2015 BCWF ABORIGINAL RELATIONS COMMITTEE ANNUAL REPORT (2014 Year End)

Since last year's convention there have been some interesting, even historic, turns of events that will impact the interests of our members. Over the past year he BCWF has made some progress in developing relationships with First Nations directly while maintaining connection with Ministry of Recognition and Reconciliation officials.

By far the most significant development has been the *William* decision. Last June 26 the Supreme Court of Canada declared that the Tsilqoti'n First Nations have proven aboriginal title to just under 1800 square kilometers of land West of Williams Lake. This decision resulted after the original 2007 decision by Judge Vickers in the BC Supreme Court went all the way to the Supreme Court of Canada. The SCC declaration that the Tsilqot'in had met the test to prove aboriginal title has seen mixed reactions from different interest groups in the Province and across Canada. Just what the resulting impacts of this important decision will mean in terms of public opportunity to access Title lands and resources in BC or the current Treaty process itself depends on a number of factors.

It's all about "Reconciliation"

The Supreme Court of Canada has consistently maintained that these actions by First Nations will not be decided based on "winners and losers" notwithstanding how differing interests may view the outcomes. The SCC has repeatedly supported Crown sovereignty so the ongoing challenge is to balance that with the needs of First Nations for preservation of their culture. "Reconciliation" has two ends and the vast majority of Canadians see only the onus of the Crown to adjust to FN demands. However, FNs and the general public must understand that the other end of reconciliation is an adjustment of those demands to the right of government sovereignty.

Reconciliation will prevail only when aboriginal and non-aboriginal interests are on the same "page" of accepting what the law is. This is

necessary for certainty and prosperity to exist. The road to arriving there may prove rough depending on how new Government and First Nations discussions succeed.

Aboriginal title is not fee simple ownership

The *William* decision has outlined what aboriginal title means. Paragraph 88 in the Reasons for Judgment states..

> [88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses

…and then it goes on to list all the conditions that apply to aboriginal title lands. These are extensive.

> subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

The duty to consult

In *Delgamuukw* the court emphasized a significant difference between aboriginal title and aboriginal rights. Aboriginal title is all about the Crown's duty to consult. The level of consultation required depends on strength of claim by the FN, on a case by case basis, and the severity of impact on FN culture the proposed development might be. Further, that consultation must be appropriate to the Crown's fiduciary duty to deal fairly with aboriginal interests. Aboriginal rights, however, are all about priority and to what extent regulation of non-aboriginal interests might impact aboriginal rights.

Justification of infringement

The *William* decision states quite clearly the need for the Crown to justify infringement of aboriginal title rights. The areas where infringement can likely be justified are actually quite broad.

Paragraph 83 contains one of the most important statements in the *William* Reasons for Judgment.

> [83] What interests are potentially capable of justifying an incursion on Aboriginal title? In ***Delgamuukw***, this Court, *per* Lamer C.J., offered this:
> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad.
>
> Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community"
> **(at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.** Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para 165]

Paragraph 94 states as below.

> This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather**, it is the right to proactively use and manage the land.**

How aboriginal title conferring the right "..*to proactively use and manage the land."* can be reconciled with the courts suggestion of how extensively justification for infringement of that right by government can be expected to pass their scrutiny will prove a major subject of FN and government discussion.

Laws of general application on aboriginal title land

Paragraph 101 states

> [101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

The Constitutional limits referred to can be summarized thusly; as long as (a) provincial law does not infringe title or (b) if the infringement can be justified Provincial law applies.

The "wrinkle" is in respect of the Forestry Act. The SCC ruled that the Province's definition of Crown land or Crown timber does not refer to land subject to Aboriginal Title which is not now governed by the Forestry Act. The SCC also suggested the Forestry Act could be amended to include aboriginal title land. It would follow that where Crown lands are referred to in the Wildlife Act the same principle would prevail.

"Partnering"

Some "experts" suggest that extensive partnering with First Nations on all land use decision making is now mandatory to the point of total capitulation of government authority. This is not the case. Government must either have FN consent or justify infringement on aboriginal title and rights when making decisions on title lands.

BCWF Action

The Aboriginal Relations Committee has been actively reviewing the Reasons for Judgment in the *William* decision with assistance from legal counsel Keith Lowes. Committee chair Rod Wiebe and Director for Strategic Initiatives Al Martin participated with others across Canada in an hour and a half webinar session hosted by the Pacific Business & Law Institute. Keith Lowes presented at our July BOD meeting and was on hand for a conference call on implications of the

William decision led by Al Martin with Provincial Federation representatives across Canada.

The *William* decision – an important note

William – was publically funded because the importance of the case caused the Court to order the Province to pay for the action as it proceeded and not to expect FNs to fund it and wait until the end for reimbursement. This was a very unusual order.

It is very unlikely the Province will have to fund further actions by other FN trying to prove title. However, the Province will have to sort out which FNs can meet the test set out in *William* and prove title, which cannot but will "assert" title and then attempt to accommodate them all fairly.

