour of the Crown imposes a duty on government to consult with Aboriginal peoples, and, where appropriate, to accommodate their interests. However, the duty to consult and possibly accommodate only arises where government has actual or constructive knowledge of the potential existence of Aboriginal title or a right, and contemplates conduct that carries the potential to adversely affect that right (*Desautel* at para. 72; *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at para. 10 [*Ross River*]; *Rio Tinto 2010* at paras. 2, 32–50).

[410] Once the duty to consult has arisen, the steps government must take in furtherance of that duty will also depend on the circumstances. As explained in *Haida*:

> 39 The content of the duty to consult and accommodate varies with the circumstances…
>
> …
>
> 43 … In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice …
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> 46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations …
>
> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to

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> minimize the effects of infringement, pending final resolution of the underlying claim …
>
> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim … Rather, what is required is a process of balancing interests, of give and take …
>
> 49 … The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.
>
> 50 … Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.
>
> [Emphasis added; internal references omitted.]

See also *Ross River* at para. 12; *Gitxaala Nation v. Canada*, 2016 FCA 187 at paras. 173–174, 180–181, leave to appeal to SCC ref'd, 37201 (9 February 2017).

[411] In *Tsilhqot'in*, the Supreme Court of Canada held that where Aboriginal title (or, by logical extension, an Aboriginal right), is no longer pending because it has been established, the duty to consult remains relevant to the assessment of Crown conduct and will be engaged by government "incursions" that carry the potential to adversely impact the right (*Tsilhqot'in* at para. 88).

[412] However, in the context of a long-standing project or ongoing activity that impaired an Aboriginal right before the right was established, the post-right duty to consult as discussed in *Tsilhqot'in* will arise only where the Crown's present conduct or present decisions raise the potential for a "novel" (new or unusual) adverse effect. The Supreme Court of Canada addressed the latter issue in *Rio Tinto 2010*:

> [48] <u>An underlying or continuing breach</u>, while remediable in other ways, <u>is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult</u>. 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 *contemplates conduct that might adversely affect it*": *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.

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> [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.
>
> [Underlined emphasis added; emphasis in original in italics.]

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[413] We understand that the post-right duty to consult applies to government conduct or decisions that will have an "immediate impact on [the] lands and resources" in question, as well as "strategic, higher level decisions" (*Rio Tinto 2010* at para. 44, citing Jack Woodward, *Native Law*, vol. 1. Toronto: Carswell, 1994 (loose-leaf updated 2010, release 4), at p. 5-41, emphasis omitted).

[414] In addition, where Aboriginal title or a right has been established, the Crown must "ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*" (*Tsilhqot'in* at para. 80). This requires that there is both "a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty" that the Crown owes to the Aboriginal group (at para. 80).

[415] Meeting the latter requirement may require that the Crown "reassess [its] prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty … going forward" (*Tsilhqot'in* at para. 92).

[416] The trial judge rejected the appellants' request to declare (and thereby impose) a fiduciary duty on Canada and British Columbia to mandate certain things of RTA, specific to its operations and abatement of the nuisance. However, he recognized that because of his factual and legal findings in resolving the nuisance claim, both levels of government would bear a prospective obligation to protect the appellants' right to fish. Although he did not delineate specific duties in his declaration, the trial judge opined that this obligation would entail consulting on

"future matters affecting [the appellants'] interests, including the river flow", and reassessing governments' prior conduct, perhaps even to the extent of considering "legislative change" (RFJ at para. 589; see also para. 604).

[417] We agree with the trial judge that his determination of an established Aboriginal right to fish in the Nechako River watershed imposes, prospectively, a positive obligation on both levels of government to protect that right. We also agree that Canada and British Columbia are duty-bound to do so in a manner consistent with paras. 77–88 of *Tsilhqot'in*.

[418] In our view, this means that Canada and British Columbia each bear a duty to consult with the appellants in respect of the annual water allocation and flow regime in the Nechako River whenever they "contemplate", individually or collectively, an action or a decision that carries the potential for a novel adverse impact on the appellants' exercise of their Aboriginal right to fish (*Rio Tinto 2010* at para. 49). See also *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124 at paras. 54, 67–74, leave to appeal to SCC ref'd, 37485, (22 June 2017). The purpose of any such consultation would be to protect the established s. 35 right from "irreversible harm" (*Rio Tinto 2010* at para. 41).

