APRES LE DELUGE – RECLAIMING THE SPACE FOR INDIGENOUS ENVIRONMENTAL STEWARDSHIP

JELP, June 6, 2015
Kananaskis, Stoney Territory
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Après Moi le Déluge

Bill C-38 and C-45

Cohen Commission into the Decline of the Fraser River Sockeye Salmon had been commissioned in 2009 – scheduled to release report in October 2012 (clear that Justice Cohen was going to focus on habitat protection and species diversity) – changes to the Fisheries Act announced in the Spring of 2012 undermining those very aspects

Lack of long-term vision and planning, focus on exploitation

After the Deluge

For Indigenous Peoples the Deluge has been much greater and going much further back than 2012

Laws and regulations used to limit indigenous control over and access to their lands and resources (Indian Act, Fisheries Act)

Indigenous Peoples strong standing constitutionally to challenge potential projects

Implement indigenous laws and jurisdiction

Indigenous Peoples as joint decision-makers can serve as checks and balances on government

Indigenous Peoples much longer term vision and responsibility to future generations

INDIGENOUS PEOPLES – STEWARDS OF THEIR LANDS AND RESOURCES

Highest concentrations of biodiversity world wide in Indigenous territories

Indigenous knowledge and practices found to enhance biodiversity

Take into account indigenous knowledge – most long term data regarding the respective territories

Indigenous Peoples as decision makers regarding access to their territories can ensure economically, environmentally and culturally sustainable decisions

Indigenous Peoples have been working together with local and environmental groups

Fill the void regarding environmental regulation, monitoring and enforcement (eyes and ears out there)

Indigenous Peoples play important role in environmental governance

INHERENT RIGHT TO SELF-GOVERNMENT (AND ENVIRONMENTAL GOVERNANCE)

Kent McNeil identifies 3 approaches to the inherent right of Self-government:

1. As a free-standing Aboriginal right within the meaning of section 35 of the 1982 *Constitution Act*.
2. As a right of self-regulation over all other section 35 Aboriginal and treaty rights.
3. As the residual sovereignty that was retained by First Nations after European colonization.

Kent McNeil, "Judicial Approaches to Self-Government since Calder: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right be Done: Aboriginal Title , the Calder Case and the Future of Indigenous Rights,* (Vancouver: UBC Press, 2007)

INDIGENOUS PEOPLES ASSERT THEIR RIGHTS TO PROTECT THE ENVIRONMENT

Many of the leading cases (Tsilhqot'in Nation, Haida Nation) were initiated to stop destruction of the environment or higher-level decisions that could have negative impact on the environment and indigenous land uses

Recent applications for injunctive relief to stop commercial herring fishery, to allow stocks to recover:

Council of Haida Nation and Minister of Fisheries and Oceans, 2015 FC 290 (successful application – March 6, 2015, Justice Manson)

NB: Ahousaht et al v. Minister of Fisheries and Oceans, 2015 FC 253 not successful, February 27, 2015 also in front of Justice Manson, despite proven rights case and successful application in the previous year – 2014 FC 197 Justice Mandamin

Tseshaht Nation in Port Alberni – stopped commercial herring fishery in Barkley Sound

Heiltsuk – direct action – stopped commercial herring fishery in their waters

MULTIPLICITY OF TACTICS

Nechako Nations (Saik'uz and Stellat'en FN) brought action *inter alia* in private and public nuisance against Rio Tinto Alcan based on the impact of the Kenney Dam on their Aboriginal Title and Rights and reserve lands) (

Alcan successfully applied at BCSC to strike pleadings as their Aboriginal Title and Rights were not yet successfully proven or recognized in a way that is binding on the Crown

BCCA overturned on April 15, 2015: Saik'uz v. Rio Tinto Alcan 2015 BCCA 154 – ruling that Aborignal Title and Rights could be made out within these proceedings against a private party – since Aboriginal Title and Rights exist prior to their declaration

Can bring claim in private and public nuisance and corporation can also be held liable for infringement of Aboriginal Title and Rights

