REGIONAL DISTRICT OF BULKLEY-NECHAKO
SUPPLEMENTARY AGENDA

Thursday, December 10, 2015

PAGE NO.	ADMINISTRATION REPORT	ACTION
2	Hans Berndorff, Financial Administrator - Nominees to the Chinook Comfor Board	Recommendation (Page 2)
	Public Hearing Minutes	
3	Public Hearing Minutes Bylaw 1756 (Topley Fire Protection Society) Electoral Area "G" *(Please see Rezoning Report pages 230-237 In December 10th agenda)*	Receive
	OTHER *(All Directors)*	
	APC Minutes	
4	Minutes: Advisory Planning Commission Area "G" RE: December 8, 2015 *(Please see Rezoning Report pages 217-229 In December 10th agenda)*	Receive
	ADMINISTRATION CORRESPONDENCE	
5-12	Fraser Basin Bulletin – Economic Development Projects in Jeopardy? Implications of the Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Decision	Receive
	NEW BUSINESS	
	ADJOURNMENT	

Regional District of Bulkley-Nechako
Memo – Board Supplementary Agenda
December 10, 2015

To:	Chair Miller and the Board of Directors
From:	Hans Berndorff, Financial Administrator
Date:	December 10, 2015
Re:	Nominees to the Chinook Comfor Board

The RDBN is to appoint two representatives to the Chinook Comfor Limited Board of Directors.

Electoral Area "B" wishes to nominate Louise Fisher as a Director and Lloyd Adams as the alternate.

We are hoping to have the names of the Electoral Area "E" nominees to be added during the meeting.

I would be pleased to answer any questions.

Recommendation: (all/directors/majority)

That the Board of Directors Resolves that Louise Fisher and _____ be appointed as Directors of the proposed Chinook Community Forest Corporation if and when the proposed Chinook Community Forest Corporation is fully registered as a corporation with the Registrar of Companies.

Further be it resolved that if either or both of the proposed Directors Louise Fisher or _____ are unable or elect not to be Directors, either or both, as necessary, of Lloyd Adams and _____ be appointed as Directors of the proposed Chinook Community Forest Corporation if and when the proposed Chinook Community Forest Corporation is fully registered as a corporation with the Registrar of Companies as alternate Directors."

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REGIONAL DISTRICT OF BULKLEY-NECHAKO
REPORT OF THE PUBLIC HEARING FOR BYLAW NO. 1756
December 8, 2015

Report of the Public Hearing held at 7:00 p.m., Tuesday, December 8, 2015 at the Topley Community Hall, 11591 Chester Street in Topley, BC. regarding Bylaw No. 1756.

Present:	Rob Newell, Chairperson Maria Sandberg, Planner Jennifer MacIntyre, Recording Secretary Dave Townsend, Applicant Jerry Botti, Chris Newell Byron Sketchley Dolores Botti Esther Krizmanich
CALL TO ORDER:	The meeting was called to order at 7:17 p.m.
BUSINESS:	
Chairperson Newell	Welcomed the persons present and introduced himself and Regional District staff and asked persons present to introduce themselves.
Chairperson Newell	Read a statement regarding Bylaw No. 1756, noting the location of information packages, and explaining the Public Hearing process.
Chairperson Newell	Called for comments on Bylaw 1756.
Dave Townsend	Stated he is in favour of Bylaw 1756.
Chairperson Newell	Chairperson Newell called for comments three times.
Chairperson Newell	Closed the hearing at 7:20 p.m.

Rob Newell, Chairperson

Jennifer MacIntyre, Recording Secretary

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Advisory Planning Commission Meeting Minutes for Area G
December 8, 2015 ~ Location: Topley Community Hall

Attendance G	✓ Rob Newell, Area 'G' Director ✓ Jerry Botti, APC Chair ✓ Vera Boyce, APC Secretary ✓ Chris Newell ✓ Frank Strimbold ✓ Tom Euverman ✓ Maria Sandberg, RDBN ✓ Jennifer MacIntyre, RDBN ✓ Pauline Watson, Applicant
Meeting called to order @:	6:06 p.m.
Chairperson:	Jerry Botti
Secretary:	Vera Boyce
Applications:	G-03-15 Rezoning and OCP Amendment application. Vote was held and all in favour of re-zoning. Motion made by Jerry Botti, Seconded by Chris Newell.
New Business:	New Zoning Bylaw. Spoke about new zoning by-law – comments will be forwarded at a later date.

