Woodward & Company LLP Newsletter **March 2012**

How First Nation Rights to Harvest Camas Can Protect Garry Oak Meadows

On February 20, 2012, W&Co lawyer Drew Mildon presented to "Connectivity Conservation: Ecosystems and Species at Risk," a dialogue series organized by the Garry Oak Ecosystem Recovery Team. GOERT is a not-for-profit Species at Risk Act action team who work with volunteers throughout southern Vancouver Island to protect and restore Garry Oak meadow ecosystems and the many red-listed species that grow within them. Below is a shortened version of Drew's presentation.

The traditional First Nations practice of Camas harvesting may prove to be the most powerful legal resource for protecting Garry Oak ecosystems. The practice provides a firm basis for Aboriginal title claims by First Nations to areas that have been the focal point for settlement by non-Indigenous peoples – developed urban zones. It may also be the basis to ground an Aboriginal or treaty rights claim which, if proven, could require other governments to take important steps to protect and rehabilitate the opportunity to practice the right. The powerful implications of asserting Camas-harvesting rights as a legal tool lies in the nature of the practice itself; the intensity of use and the enclosure-like treatment of Camas plots effectively meet the legal tests for rights and title. At the same time, the constitutional nature of the protection offered to those rights means they have the strongest legal protections available in Canada; an Aboriginal right to harvest Camas could not simply be changed by an unfriendly government uninterested in protecting endangered species.

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Upcoming Events:

March 6 & 7: Aboriginal Law – Current Issues (PBLI) Renaissance Hotel Harbourside, Vancouver. W&Co's **Dominique Nouvet** presents on The Repeal of Section 67 of the *Canadian Human Rights Act*: Implications for First Nation Governments.

Quick Updates:

The Tsilhqot'in National Government and Taseko Mines Ltd. have settled the two court cases (Taseko's Civil Claim against Chief Marilyn Baptiste and others, and Chief Baptiste's Petition challenging the permits) relating to the exploration program:

> **"Taseko will commence a reduced scope of work that will be undertaken for the sole purpose of obtaining information required for the Federal environmental assessment of the proposed New Prosperity Project. On this basis, the parties have agreed not to further pursue existing legal actions."**

TNG and the Tsilhqot'in remain 100% committed to opposing and defeating the New Prosperity Project.

WEST MOBERLY APPEAL REJECTED BY SCC

On February 23, 2012, the Supreme Court of Canada denied leave to appeal the BC Court of Appeal's decision in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247. This means the B.C. Court of Appeal judgment is good law, which is significant for the West Moberly First Nations Treaty 8 rights. *West Moberly* holds that historical context, including the cumulative impacts of past activities, is relevant when determining the scope of consultation required in a given case. For the article on the BCCA decision, please refer to our June 2011 Newsletter. ❖

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The courts have taken a "purposive" approach to interpreting section 35 of the Constitution, asking what the section is meant to protect. Ultimately, it has been described as having the goal of promoting reconciliation between First Nations and the broader Canadian settler society. Post-1982, those Aboriginal and treaty rights cannot be extinguished – to do so would be unconstitutional. Constitutional rights protect Aboriginal and treaty rights from governments elected by majorities who may wish, for financial or other reasons, to trample those rights.

In the Tsilhqot'in decision, Justice David Vickers found that the Tsilhqot'in have an Aboriginal right to hunt and trap to make a moderate livelihood in an area of land covering 438,100 hectares. This right includes a requirement that the province ensure that this area was managed to provide that there would always be a harvestable surplus of the diverse species hunted and trapped by the Tsilhqot'in. This means that enough natural forest must exist to provide sufficient natural habitat such that a surplus population of these animals are able to exist. Now, if any forest company wants a permit to log any forest in this area, they must first find out how many animals are in the forest, and prove that they can carry out logging in such a way as to ensure that the animals will not only continue to exist but will actually thrive. So the Court has mandated a role for wildlife biology. There can be no industrial activity that is blind to the consequences on wildlife. We need to know ahead of time whether the species will be able to thrive once industry has been through. This reasoning also applies to important plant species.

In 2000, Canada approved a 200 metre-wide, 23 km ice road along the boundary of the Mikisew Cree reserve. The Mikisew appealed the approval of the road to the Federal Court and had the decision to approve the road overturned on the basis that it would have a negative impact on their treaty rights. The Supreme Court of Canada supported the decision of the lower court in quashing the road permit on the basis that there was not sufficient consultation about the road with the Mikisew Cree. The Court found that what mattered was where a treaty First Nation traditionally hunted, trapped and fished and that the road was a significant impact on those lands and the rights of the Mikisew. Most importantly, the Court said that what the constitution protects is a meaningful exercise of treaty rights.

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Development cannot proceed if species depended on to exercise Aboriginal or treaty rights will be impacted to the point where there is no longer enough healthy habitat to support the species in the areas where the First Nation wishes to practices its rights. It would be very difficult for other governments to argue that the availability of productive Camas lands are not already reduced to the point of crisis.

There are, of course, a common and complex set of intersections when we consider the fate of Garry Oak ecosystems and their past historical circumstances. From early settlers demonstrating a preference for their open aspect, to the loss of burning practices with impacts from small pox and other diseases on First Nations communities, to contemporary environmental concerns, multiple cultures and aspects of cultures intersect in these spaces. The common law of Aboriginal and treaty rights is likely to bring to bear a further line of force. We are in a period of serious resurgence of Aboriginal cultural practices, in particular those practices that re-establish and reaffirm connections to the land – including connections that the Canadian courts have proved willing to recognise. ❖

LEIGH ANNE BAKER CALLED TO YUKON BAR

On February 7, 2012, Leigh Anne Baker signed the historical Yukon Bar registry – a very exciting moment!
Congratulations Leigh Anne! ❖

W&Co Eight-Week Challenge Over

An intense 8-week challenge that began in January ended in early March for a dozen of W&Co's team. The goal: largest overall percentage of body mass loss. Everyone weighed in and had their measurements recorded.

Each participant anted up $100 for a total prize of $1200, so the sacrifices and strenuous workouts led by Micki Keenliside were worth it. In the end, everyone lost pounds and inches, with total losses ranging from 3.3% to an astonishing 14.2%. Congratulations to everyone who participated! ❖