



Landmark decision coming any day now

By James Vassallo

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A monumental legal decision that could forever change the relationship between government, First Nations and industry could be handed down by the Supreme Court of Canada as early as tomorrow.

The Haida Nation v. Weyerhaeuser case, which began with two precedent-setting victories in 2002 over the provincial transfer of Tree Farm License (TFL) 39 to Weyerhaeuser from MacMillan-Bloedel, may give private industry the same obligations as those that have been traditionally only been put on government.

“If I was to look into that crystal ball, yeah, I’d say the Supreme Court will uphold the B.C. court decision,” said Tony Fogarassy, an energy lawyer with the firm Clark, Wilson.

The B.C. Court decision affirmed that industry has a duty to both consult and accommodate the interests of First Nations when developing resources on their traditional lands. Prior to the decision, industry could listen to concerns by Aboriginal peoples.

Council of the Haida Nation (CHN) President Guujaaw refers to consultation as “bogus”, because it was not binding.

“There is a principle that was developed at the court of appeal, a notion of constructive trustee,” said Fogarassy, formerly from Prince Rupert. “The court found that Weyerhaeuser knew they had been granted the transfer illegally.

“Because Weyerhaeuser knew, they were in a fiduciary relationship with the Haida.”

This essentially means that the forestry giant was obligated to act in the interests of the Haida as well as their own, just as the Crown, which holds public land but does not own it, is supposed to.

“For Weyerhaeuser, it was like a cold slap in the face,” he said. “They were wondering, ‘Why should we be stepping into the shoes of the crown?’

Even if the company had not been aware they were benefiting at the expense of the Haida, the concept of “unjust enrichment”, adopted from family law, could also be in play, said Fogarassy. An example would be a stay-at-home parent who looks after the children while the other builds a business. In the event of a divorce, the home parent is still entitled to the successes resulting from the business because the opportunity wouldn’t have existed without their role.

“[The question is] will they develop that concept or put a stake through the heart of it?” he said.

The interesting thing about these concepts is that it could lead to a lot of claims opening up retroactively, he said.

“It’s really what lawyers call a slippery slope,” said Fogarassy.

Although there is only one case in B.C. concerning Aboriginal rights to private land, which involved hunting on a large piece of ranch land, there is also the possibility that the decision could open up an opportunity for First Nations to pursue claims against private developments.

“I don’t think that the Haida case will get involved in that issue,” he said. “But, that

said, it might. In B.C. I suspect that case will come around probably in the Lower Mainland where Crown land is in short supply and there are many overlapping claims.â€?

This means that First Nations could request consultation around developments like Rupertâ€™s container port, as several Tsimshian bands have, however private land is considered to be off the table in treaty negotiations.

â€œIn the grand scheme of things, an Aboriginal people can not veto a development,â€? said Fogarassy, â€œUnder Canadian constitutional law itâ€™s rare that you exclude one group at the expense of another.

â€œJust as Weyerhaeuser may have a legitimate right to harvest trees, that is balanced by the Aboriginal rights of groups like the Haida.â€?

Whatever the decision, all the parties may claim victory. First, the court will determine if industry does have a duty to Aboriginal peoples and, secondly, what is the nature and scope of that duty.

â€œWhat we want is rules to the road that Aboriginals, industry and the Crown can follow,â€? he said. â€œA lot of decisions have been very ambiguous.â€?

Fogarassy sees the potential for both good and bad depending on how Haida is handled. â€œIt might be the basis of creative law suits,â€? he said. â€œOn the other side, it could be a real bell weather for making deals, we all know where weâ€™re at.â€?

â€œMost Aboriginal peoples are not interested in breaking deals, they want to make deals.â€?

Fogarassy is set to be a presenter at the Native Investment and Trade Associationâ€™s Resource Expo 2004 where the Haida case will be front and centre. Event sponsors The Globe and Mail are reporting reasons for judgment in the case will be delivered by the courts on Thursday, however The Daily News has learned from a source close to Weyerhaeuserâ€™s legal team that industry lawyers have not, as yet, been called to Ottawa. While the source says this could change at any moment, the likelihood of a decision before the event is still up in the air. The Supreme Court has a statutory obligation to release a judgment within the next couple of weeks.

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