[419] In deciding whether a contemplated action or decision carries the potential for a novel adverse impact, Canada and British Columbia are well-advised to keep in mind para. 46 of *Rio Tinto 2010*, which states that a "generous, purposive approach to this element [of the duty to consult] is in order". As noted, the trial judge made a specific finding in this case that "while the cause [of the adverse impact on the appellants' right to fish] 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" (RFJ at para. 612).

[420] Canada and British Columbia must also ensure that their continued management of the annual water allocation and flow regime in the Nechako River is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*.

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[421] What this latter obligation requires of government will necessarily be informed by the fact that in their nuisance claim, the appellants established an Aboriginal right, not title to land. This is an important distinguishing factor between the appellants' case and *Tsilhqot'in*. In *Tsilhqot'in*, the fact that Aboriginal title was at stake informed both the assessment of breach of duty by British Columbia and the question of remedy. See, in particular, paras. 89–94 of *Tsilhqot'in*.

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[422] We are satisfied that the prospective duties identified in this case are properly characterized as fiduciary duties.

[423] Our reasons for this conclusion are two-fold.

[424] First, the trial judge found that the appellants proved an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*. In this context, the "honour of the Crown" is indisputably engaged (*Manitoba Métis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para. 69 [*Manitoba Métis*]). In *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the majority emphasized that the honour of the Crown is always at stake:

> [22] … The duties that flow from the honour of the Crown may vary according to the circumstances in which they arise but, whether we are dealing with the assertion of sovereignty or the resolution of rights or title claims, the honour of the Crown is always at stake …
>
> [Emphasis added; internal references omitted.]

[425] Second, *Haida* made clear that "where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty"; the content of that duty may vary to account for the Crown's other obligations, but fulfilling that duty still requires the Crown "to act with reference to the Aboriginal group's best interest" (at para. 18, emphasis added).

[426] See also *Southwind*, which confirms that a fiduciary duty may arise when "the Crown exercises discretionary control over cognizable Indigenous interests or where the conditions of a private law *ad hoc* fiduciary relationship are met" (at para. 61,

citing *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 44 [*Williams Lake*]; *Manitoba Métis* at paras. 48–50; *Wewaykum* at para. 85).

[427] The trial judge found, as a fact, that both Canada and British Columbia actively participate as members of the Technical Committee in managing the annual water allocation under the 1987 Settlement Agreement and "setting the flow" regime for the Nechako River (RFJ at para. 531). He also concluded that in these roles and given their governmental authority, generally, Canada and British Columbia retain "some ability to increase the flow of water into the Nechako River" (at para. 590).

[428] In our view, these findings impliedly hold that the two levels of government have assumed discretionary control over a subject matter in respect of which the appellants have proved an Aboriginal interest. Considered as a whole, this implied finding was open to the trial judge on the record. The appellants also specifically pleaded an assumption of discretionary control as a basis for declaratory relief in their second amended notice of civil claim.

[429] As the law currently stands, the assumption of discretionary control means that each of Canada and British Columbia has a "strong" fiduciary duty to "act with reference to the [appellants'] best interest" (*Haida* at para. 18; *Southwind* at para. 62). The standard of care expected of them is that of "a person of ordinary prudence in managing their own affairs" (*Southwind* at para. 64, citing *Williams Lake* at para. 46).

[430] This does not mean that in the context of their role on the Technical Committee, and in exercise of other authority that reasonably may impact the appellants' Aboriginal right to fish, Canada and British Columbia must act in the sole interest of the appellants. Aboriginal rights law in Canada recognizes that the content of a fiduciary duty "may vary to take into account the Crown's other, broader obligations" (*Haida* at para. 18). See also *Wewaykum* at paras. 86, 92–93.

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[431] The Supreme Court of Canada explained it this way in *Wewaykum* (at para. 96):

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.).
>
> [Emphasis added.]

