Woodward & Company LLP Newsletter **August 2013**

Ahousaht Indian Band v BC: Nuu-chah-nulth Fishing Rights Affirmed

On July 2nd 2013, the BC Court of Appeal released its decision in the reconsideration of *Ahousaht Indian Band v Canada (Attorney General)*, 2013 BCCA 300, concerning a claim to Aboriginal commercial fishing rights by five Nuu-chah-nulth Nations (Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht).

After they successfully argued their claim at trial and on appeal, the Attorney General sought leave to appeal to the Supreme Court of Canada, who directed that the case go back to BCCA to be reconsidered in light of the Supreme Court of Canada's recent decision in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56. In *Lax Kw'alaams*, the Band argued that before a court can characterize a claimed right, it must first inquire and make findings about the pre-contact practices and way of life of the claimant group. The Supreme Court rejected this, stating that a "commission of inquiry" model is not suitable to civil litigation. Rather, the nature of the claim must be characterized based on the content of the pleadings, giving opposing parties fair notice of the case to meet.

In *Ahousaht*, the BCCA considered the Supreme Court's ruling in *Lax Kw'alaams* as directed, but they did not find that it had any impact on their disposition of the appeal. Canada argued that the trial judge erroneously embarked on a "commission of inquiry," when she stated that she would first "review the

…continued on page 2

PUBLIC HEARINGS BEGIN FOR NEW PROSPERITY MINE

For twenty years, Taseko Mines Limited (TML) has tried to get approval for a low-grade, open-pit copper and gold mine at Teztan Biny (Fish Lake.) The Prosperity Mine proposal is one of the most contested mining projects in Canada. After a rejection of the project in 2010 by the Federal government, based on a scathing independent panel report describing unprecedented impacts to the environment, and Tsilhqot'in current use, rights and culture, Taseko Mines Ltd. quickly announced it had 're-jigged' the proposal and would re-submit. This new proposal does not have the support of the Tsilhqot'in Nation.

For the first time, a mine proposal once rejected is being reviewed again by a new federal panel, over the objections of local First Nations. This is unprecedented in the history of the federal environmental assessment process.

This is a key test of the new federal environmental assessment process. It is also a test of the court system as Teztan Biny lies within one of the only court-proven Aboriginal rights areas in the country. The *Tsilhqot'in Nation v. B.C.* (aka *William Case*) resulted in proven Tsilhqot'in rights to hunt, trap and trade that have not been appealed by Canada or B.C.

New hearings for the revised project begin on July 22nd in Williams Lake, B.C. and run to August 23rd. ❖

Aerial view of Teztan Biny

UPCOMING EVENTS:

Nov. 4 – 8, 2013 Conservation of First Nations' Territories by and for First Nations Workshop Tla-o-qui-aht Territory, BC (deadline for submissions **August 31, 2013**) Details on our website: www.woodwardandcompany.com/events

Ahousaht…continued from page 1

evidence and make findings of fact with respect to the existence and nature of ancestral Nuu-chah-nulth fishing and trading practices". [13] However, the Court of Appeal held that simply looking at that statement did not sufficiently capture the approach of the trial judge, and that when one looked at the entirety of the her reasons, it was clear that she was "fully cognizant of what was at issue in this litigation". [18]

The trial judge made use of unusual procedure in considering this claim. Generally, in Aboriginal rights cases, the claimant group must prove that they have the right they claim, then show that the Crown has *prima facie* infringed that right in some way. The Crown must then show that this infringement was justified. In this case, the trial judge ruled on the existence of the right and found that Canadian fisheries legislation constituted an infringement, but left the issue of justification to future negotiations or proceedings. The Court of Appeal approved of this procedure, stating that it is practical, in cases such as this one where the Crown has not previously recognized an Aboriginal right, to make a declaration concerning the right and then allow the parties to negotiate accommodation. If they are unable to come to an agreement, they can then return to court to seek a decision on the justification issue.

This approach allows for the legal recognition of a right, which may help put Aboriginal groups in a stronger position when negotiating with the Crown. As the Nuu-Chah-Nulth Tribal Council said in a statement issued on the day this appeal was handed down, the decision "provides further impetus to set negotiations and reconciliation on track." ❖ (http://www.hashilthsa.com/news/2013-07-02/nuu-chah-nulth-nations-applaud-bc-appeal-court-decision).

Sechelt Indian Band v BC: Fee Simple First Nations Lands Are Not Subject to Provincial Legislation

On June 5th 2013, the BC Court of Appeal handed down its decision in *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262. The case dealt with the application of provincial legislation to reserve lands that were no longer held by the federal government, but had been transferred to the Sechelt Band in fee simple via the *Sechelt Indian Band Self-Government Act*, SC 1986 c 27. The Sechelt Band operates a manufactured home park and leased lots to tenants who were not members of the Band. In 2007, Sechelt sought to increase the yearly rent from around $6,500 to around $24,000. The tenants applied to the Residential Tenancy Board, which has jurisdiction over mobile home parks pursuant to the *Manufactured Home Park Tenancy Act*, SBC 2002, c 77, to resolve their dispute. The dispute resolution officer on the file issued a decision in February 2011 that the proposed rent increases were ineffective. The Band applied for judicial review of that decision, arguing that the *MHPTA*, as provincial legislation, could not apply to Band lands which are under exclusive federal jurisdiction pursuant to s 91(24) of the *Constitution Act, 1867*. At the BC Supreme Court, Justice Silverman found that the dispute between the tenants and the Band should properly be characterized as one concerning money rather than land. Sechelt lands were only incidentally affected by the RTB decision regulating rent, so the statute could apply.

The Band appealed Justice Silverman's decision, arguing that the *MHPTA* is directly concerned with rights and obligations relating to land and should be read down to exclude Sechelt lands. It submitted that the RTB's intervention "substantially impairs the ability of the Band to control and manage the Sechelt Lands" [para 24]. The tenants submitted that because the lands now have fee simple status, they are no longer reserve lands under exclusive federal jurisdiction, and the *MHPTA* ought to apply.

While the Sechelt's lands are no longer covered by the provisions of the *Indian Act*, the *Sechelt Indian Band Self-Government Act* s 31 states that, "for greater certainty, Sechelt lands are lands reserved for the Indians …" The Court agreed that this provision showed clear parliamentary intent to "preserve the character of the Sechelt Lands as reserve lands subject to federal jurisdiction" [31] and that any analysis should reflect that intent.

The respondents further submitted that the *MHPTA*, if not applicable by its own terms, should be "found to be made applicable under s 88 of the *Indian Act* or s 38 of the *Self-Government Act*", which both allow for provincial laws "of general application" to apply with respect to Aboriginal people as long as they are not incompatible with federal legislation. Previous decisions have confirmed that s 88 does not constitutionally invigorate provincial laws in their application to Indian lands. Having rejected the lower court's characterization of this dispute as one regarding money rather than land, the Court of Appeal held that "the impugned decision does seek to regulate terms of possession and management of the Sechelt lands" [46] and was therefore invalid.

In coming to a decision, the Court of Appeal emphasized the difficulty bands have historically had generating economic benefit from their reserve lands, due to their unique legal status. Justice Hall wrote that "the endowment of the lands with fee simple status was to facilitate registration of the lands and to enhance Band capacity to make economic use of the lands. […] This should enhance development opportunities for such lands." [31] ❖

Both briefs written by Camille Israël.

Welcome back, Camille!

Former summer student **Camille Israël** returned to W&Co this July, this time to complete her articles. Camille will be with the firm through to spring 2014. We're delighted to welcome her back. ❖