WOODWARD & COMPANY

Woodward & Company LLP Newsletter **December 2014**

SCC Grants Leave to Appeal in *Harry Daniels et al. v. Her Majesty the Queen*: November 20, 2014

By Alexandra Ghihor, Student-at-Law

The applicants instituted proceedings in 1999 to resolve a long-standing issue about whether Canada or the provinces has jurisdiction over Métis and non-status Indian peoples. Specifically, they sought determination that the federal government has constitutional jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*.

The trial court declared that those persons who are "Métis" and "non-status Indians" are "Indians" within the meaning of the expression "Indians and Lands Reserved for Indians" contained in s. 91(24). The Crown appealed, asserting errors of law on the part of the trial judge, and asked that the declaration be set aside. The respondents cross-appealed, asking that the declaration remain and two additional declarations be granted:

(1) The Crown owes a fiduciary duty to Métis and non-status Indians;

(2) The Métis and non-status Indian people of Canada have the right to be consulted and negotiated with, in good faith.

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Upcoming Events:

Dec. 22 & 23, 29 & 30: Open 8am – 4pm.

Dec. 24 & 31: Open 8am – 1pm.

Dec. 25 & 26, Jan. 1 & 2: Office closed for the holiday.

Woodward & Company welcomes Brock Roe to the team

We are very pleased to announce that Brock Roe has joined our firm as an associate.

Brock is Nehiyaw and a member of the Bigstone Cree Nation located in Treaty 8 territory. He was born and raised in Fort St. John, British Columbia, and attended the University of Alberta in Edmonton. While at the University of Alberta he completed his Bachelor of Arts in Native Studies with Honours, and his Bachelor of Laws, both in 2009.

During his studies, he served as the President of the Aboriginal Law Students' Association, participated in the Kawaskimhon Aboriginal Rights Moot in 2008, and worked as a research assistant to Professors Catherine Bell and Val Napoleon. Brock has also been a member of the Indigenous Bar Association since 2006, and is serving his second term on the board as Vice President. ❖

Harry Daniels et al…*continued from page 1*

The Crown's appeal was allowed, in part, and the declaration was varied as to exclude "non-status Indians" from its scope. The respondents' cross-appeal was not allowed.

The Supreme Court of Canada is now tasked with determining whether the Court of Appeal erred in varying the terms of the declaration and in declining to grant the additional declarations sought by applicants. The Supreme Court's decision will clarify the law regarding the Crown's duty towards Métis and non-status Indians and, regardless of the outcome, will have significant implications on Canada's relationship with Métis and non-status Indians. ❖

The importance of the *Tsilhqot'in* decision for First Nations across Canada

In a conference hosted by the University of Manitoba Centre for Human Rights Research and the Treaty Relations Commission of Manitoba on November 21 and 22, 2014, Woodward and Co. lawyer **Heather Mahony** discussed the implications of the *Tsilhqot'in v. BC* decision for treaty- and non-treaty First Nations across Canada. Heather reviewed how the legal team at trial marshalled the evidence – including the oral history of numerous Tsilhqot'in elders, expert witnesses and thousands of historical documents - to establish that the Tsilhqot'in Nation holds Aboriginal title to approximately 2000 km^2 within their traditional territory.

While the Supreme Court of Canada's finding of Tsilhqot'in Aboriginal title has clear implications for the title claims which have been filed by Indigenous peoples across the country, Heather argued that the trial decision in *Tsilhqot'in* concerning aboriginal hunting and trapping rights may also have implications for the enforcement of historic treaties. In *Tsilhqot'in,* the failure of the Crown to do any analysis of the needs of the Tsilhqot'in people, or to develop a database on numbers of wildlife, resulted in a finding of unjustifiable infringement of Tsilhqot'in hunting and trapping rights. In the case of treaty harvesting rights, if a "taking up" by the Crown leaves the First Nation beneficiaries with no meaningful ability to exercise the right, then a potential action for infringement will arise. The trial judge's reasoning in *Tsilhqot'in* may point to a Crown obligation to develop "sufficient credible information" to determine whether or not the First Nation treaty beneficiaries will retain a meaningful ability to exercise their harvesting rights. Further, failure to manage wildlife habitat to "ensure a continuation of [the] rights" may leave the Crown vulnerable to a challenge of unjustified infringement when "taking up" land pursuant to historic treaties. ❖

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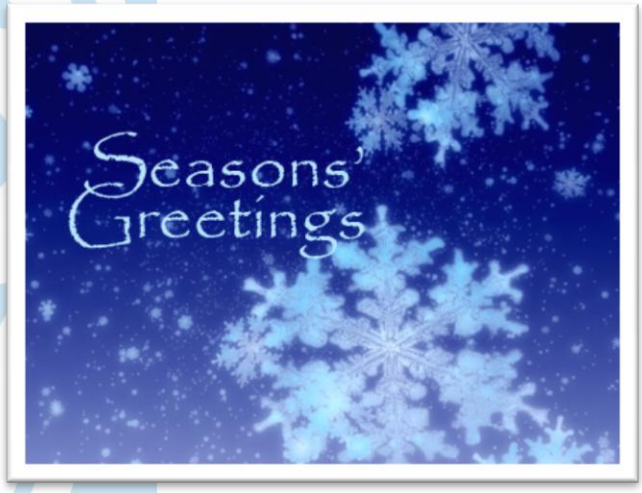
Jack Woodward Retires

After a lifetime of achievement in Aboriginal law, Jack Woodward, Q.C. has retired his partnership status at Woodward & Company LLP. Jack is currently concentrating on writing and teaching.



All of us at Woodward & Company LLP wish you the very best of this holiday season and for the New Year!