



## **Cases “on reserve”**

Our firm has a number of court decisions pending, in matters where the case has been fully argued and the court has "reserved" decision, meaning, that the judges are considering the matter and will issue their decision at some point in the future. These include:

**Tsilhqot'in Nation:** The BC Court of Appeal is considering the appeal from the landmark aboriginal title and rights decision in the Roger William case.

**Beaver Lake Cree Nation:** The Alberta Court of Queen's Bench is considering whether to allow Michael Mansfield, Q.C. and other lawyers from Toops Chambers in London, U.K., to do *pro bono* work on the treaty infringement case in the tar sands.

**Liard First Nation:** In connection with the Selwyn Mine, Liard First Nation challenged the issuance of a mining permit because the Yukon government failed to assess impacts on fish resources. ❖

## **OTHER DEVELOPMENTS IN ABORIGINAL LAW:**

### ***Canadian Forest Products Inc. v. Sam,* 2011 BCSC 676**

This Court decision resulted in ultimate success for the House of Ginehklaiyex of the Lakisilyu clan of

*...continued on page 2*

## **MORE DEVELOPMENTS:**

### ***West Moberly First Nations v British Columbia,* 2011 BCCA 247**

This Court decision is significant victory for the West Moberly First Nations (“West Moberly”) Treaty 8 rights. The British Columbia Court of Appeal upheld the decision of the Trial Judge that the Crown was in breach of its duties to adequately consult West Moberly when granting coal mining exploration and sampling permits.

The Court held that when governmental officials exercise their decision making power they must respect legal and constitutional limits including recognizing and properly interpreting Treaty rights. The statutory mandate of decision makers does not limit them so far as their duty and power to consult and does not prevent them from consulting whatever resources they require in order to make properly informed decisions that take cognizance of Treaty 8 and its true interpretation.

The Court also held that it is proper to consider the historical context of the Treaty right (past Crown actions) with respect to the right at issue in consultation in order to gain a proper understanding of seriousness of the potential impacts on Treaty rights. This is not to attempt to address past wrongs but to address the existing state of affairs and the consequences of what may result from pursuing the proposed project.

The Court also emphasized the importance of the Crown recognizing oral Treaty promises. The Court held that in promising the First Nation that it was free to continue to hunt and fish after the Treaty as before, the Crown’s right to take up land for mining would

*...continued on page 2*

## **UPCOMING EVENTS:**

July 1 - 3 : Beaver Lake Cree Nation Annual Pow Wow.

the Wet'suwet'en Nation in their longstanding battle to preserve their claimed Aboriginal title lands.

This case concerned two opposing applications for injunctions. Canadian Forest Products Ltd (Canfor) sought an injunction to prevent House members from obstructing their logging operations and the House with the support of the Nation counterclaimed for an injunction to stop Canfor's logging efforts. The Court held that both parties had serious issues to be tried but because an injunction to stop Canfor from logging would not put them out of business while the House faced losing the last stretch of untouched area in the House territory, it was held that the House of Ginehklaiyex would suffer the greatest amount of harm if they were not awarded the injunction they sought.

Importantly, although this was not a consultation case, the Court stated that the Crown failed to encourage meaningful negotiation of competing rights and interests and assisted Canfor while neglecting to inform the House members of important matters.

This injunction plays an important role in the protection of claimed Aboriginal title lands and is a significant triumph in recognizing the traditional structure and laws of the Ginehklaiyex House within the Wet'suwet'en Nation. ❖



### ***Ahousaht Indian Band v. Canada (Attorney General), 2011 BCCA 237***

This decision by the British Columbia Court of Appeal affirms the ruling by the Trial Judge that the Nuu-chah-nulth plaintiffs have an aboriginal right to sell fish which is currently being infringed by Canada's fisheries regulations. This case is generally a victory for the plaintiff Nuu-chah-nulth communities, though many issues remain unresolved.

*...West Moberly continued from page 1*

never have been understood by the treaty makers as the right to engage in present day mining practices. The Crown failing to understand what this Treaty means and proceeding with consultation on that basis is a failure to consult reasonably.

While this case is a solid victory for the West Moberly, the question as to what is proper accommodation remains open. The Court decision was 2-1 majority with each Justice having a different opinion as to what was proper accommodation in these circumstances. Justice Hinkson, the concerning majority Justice, held that accommodation can only mean addressing the potential adverse effects of the present conduct, not remedying past events, in light of the recent Supreme Court of Canada *Rio Tinto* decision. In the event this case is appealed further, a decision by the Supreme Court of Canada could have implications in regards to the Crown's duty to consult with respect to prior Crown actions and the boundaries of accommodation. Please feel welcome to contact us for further information. ❖

#### ***Ahousaht continued...***

Firstly, the Court reserved judgment on the accommodation and justification aspect of the infringement, and sent the parties back into an extended period of negotiation to determine if the right to sell fish can be exercised without jeopardizing Canada's objectives and interests.

Additionally, the Court split on the characterization of the right to sell fish. While Justice Hall and Justice Neilson left the definition relatively broad only noting that the right does not extend to a modern industrial fishery, Justice Chiasson held that the right was limited to selling fish to attain sustenance or a moderate livelihood (i.e. food, clothing, shelter, supplemented by a few amenities).

Finally, the Court held that although the right to sell fish encompasses a broad range of fishery resources, it does not include the right to sell geoducks. It remains to be seen whether any of the parties will seek to appeal this decision to the Supreme Court of Canada. ❖