Meeting Adjourned @ 6:48 p.m.

_____

Secretary Signature

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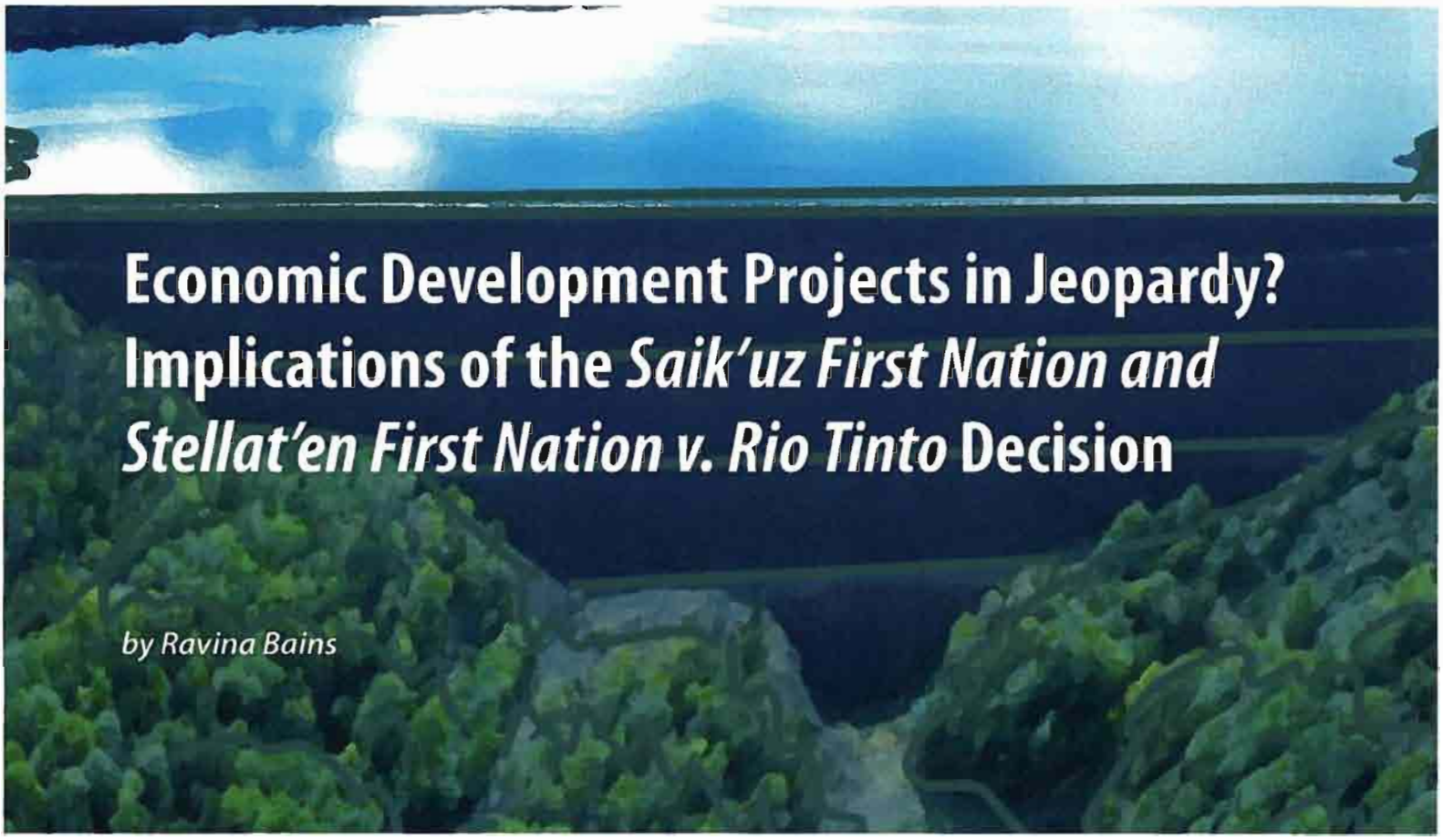
FRASER RESEARCH BULLETIN