Comments to the same effect are found in *Southwind* at para. 101. See also *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 59 [*Chippewas SCC*]; *Tsilhqot'in* at paras. 81–83.

[432] We accept that in light of Canada and British Columbia's "broader obligations" relevant to the Kenney Dam, the related reservoir and the regulation of water in the Nechako River (RFJ at paras. 597–600), it was open to the trial judge to reject the specific terms of the declaration sought by the appellants at the trial. A declaration worded as the appellants suggested would have wholly undercut the authorizing infrastructure surrounding RTA's operations.

[433] For one, granting the proposed declaration would have been antithetical to the trial judge's application of the defence of statutory authority and his conclusion that because of that defence, there was no proper legal basis from which to grant injunctive relief specific to RTA. We agree with RTA that if the proposed declaration had been granted, the appellants would have obtained through the back door the very form of relief against RTA that the trial judge held they were not entitled to in their nuisance claim.

[434] Second, the declaration sought at the trial, and now on appeal, would, in its practical effect, require a functional revamping of the terms of RTA's current water licence. This is not the proper role of a court. Judges are not entitled through the auspices of declaratory relief to stand in the shoes of government, usurp its administrative and policy functions, and substantively vary a licence or other form of regulatory authorization that governs a particular operation. This is especially the

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case where the nature of the decision-making at issue requires scientific expertise, the identification and weighing of potentially myriad competing interests, public safety issues, and intimate familiarity with the contractual, statutory, regulatory and policy framework governing the impugned activity.

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[435] Third, the law is clear that declaratory relief “should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question” (*Ewert* at para. 83). If the appellants wanted to challenge the validity of RTA’s FWL (which incorporates the annual water allocation defined in the 1987 Settlement Agreement), or its terms, the proper course would have been to bring an application for judicial review. In this regard, we find apposite the dissenting comments of Justice Rowe in *Ewert*, that the courts must be careful to not grant declarations that “would effectively bypass the ordinary process of judicial review” (at para. 127).

[436] However, these limitations did not preclude the trial judge from asking whether he could craft a declaration against Canada and British Columbia with somewhat greater specificity to offer the appellants a more meaningful form of relief.

The trial judge’s error

[437] In particular, the trial judge was not precluded from including terms in the declaration that expressly recognize a prospective duty to consult, and to emphasize to Canada and British Columbia the importance of ensuring that their ongoing involvement with RTA, the Kenney Dam and related reservoir is “substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*” (*Tsilhqot’in* at para. 80).

[438] As noted by Rowe and Shnier at 318, there are cases in which the courts have crafted declarations that bear some resemblance to injunctive relief:

> … Declarations allow courts to state generally what is necessary to comply with constitutionally guaranteed treaty rights, and allow the government flexibility in how to achieve that compliance. Further, declarations about a discrete issue or aspect of an agreement may facilitate negotiation outside the litigation process, which can be particularly important in the context of

> treaties with Aboriginal peoples. This, in conjunction with the fact that in the interpretation of treaties with Aboriginal peoples, rights protection by section 35(1) are at stake, may in some cases explain judicial willingness to grant comparatively expansive declarations of rights under Aboriginal treaties as compared to rights under contracts between private parties.
>
> [Emphasis added; internal references omitted.]

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[439] Declarations that "bear some resemblance to injunctive relief" are occasionally referred to as "declarations plus". This form of relief "attempt[s] to bridge the gap between declarations and injunctions and combine the benefit of both remedies" (Roach at § 12:10).

[440] In our view, *West Moberly 2011* and *Ahousaht*, both of which originate from this jurisdiction and are cited by the appellants, reflect a "declarations plus" approach. These cases involved Aboriginal interests and the declarations that were issued were more specific and directive than the one granted by the trial judge in this case.

[441] In *West Moberly 2011*, a chambers judge declared that the provincial Crown failed to consult and accommodate Aboriginal hunting rights adequately when authorizing coal exploration in a particular area of British Columbia. The impugned authorization was stayed for 90 days and government was directed, in consultation with the affected First Nations, to "proceed expeditiously to put in place within that period a reasonable, active plan for the protection and augmentation of the Burnt Pine herd…" (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359 at para. 83).

