PAPE
SALTER
TEILLET LLP BARRISTERS AND SOLICITORS

Protecting the Commitments in Modern Day Land Claims and Co-Management in the Northwest Territories

A Summary of *Tłı̨chǫ Government v. Canada*, 2015 NWTSC 09

Overview of Document

This document provides an overview and summary of the Northwest Territories Supreme Court's decision in *Tłı̨chǫ Government v. Canada*, 2015 NWTSC 09 (the "Injunction Decision"). The Injunction Decision stops Canada from implementing its changes to the *Mackenzie Valley Resource Management Act* (the "*MVRMA*") while the Tłı̨chǫ Lawsuit (described below) proceeds to conclusion.

The document has been prepared by legal counsel to the Tłı̨chǫ Government on the Injunction Decision (Nuri Frame and Jason Madden) at the Tłı̨chǫ Government's request. This document is not legal advice and should not be relied upon as such. Nor do the legal interpretations and conclusions in the document necessarily reflect the positions of the Tłı̨chǫ Government.

The Starting Point for the Case: The Tłı̨chǫ Agreement

In order to understand the Injunction Decision, you need to start with the Tłı̨chǫ Agreement (the "Agreement"). The Agreement was signed by Canada, the Northwest Territories and the Tłı̨chǫ on August 25, 2003. It took over a decade to negotiate. It is a modern-day treaty and is unique among the modern treaties in the Northwest Territories because it is both a land claim and a self-government agreement.

The Agreement was a monumental achievement for the Tłı̨chǫ people. It was negotiated in order to define and provide certainty with respect to the rights of the Tłı̨chǫ relating to land, resources, and self-government. In particular, the Agreement was designed to ensure the Tłı̨chǫ would always have a meaningful decision-making role over the land and waters that have sustained them since time immemorial. This is protected—as a right—within the Agreement.

Because section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights, including "rights acquired by way of land claims agreements", the rights protected in the Tłı̨chǫ Agreement are constitutionally protected as well.

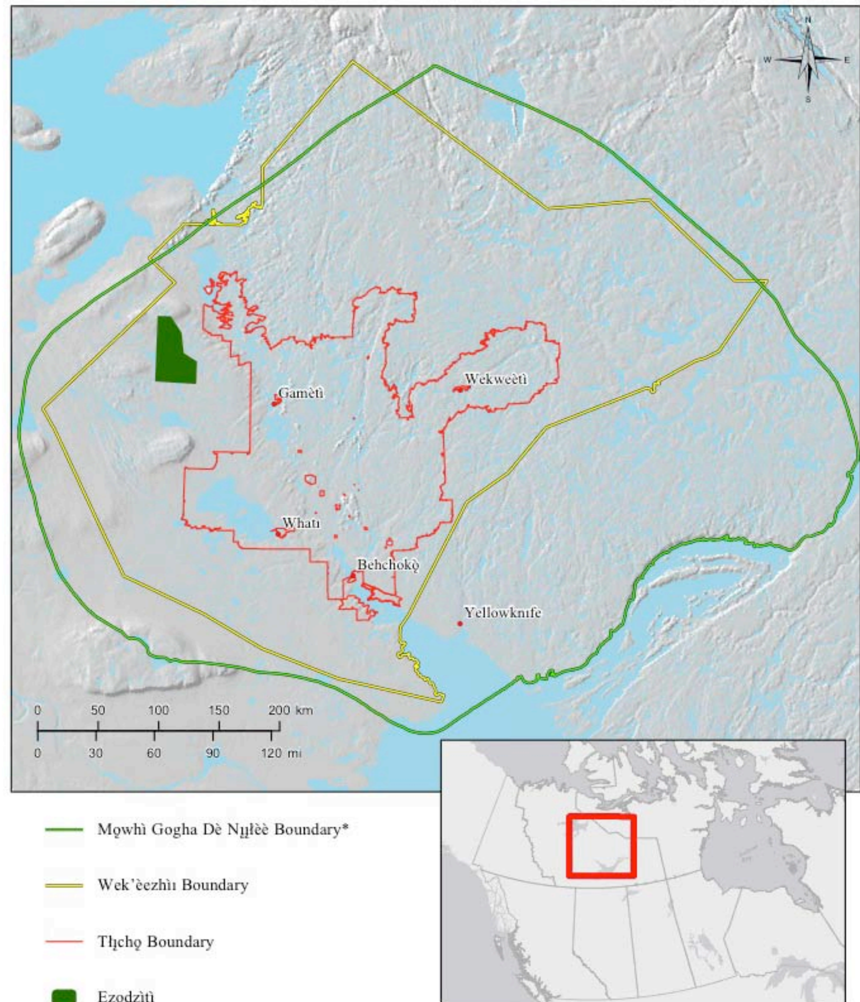
Within the Tłı̨chǫ Agreement, there are three distinct but inter-related geographic areas:

