

# FIRST NATIONS FIRST



WOODWARD & COMPANY LLP | BARRISTERS & SOLICITORS

DECEMBER 2015 NEWSLETTER

## First Nations' Victory in Doig River First Nation and Blueberry River First Nation v Her Majesty the Queen in Right of Canada, 2015 SCTC 6

On November 5, 2015, the Specific Claims Tribunal released a decision in favour of the Doig River and Blueberry River First Nations, finding Canada liable for breach of fiduciary duty. One of the successful claimants was represented by Ava Murphy, who has recently joined Woodward as an associate.

The First Nations, previously the Fort St. John Beaver Band, surrendered their original reserve to Canada in 1945. Canada then purchased replacement reserve lands from British Columbia in 1950. However, Canada did not scrutinize the transfer documents and so it did not realize that BC had only transferred the surface rights and had kept the subsurface rights for itself. When Canada finally discovered the error, it did not inform the band.

### UPCOMING EVENTS:

*Seasonal Office Hours: Our office will be closed Friday, December 25th and Friday January 1, 2016.*

## Indigenous Legal Traditions

Indigenous legal traditions are making headway in research and recognition by Canadian courts. After roughly 500 years of denying that Indigenous peoples have their own laws, Canada's highest court has been calling for input and understanding of what First Nations' laws were in place before the arrival of Europeans and colonial common law – and which continue today. Indigenous legal traditions are exactly that: the laws and legal systems First Nations have in place to guide the conduct and governance of the people.

In the Tsilhqot'in Nation case, evidence and arguments on the existence and form of Tsilhqot'in laws was fundamental in successfully proving Aboriginal title on a territorial basis. We have in-house knowledge and experience working with Indigenous legal traditions on behalf of clients in past and current projects. One example of a method of engagement with Indigenous laws was recently published in the *Ottawa Law Review* Vol. 45.3: *Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective*, authored by Woodward LLP lawyer, Alan Hanna. The article explores methods of engaging with Indigenous laws through oral stories and seeing how the resulting legal principles have been applied in contemporary Tsilhqot'in society. A court case is only one application of Indigenous laws. Indigenous legal traditions may be used to for everything from supporting internal governance, to lawmaking and community revitalization.

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## FIRST NATIONS' VICTORY... CONTINUED.

The Tribunal agreed with the First Nations that Canada had breached its fiduciary duty when it failed to investigate the transfer to ensure that it was getting the subsurface rights. A second breach arose once Canada realized its error but failed to inform the band and consult on how to proceed.

The Tribunal noted that Canada's inadvertence might have been inconsequential had the band's intention been fulfilled, but this was not the case. The band's intention to possess lands suitable for their lifestyle was perpetually vulnerable to others' access to the reserves and exploitation of its resources without consultation or profit-sharing.

*It was unnecessary to speculate about what the band might have done had it been informed. "The point is that [the band] ought to have been consulted so that it could make an informed choice."*

The decision is helpful to First Nations in a number of ways. First, it confirms that a cognizable interest attaches to lands that are promised as a condition of surrender. Second, it clearly establishes that the Crown as a fiduciary must take all prudent and reasonable steps to know exactly what it is acquiring for the First Nation. If the Crown is acquiring anything less than intended, then it must consult the First Nation on how to proceed. Finally, the decision reaffirms that an errant fiduciary will not be able to avoid liability by speculating about what might have happened had there been no breach.

A decision on compensation has not yet been made.

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## SEASON'S GREETINGS.

*Best Wishes of this holiday season from all of us at Woodward and Company!*

## New Direction on UN Declaration

Prime Minister Justin Trudeau made his ministerial mandate letters public on November 13th, as part of a promise to increase transparency in government. His letter to Dr. Carolyn Bennett, Minister of Indigenous and Northern Affairs, emphasizes reconciliation and the need to build strong nation-to-nation relationships with Indigenous communities in Canada. Dr. Bennett's mandate includes developing a strategy for conducting an inquiry into missing and murdered Indigenous women. First on her list of priorities, however, is implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.

The Declaration was adopted by the United Nations General Assembly on September 13, 2007, and contains 46 Articles which recognize the political, legal, cultural, and religious rights of indigenous peoples around the world. Canada was one of only four nations that voted against the Declaration, citing concerns about Article 19, which requires states to obtain the "free, prior, and informed consent" of Indigenous peoples before enacting legislation or taking measures which would infringe their rights. In 2010, Canada finally issued a tepid endorsement of the Declaration, but continued to label it merely "aspirational." Just last year, Canada refused to sign an Outcome Document produced by the World Conference on Indigenous Peoples, which aimed to create international consensus on how to actualize the Declaration.

Prime Minister Trudeau's commitment to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*, constitutes a major shift in policy concerning Indigenous rights. It remains to be seen what legal and practical impacts this will have on First Nations communities in Canada but with the Supreme Court of Canada's repeated endorsement of "consent" in the *Tsilhqot'in Nation* case, we are hopeful of increased respect for our clients' rights and land interests.

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