[442] On appeal, this Court affirmed the declaration that there was inadequate consultation and accommodation (*West Moberly 2011* at para. 166). It set aside the part of the declaration directing that government establish a plan for protecting the caribou herd. However, it directed that implementation of the authority to explore coal be stayed "pending meaningful consultation conducted in accordance with [its] reasons" (at para. 167, emphasis added). Moreover, the stay was granted "without prejudice to the giving of such directions for accommodation following further consultation between the parties, as may appear appropriate" (at para. 168).

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[443] In *Ahousaht*, the plaintiffs' Aboriginal right to fish within their fishing territories and to sell that fish was held to include: "[p]roviding predictable and long term fishing opportunities" and "[a]llowing the sale of fish into the commercial marketplace with the opportunity, but not the guarantee, of sustainability and variability" (see the Appendix to *Ahousaht*). The trial court issued a declaration stipulating that Canada's "general regulation and management of the regular commercial fisheries", as well as certain aspects of the scheme, unjustifiably infringed the Aboriginal right (Appendix to *Ahousaht*).

[444] The trial court then ordered, consistent with the declaration, that Canada "develop a fishery management plan for accommodating" the plaintiffs' exercise of their rights to harvest and sell certain species of fish "in a manner that remedie[d] the general and specific findings of unjustified infringement". Canada was also directed to "offer the [plaintiffs] opportunities to exercise their [A]boriginal rights to harvest and sell" certain species of fish "in a manner that remedie[d] the general and specific findings of unjustified infringement" (see the Appendix to *Ahousaht*).

[445] With some modifications, this Court upheld the declaration and ensuing orders on appeal, even though they were directive in nature. The Court did not consider it necessary to make "mandatory orders" against Canada, but acknowledged that this type of an order may be available if Canada did not act diligently to remedy the problems identified by the trial judge (*Ahousaht* at para. 299). The Court also recognized the potential for future "compensatory orders … should a case be made out for them" (at para. 299).

[446] For other examples of declarations and associated commentary that were more directive in nature than the one in this case, and considered at the appellate level, see also *Restoule* at para. 505 and *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216 at paras. 84–95.

[447] These cases show that the principles governing declaratory relief are sufficiently broad and flexible to "declare what the constitution requires without descending into great details", but, at the same time, provide "some means to

promote agreement or ensure dispute resolution about the details” (Roach at § 12:13).

[448] In our view, given the trial judge’s findings about ongoing detrimental impacts of the regulation of the Nechako River’s water flow on the appellants’ Aboriginal right to fish, the effect of those impacts, and governments’ continued role and authority in regulating the water flow, a more specific declaration was necessary, with direction as to how Canada and British Columbia are to exercise their fiduciary duties properly to protect these rights. The trial judge erred in principle by failing to appreciate that he had the authority to do this.

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Remedy on appeal

[449] At the hearing of the appeal, we sought assistance from Canada and British Columbia in crafting more specific wording in the event the Court saw fit to revise the existing declaration. Unfortunately, no suggestions were forthcoming. Instead, both levels of government stood fast in their insistence that there is no proper basis for appellate intervention with the declaration, as currently formulated.

[450] For ease of reference, we repeat the wording chosen by the trial judge (RFJ at para. 653):

> 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.

[451] No one has suggested that the first of these terms, including use of the phrase “Nechako River watershed”, lacks clarity. The Nechako River watershed was defined in the ASF at para. 36. We assume the parties are content with that definition:

> The Nechako watershed is located in the northwest portion of the Fraser River Basin. The region includes the communities and traditional territories of several First Nations as well as a number of cities and towns including Prince George, Vanderhoof, Burns Lake, Fraser Lake and Fort St. James.

[452] As such, we will leave the first term of the declaration intact.