FRASER INSTITUTE

FROM THE CENTRE FOR ABORIGINAL POLICY STUDIES

November 2015



Economic Development Projects in Jeopardy? Implications of the *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* Decision

by Ravina Bains

Summary

- The *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* BC Court of Appeal decision opens the door for future aboriginal title litigation against private parties—litigation that was previously only brought against provincial and federal governments.
- **Following the Rio Tinto decision,** First Nations no longer have to prove aboriginal title before bringing damages claims against private parties, such as resource companies. Simply claiming aboriginal title is enough to bring forward litigation against private parties.
- In provinces like British Columbia where over 100% of the province is currently under claim, this puts all current and future economic development projects in jeopardy.
- Specifically, this judgment could put the Kitimat aluminum smelter and the Kenney Dam, which has been operating for over 60 years with the support of Haisla First Nation, in jeopardy.
- Just as the *Tsilhqot'in* decision resulted in increased litigation against the Crown, this judgement will now result in litigation against private parties regarding aboriginal title, which prior to this case was unprecedented.

Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Decision

Introduction

In 2014 I wrote about how the Supreme Court's historic Tsilhqot'in decision was going to be a game changer for economic development projects and aboriginal title cases in British Columbia. A year later, another historic decision, that the Supreme Court of Canada declined to hear, will not only affect the economic prosperity of British Columbia, but is also likely to affect the rights of private parties. In its ground-breaking decision of October 15, 2015, the Supreme Court of Canada upheld an April 2015 BC Court of Appeal decision that will allow Saik'uz First Nation and Stellat'en First Nation (henceforth known as the Nechako Nations) to bring forward a damages claim against Rio Tinto for the Kenney Dam, which has been operating for over 60 years in British Columbia. The First Nations will be able to bring forward an action for damages against the private company without having proven aboriginal title. The BC Court of Appeal found that simply claiming aboriginal title is sufficient to allow a claim against a private party to proceed to trial.

This research bulletin provides background on the case and outlines the implications of the decision.

Background

Project

The Kenney Dam, located on the Nechako River, was built by Rio Tinto in the 1950s on land that the province of British Columbia sold to Rio Tinto. The dam provides water for Alcan's power generation facility in Kemano, which produces electricity that Rio Tinto uses in its aluminum smelter located in Kitimat. The Kenney Dam has been in operation for over 60 years and the aluminum smelter has been in production for the same time period. The Kitimat smelter is associated with the Haisla First Nation Council's business development group and recently underwent a $4.8 billion dollar upgrade that has resulted in a 50% reduction in the smelter's emissions and the capacity to generate over 420,000 tonnes of aluminum annually (Rio Tinto, 2015).

First Nations

The two First Nations communities involved in this case are located near Prince George. Saik'uz First Nation is located just outside Vanderhoof, British Columbia. It has 956 members, 54% of whom live off reserve (AANDC, 2015a). According to Aboriginal Affairs and Northern Development Canada, the community's unemployment rate in 2011 was over 48%, which grew 3 points from 45% in 2006. In 2015, the community received over $2.8 million dollars in government funding and generated over $3.6 million in own source revenue. Over $1.3 million of this own source revenue was from a Kenney dam road settlement (Saik'uz First Nation, 2015, July 29).

Stellat'en First Nation has just 540 members, 62% of whom do not live on reserve (AADNC, 2015b). In contrast to Siak'uz First Nation, Stellat'en First Nation has a much lower unemployment rate at 18%, which grew by 4% from 14% in 2006. In 2015 the community received over $2.4 million in government funding and generated over $2.2 million in own source revenue, $1.8 million of which came from natural resource deals (Stellat'en First Nation, 2015, July 28).

As table 1 demonstrates, these communities are relatively small and are generating as much own source revenue, more in the case of Saik'uz First Nation, as they receive in government transfers. Interestingly, despite their opposition to the Kenney Dam, the majority of the own

Table 1: Facts about Saik'uz and Stellat'en First Nations

	Saik'uz First Nation	Stellat'en First Nation
Population	956 (516 off reserve, 440 on reserve)	540 (335 off reserve, 205 on reserve)
Unemployment rate	48%	18%
Government funding	$2,838,311	$2,489,594
Own source revenue	$3,630,128	$2,175,053

Sources: AANDC, 2015a; AANDC, 2015b.

source revenue for each comes from natural resource projects in British Columbia.