ATTEMPTING TO JUSTIFY THE UNJUSTIFYABLE

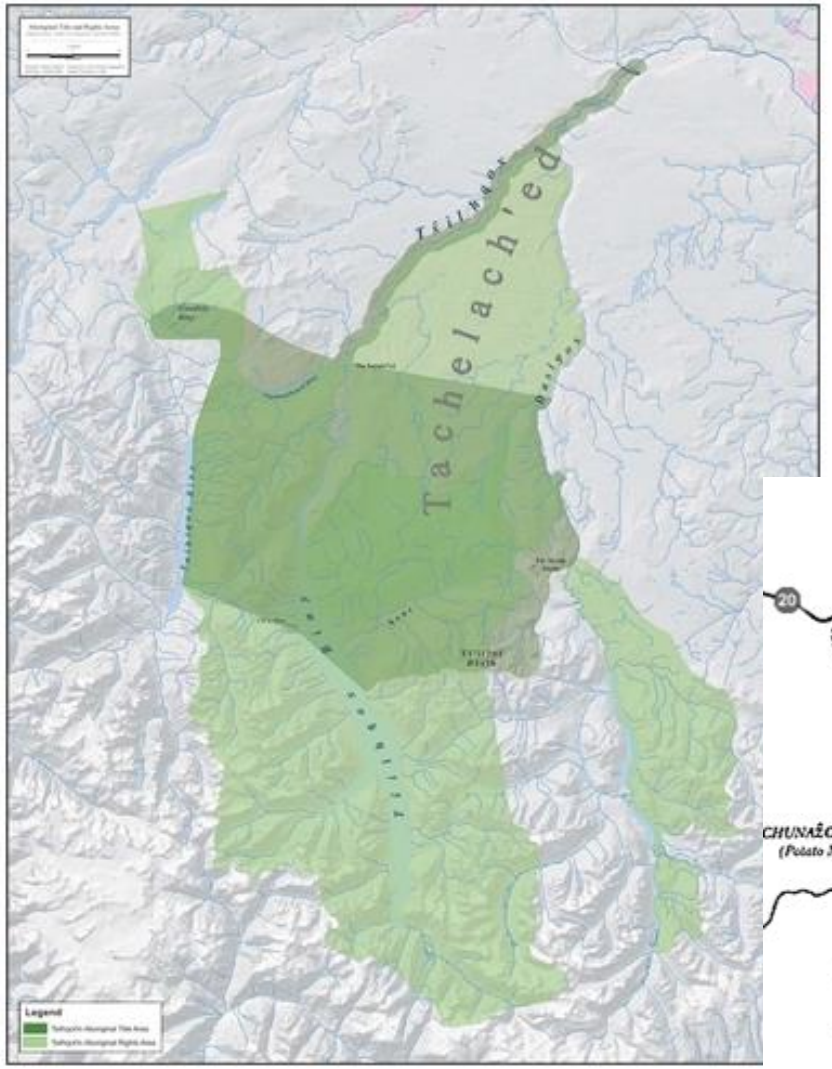
Aboriginal Rights Litigation – establishing braoder Aboriginal rights (including right to manage and protect the environment, stocks,…)

Federal government adds insult to injury by claiming that they have to be sole decision makers regarding conservation (when they have failed to protect the environment and stocks and are more and more abdicating their responsibility) and allocation (when they have mismanaged it so far) (at the justification stage of Aboriginal Title and Rights trials)

