



### **SCC Dismisses Leave to Appeal Applications for 2 Duty to Consult Cases**

On April 11, 2013, the Supreme Court of Canada dismissed two applications for leave to appeal. Both cases involved issues of Crown consultation, and given that the Supreme Court of Canada does not provide reasons when dismissing leave to appeal applications, the aboriginal groups are left wondering whether the applications simply did not meet the 'national importance' test for leave, or whether, as a broader policy issue, the court is signaling that it is not interested in hearing consultation cases.

In *Athabasca Chipewyan First Nation v. Energy Resources Conservation Board et al.*, the Athabasca Chipewyan First Nation (ACFN) applied to the Supreme Court of Canada for an order that the tribunal of first instance had a duty to decide whether the Crown had adequately consulted and accommodated ACFN.

By way of background, Shell Canada applied to amend its license to expand the existing Jackpine oil sands mine near Fort McMurray, Alberta. Such an amendment required approval from the provincial Energy Resources Conservation Board (ERCB). It also triggered federal and other provincial crown approvals. The ERCB and the federal Minister of the Environment entered into an agreement to refer the project to a Joint Review Panel charged with performing an environmental assessment

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### **Canadian Bar Association 2013 National Aboriginal Law Conference**

This year's Canadian Bar Association National Aboriginal Law Conference, entitled *Working With and Within Indigenous Legal Traditions*, was a sell-out success! The April 11 – 12 event at Victoria's Fairmont Empress Hotel impressed the 160 attendees, thanks in large part to the many Woodward & Company people who contributed their time, energy and knowledge.

Aimée Craft of the Public Interest Law Centre in Winnipeg, and renowned Indigenous legal scholar John Borrows co-chaired the event. Woodward & Co.'s **Drew Mildon** co-chaired the organizing committee. Drew also served as moderator on the panel *Our Land, Our Laws: Indigenous Land Use and Land Management*, which included a joint presentation on *St/autw̓ smeli* (matrimonial) real property law by Belinda Claxton of Tsawout First Nation and Woodward's **Heather Mahony**.

**Gary Campo** and **David Robbins** presented on their experiences and knowledge of Indigenous law through the Tsilhqot'in litigation; **Leah Mack** spoke about custom membership codes and election codes in the context of recent case law. The firm's newest addition, summer student **Alan Hanna**, presented on his Indigenous legal research with the Tsilhqot'in Nation, through the *IBA/UVIC Indigenous Laws Research Project*. *...cont'd on p.2*

### **UPCOMING EVENTS:**

**May 7 - 8** : PBLI Aboriginal Law: Current Events - UBC Robson Square. On May 7<sup>th</sup> the Honourable Douglas Lambert will speak at a panel entitled **Aboriginal Rights and Title: An Analysis of *William v. British Columbia***.



Linda McDonald, Jack Woodward & Drew Mildon

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of the proposed expansion and determining whether that expansion was in the public interest. The Panel invited all interested parties to give notice of constitutional questions they proposed to raise. ACFN filed a notice questioning whether the provincial and federal Crowns had discharged their constitutional obligations to consult with ACFN. The Panel declined to consider ACFN's constitutional questions, holding that it did not have jurisdiction to consider whether the Crown had complied with its obligation to consult with aboriginal peoples. This, despite governing legislation which clearly stated that the Panel could decide "all questions of constitutional law," and Supreme Court of Canada decisions that say decisions that are offside of the constitution cannot be in the public interest. The Panel also held that it would be premature to consider whether the Crown had discharged its duty to consult at that stage of the proceedings because Crown lawyers said that their clients intended to consult ACFN in future. Each of the Alberta Court of Appeal and the Supreme Court of Canada dismissed ACFN's leave to appeal applications:

<http://scc.lexum.org/decisia-scc-csc/scc-l-csc-a/en/item/12982/index.do>

ACFN does not believe its rights have been upheld and has vowed to remain vigilant in its quest for justice:

"We are truly disappointed with this decision as we have diligently proceeded through legal avenues to have our rights upheld," Athabasca Chipewyan Chief Allan Adam said in a statement. "We understand that this joint review panel was supposed to uphold everyone's constitutional rights. Why has there been an exception with regards to First Nations' consultation rights? Government must be held accountable to their treaty obligations."

In *Adams Lake Indian Band v. Lieutenant Governor in Council, et al.*, Adams Lake Indian Band (ALIB) also sought relief on the basis that there was inadequate consultation by the Crown. In 1993, the B.C. provincial government entered into a master development agreement ("MDA") with Tod Mountain Development Ltd. (now Sun Peaks Resort Corporation) that contemplated an expansion of the ski hill. The MDA permitted purchase of Crown lands within the traditional areas claimed by ALIB. In 2010, the Lieutenant Governor in Council passed an order in council that authorized the issuance of letters patent to

create Sun Peaks Mountain Resort Municipality, which came into force June 2010. In July 2010, ALIB filed a petition with the B.C. Supreme Court for an order quashing the order in council on the basis that government consultation with ALIB had been inadequate. The B.C.S.C. allowed the petition in part and found there was inadequate consultation and ordered the province to conduct further consultation with ALIB. However, the B.C.S.C. did not quash the order in council. The B.C.C.A. allowed the appeal and dismissed the petition and cross-appeal. The Supreme Court of Canada dismissed ALIB's leave to appeal application: <http://scc.lexum.org/decisia-scc-csc/scc-l-csc-a/en/item/12972/index.do> ❖

### CBA Conference...continued from page 1

Special acknowledgement goes to Butch Dick of Songhees Nation for welcoming the guests into the territory and conducting an opening prayer, and to the Honorable Steven Point, whose direct, sincere presentation set the tone for the next two days. This year's National Aboriginal Law Conference is one that will be remembered. ❖

### W&Co's 2013 TC 10k Team



Congratulations to our intrepid team of Skookum Racers! Some great times, many under the hour mark. We placed 9<sup>th</sup> out of 18 legal and accounting teams. Thanks all! ❖

### WELCOME SUMMER STUDENT – ALAN HANNA

- Alan has just completed second year law at UVic;
- He has a Masters in Anthropology from UVic;
- He taught telecommunications at Thompson Rivers University (way back when it known as the University College of the Cariboo) and ran his own telephone company;
- He has self-published a book, and has been published in *the Advocate* and *Beautiful BC Magazine*. ❖