The Case

In 2011, the Nechako Nations filed an action for damages against Rio Tinto with the BC Supreme Court, claiming that the Kenney Dam is causing significant environmental harm to the Nechako River that is "negatively affecting the fisheries resources of the Nechako River system," which in turn was affecting the First Nations' ability to use the fisheries resources (2015 BCAA 154, para 24). The communities also asserted that the lands on which the dam is located, along with the Nechako River, are subject to their aboriginal title and rights because "they have used and exclusively occupied... the Nechako River and the lands along the banks of the River, since the date at which British Sovereignty was asserted over British Columbia in 1846" (2015 BCAA 154, para 22). In response, Rio Tinto asserted the First Nations claim had no chance of succeeding because the Nechako Nations had only claimed aboriginal title and not proven title, and therefore their case was unwarranted. In other words, Rio Tinto's defence was that First Nations communities could not argue the private company interfered with aboriginal title and rights because the First Nations hadn't proven their title to the land. Justice Cohen of the BC Supreme Court ruled in favour of Rio Tinto and dismissed the First Nations claims on the basis that the Nechako Nations case was based on "asserted but unproven claims to aboriginal title and rights, [and] had no reasonable chance of succeeding" (2015 BCSC 2303, para 163-164).

In response to the BC Supreme Court decision, the First Nations appealed the decision to the BC Court of Appeal. The BC Court of Appeal overturned Justice Cohen's decision in the spring of 2015, asserting that aboriginal title does not have to be proven before bringing a claim against a private party for damages. Justice Tysoe of the BC Court of Appeal said aboriginal title and rights already exist prior to being recognized in court and the nature of this title does not need to be proven or defined before a damages claim is brought forward. In other words, Justice Tysoe found that Aboriginal title and rights can be proven during the trial phase and requiring First Nations to prove title before bringing a damages claim against a third party imposes a burden on First Nations communities that does not exist for other Canadians.

Following this decision, Rio Tinto applied for leave to appeal with the Supreme Court of Canada asking the court to review the decision. However, on October 15th the Supreme Court of Canada dismissed Rio Tinto's application and upheld the BC Court of Appeal's decision.

What are the implications of this decision for First Nations, third parties (such as resource companies and private citizens), and current and future resource projects in Canada? Coupled with the 2014 *Tsilhqot'in* decision, the *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* court decision will result in additional uncertainty for current and future resource projects in non-treaty provinces such as British Columbia, increased litigation, and now litigation against private companies and potentially private property holders as well.