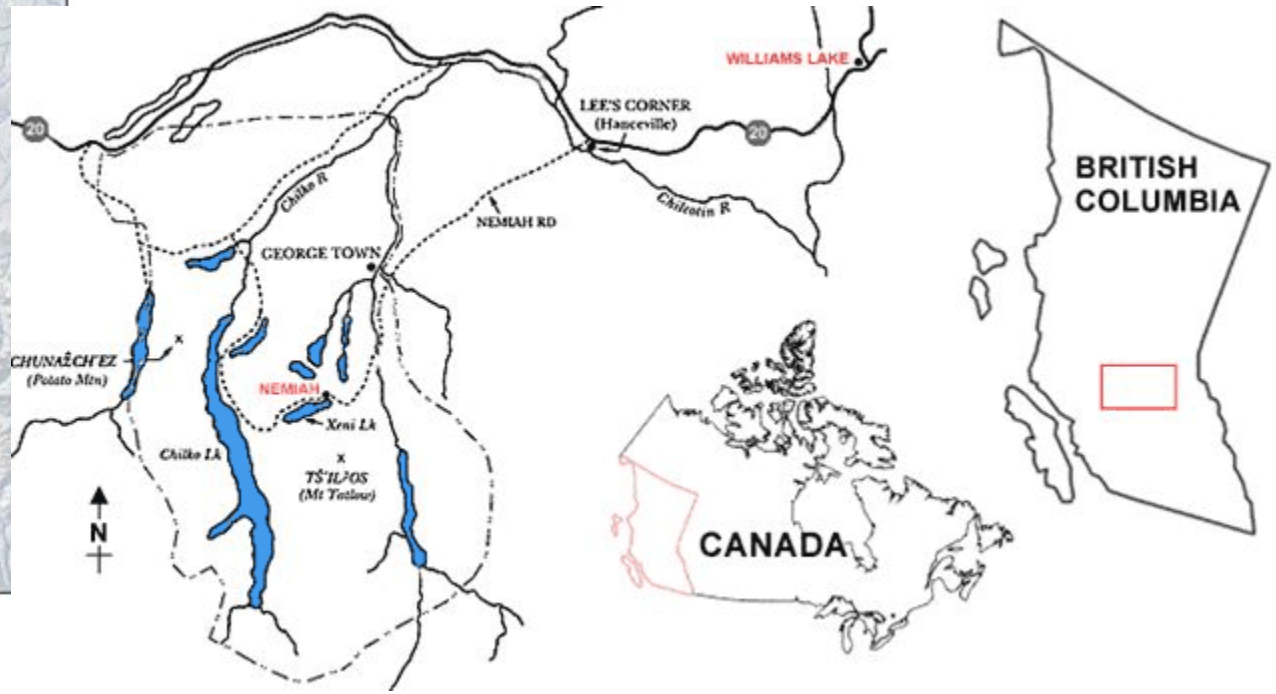
Lets look at what they are trying to justify in the first place – e.g.: ban on sale of fish – introduced in 1888 – when objective was to limit indigenous access to enable commercial industrial access)

Ahousaht case (2013 BCCA 300) where established rights to commercially fish all stocks, after failed negotiations, now in justification stage of trial – beyond 40 days just with the evidence the federal government has been calling

TSILHQOT'IN NATION V. BC 2014 SCC 44



Aboriginal Title Area (dark green, 1900 km²)
Tachlach'ed – Chilko salmon spawning grounds in Title area
ABORIGINAL TITLE includes the right to pro-actively use and manage the land.
Aboriginal Rights found throughout coloured area
Involvement in decision-making for larger Tsilhqot'in territory



CONSENT

Once Aboriginal Title is established proposed developments would be subject to consent of the respective Indigenous Peoples

or absent that a stringent test where the Crown would have the justify the infringement of Aboriginal Title.

