



### **Bands have authority to seize members' CPs in order to satisfy judgments**

On February 26, 2015, the Supreme Court of Canada refused leave to appeal in a case which had affirmed a First Nation's authority to seize its members' Certificates of Possession (CP). *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565 involves a 20-year dispute between the Mohawks of the Bay of Quinte First Nation ("MBQ") and a number of individual members of the band. The lands at issue belonged to the MBQ and were located on the Tyendinaga Indian Reserve. In 1992, the Brants made an offer to purchase possession of the land from MBQ, but the purchase was never concluded. Nevertheless, the Brants borrowed hundreds of thousands of dollars against the land and constructed a building. From this building they conducted business until 1996, when the building was vacated. The borrowed money was not repaid.

In 2000, the Brants tried to pay the MBQ the purchase price that had been offered in 1992. The Tyendinaga Mohawk Council immediately refused this offer, but the Brants re-entered the lands and

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### **UPCOMING EVENTS:**

**March 27:** Drew Mildon will speak on the 30<sup>th</sup> anniversary of the Meares Island injunction at Tin Wis Resort - *Protecting the Land, Forests, and Waters with Aboriginal and Treaty Rights after Tsilhqot'in*. 10am-4pm, \$30, lunch included.

### **THE COMMUNITY CONFERENCE W&Co takes part in new joint law project**

Alan Hanna, our esteemed articulated student, presented at this year's University of Victoria Faculty of Law Community Conference held on February 27, 2015 in the First Peoples House on the UVic campus.

The Community Conference was a participatory exploration of Indigenous legal orders. Alan, along with other researchers from the Indigenous Legal Research Unit (ILRU), presented on the emerging work in this field including the 2012 joint project with the Indigenous Bar Association, the University of Victoria, the Truth and Reconciliation Commission and the Ontario Law Foundation, where they worked with several communities in several nations across Canada on articulating their Indigenous legal traditions (Coast Salish, Tsilhqot'in, Northern Secwepemc, Cree, Anishinabek, and Mi'kmaq).

The Conference included a presentation from Maxine Matilpi on her research in identifying legal significance in traditional ceremonies, in addition to the presentations on the research method of drawing legal principles from oral stories. The conference culminated with break-out groups that the ILRU members facilitated, who were then able to work through a case brief of an oral story and report their findings back to the whole group.

The Community Conference was well attended and people engaged enthusiastically with these Indigenous legal traditions as law. ❖

buildings at this point in time. In 2002, the lands and buildings were sold by the Brants to Miracle for \$100 000; the Brants were aware that they did not have possession of the land and had not repaid their loan against the land.

In 2008, the MBQ commenced an action against the Brants and Miracle to regain control of the lands and building. The MBQ argued that Miracle was trespassing on their land without a valid Certificate of Possession. In 2008, the trial judge granted the MBQ a mandatory injunction restraining Miracle and others from occupying the land and ordered that the Brants and Miracle pay \$250 000 in general damages and \$50 000 in punitive damages to the MBQ. The Ontario Court of Appeal confirmed this decision, and leave to appeal to the Supreme Court of Canada was denied.

To satisfy the judgment, the MBQ took out a writ of seizure and sale on three properties to which Miracle had a certificate of possession. These properties were not the property at issue in the original trial. In 2011, a motion for directions on enforcement of writs of seizure and sale was heard; MBQ's writs against Miracle were validated by the Court and the Sheriff was directed to sell the Certificates of Possession. Ultimately, on advice from the Ministry of the Attorney General of Ontario, the Sherriff declined to sell the Certificates, stating that it would be contrary to section 29 of the *Indian Act* which prohibits reserve lands from being seized. Thus, in the present case, the MBQ brought a motion to enforce the transfer of the Certificates of Possession.

The Court concludes that a Certificate of Possession is evidence of the allotment of possession of reserve lands by a band council to an Indian band member. A Certificate of Possession is not a conveyance; it gives all the incidents of ownership except for the legal title which remains with the Crown. Consequently, the right of possession of reserve land, which is denoted by a Certificate of Possession, is either the real or personal property of an Indian, and accordingly can validly be subject to seizure and execution in favour of the MBQ under s. 89 of the *Indian Act*.

For that reason, the court found that the sale of Miracle's Certificates of Possession, as ordered by the trial judge, was the appropriate remedy to recover

the monies owed to the MBQ, and that the interpretation by the Ministry of the Attorney General of Ontario and the Sherriff was incorrect. ❖

## IMPORTANT NEWS - INDIAN ACT AMENDMENT AND REPLACEMENT ACT

Federal Bill C-428, the *Indian Act Amendment and Replacement Act*, came into force on December 16, 2014. The many amendments it makes to the *Indian Act* are now incorporated into the consolidated *Indian Act* found on the Department of Justice website.

There are at least three key issues that First Nations should be alerted to:

### 1. Minister cannot disapprove bylaws enacted under s. 81

First Nations now have the authority to pass by-laws under s. 81 without first having to obtain the Minister's approval. This will have an immediate impact on certain initiatives that are being undertaken by First Nations as the content of these laws will no longer be constrained by AANDC policy. This is especially relevant to dealing with waste and environmental management issues on reserve. The expanded seizure powers in s. 103 of the Act provide greater enforcement authority. Further, the revisions to s. 104 of the Act mean that monies received from fines imposed under s. 81 bylaws now belong to the First Nation. These changes mean that First Nations are in a much stronger position to enact and meaningfully enforce bylaws in all areas than they ever have been before.

### 2. Mandatory publication of by-laws

The new Section 86 of the *Indian Act* requires that the council of a band must publish a copy of every by-law made under the Act (meaning by-laws under s. 81, s. 83, and s. 85.1):

- a) On an Internet site,
- b) In the First Nations Gazette, or
- c) In a newspaper that has general circulation on the reserve of the band.

We recommend that bands publish every by-law made under the Act, whether the by-law existed before this amendment or is created after the amendment.

### 3. No more Special Reserves

With a little legislative sleight of hand, Parliament has replaced section 36 with a new section 36.1. By changing the word "have" to "had", Parliament has closed the door on the creation of any new special reserves. ❖

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