Mǫwhì Gogha Dè Nı̨ı̨tłèè is the overall traditional territory of the Tłı̨chǫ and spans approximately 205,000 km^2. The Agreement guarantees the Tłı̨chǫ harvesting rights and the right to economic participation in the wealth generated in this area.

Wek'èezhìi encompasses approximately160,000 km^2 and lies in the heart of Mǫwhì Gogha Dè Nı̨ı̨tłèè. This area is described as the "management area" in the Agreement. It is double the size of New Brunswick.

Tłı̨chǫ Lands span approximately 39,000 km^2 within Wek'èezhìi. In this area, the Tłı̨chǫ Government own the land in fee simple and exercise primary jurisdiction, subject to certain limits set out in the Agreement. This area is roughly the size of Switzerland.

Tłı̨chǫ Agreement Boundaries



The Agreement commits to the Tłı̨chǫ being co-managers and joint decision-makers in Wek'èezhìi. The Wek'èezhìi Land and Water Board ("WLWB") is the centerpiece of this co-management regime. It is responsible for making decisions with respect to land and water within Wek'èezhìi. The Agreement states that the WLWB "shall" be established.

In 2005, when Canada, in consultation with the Tłı̨chǫ Government, passed legislation to implement the Tłı̨chǫ Agreement, the *MVRMA* was also amended to create the WLWB. At this time, the regional boards for the Gwich'in and Sahtu boards were already in place through the *MVRMA*. Essentially, the *MVRMA* implements parts of these modern treaties.

Since its creation, the WLWB has been repeatedly recognized as a “success” by the Auditor General of Canada, the Government of the Northwest Territories and industry. The Tłı̨chǫ people are also very supportive of the WLWB, as an important piece of their self-government and co-management in Wek’èezhìi.

What Happened that Led to the Tłı̨chǫ Lawsuit?

Beginning in the late 2000s, Canada began to pursue “regulatory improvement” in the north, without meaningfully consulting with Aboriginal groups or really listening to what they were saying about making changes to the co-management regime.

In 2013, over the objections of the Tłı̨chǫ Government and other Aboriginal groups, Canada proposed changes to the *MVRMA* that eliminated the WLWB and other regional boards by creating a “superboard” for the entire Mackenzie Valley. These changes were passed by Parliament in March 2014 as Part IV of the *Northwest Territories Devolution Act* (the “*Devolution Act*”). The changes to the *MVRMA* were set to take effect on April 1, 2015.

In response to Canada’s *MVRMA* changes, the Tłı̨chǫ Government filed a lawsuit against Canada on May 8, 2014 (the “Tłı̨chǫ Lawsuit”). The Tłı̨chǫ Lawsuit claims that Canada’s changes to the *MVMRA* are unconstitutional and that they breach the Tłı̨chǫ Agreement. The lawsuit only challenges the *MVRMA* changes (i.e., Part IV of the *Devolution Act*). It does not challenge other parts of the *Devolution Act*.

What is the Injunction Decision?

Lawsuits—particularly ones that deal with constitutional issues—often take a significant amount of time to prepare for trial, proceed through trial, and be decided. That is the nature of litigation. For a variety of reasons, justice is often not quick.

This created a significant concern for the Tłı̨chǫ Government, since Canada was intending to implement its changes to the *MVRMA* on April 1, 2015. This would mean the WLWB would be destroyed and its staff and institutional knowledge would be lost well before the Tłı̨chǫ Government could get a court decision on whether what Canada was doing was unconstitutional.

In situations like this, courts have the ability to grant temporary remedies or relief that stops a party from going ahead with a specific action until the court has the opportunity to fully determine the legal issues in the underlying lawsuit. This is what an injunction does—it stops a party from doing something while the issues in a lawsuit remain unresolved. Essentially, the *status quo* is maintained while the lawsuit proceeds.

