



## **British Columbia Update: West Coast Provincial Policies Ebb and Flow**

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From the earliest 20th century Squamish fishing cases, to the many active judicial reviews of consultation underway in the Province today, British Columbia has been a hotbed of civil and criminal defence of Aboriginal rights as well as direct political action. The result has been regular, if reluctant, changes in government behaviour which might be interpreted variously as: a) litigation adverse; b) genuinely aimed at embracing the goal of reconciliation; or, c) doing the bare minimum to avoid a negative judicial review outcome while driving forward industrial development in the territories of Aboriginal communities who are too poverty-stricken to meaningfully or effectively engage in consultation processes or to take legal steps in defence of their lands. Regardless of past approaches, British Columbia Premier Christie Clark's latest promise to open eight new mines and expand another nine, and the angry response of First Nations leaders to this announcement, suggests that

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### **UPCOMING EVENTS:**

**January 9:** Beaver Lake Cree appeal of Michael Mansfield decision - **Jack Woodward and Pat Hutchings** will appear in Edmonton court for a 1-day hearing.

**Jan. 30 – Feb. 3 –** Beaver Lake Cree pre-trial motion hearing – **David Rosenberg & Jack Woodward** will represent BLCN against Canada and Alberta's motion to strike.

## **Jack Woodward appointed Queen's Counsel**



Jack Woodward, Q.C.

Having spent his career challenging government policies in court, Jack was not surprised to hear that the Attorney General was on the line. However, this call was not from some government lawyer on the other side of a case, this was the actual Attorney General herself, Hon. Shirley Bond, with the cheerful news that Jack is to be appointed as one of "Her Majesty's Counsel

Learned in the Law," an ancient designation dating back to the first Q.C. - Sir Francis Bacon in 1597.

Awarding the title Q.C. to some senior lawyers is a tradition carried out in England and most Commonwealth countries. The designation is largely ceremonial, though some courts still give precedence to a Q.C. in setting the order in which cases are called. A Q.C. wears robes made of silk, with longer sleeves and larger collars, so the appointment is sometimes called "taking silk."

As one of the founding fathers of aboriginal law in Canada, Jack's nominating team noted that aside from his landmark text *Native Law*, "he has been a driving force in establishing the principles governing aboriginal rights and title." He filed the first Canadian aboriginal rights case after the proclamation of the 1982 Constitution. *Peters v. A.G.B.C.* (1983) 42 B.C.L.R. 373 (S.C.). Jack has advanced the only aboriginal title case to go to trial since *Delgamuukw*, setting a unique advanced-costs precedent while doing so: *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No.2465, 2007 BCSC 1700 (decision from the BCCA pending).

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the Province will need to find ways to develop mutually agreeable solutions with First Nations or risk putting the match to a brand new “war in the woods”.

### **Treaties and Their Alternatives**

One of the first major litigation-driven changes in British Columbia policy was the initiation of the treaty process mid-way through the Meares Island action. When the plaintiffs had completed submitting their evidence and obtained an injunction against logging based on their Aboriginal rights, then-Provincial Attorney General Andrew Petter requested that the case be placed in abeyance while the Province pursued a treaty negotiation process. Twenty-seven years later, only three treaties have been signed and the current head treaty commissioner is calling for the government to either display a renewed commitment, or to undertake steps to simply “shut ‘er down”. In the face of the standstill on treaties and the deluge of consultation judicial reviews, British Columbia has pursued some alternatives to the treaty process with First Nations.

### **Interim Measures Agreements**

Interim Measures Agreements (“IMAs”) attempt to balance the conflicting interests of First Nations and British Columbia and provide benefits to both by allowing economic development to take place while treaty negotiations are ongoing.

### **Forest and Range Agreements**

Forest and Range Agreements (“FRAs”) were introduced by the Provincial Government in 2003. FRAs attempt to provide “workable accommodation” of asserted Aboriginal rights and/or title that may be impacted by forestry decisions.

### **Strategic Engagement Agreements**

Strategic Engagement Agreements (“SEAs”) are designed to encourage positive and respectful government-to-government relationships between First Nations and the Province; establish mutually agreed upon procedures for consultation and accommodation; and act as an incremental step in treaty negotiations.

### **New Consultation Guidelines & Preliminary Assessments**

In July of 2010, BC released its new “Interim Updated Procedures for Meeting Legal Obligations When Consulting First Nations.” In March of 2011, the Province also released an interim “Guide to Involving Proponents When Consulting First Nations.” Both documents demonstrate increased attention by the Province to the initial assessment of the strength of claims to asserted

rights and to an open sharing of that assessment process with First Nations.

### **Looming Issue: Historical Infringements**

Confusion continues to reign respecting so-called “historical infringements”. Following the recent *Rio Tinto* decision, Crown actors have repeatedly taken the position that historical activities - that is, existing infringements - do not require consultation or accommodation because there are no “new” impacts on Aboriginal rights and title. First Nations assert that new infringements are often additive or cumulative as a result of past infringements so that new authorizations have a higher level of impact and the Crown should consider existing infringements when assessing potential impacts of new actions.

*Drew Mildon acts as legal counsel for several First Nations governments on land rights, governance issues and corporate matters. He has been with Woodward & Company LLP since January of 2004, when he was hired as a coop student to work on the Tsilhqot’in Aboriginal rights and title action. Drew currently divides his time between Woodward’s Victoria and Whitehorse offices – and he suspects that someone is using his desk in both places when he is not there.*

*Matthew Boulton began his articles at Woodward and Company this past September after completing his legal studies at the University of Victoria in August. Matthew developed his interest in practicing Aboriginal law while obtaining his BA at the University of Lethbridge. As a student, he probably wrote most of this article, but Drew is going to take some credit for it anyway. ❖*

### **Jack appointed Q.C. ...continued from page 1**

Jack obtained his law degree from the University of Victoria in 1978. He began the gargantuan task of writing *Native Law* in the early 1980s following a stint in Ottawa, during which time he had a hand in drafting section 35 of the *Constitution Act*. Jack’s book, the first Canadian tome on aboriginal law, was published in 1989. *Native Law* remains a leading text on the subject, and has been often quoted in precedent-setting judgments.

Jack started Woodward and Co. as a sole practitioner in 1988 and has grown the practice to include clients in Ontario, Alberta, the Yukon and British Columbia and to employ 19 lawyers, while focusing almost exclusively on aboriginal law from an aboriginal perspective.

In the narrative provided by Jack’s nominators, they wrote: “Jack is a giant in his field. Bestowing a Q.C. on him is...most deserving and long overdue.” ❖