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William v BC at the Supreme Court of Canada

By Camille Israël

On November 7, 2013, the Supreme Court of Canada will begin hearing the Tsilhqot'in Nation's appeal in *William v British Columbia* (Trial decision: *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700; BC Court of Appeal decision: *William v British Columbia*, 2012 BCCA 285).

The trial concerned claims by the Tsilhqot'in for declarations of Aboriginal title and rights relating to land in central British Columbia. The trial judge found that the Tsilhqot'in had certain Aboriginal rights, including the right to hunt and trap throughout the area. He also found that Aboriginal title existed in approximately 40% of the area claimed by the Tsilhqot'in (the "Opinion Area"), but found he could not grant a declaration of title because the claim had been argued as "all or nothing".

On appeal, the BC Court of Appeal endorsed the trial judge's findings on Aboriginal rights. They also considered the preliminary issue of the "all or nothing" claim for Aboriginal title, finding that the trial judge had incorrectly decided this issue and that the pleadings did not prevent a partial declaration of title. However, the BCCA held that the trial judge had applied an incorrect "territorial" approach in his analysis of the

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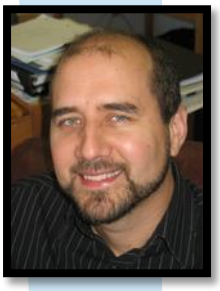
UPCOMING EVENTS:

November 7: *William vs BC* title hearing at the Supreme Court of Canada.



FEDERAL COURT CONFIRMS THAT EMPLOYERS HAVE THE RIGHT TO TERMINATE EMPLOYMENT WITHOUT CAUSE

By Eamon Murphy

Mr. Justice O'Reilly recently confirmed, in *Atomic Energy of Canada Limited v. Joseph Wilson* 2013 FC 733**,** that non-union employers subject to the *Canada Labour Code* (the "Code") are entitled to terminate employees without cause.

In 2009, the applicant, Atomic Energy of Canada Limited (AECL), dismissed Mr. Joseph Wilson without cause. AECL paid Mr. Wilson 6 months' severance pay. Mr Wilson complained of unjust dismissal. The adjudicator had concluded that the Code only permits termination for cause. In overturning the adjudicator's decision, Mr. Justice O' Reilly found that the adjudicator unreasonably relied on prior jurisprudence in support of his conclusion.

This decision is of importance to First Nation employers because it confirms that First Nations can terminate an employee without cause, subject to providing notice or severance pay in accordance with sections 230 and 235 of the Code.

This decision puts an end to the erroneous notion that the Code only allows employers to terminate employees with cause. Please contact our office for further information about the case and how it might apply to your organization's particular circumstances. ❖

title claim. Writing for the panel, Justice Groberman stated that previous Supreme Court of Canada jurisprudence required a degree of "regular use of definite tracts of land" (para 191) to establish Aboriginal title. Therefore, Aboriginal title had to be established on a site-specific, rather than a territorial, basis and the Tsilhqot'in's claim failed (para 225).

The principal question at the Supreme Court of Canada will be whether the BCCA erred in applying a site-specific standard for Aboriginal title. The Tsilhqot'in Nation will argue that the **BC Court of Appeal erred in creating a new test** and that the SCC should make a declaration of Aboriginal title to the Opinion Area. The respondents, British Columbia and Canada, will argue that the **BCCA properly applied the SCC's previous jurisprudence on Aboriginal title and that their decision should stand**.

The Tsilhqot'in are supported in their position by a number of interveners. In their factum, the Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation and Kwakiutl First Nation expressed deep concern that the Court of Appeal gave no weight to the Tsilhqot'in's Indigenous laws in its decision, and endorses the territorial approach. Other interveners representing one or more First Nations are the Office of the Wet'suwet'en Chiefs, the Te'mexw Treaty Association (representing the Snaw-naw-as First Nation, Songhees Nations, T'Sou-ke Nation, Beecher Bay First Nation and Malahat First Nation), the First Nations Summit, the Haida Nation, the Gitanyow Hereditary Chiefs, the Assembly of First Nations, the Indigenous Bar Association, the Coalition of the Union of BC Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, the Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, the Hul'qumi'num Treaty Group and the Gitxaala Nation. These interveners also endorse the argument that the BCCA erred in creating a new test. Finally, Amnesty International and the Canadian Friends Service Committee as well as Chilko Resorts and Community Association and the Council of Canadians are non-First Nation organizations that also endorse the argument that the BCCA erred in creating a new test.

For their part, BC and Canada are supported by interveners the Attorney General of Quebec and the Business Coalition (Business Council of BC, Council of Forest Industries, Coast Forest products Association, Mining Association of BC, Association for Mineral Exploration BC). Other interveners refrained from taking a position on this issue.

A second issue will consider the legal consequences of a finding of Aboriginal title. The Supreme Court has stated certain constitutional questions, asking whether British Columbia's *Forest Act* and *Forest Practices Code* are applicable to Tsilhqot'in Aboriginal title lands. The Tsilhqot'in Nation will argue that these statutes **are inapplicable**. The Respondents, BC and Canada, will argue that they **are applicable**, except insofar as they authorize unjustified infringement of Aboriginal title.

The interveners supporting the Tsilhqot'in's position on this issue are the Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation and Kwakiutl First Nation, as well as the Coalition of the Union of BC Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, the Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands. Most of the interveners supporting the Tsilhqot'in on the first issue refrained from taking a position on the constitutional questions.

For their part, BC and Canada are supported by the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of Saskatchewan and the Attorney General of Alberta, as well as the Business Coalition (Business Council of BC, Council of Forest Industries, Coast Forest products Association, Mining Association of BC and Association for Mineral Exploration BC). ❖

New Prosperity Mine EA Report Released

The Tsilhqot'in Nation welcomed the CEAA Panel Report on the New Prosperity mine proposal, released on October 31st. TNG noted in a release that it contains even more concerns and criticisms than were contained in the 2010 report into Taseko Mines Ltd.'s original proposal. That report was described by then environment minister Jim Prentice as "scathing" and "most condemning" when he rejected the first proposal on behalf of the federal government.

"In 2010 TML and Environment Canada stated the rejected proposal was the least environmentally risky of all options, so it comes as absolutely no surprise that this latest proposal has been found to be worse," said Chief Joe Alphonse, Tribal Chair for the Tsilhqot'in National Government. "First Nations will be outraged if the federal government accepts this project after rejecting the first one… The federal government now has what it needs to finally put a nail in the coffin."

Link to CEAA Executive Summary: http://ceaa-acee.gc.ca/050/documents/p63928/95790E.pdf