So, in July 2014, the Tłı̨chǫ Government filed an application asking the court to grant it an injunction to stop Canada from moving forward and implementing its changes to the *MVRMA* until the Tłı̨chǫ Lawsuit is complete. This application was argued before Justice Karan Shaner of the Northwest Territories Supreme Court in December 2014.

On February 27, 2015, Justice Shaner released her Reasons for Judgment and granted the Tłı̨chǫ Government an injunction against Canada. This stops Canada from moving ahead with destroying the WLWB and creating its proposed "superboard" until the Tłı̨chǫ Lawsuit is complete. This is what the Tłı̨chǫ Government asked for.

The following sections deal with the legal analysis undertaken by the court:.

The Injunction Decision: Authority to Grant Interlocutory Injunctive Relief

Before it could determine whether it would be appropriate to grant an injunction in this case, the court first had to decide whether it had authority to do so. Canada argued that the court was barred from issuing an injunction by the *Crown Liability and Proceedings Act* and by the common law principle of Crown immunity. The court rejected this argument, noting that a number of decisions have held that Crown immunity is not a bar to injunctive relief in constitutional cases.

> "In a legal system where legislation must, by law, fall within the framework of the Constitution and where the courts are entrusted with the responsibility of determining whether those laws, once enacted, comply with the Constitution and the rights protected thereunder, it would be inimical to hold that the courts have no authority to issue interlocutory injunctive relief against the Crown. If Constitutional protection of rights is to be meaningful, the courts must have the ability to ensure that enforcement of those rights is not, in the end, a merely academic exercise."
> – Injunction Decision, para. 41.

Canada also argued that it was beyond the jurisdiction of the court to enjoin the Governor-in-Council from proclaiming an Order bringing the *MVRMA* amendments into force based on the well-established principle that the three branches of government—the legislature, the executive, and the judiciary—must respect and take care not to intrude on one another's spheres of activity. In support of this argument, Canada relied on two cases in which an injunction was sought prior to Royal Assent to legislation. In both of those cases, the courts held that granting the relief would constitute inappropriate interference in the legislative process. While the court in this case agreed that it did not have jurisdiction to interfere in the legislative process, it noted that the facts here differed from those in the two other cases in one important respect: the *Devolution Act* and the *MVRMA* amendments within it already received Royal Assent. That means that the legislative stage has ended, and all that remains is for the executive branch to act on the authority it has been granted by Parliament under the *Devolution Act* to proclaim an Order-in-Council bringing the amendments to the *MVRMA* into force.

The court acknowledged it was difficult to conceive of many circumstances in which it would be appropriate for a court to enjoin the executive branch directly from doing what Parliament had authorized it to do. It went on to hold, however, that this did not mean the Tłı̨chǫ Government should be left without a remedy. The court ultimately concluded that there was no jurisdictional barrier to granting an interlocutory injunction in this case, provided the Tłı̨chǫ Government could demonstrate such relief was warranted.

The Legal Test for an Injunction and the Tłįchǫ Government Claim

Having determined that it had the jurisdiction to issue some form of injunctive relief, the court proceeded to consider whether an injunction was appropriate in the circumstances of this case. An injunction in a constitutional case will only be granted if the party seeking the injunction is able to establish three things:

1. That there is a serious constitutional question to be tried;
2. That it will suffer irreparable harm if the injunction is not granted; and
3. That the balance of convenience favours granting the injunction.

There is a Serious Constitutional Question

The Tłįchǫ Government argued that the principles of treaty interpretation and the terms of the Tłįchǫ Agreement, as well as the manner in which Canada purported to consult with the Tłįchǫ about the amendments to the *MVRMA*, gave rise to a serious question about the constitutionality of those amendments.

Canada took the position that there was no serious question to be tried based on its interpretation of the Agreement. On Canada's interpretation, it was permitted to eliminate the WLWB by paragraph 22.4.1 of the Agreement, which provides that "where legislation establishes any other land and water board with jurisdiction in an area larger than but including Wek'èezhìi, that board shall assume the powers and responsibilities of the WLWB." Canada also submitted that it had complied with all consultation requirements imposed by the Agreement.