Cases against private entities versus the Crown

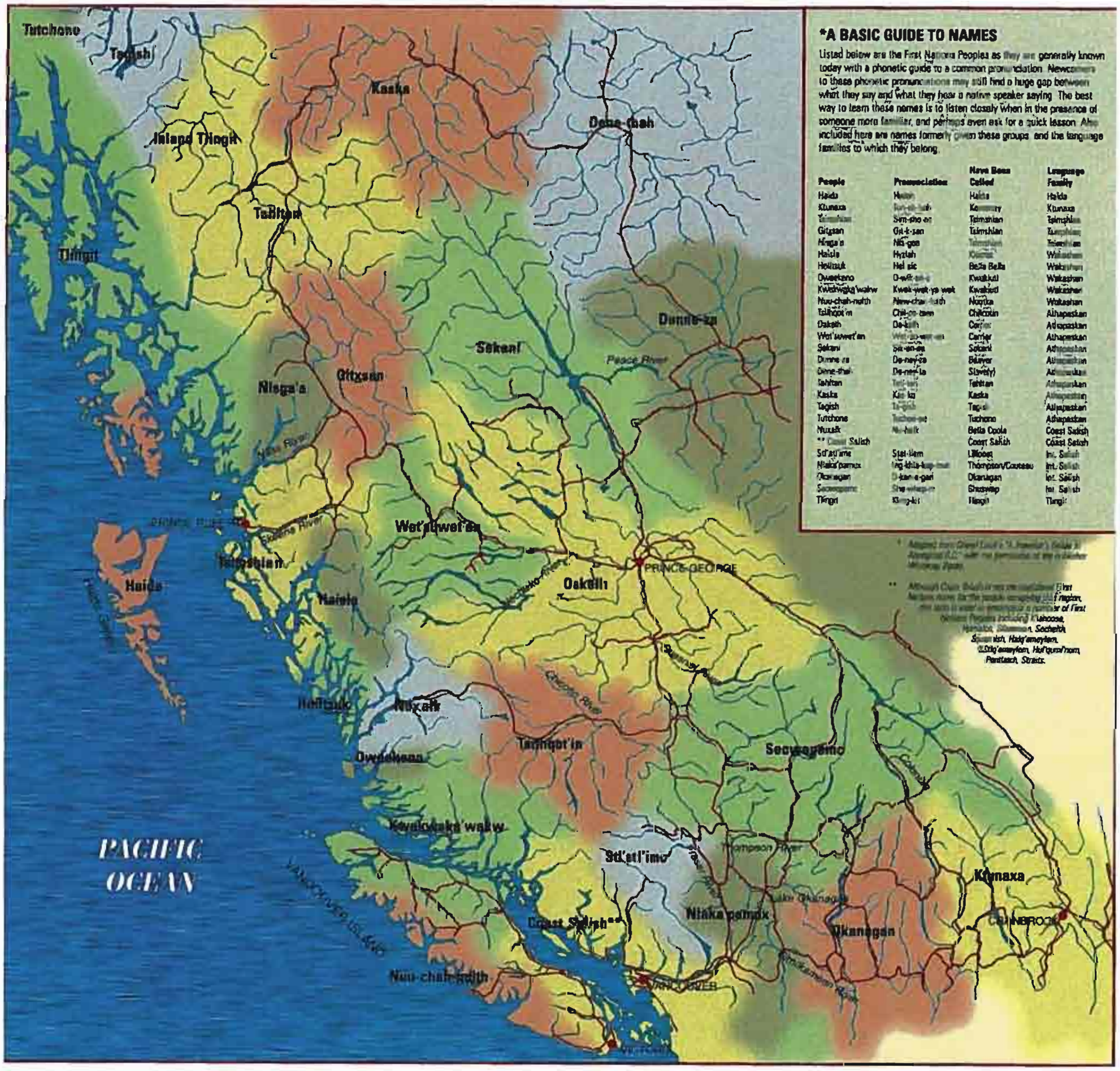
The *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* is a ground-breaking decision for a number of reasons, one of which is the nature of future claims that can now be brought forward against private parties that were previously limited to governments. Previous claims of aboriginal title have always been brought against the Crown. As Justice Cohen stated in his BC Supreme Court judgement, the problem with the Nechako Nations claim was that they wanted to prove their title through action against a private company, not the Crown "and that the Crown is a key party and is the only party who can properly fulfill the role of adversary" when addressing aboriginal title (2013 BCSC 2303, para 158-162). The BC Court of Appeal clearly disagreed with this point. By refusing to hear this appeal, the Supreme Court of Canada has opened the door to future litigation against private parties that was previously reserved only against the Crown. This means more litigation on aboriginal title, and now expanded to litigation against private parties.

Asserted versus proven aboriginal title

The BC Supreme Court held that a claim for damages could not be brought forward against Rio Tinto because the First Nations had only asserted aboriginal title and rights and had not proven that aboriginal title and rights existed. The BC Court of Appeal disagreed with this statement and held that if the First Nations claim that they "exclusively occupied portions of the Central Carrier territory, including the Nechako River and lands along its bank, at the time of British sovereignty" was true, then they would have aboriginal title to those lands and could attempt to prove that title during their claim for damages against Rio Tinto (2015 BCAA 154, **para 22). However, there are several problems** with this assertion by the BC Court of Appeal.