[453] However, consistent with the principles discussed by the Supreme Court of Canada in cases such as *Haida, Rio Tinto 2010* and *Tsilhqot'in*, we vary the second term of the declaration to read this way:

> 2. As an incident to the honour of the Crown, both the federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by consulting the plaintiffs whenever governments' action or conduct in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, raises the potential for a novel adverse impact on the right;

[454] This variation achieves, at least in part, what was requested by the appellants in the proposed declaration they articulated at the trial, namely, consultation specific to governments' "monitoring [of] and decisions [made]" in managing the flow regime in the Nechako River.

[455] We will also add a third term to the declaration:

> 3. As an incident to the honour of the Crown, both the federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by ensuring that governments' ongoing and future participation in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*.

[456] In our view, this restructured declaration, although still stated in relatively general terms, is more likely to make a practical difference in addressing the ongoing and future cognizable threat to the appellants' now-established right to fish. Explicitly recognizing a duty to consult when governments' action or conduct raises the potential for a novel adverse impact makes it clear that both Canada and British Columbia have a positive obligation to take steps, in good faith, that serve to achieve the underlying objectives of that duty when it is properly engaged. Those objectives

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were highlighted by Justice Rowe in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40:

> [156] … On the part of the Crown, the duty to consult serves two distinct objectives: first is a fact-finding function, as through consultation the Crown learns about the content of the interest or right, and how the proposed Crown conduct would impact that interest or right. The second objective is practical; the Crown must consider whether and how the Aboriginal interests should be accommodated. The Crown must approach the process with a view to reconciling interests …
>
> [Emphasis added.]

[457] Although it is up to Canada and British Columbia to determine how they will meet their duties in the restructured declaration, the Court would expect, at a minimum, that when the duty to consult is properly engaged, it would entail providing the appellants with full opportunity to make submissions to Canada and British Columbia in the context of their role on the Technical Committee about the action or conduct at issue, and the impacts of the continued and future regulation of the Nechako River's flow regime on their right to fish; reporting back to the appellants to show how the concerns raised by them were considered; and setting out the effects of the consideration on any related decisions (*Haida* at para. 44).

[458] According to the ASF, the Technical Committee issues "Decision Records" that capture its decision-making. As such, there appears to be a mechanism already in place through which reporting back to the appellants may appropriately occur.

[459] When contemplating its duties, it will be important for Canada and British Columbia to keep in mind that "[r]esponsiveness is a key requirement of both consultation and accommodation" (*Taku* at para. 25, emphasis added). The duty to consult "requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted" (*Chippewas SCC* at para. 2, emphasis added).

[460] In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*], the Supreme Court of Canada affirmed that the content of the duty to consult, once triggered, "falls along a spectrum ranging from limited to deep consultation,

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depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right" (*Clyde River* at para. 20). Where an Aboriginal right has been proved, as was the case here, consultation that falls at the "highest end of the spectrum" is generally required (at paras. 43–44). See also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras. 79–81.

[461] In light of this reality, Canada and British Columbia may wish to consider whether, even without a triggered post-right duty to consult, it would nonetheless be fruitful to facilitate and establish some form of regular consultation with the appellants on the continued and future regulation of the Nechako River. Given the findings made by the trial judge in this case, we are of the view that taking that step would be consistent with the principle of reconciliation.

Disposition

[462] In sum, the appeal is allowed in part, solely with respect to the declaratory relief against Canada and British Columbia. The trial judge's order for declaratory relief is varied as follows:

a) the first term remains intact;

b) the second term of the declaration is varied to read:

> 2. As an incident to the honour of the Crown, both the federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by consulting the plaintiffs whenever governments' action or conduct in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, raises the potential for a novel adverse impact on the right;

c) a third term is added to the declaration:

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3. As an incident to the honour of the Crown, both the federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by ensuring that governments' ongoing and future participation in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*.

[463] The remaining grounds of appeal are dismissed.

[464] The appellants and RTA have had divided success in advancing and responding to the issues raised on appeal. In the circumstances, we order that each party shall bear their own costs in the appeal.

[465] We thank counsel for their able submissions.

"The Honourable Mr. Justice Hunter"

"The Honourable Mr. Justice Abrioux"

"The Honourable Madam Justice DeWitt-Van Oosten"

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