The court rejected Canada's arguments, holding that its ability to rely on paragraph 22.4.1 of the Agreement to justify its actions was "far from a foregone conclusion"; indeed, "a cursory review of the language in paragraph 22.4.1 reveals that it may be open to a number of interpretations" (para. 62). The court also held that in light of the history of how the amendments to the *MVRMA* came about, the Tłįchǫ Government's argument that the consultation process was not meaningful and that Canada failed to give full and fair consideration to the Tłįchǫ Government's views could not be said to be "trifling or frivolous" (para. 63). The court concluded there was a serious constitutional issue to be tried.

> "Whether the Tłįchǫ Agreement may be interpreted as allowing Canada to unilaterally eliminate the WLWB and, in turn, the constitutional validity of Canada's amendments to the *MVRMA*, are in issue. Whether Canada met its consultation obligations is in issue. These are matter[s] of great importance to the parties and the stakes for both are high."
>
> – Injunction Decision, para. 64

The Tłįchǫ Will Suffer Irreparable Harm

The Tłįchǫ Government argued and the court accepted that the Tłįchǫ did not have to prove that irreparable harm was an absolute certainty. It only needed to prove that it was a reasonable likelihood or probability. The court concluded that to hold otherwise would create an impossible standard in cases where applicants seek to prevent the "often intangible and somewhat unpredictable types of harm which can flow from a breach of constitutional rights" (para. 68).

The court also held that a breach of the duty to consult may result in irreparable harm because consultation that conforms to the legal obligations of the consulting party must occur before the impugned activity is undertaken.

> "Given the questions about the adequacy of the consultation process, the fact that the amendments will result in the WLWB being dismantled, and given the WLWB is the vehicle by which the Tłįchǫ Government participates in decisions respecting land and water use affecting Wek'èezhìi, I am satisfied the Tłįchǫ Government will suffer irreparable harm should injunctive relief not be granted pending final determination of the constitutional issues."
> – Injunction Decision, para. 86

The Tłįchǫ Government argued that the alleged breach of Canada's duty to consult, as well as the alleged breach of its treaty rights, gave rise to a reasonable possibility that it would suffer irreparable harm if the injunction were refused. For example, if it was ultimately determined that Canada failed to give full and fair consideration to the Tłįchǫ Government's concerns and thus failed fulfill its obligations to consult as required under the Agreement, the opportunity to engage in meaningful negotiations would have been lost. Further, the elimination of the WLWB and the restructuring of the regulatory regime would significantly diminish Tłįchǫ participation in decisions affecting Wek'èezhìi. The elimination of the WLWB would also result in the loss of the institutional knowledge and expertise developed by the board members and staff of the WLWB over the past decade. The Tłįchǫ argued that all of these effects constituted irreparable harm.

Canada argued that the Tłįchǫ Government would not suffer irreparable harm because any wages lost by current employees of the WLWB could be compensated by monetary damages, and because there was no basis to assume that the restructured MVLWB would make erroneous decisions. The court found that Canada appeared to misunderstand the Tłįchǫ Government's arguments on these points, which focused on the loss of institutional knowledge and capacity—not wages—and the loss of the opportunity to participate in decisions about Wek'èezhìi—not whether those decisions would necessarily be right or wrong.

Canada also argued that no rights had been breached, because it was entitled to eliminate the WLWB pursuant to paragraph 22.4.1, and because the one Tłįchǫ appointee to the new eleven-member "superboard" might be appointed to a three-person panel making decisions about Wek'èezhìi where it is "reasonable to do so". This, Canada argued, provided "a strong measure of assurance" for Tłįchǫ participation in decisions about Wek'èezhìi. The court found this argument to be problematic because it was based on the premise that Canada was correct in believing that it was entitled to eliminate the WLWB and transfer its authority and responsibility to the larger board. As the court observed, this was the key issue to be determined in the Tłįchǫ Lawsuit.

Based on these factors, the court concluded that the changes met the irreparable harm threshold.

The Public Interest and the Balance of Convenience Favour the Tłįchǫ

The Tłįchǫ advanced three arguments with respect to the balance of convenience:

1. Because it was also a public government, the burden of establishing a public interest benefit should weigh less heavily on it than on a private applicant. This is because unlike a private applicant, who is presumed to be advancing its own interests, the Tłįchǫ Government represents its citizens and promotes a range of public interests.
2. Since it was only asking for the WLWB to be exempted from the amendments, rather than for those amendments to be suspended in their entirety, the presumed public interest in validly enacted legislation would be minimally impaired.
3. The public interest would clearly benefit from the preservation of the *status quo*. By maintaining the WLWB, the court would preserve public access to a proven and effective decision-making body; preserve confidence in the sanctity of treaty promises and the relationship between Canada and Aboriginal peoples; and ensure legal and regulatory certainty with respect to land and water use in Wek'èezhìi.

