



The *Tsilhqot'in* Nation Appeal (SCC) and Your Future



By David Robbins

On November 7, 2013 I had the honour to appear as co-counsel on behalf of the *Tsilhqot'in* Nation in the Supreme Court of Canada. The *Tsilhqot'in* Nation appeal involves the only case of Aboriginal title proven at trial in Canada. The Court's

forthcoming decision stands to be of major significance to the *Tsilhqot'in* Nation and other Aboriginal peoples across British Columbia and Canada.

The main issue before the Supreme Court of Canada is this: whether the appellant Chief Roger William is owed a judicial declaration of *Tsilhqot'in* Nation Aboriginal title to claimed lands for which Aboriginal title was proven at trial. How the Supreme Court of Canada decides this issue will likely establish ground-breaking precedent for how broad or narrow Aboriginal title is, as protected under s. 35(1) of *Constitution Act, 1982*.

...continued on page 2

Mohawks (Bay of Quinte) v Maracle 2013 ONSC 4733



By Camille Israel

The band sought to recover a debt from the defendant by transferring his Certificate of Possession ("CP") to the band.

The issue involves an interpretation of sections of the *Indian Act* ("Act") which prohibit reserve lands from being subject to seizure (s. 29) but allow seizure of real and personal property on reserve by "an Indian or a band" (s. 89(1)).

Both the Band and the Indian Land Registrar submitted that s. 89(1) should be interpreted as an exception to s. 29, so that reserve lands can be subject to seizure only at the instance of an Indian or a Band under the *Act*. The defendant argued that courts have no authority to make orders concerning reserve lands, and that the words "subject to this Act" in s. 89(1) make it subordinate to s.29, and therefore reserve lands are always immune from seizure without exception.

The judge reviewed the legislative history and purpose of these sections, and found a clear distinction between the terms "reserve lands" in s.29 and "real and personal property of an Indian" in s. 89(1). While a CP entitles its holder to possession of reserve lands, the holder only owns the CP, not the underlying reserve lands.

...continued on page 2

UPCOMING EVENTS:

Holiday Hours: During the holidays, our offices will be closed December 25, 26, 27 and January 1.

Tsilhqot'in Nation Appeal...continued from page 1

The lower courts disagreed on this issue. The British Columbia Court of Appeal took a much narrower approach to Aboriginal title than the trial judge. Based on the November 7th hearing there is reason for optimism, from an Aboriginal perspective, that the Supreme Court of Canada will decide this issue in favour of the Tsilhqot'in Nation and the trial judge's broader Aboriginal title.

The Supreme Court of Canada's judgment in *Tsilhqot'in Nation* can be expected in 2014. When exactly may depend on how many other issues the Court chooses to deal with beyond the scope of Aboriginal title itself. If the Court chooses to leave other Constitutional issues for a future case, then one can reasonably expect a decision as early as the spring of 2014. However, if the Court chooses to deal with other Constitutional issues as well – e.g. whether Tsilhqot'in Nation Aboriginal title is immune under the *Constitution Act, 1867* from the British Columbia *Forest Act* and whether the *Forest Act* is an unjustified infringement of Tsilhqot'in Nation Aboriginal title – then one can reasonably expect a decision in the autumn of 2014.

Regardless, next year's decision in *Tsilhqot'in Nation* stands to affect the likelihood of success in future court cases of Aboriginal title, the depth of current consultation and accommodation processes based on strength of claim to Aboriginal title, and the mandates for existing treaty-related negotiation processes. Now is the time for Aboriginal communities to ensure they are strategically prepared for such change in 2014. Having proved Tsilhqot'in Nation Aboriginal title at trial, we know what this takes.

We'd be pleased to help you. To learn more, please just give me a call or drop me a note. Long overdue, the era of meaningful reconciliation is on the horizon. Be ready. ❖

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Mohawks vs Maracle....continued from page 1

Ordering seizure of the CP means seizing “real and personal property of an Indian”, not “reserve lands” per se. Such an order would therefore not transgress the s. 29 prohibition on seizing reserve lands.

Though the Minister did not oppose the order in this case, the judge cautioned that the final approval of any CP transfer is a matter within the exclusive discretion of the Minister, and the court could not order the Minister to approve it. ❖

Welcome Kathleen!



Please join us in welcoming legal assistant Kathleen McKerracher to the firm. Kathleen brings over 20 years' experience as a legal assistant, primarily in the areas of defence litigation, personal injury, and family law.

In addition, she worked for two years in the Aboriginal Dept. of another Victoria law firm. Kathleen provides support to David Robbins, Alana DeGrave, Berry Hykin, Matt Boulton and Murray Browne. ❖



*From all of us at
Woodward &
Company
LLP...*

Thank you for another wonderful year of being able to work with you. We wish everyone a joyful holiday season! And please accept our best wishes for a very happy New Year.