Union of BC Indian Chiefs

Last September 12, Al Martin, George Wilson, Cheryl Johnson and I, as your Aboriginal Relations Committee chair, met with Union of BC Indian Chiefs officials in their Vancouver office. Representing UBCIC were Grand Chief Stuart Phillip, Executive Director Don Bain and VP Bob Chamberlain.

The discussion began with our questions around public access to lands and resources in light of the recent William decision. There is no reference in the Wildlife Act to aboriginal title lands for purposes of hunting and trapping and the expectation, obviously, of First Nation consent arises. Executive Director Don Bain stated that, "Access consent is best gained by developing relations with individual bands." He further suggested that BCWF support for aboriginal title would go a long way in gaining access to their traditional territories.

To retain assurance of public access for hunters and anglers on title lands BCWF action must be taken. Relying on government to champion public rights of access has not been productive so the BCWF is beginning a long process of engaging FNs because, in one

form or another, "consent" may well be the hinge pin on which our continued access privileges depend.
Whatever rights to access crown land that may exist do not gain any respect in law as court injunctions, if obtainable, are often not enforceable on First Nations obstructing access to traditional territory.

The meeting ended with an invitation for the BCWF to be on the agenda at their mid-February 2015 meeting. This would be the first time ever that the BCWF has received such an invitation and an opportunity to set the stage for developing relationships.

Ahousaht – The whole story
The trial

In November of 2009 Madame Justice Nicole Garson concluded that the *Ahousaht, Ehattesaht, Mowachaht/Muchalaht, and Tla-o-qui-aht Indian Bands and Nations* did, in fact, have aboriginal rights to commercial fisheries. The evidence presented was almost identical to that of *Lax-Kw'allaams* where Canadian Supreme Court Judges ruled against claims to that right. Below is an excerpt from that report.

Despite several Supreme Court of Canada rulings (Van der Peet and NTC Smokehouse) against an aboriginal right to commercial fisheries Madame Justice Garson declared in her reasons for judgment

1. "that they have aboriginal rights to harvest all species of fisheries resources in their traditional territories for whatever purpose … exchange of money …commercial use."
2. "that they have aboriginal title to their fishing territories and, as a component of that title, rights to harvest all species of fisheries resources in their title territories for whatever purpose."
3. "that the Fisheries Act and regulations promulgated thereunder unjustifiably infringe the plaintiffs' rights and title, and are applicable to the plaintiffs to the extent of the infringement; and
4. in the alternative, that Canada has breached the duty it owes to the plaintiffs by restricting their ability to fish for commercial purposes or to otherwise access fisheries resources from their territories."

Then the judge granted the parties two years in which ".. to consult and negotiate a regulatory regime for the Nuu-Cha-Nulth that recognizes their aboriginal rights."

The Appeal – BC Court

It was only after pressure from the industry and conservation groups like the BCWF but a month later the Crown filed for leave to appeal the decision in the BC Court of Appeal.

This court concluded that the trial was incomplete as the Trial Judge had adjourned the case for two years pending a negotiated "regulatory regime" with the intention, if that failed, to continue the trial. Infringement on aboriginal rights to fisheries by DFO management was to be the main issue in the continuation.

Ahousaht appeal to the Supreme Court of Canada

The negotiations failed after the two years provided and then the *Lax Kw'alaams* decision came down from the SCC. Leave to appeal the judgment in the BC Court of Appeal in the SCC was not granted. The SCC remitted the proceedings of the case back to the Appeal Court for their reconsideration with the SCC decision in *Lax Kw'allaams* in mind.

The BC Court of Appeal Reconsideration

On February 14, 2011 I attended the second hearing of *Ahousaht* in the BC Court of Appeal.
The panel of judges hearing the Reconsideration was the same that heard the original Appeal so their conclusion was essentially repeated. That was, given the incomplete status of the trial, there was no way to assess whether the Trial judge had erred in application of SCC supported (*Vanderpeet)* analysis.

Further, the SCC directed that two more steps in the trial had to be completed. One was the resolution of species specificity or clarity on commercial fishing rights to what species of fish might be subject to

claims. The Ahousaht FN(s) did not harvest everything so there cannot be an aboriginal right to harvest everything.

The final step to be required came from *Lax Kw'allaams* and is part of the process of defining an aboriginal right in consideration of the rights and needs of the rest of society.

Note on "Step 4"

The BCWF Board of Directors and anyone who appreciates the right of public access to Crown lands and resources should be reminded that a "Step 4" has been introduced into the mix with the *Vanderpeet* analytical process in establishing an aboriginal right. This additional requirement which requires due consideration of the impacts to the rights of others in society came about in the judgment in *Lax Kw'allaams.* The BCWF represented by counsel Keith Lowes, in partnership with the Seafood Alliance in that case, were the voice for the public right to fish that resulted in "Step 4" being established in defining an aboriginal right by the Supreme Court of Canada.

