WOODWARD & COMPANY

Woodward & Company LLP Newsletter **Summer 2012**

Aboriginal Title: The B.C. Court of Appeal in *William v. B.C. and Canada*

The trial in this matter concerned claimed declarations of Tsilhqot'in Aboriginal title and certain defined Tsilhqot'in Aboriginal rights relating to land in the central region of British Columbia. The trial decision was 473 pages in length and the trial judge, the late Mr. Justice David Vickers, took great pains to ensure that the parties got a full and fair trial. He held court in the winter of 2003 in the heart of the claim area and he also held night sittings of the court to allow Elders to testify about sacred matters that would not otherwise have been available to the Court. At the conclusion of the trial, the learned trial judge found:

1. The Tsilhqot'in had certain Aboriginal rights including the Aboriginal right to hunt and trap throughout the claim area and earn a moderate livelihood from the exercising of that right.
2. He was of the opinion that Aboriginal title existed to a portion of the claim area (approximately 40%).
3. He could not grant a declaration of Aboriginal title in spite of his opinion because the pleadings, as interpreted, sought title to the entire claim area and accordingly were "all or nothing". Because Aboriginal title had only been proved for a portion of the claim area, the claim for Aboriginal title failed.

…continued on page 2

Profile: Matt Boulton

Matt first joined the firm as a co-op student in September 2010. He loved working at W&Co so much that he returned as an articling student a year later. Now Matt is happy to be back at the office to round out the final two weeks of his articles. Matt hopes to be called to the B.C. bar in August and will join W&Co as an associate; he couldn't be more thrilled. "I consider myself lucky and blessed to be at W&Co where I can do the work I am passionate about alongside an incredibly brilliant, dedicated, and friendly group of lawyers and staff."

Matt grew up on a small farm outside Lethbridge, AB, and holds a BA (honours with great distinction) in Sociology from the University of Lethbridge and received his J.D. from the University of Victoria in August 2011.

Matt is most passionate about protecting Aboriginal rights and title and ensuring First Nations can continue to exercise their rights in a meaningful way throughout their traditional territories. Matt assisted Jay Nelson and Dominique Nouvet with the Tsilhqot'in's successful injunction application against Taseko Mines Ltd., which prevented Taseko from conducting further "exploratory work" in Tsilhqot'in territory until adequate consultation had taken place. Matt is also very interested in First Nations governance, law development, and furthering the self-government initiatives of First Nations.

Seen here with his father, Matt likes to camp, fish, hunt, rock climb, run, snowboard, skimboard, surf, and tend to his small patio pallet garden. He also recently completed the "Tough Mudder" with several W&Co colleagues.

Upcoming Events:

August 12 - 14 : CBA Canadian Legal Conference - **Vancouver, BC –** with keynotes by Robert Fowler, Jimmy Wales, and Alberta Premier Alison Redford.

…BC Court of Appeal continued from page 1

4. If he was wrong on this preliminary issue concerning the pleadings, then his opinion that Aboriginal title existed within the claim area was binding on the parties.

All three parties appealed. On appeal, the Plaintiff Tsilhqot'in claimed that the case was properly pled and accordingly Aboriginal Title should have been declared with respect to the entire Claim Area (as that term was defined by the trial judge). Canada argued that Aboriginal title had not been proved at trial and that the Tsilhqot'in should be prohibited from going back to court to claim title within the claim area. British Columbia argued that the Aboriginal rights found by the trial judge were too broad and could not be upheld on a number of grounds.

583 days after the matter was argued, thus making it one of the longest reserved decisions in British Columbia history, the British Columbia Court of Appeal released its decision in *William v. B.C. and Canada*, 2012 BCCA 285. In an unanimous decision, the British Columbia Court of Appeal (reasons written by Groberman JA concurred in by Levine JA and Tysoe JA) dismissed all three appeals. In the result, the Tsilhqot'in have Aboriginal rights to the entire claim area but must return to trial and start again if they wish to establish Aboriginal title to any specific sites.

…continued in next column

W&Co Presents at CBA Legal Conference

Heather Mahony will be speaking at the Canadian Legal Conference in Vancouver on August 14th on the subject of contracting with First Nations.

The CBA Canadian Legal Conference and Expo is the premiere annual event for legal professionals in Canada. The Conference features outstanding PD programs, sessions and networking opportunities.

This year's conference runs August 12 - 14 in Vancouver, BC.

On the one hand, Aboriginal harvesting rights received a significant endorsement - the Court of Appeal affirmed the full range of Tsilhqot'in Aboriginal rights throughout the entire Claim Area. Those rights include the Aboriginal right to hunt and trap, including the capture and use of wild horses, thereby affirming the trial judge's finding that the Tsilhqot'in had developed the practice independently of Europeans when wild horses first appeared in their traditional territory. The BC Court of Appeal also affirmed the Aboriginal rights to trade in skins and pelts to secure a moderate livelihood. Mr. Justice Groberman held that British Columbia's strategic-level forestry management unjustifiably infringed Tsilhqot'in Aboriginal rights in the claim area and agreed that the extensive clear-cut logging planned for the Claim Area was incompatible with Tsilhqot'in Aboriginal rights.

On the other hand, the Court of Appeal adopted a very narrow approach to Aboriginal title. Although the Plaintiff claimed a specific, defined portion of their overall territory, and although the Supreme Court of Canada had determined in the *Delgamuukw*, *Bernard* and *Marshall* decisions that Aboriginal title can be established by exclusive control and "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources", the Court of Appeal, agreeing with the Crown, held that Aboriginal title can be established only to specific, intensively used sites, and not more broadly to hunting and trapping grounds. The trial judge, relying on the Supreme Court of Canada, had referred to this theory of Aboriginal title as a "postage stamp" approach and an "impoverished view of Aboriginal title".

The Tsilhqot'in have publicly declared their intention to appeal the finding on Aboriginal title to the Supreme Court of Canada. If granted leave to appeal, the clear task of the Supreme Court will be to revisit its earlier decisions in *Delgamuukw*, *Bernard* and *Marshall* and decide whether the Plaintiffs have Aboriginal title to the broad areas that the trial judge found they exclusively and regularly used, or adopt the narrow approach proposed by the Court of Appeal. ∞