WOODWARD & COMPANY

Woodward & Company LLP Newsletter **FEBRUARY 2013**

DANIELS v. CANADA

In a decision released last month, a federal court judge held that Métis and non-status Indians are considered Indians under section 91(24) of the *Constitution Act 1867*. The ruling clarifies a long-standing uncertainty about whether the federal or provincial governments have jurisdiction to make laws regarding Métis and non-status Indians. The case took more than twelve years to get to court, largely because of the federal government's attempts to block the action from going forward.

In a 175-page decision that swept through more than 400 years of history, Judge Phelan stated: "The recognition of Métis and non-status Indians as Indians under section 91(24) should accord a further level of respect and reconciliation by removing the constitutional uncertainty surrounding these groups."

The plaintiffs were successful in seeking a declaration that Métis and non-status Indians are "Indians" within the meaning of the expression of "Indians and lands reserved for Indians" in s. 91(24) of the *Constitution Act 1867*. However, Judge Phelan dismissed two other declarations sought by the plaintiffs--that they are owed a fiduciary duty and that they have the right to be consulted as Aboriginal peoples—on the basis that these were ancillary to the primary declaration.

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SCC GRANTS TSILHQOT'IN LEAVE TO APPEAL TITLE CASE

On Thursday, January 24, Canada's top court issued a decision granting the Tsilhqot'in First Nation permission to appeal a ruling that rejected its claim to aboriginal title over 440,000 hectares of land.

For generations, since contact, First Nations have fought for recognition of their title to their core traditional lands. Over time, the courts have steadily rejected the Crown's denials of Aboriginal title based on the doctrine of discovery, or terra nullius, or extinguishment, and confirmed that Aboriginal title continues to exist – in theory. To this day, 15 years after *Delgamuukw*, First Nations still await the first recognition of Aboriginal title on the ground.

The *William* case squarely raises one of the most central issues of indigenous rights that has persisted for centuries: what land rights do First Nations hold today over the lands that they held in their control before the Crown asserted sovereignty? The resolution of this issue will speak to the place of First Nations in the fabric of Canadian society, the extent to which they will control their own future, and the shape of Crown-First Nations relations for decades to come.

The trial court in the *William* case, for the first time in modern history, identified extensive Aboriginal title lands in the heart of Tsilhqot'in country, including the Nemiah Valley. (***continued on page 2)***

Leaders of the Tsilhqot'in Nation in Ottawa

UPCOMING EVENTS:

March 7: **Dominique Nouvet** presents at PBLI in the Aboriginal Rights to Fish and Environmental Law session, on "Changes in Legislation and Recent Case Law" along with Sean Nixon and Janice H. Walton.

Phelan noted that the plaintiff's task had been made more difficult by Canada's "refusal to admit numerous documents which came from its own archives and departments."

The court found that although the federal government had already paid a portion of the plaintiff's costs, the plaintiffs could apply for a further cost award due to the public importance of the litigation and the fact that counsel's fees had been paid at a suppressed level. This may not be the final word—Canada may appeal the decision. ❖

ENBRIDGE HEARINGS COME TO VICTORIA

Two hundred and fifty-three people spoke out against the proposed Enbridge Northern Gateway Pipeline at the Joint Review Panel hearings in Victoria last month. According to a local environmental organization, not a single person spoke in favour of the project.

W&Co's **Drew Mildon** appeared on the first day and pointed out to the panel that the hearings were premature and were therefore a waste of taxpayer dollars and time, noting: "The constitutional rights of the Aboriginal peoples who live along the pipeline route and the First Nations in Alberta whose Treaty rights are being affected by the oil projects that will be sending bitumen through this pipeline, those have not been dealt with." He suggested that any recommendation of the panel would be meaningless if consent had not been obtained from impacted First Nations and that level of impacts had been drastically under-assessed. Drew also raised the problem of global warming and requested that the panel obtain complete details of the environmental impacts of the extraction, withdrawal, processing and burning of the bitumen that would pass through the pipeline.

Opponents to the project voiced concerns from a wide array of professional and personal perspectives and included engineers, economists, scientists, religious leaders and teachers. Many cited concerns about the long-term effects of the pipeline on future generations and the impacts the pipeline and tankers will have on the coastal environment. According to the Dogwood Initiative's count, 1159 people spoke against the project at community hearings for oral statements in BC, while two people spoke in favour. ❖

The BC Court of Appeal overturned the trial judge on this issue, holding that Aboriginal title can be established only to small, intensively used sites, and not to the core hunting, trapping, gathering areas that a First Nation controlled and used to sustain their communities and culture, year after year, season after season. In the eyes of the BC Court of Appeal, indigenous ways of using and occupying the land aren't "intensive" enough to prove title to land -- a decision denounced by First Nations across BC and Canada as the same discriminatory and insulting reasoning that underscored the now discredited "doctrine of discovery" and terra nullius.

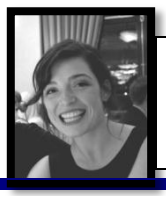
In the words of Chief Joe Alphonse, Tsilhqot'in Tribal Chair, "We're grateful to have the opportunity to present to the Supreme Court of Canada a different path to reconciliation. Our voices will be heard at last." ❖

Case Brief: *Ross River Dena Council v Yukon*, 2012 YKCA 14

In this case, the Yukon Territory Court of Appeal held that the Crown has a duty to notify and, where appropriate, consult with and accommodate the Ross River First Nation before allowing any mining exploration activity to occur that would prejudicially affect their asserted Aboriginal rights. The Ross River First Nation took the Crown to court for failing to consult with them before recording quartz mining claims. The trial court held the Crown had a duty to consult but that the duty was met by simply providing notice of newly recorded claims. Ross River First Nation appealed.

On appeal, the Crown argued that because it has no discretion to refuse to record a claim once certain procedures are followed, there is no actual "decision" that could trigger the duty to consult. The Court of Appeal rejected this argument, and pointed out that these types of statutes are defective. They noted that the lack of discretion in the *Quartz Mining Act* regime was the very source of the problem.

The Appellate Court found that although the current division of exploration activities into four classes goes some way to ensuring Crown oversight of such activities, it does not specifically address concerns about the impact of Class 1 exploration activities on Aboriginal rights. It held that at least where Class 1 exploration activities will have serious or long-lasting adverse effects on claimed Aboriginal rights, the affected First Nation must be provided with notice of the proposed activities and, where appropriate, an opportunity to consult prior to the activity taking place. The Court suspended its declarations for one year to give the Crown the opportunity to make the statutory or regulatory changes necessary to allow for appropriate consultation. ❖



WELCOME OUR NEW COOP STUDENT

Alixandra Stoicheff ~ Alixandra is part-way through her second year at University of Victoria law. Alixandra will work with W&Co until April 2013.