> *"The existence and scope of Aboriginal rights protected as they are*
> *under Section 35(1) of the Constitution Act 1982 must be determined*
> *after a full hearing that is fair to all the stakeholders."* – J. Binnie in *Lax Kw'alaams.*

The Continuation of the Trial

The resumption of the *Ahousaht* trial began on March 9, 2015. The new trial judge is faced with many complexities because the original judge adjourned the case before hearing all evidence or testimony from the Crown side and had (prematurely) issued a declaration of an "artisanal" aboriginal right to commercial fisheries (except geoduck) up to nine miles offshore. Also, the original trial judge's declaration gave the Ahousaht FN et al and DFO two years to reach an agreement on how to implement the "artisanal" commercial fishery.

There are disputes regarding the scope of the proceedings with counsel for the *Ahousaht et al* arguing that the rejection of the leave to appeal in the SCC narrows the trial down to only issues around justification of DFO infringement on the right created by the original trial judge. That would dismiss any argument around specificity of fisheries and step 4 of defining the right as laid down in *Lax Kw'allaams.*

The Crown has argued that the Trial judge must consider the augmented *Vanderpeet* analytical process and the *Lax Kw'alaams* decision.

Originally sixty days of court time was scheduled but after a pre-trial conference it has been increased to one hundred days so it is not expected to conclude until sometime in November 2015. The allowance for more time indicates there may be more time for the BCWF and Seafood Alliance who are partnered as Interveners. Counsel Keith Lowes has applied for Intervener status in the trial, rather than just in appeal which, if granted would, within limits, allow our counsel to cross examine, bring witnesses and make submissions in the actual trial.

Our legal counsel must prepare for three different scenarios. One being refused Intervener status at trial and briefing to have our evidence through Crown Counsel should that happen. The second is being prepared for a trial broad in scope and the third to be prepared for a trial quite narrow in scope.

Judicial Review Application and Interlocutory Injunction

Although this is a separate proceeding in Federal Court it relates to the Ahousaht trial. The Ahousaht FN filed an Application for a Judicial Review of a decision by DFO to open a commercial roe-herring fishery on the West Coast of Vancouver Island in March of 2014. The argument for the review
is that the original *Ahousaht* trial granted an aboriginal right to commercial fisheries and the Federal Fisheries Minister must

accommodate that. But since the Review would not be heard until after the fishery would have occurred the Ahousaht FN applied for an Interlocutory Injunction declaring their aboriginal commercial fishing right and an order to prohibit the fishery pending the outcome of the hearing of the Judicial Review.

The Federal Court judge concluded the Ahousaht had met the necessary conditions and granted the Interlocutory Injunction so the Minister was prohibited from opening the WCVI roe herring fishery until the Judicial Review is heard.

In February of 2015, again, the Ahousaht FN applied for an injunction to disallow a commercial roe herring fishery in their traditional territory but this time they failed to convince the (new) judge that "irreparable harm" to them would result from the fishery.

In March of 2015 the Haida also applied for a similar injunction to prevent DFO from conducting a commercial roe herring commercial fishery in Haida Gwaii. They succeeded in proving "irreparable harm" not to the resource directly but to the collaborative relationships the Haida have with Parks Canada. In addition the judge further concluded "Canada's unilateral implementation of the roe herring fishery for 2015 compromises rather than encourages the mandated reconciliation process" of the Gwaii Haanas Agreement of 1993. So the Haida were successful political reasons not scientific ones.

Panel Presentation at UVic – Sept. 25

Last September 25th I attended a panel presentation advertised as *Tsilhqot'in Nation vs BC* in the Fraser Building at University of Victoria. The presenters were a law professor from UVic, a lawyer from a major firm handling many aboriginal legal issues, and another lawyer who was general counsel for the Tsilhqot'in First Nations. It was quite disappointing as the facts regarding the *William* decision in the Supreme Court of Canada were presented in a deliberately distorted way. The bias toward aboriginal issues and against the Federal Justice Department was overbearing. In short the audience

of nearly five hundred people, mostly young students, was subject to an evening of misinformation and indoctrination not education.

In discussion later with BCWF counsel Keith Lowes I learned that this is the case in most law schools in BC and Victoria University is the most noteworthy in terms of misinforming on what the law actually is and demonstrating bias for aboriginal interests over others in society.

Tahltan blockades

Resident hunters lost roughly a month of open season for Bull Moose as a result of a blockade set up by a splinter group of the Tahltan First Nations the "Klabona Keepers". They were accompanied by members of the Wildlife Defense League which is a committed anti-hunting group and supported by the "On Boarders" who are social and environmental activists. Unlike a similar situation in 2009 the BCWF did not take particularly noticeable action. The question of why we did not apply for a court injunction to cease and desist the obstruction has been asked.

Court injunctions

This option has been discussed with legal counsel for the BCWF and the opinion offered was that a court injunction is a cumbersome tool that is not always effective. Firstly, a court has to be convinced the public good will be served by issuing it. Then it must be enforced with arrest and charges being the "or else" if it is ignored. In cases where they are brought against First Nations protest as long as it is peaceful we have been told directly by the RCMP they will often simply refuse to enforce it.

Native Affairs Policy Resolution

Adopted in 2007 it is likely time to review this BCWF policy if nor for a general updating at least for consideration to rename. I will be seeking BOD direction on this.

Respectfully submitted:

Rod Wiebe – Chair,
BCWF Aboriginal Relations Committee