WOODWARD & COMPANY

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A New Year, A New Era

By Drew Mildon

2015 marks 30 years since Woodward & Company, working for the Tla-o-qui-aht and Ahousaht First Nations, won an injunction to stop the logging of Meares Island in Clayoquot Sound based on the Aboriginal rights of the two First Nations. In the Court of Appeal decision, which upheld the injunction that remains in place today, Justice Seaton noted that "The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged." In response to the Meares injunction, then-BC Minister of Justice, Andrew Petter, wrote to the Court and requested that the matter be put in abeyance while British Columbia commenced a treaty process to address outstanding Aboriginal legal claims. While the original intention to seek a non-litigation resolution appeared honourable, the treaty process floundered in part due to the failure of British Columbia to put sufficient land and land management rights on the table.

It has been three decades since our law firm began this important struggle for justice – to ensure that First Nations resume their rightful place as decision-

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Upcoming Events:

January 27-28: 15th Annual Aboriginal Land Resource Management Forum, Four Season Hotel, Vancouver, BC. **David Robbins** will present at 9:55 on the 27th: The Tsilhqot'in Decision – Implementation Measures.

Federal Government failed to consult on Omnibus Bills

Chief Steve Courtoreille et al v The Governor General in Council et al

In 2012, Bill C-38 and Bill C-45 received Royal Assent and became law in Canada (the "Omnibus Bills"). The Omnibus Bills made amendments to a number of environmental laws including the *Fisheries Act*, the *Species at Risk Act*, the *Navigable Waters Protection Act* (now the *Navigation Protection Act*) and the *Canadian Environmental Assessment Act.* One of the main results of these amendments was that the overall number of bodies of water to be monitored by federal officials was reduced. Legislative protection for fish habitat was also reduced.

Despite the fact that some of the affected bodies of water are located within the Mikisew's Treaty No. 8 territory, the Mikisew were not consulted before the Omnibus Bills were passed. As a result, the Mikisew sought declarations from the Federal Court that the Crown had a duty to consult with the Mikisew regarding the development and introduction of the Omnibus Bills. The Mikisew also sought a declaration that the Crown had a duty to consult before passing bills that have the potential to affect Mikisew Treaty rights through changes to environmental laws.

Canada argued that the matter was political and legislative and therefore outside the jurisdiction of the courts and that the separation of powers in the Canadian state requires that the courts do not interfere with the legislative process. Nevertheless, when examining the issue from the perspective of s.35 rights, the court found that a duty to consult arose in the circumstances of this case. ***...continued on page 2***

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makers with respect to their traditional lands, and with respect to the ecological health and integrity of those lands. While there have been many frustrations, the tremendous successes of 2014 have marked a turning point and we believe there is great reason for optimism in 2015.

The June 26, 2014 Tsilhqot'in Nation decision of the Supreme Court of Canada included the very first Aboriginal title declaration in Canadian history. The journey we began with the Tsilhqot'in in the late-1980s has reached a stunningly successful conclusion. The Court found that the Tsilhqot'in hold Aboriginal title to almost 2,000 square kilometers of land in the BC interior, confirming what the First Nations had always known, those are their lands and they were never ceded, never treated, and always central to their culture. A clear message has been sent to British Columbia and Canada to get serious about Aboriginal title and to stop acting like it doesn't exist. The Supreme Court of Canada said that the one sure way that Aboriginal title could be infringed is with the consent of the affected Aboriginal Group. Indigenous communities from around the world are looking to the decision and asking how they too can achieve the consent requirement promised by the UN Declaration on the Rights of Indigenous Peoples.

The Tsilhqot'in action also has important implications for other Aboriginal and Treaty rights. The BC Court of Appeal confirmed the finding that the Tsilhqot'in have an Aboriginal right to hunt and trap to earn a moderate livelihood. The result is that the constitutionally-protected right to an environment that provides a surplus and diversity of species to be hunted, trapped, and fished, is a right of conservation that can only be infringed if justified. The Court found that the Tsilhqot'in rights had been infringed and that BC's forestry regime did not and could not be justified. We believe this reasoning is iron-clad and applies to the constitutionally protected Aboriginal and Treaty rights across Canada.

In the year ahead, First Nations will be dealing with a number of resource projects that seriously threaten the ecological integrity of their traditional homelands. In British Columbia, proponents will continue to push the Enbridge Northern Gateway and the Kinder Morgan Transmountain Pipelines. The BC Government recently announced their intention to proceed with the Site "C" dam, a project that will impact dozens of downstream communities and further impact Nations in Alberta and BC that saw their lands reduced or decimated by the Bennett Dam. In Ontario, Quebec and New Brunswick, the plan to convert an existing pipeline to send Alberta tar-sands bitumen east threatens the health and safety of innumerable lakes, rivers, and streams. In the prairies, the provincial governments continue to pour their hopes into a crashing oil industry and face off against many courageous Nations forced to defend the health of their communities at great cost.

In each of these cases, First Nations should engage early and address the proposed projects strategically, and be fully involved in the final decision-making. The colonization of resources on Indigenous lands is coming to end; the era of recognition and reconciliation has begun. 2015 promises to be an exciting year and we look forward to working with our clients to achieve their goals and to take back their lands. ❖

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Federal Government failed to consult - *continued*

That duty was triggered by the introduction of the Omnibus Bills in Parliament.

When the Court reviewed the facts of the case, it found that there was sufficient potential risk to the fishing and trapping rights of the Mikisew imposed by the amendments to the *Fisheries Act* to trigger the duty to consult with the Mikisew. The Court declared that the Mikisew should have been given notice of the changes to the *Navigation Protection Act* and the *Fisheries Act* and a reasonable opportunity to make submissions on the proposed amendments. However, the court refused to grant any relief that would force Canada to revisit the Omnibus Bills. ❖