The court rejected the first two arguments. Although the court stated there was "no doubt the Tłįchǫ Government is an order of government" (para. 91), it held that the obligation to establish a public interest benefit did not depend on the applicant's public or private nature, but rather flowed from the presumption that validly enacted legislation will serve the public interest. The court also held that simply exempting the WLWB from the amendments was impossible because of the "all or nothing" manner in which the legislation was drafted.

The court went on to agree with the Tłįchǫ Government's fundamental premise that maintaining the WLWB pending final determination of the Tłįchǫ Lawsuit would benefit the public interest in a number of ways. Although the court was not prepared to find that the WLWB served the public interest better than the "superboard" would, it accepted the argument that granting an injunction would prevent a possible breach of the Tłįchǫ Agreement.

In the court's view, there is a very real public interest benefit in preserving the *status quo* in circumstances in which the effect of the impugned legislation is to dismantle and disrupt existing infrastructure, which will then have to be rebuilt if the Tłįchǫ Lawsuit is successful. The court also accepted the Tłįchǫ Government's argument that if the legislation was ultimately held to be unconstitutional, the validity of any decision made by the MVLWB in the interim about land and water use in Wek'èezhìi could be called into question. Avoiding such uncertainty was in the public interest, which tipped the balance of convenience towards granting the injunction.

What Relief Did the Court Grant?

Having decided that the Tłįchǫ Government had satisfied all three branches of the test and was entitled to interlocutory injunctive relief, the court stated it would issue an order suspending the effect of s. 253(2) of the *Devolution Act*. That provision grants the authority to proclaim an Order-in-Council fixing the date on which the amendments to the *MVRMA* come into force.

Rather than enjoining the Governor-in-Council directly from bringing the amendments into force, this order simply holds the authority to do so—which was granted by Parliament when it enacted s. 253(2) of the *Devolution Act*—in abeyance until the Tłįchǫ Lawsuit is decided. The court order takes effect immediately, and will remain in effect until the final disposition of this case.

What Does This Mean On-The-Ground?

The Injunction Decision means the *status quo* is maintained with respect to land and water management in the Northwest Territories until the Tłįchǫ Government's lawsuit is complete. The on-the-ground effect of the injunction order is to preserve the WLWB as well as the Sahtu and Gwich'in Land and Water Boards, which also have jurisdiction over uses of land and waters and the deposit of waste in their respective management areas in the Mackenzie Valley. The existing Mackenzie Valley Land and Water Board will continue to regulate activities proposed to take place outside of the three land claim management areas or which will take place or have an effect in more than one area.

What Happens Next?

The Tłįchǫ Government continues to move forward with its lawsuit against Canada. It is currently at the stage where both parties collect and exchange information they have about the lawsuit. A trial date has not yet been set and it is likely the trial will not be held until 2016. As indicated above, the *status quo* with respect to land and water management in Wek'èezhìi will continue until the Tłįchǫ Lawsuit is complete.

In the Tłįchǫ Government's press release following the Injunction Decision, Tłįchǫ Grand Chief Erasmus said, "We are optimistic that Canada will read this decision and recognize that we must begin to work together to find solutions that work for all treaty partners. The days of unilateral action by Ottawa are over. Our door is always open to respectful negotiations and finding mutually beneficial solutions."

As the lawsuit and potential discussions with Canada move forward, the Tłįchǫ Government has indicated that it will continue to provide updates to its citizens and post information on its website (www.tlicho.ca) as it becomes available.

About Us

Pape Salter Teillet LLP is a law firm with offices in Toronto and Vancouver. For more than thirty years, we have been working with First Nations, Métis and Inuit peoples to secure a constitutional and legal space that protects our clients' lands, identities, cultures, economies and self-government. For more information about our firm please visit www.pstlaw.ca or contact us directly.

Nuri Frame, Partner
Pape Salter Teillet LLP
Phone: (604) 681-3002, Ext. 1254
Email: nframe@pstlaw.ca

Jason Madden, Partner
Pape Salter Teillet LLP
Phone: (604) 681-3002, Ext. 1255
Email: jmadden@pstlaw.ca