WOODWARD & COMPANY

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Changes Ahead in BC Treaty Process

After a strange series of events that included BC withdrawing its support for a previously agreed to new chief treaty commissioner, BC Premier Christy Clark announced that BC would not appoint anyone to the position of chief commissioner because she doesn't think the treaty process is working. Clark stated that: "We made a principled policy decision - The decision is not to continue with the status quo … In terms of next steps – whether or not the treaty commission will change or whether it will continue to exist – is going to be something we decide together with First Nations." The unanswered question is whether that new direction will involve honourable dealing with First Nations, or a return to the old days of the Province taking a hard line position that First Nations can only implement or protect their rights through the courts.

The BC Treaty Commission was launched in 1993 after the Province had spent more than 120 years effectively ignoring the rights of First Nations to their traditional lands.

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Upcoming Events:

June 2-3: **Drew Mildon will be speaking at the Canadian Institute's *Environmental Law and Regulation in Alberta* at the Telus Convention Centre.**

W&Co receives top ranking as Aboriginal law boutique

Woodward and Company LLP is delighted to be ranked among the top boutique firms practicing Aboriginal law in Canada. The ranking is carried out by the independent legal directory, Chambers Global 2015.

Drew Mildon, Managing Partner at W&Co, noted: "There is a certain satisfaction to be ranked in this way. The Chambers ranking is based in part on client interviews. Our team constantly strives to achieve excellence in client service, and this recognition affirms our efforts in that regard."

Chambers and Partners select firms for rankings based on a 3-step process; submissions put forward by law firms, client interviews during the course of research, and their own database resources.

Senior partner **Eamon Murphy** reflected on the top ranking, "We are thrilled to be ranked among the top Aboriginal law boutique firms. I am very proud to be part of this firm with its extensive history of dedication to justice for First Nation communities. It is a real pleasure to work with such an exceptional team of professionals." ❖

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The process was launched just two months after BC wrote to the judge in the Tla-o-qui-aht and Ahousaht First Nations court case for their claim to Meares Island, and promised that the province would address the "tenure question" by creating a treaty negotiating table. 22 years later, the process managed to complete 4 treaties. There are still 53 negotiating tables and their future is unclear, as is the future of the millions of dollars in loans many First Nations have taken on in reliance that the treaty process would result in an acceptable final agreement.

Over the last few years, BC has been pulling resources away from the treaty table and moving them to interim and single deal negotiations. First Nations can likely expect this trend to continue with more Strategic Engagement Agreements, Impact Benefits Agreements, and sector-based royalties as approaches that BC will endorse going forward. The Province will likely be offering financial benefits in return for consent on specific projects. First Nation governments and communities will want to carefully consider their options, and the ways these "one-off" agreements will impact on their ability to make future land-use decisions and protect important resources for the future of their communities. The *Tsilhqot'in* case has made it clear that territorial claims for Aboriginal title in court are a real alternative to the expensive and mostly unsuccessful treaty tables; given the Province's decision, it is more important than ever to develop and implement long-term strategies to protect First Nation lands and economies in the years ahead. ❖

Haida Nation obtains injunction against Department of Fisheries & Oceans: *The Council of the Haida Nation v. The Minister of Fisheries and Oceans* 2015 FC 290

The Council of the Haida Nation sought an interlocutory injunction against the Minister of Fisheries and Oceans to prevent the reopening of the herring fishery in the area surrounding Haida Gwaii. The Council of the Haida Nation opposed reopening the fishery because of ongoing and unexplained instability and decline in the herring fishery.

Each year, the Department of Fisheries and Oceans (DFO) conducts stock assessments to determine which fisheries are healthy enough to be opened to commercial fishing. In 2014, DFO used two different stock assessment models to assess the viability of a commercial herring fishery in Haida Gwaii. The "Historical Management Procedure" used the traditional method of assessing stock levels and found that it was likely that Haida Gwaii stock would be below the allowable cut-off level and a commercial fishery would not be allowed. However, in applying the new "Base Case" model to assess stock levels, DFO found that there was a high probability that the Haida Gwaii stock would be above the cut-off level and a commercial fishery could be opened. Both models indicated that the Haida Gwaii stock had declined from 2013 to 2014 and predicted that it would continue to decline in 2015.

Despite the predicted decline and the inconsistencies between the two models, DFO chose to recommend that the Minister of Fisheries and Oceans open the commercial herring fishery for 2015 in all five major areas of the Pacific Region, including Haida Gwaii. Of the two options considered by DFO for Haida Gwaii, keeping the fishery closed was not one of them.

As a result of DFO's authorization of the commercial fishery for 2015, the United Fishermen and Allied Workers Union (UFAWU), in support of the Haida Nation, sent letters to all commercial herring fisherman asking them to not select Haida Gwaii for fishing in 2015. The UFAWU chose to send these letters for a number of reasons, including: their own independent scientific review of the fishery, the lack of inclusive decision making in the DFO process, their own fishermen's assessment of the stocks, respect for local First Nations insights, and a willingness to build a collaborative understanding of the state of the herring fishery in the shared ecosystem.

In analyzing all of the pertinent facts, the court found that regardless of which model DFO employed, there was a very high degree of uncertainty about the stability of the herring stock in the Haida Gwaii area for 2015. With this in mind, and taking into account the existence of the Gwaii Haanas Agreement and the Haida Gwaii marine conservation area, the court found that there was a heightened duty for DFO and the Minister of Fisheries and Oceans to consult and accommodate the Haida Nation when making decisions about the herring fishery around Haida Gwaii. The court went on to conclude that the failure to meaningfully consult with the Haida Nation and the decision to open the herring fishery despite a tenuous scientific basis for this decision ultimately meant that the decision of the Minister of Fisheries and Oceans could not be upheld. For this reason, the court issued an injunction preventing the Minister of Fisheries and Oceans from opening a commercial herring fishery around Haida Gwaii for 2015. ❖