WOODWARD & COMPANY

Woodward & Company LLP Newsletter **June 2014**

Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2014 BCSC 849

By Laura Bonenfant

On May 14, 2014 the Supreme Court of British Columbia found that the Crown has a duty to consult First Nations when disposing of unharvested timber (undercut) that has been returned by a Tree Farm Licence holder pursuant to section 75.8(1) of the *Forest Act.*

In this case, Western Forest Products had only harvested 65.6% of their allowable annual cut during the 2007-2011 cut control period, and had subsequently returned to the Crown 1,381,036 cubic metres of undercut volume that had accumulated in Tree Farm Licence 19 (the "TFL 19 Undercut"). BC subsequently decided to retain 25% of the TFL 19 Undercut for potential disposition to third parties, while returning the remaining 75% to the TFL 19 inventory, without consulting the First Nations with Aboriginal rights and title interests in the area.

The effect of the Province's decision was that it foreclosed the opportunity for these First Nations to be allocated anything more than 25% of the

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Upcoming Events:

Happy Solstice!

Profile: Melissa Daniels

Please join us in welcoming our newest lawyer to the firm. Melissa grew up in Fort Smith, Northwest Territories and is a member of the Athabasca Chipewyan First Nation.

She holds a Bachelor of Science in Nursing from the University of Alberta, a Juris Doctorate from the University of Saskatchewan and is currently a graduate student at Harvard University. Her graduate research is primarily focused on resolving resource conflict through the application of traditional ecological knowledge and indigenous legal principles. Melissa is also interested in the potential correlation between resource exploitation and missing and murdered Indigenous women.

Prior to becoming a lawyer, Melissa worked in a variety of settings as a Registered Nurse including public health, academia and pediatrics. Melissa left her nursing practice to study law with the objective of protecting the health and well-being of communities downstream of the Athabasca oil sands developments.

Melissa is excited to expand her practice in the areas of environmental and Aboriginal law. She will be assisting Nations in their quest to protect their Treaty and Aboriginal rights and title during consultation, negotiation, and regulatory processes. ❖

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TFL 19 Undercut.

The Court quashed this decision due to the Crown's failure to consult, and as such, the disposition of the TFL 19 Undercut is presently before the Province for redetermination.

In assessing whether the duty to consult was triggered, the Court refused to accept the Crown's argument that no duty to consult was owed because the right or interest affected was economic in nature as opposed to being an Aboriginal right.

Instead, the Court confirmed that the duty to consult may be triggered by contemplated Crown conduct that involves "strategic, higher level decisions" and that the potential adverse impacts triggering the duty may be economic as well as physical.

This decision will require that the Crown consult all affected First Nations before disposing of undercut that has been returned to the Crown pursuant to the *Forest Act*. ❖

Woodward and Company Updates

The firm welcomes back Alan Hanna, a former coop student from the University of Victoria. Alan will be completing his articles with us over the next 12 months.

DEADLINE: Please note that July of this year is the first deadline under the *First Nations Financial Transparency Act.*

By **July 29, 2014**, First Nations governments are required to provide their audited consolidated financial statements and schedule of remuneration and expenses to Members who have requested them; and publish both documents on the First Nation's website.

Keewatin Appeal

Woodward & Company legal counsel David M. Robbins, Heather Mahony, and Dominique Nouvet at the Supreme Court of Canada.

On May 15, 2014 the Supreme Court of Canada heard the appeal from *Keewatin v. Ontario (Natural Resources),* 2013 ONCA 158. The appeal raises the question of how to interpret Treaty No. 3 insofar as it authorizes the taking up of Ojibway lands in parts of Ontario. Of significance across Canada, the appeal may also determine whether a Province has the authority to impair treaty (and aboriginal) rights generally by virtue of provincial powers found in *Constitution Act, 1867.*

This second question – the extent of provincial authority as of Confederation - is of particular importance in British Columbia. In B.C. there is an absence of treaty rights throughout much of the Province. However, aboriginal rights, including aboriginal title to land, continue. A Court decision interpreting *Constitution Act, 1867* as providing the Province of British Columbia with authority to impair aboriginal rights, including aboriginal title, would be of major concern to aboriginal peoples. As a result of this concern, legal counsel from Woodward & Company sought and received the Court's permission to intervene on behalf of the Cowichan Tribes.

The Court reserved its decision after hearing oral argument from First Nations, First Nation organizations, Canada and most Provinces, as well as industry. Judgment on the appeal can be expected sometime in 2014, perhaps even as a companion decision to the forthcoming judgment in the appeal in *Tsilhqot'in Nation v. British Columbia,* heard in November 2013. We will keep you posted. ❖