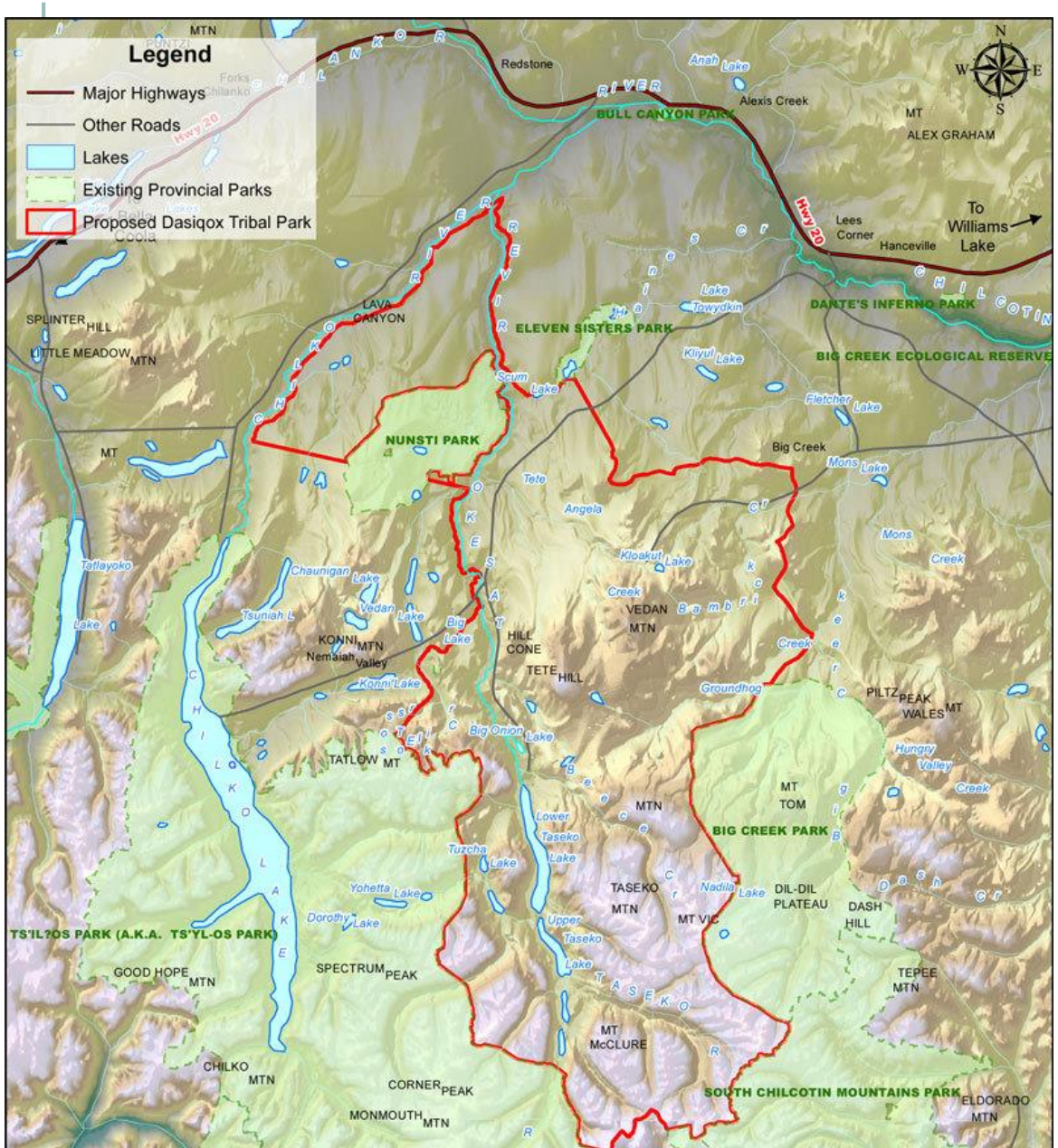
Hard to imagine how Crown can justify substantive decisions regarding access to land and especially allocation of resources given that the Crown does not retain any beneficial interest in the Aboriginal Title lands and resources

Following a declaration of Title the Crown might have to reassess prior conduct, which might require cancellation of a project that unjustifiably infringes Aboriginal Title

Supreme Court of Canada reminded both the Crown and proponents, that the only way to obtain legal and economic certainty regarding proposed developments, is to secure the consent of Indigenous Peoples.

> [97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

BROADER IMPLEMENTATION



Chilko Taskeo confluence

http://www.dasiqox.org/

Location: http://www.dasiqox.org/where-is-it-/

Includes area of proposed Taskeo New Prosperity Mine, Wildlife corridor between title area and other parks)

IMPLEMENTATION OF THE TSILHQOT'IN DECISION

November 9 and 10, 2014 TRU and the Tsilhqot'in National Government (TNG) hosted a think tank about the implementation of the Tsilhqot'in decision at TRU Williams Lake, which brought together Tsilhqot'in leadership and academics from across Canada

INDIGENOUS TERRITORIAL AUTHORITY

Indigenous Governance:

based on indigenous laws, issues of internal governance and management of lands and resources

Indigenous – Crown Relations:

Decisions regarding access to land and resources

Indigenous – Settler Relations:

Indigenous Peoples have standing and constitutionally protected rights – increased interest in working together to ensure more sustainable development