First, as mentioned above, it exposes private parties to litigation that was once solely confined to governments. Governments have access to historical records and negotiation documents to help them adequately litigate aboriginal title cases. Private parties do not have this type of evidence and information, which can put them at a disadvantage. Second, it remains unclear what the role of the Crown is in aboriginal title cases between First Nations and private parties. Will the provincial or federal government intervene in a damages case between Rio Tinto and the Nechako Nations, and will the provincial and federal governments recognize aboriginal title that has been granted through a decision between a First Nation and a private party? These questions remain unanswered. Finally, the BC Court of Appeal judgment fails to pay adequate attention to the unique nature of aboriginal property. The

Figure 1: First Nations Claimed Traditional Territory



Source: British Columbia, Ministry of Education, *First Nations Peoples of British Columbia*. <https://www.bced.gov.bc.ca/abed/map.htm>, as of November 3, 2015.

court treats First Nations claims the same way that a claim by a private landowner with uncertain title would be treated. But this does not give regard to the unique relationship between the Crown and First Nations. First Nations are not like all other private property owners. Aboriginal title, as said by the BC Court of Appeal, pre dates Canadian sovereignty and is a matter between the Crown and First Nations. Therefore, the wrong that is alleged in an aboriginal title case is a claim about a wrong committed by the Crown in failing to recognize title. That is why it is appropriate to have aboriginal title claims litigated between the Crown and First Nations, not private parties. Allowing aboriginal title claims to be litigated against private parties misunderstands the unique aspects of aboriginal title and the unique relationship between First Nations and the Crown, neither of which exists between First Nations and private parties.

One thing is certain: this ground-breaking decision will result in increased litigation not only by First Nations against private parties, but also by private parties against the Crown. For example, if Rio Tinto is held liable for damages, Rio Tinto could sue the province of BC for compensation, as everything it did was under provincial license. Further, no longer does a First Nation have to prove aboriginal title prior to bringing a case forward against a private party. What will be the impact of this on a province such as British Columbia, which has very few treaties?

Impact on economic development projects

Like the *Tsilhqot'in* decision, the *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* decision will affect economic development in British Columbia. The *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* judgement allows First Nations to bring forward litigation against private parties by simply claiming aboriginal title. In order to prove aboriginal title, a First Nation needs to prove "sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation" (2014 SCC 44, para 30). As demonstrated by the *Tsilhqot'in* case, which took two decades to settle, proving aboriginal title remains difficult. However, as figure 1 illustrates, territory claims from First Nations in British Columbia currently account for more than 100% of the land in the province. That means that every single project that is currently operating in British Columbia, along with all future projects, will be susceptible to litigation for damages. Furthermore, within these claim areas are urban centres and private property holders; it remains unclear what would happen were a First Nation to pursue litigation against an individual private property holder.

The Fraser Institute Annual Survey of Mining Companies (2015) has shown that the number one impediment for mining investment in British Columbia is uncertainty over disputed land claims. These concerns result from the uncertain status of aboriginal land claims in the province. By exposing private parties to litigation that has traditionally been brought only against governments, this judgement compounds the issue of land uncertainty in British Columbia. In addition to casting doubt on future resource projects, this judgement also jeopardizes projects like the Kenney Dam, which have been operating for over half a century.

In its judgement, the BC Court of Appeal has shown a disregard for economic principles. Recent court decisions regarding aboriginal title, including *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto*, have attempted to extend property rights to First Nations and right historic wrongs. However, they have done so

without considering the economic impact of their decisions. For example, the *Mikisew* decision extended aboriginal consultation to lands where aboriginal title had been surrendered under treaty agreements. Previously, consultation was only required on lands that were under claim. The *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* decision has opened the door to litigation between First Nations and private parties and potentially put projects that have operating for over half a century at risk. To address this increased uncertainty caused by legal decisions, the courts could try and take notice of the economic impact of their decisions and adjust accordingly. In other words, justices can make more effort to "seek clarity and bright lines in their judgments rather than opting for remedies that invite further litigation" (Flanagan, 2015). There is precedent for important values being applied to court decisions. For example, in the Secession Reference, the Supreme Court referred to "underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities" (Flanagan, 2015). Therefore, in order to address these economic implications, justices should consider the economic impact of their judgments.

Conclusion

Although the *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto* decision did not receive as much media attention as the *Tsilhqot'in* decision, it may have an equal, and possibly larger, impact on economic development projects, particularly in British Columbia. This judgement has also opened the door to future litigation against private parties; litigation that needs only an unproven claim to aboriginal title to move forward. This decision has the potential to create an environment of heightened uncertainty for all existing and future economic development projects and could result in future litigation between First Nations and private property owners in provinces such as British Columbia, where over 100% of the province is currently being claimed by First Nations and aboriginal title to land has not been regulated by treaties.

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Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto, 2013 BCSC 2303.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.

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