Pape Salter Teillet

PST Case Summary

Tłı̨chǫ Government v Canada

Analysis and implications of the Northwest Territories Supreme Court 2015 injunction decision*

Overview

On February 27, 2015, the Supreme Court of the Northwest Territories issued an injunction decision in a high-profile case between the Tłı̨chǫ Government and the Government of Canada. At stake was whether the federal government could eliminate the Tłı̨chǫ's existing role in resource management for the Mackenzie Valley by replacing the Wek'èezhìi Land and Water Board.

The decision stopped the Government of Canada from implementing its intended changes to the *Mackenzie Valley Resource Management Act (MVRMA)* while a lawsuit initiated by the Tłı̨chǫ in 2014 proceeded to a conclusion. The Northwest Territories Supreme Court, after accepting the argument that the Tłı̨chǫ Government could pursue relief through the courts, held that there was a serious constitutional issue to be tried, and that the federal government had not met its obligation to consult with the Tłı̨chǫ. The court further found that the Tłı̨chǫ would experience unquantifiable and irreparable harm if the *MVRMA* amendments came into effect, and that it was in the public interest to protect the status quo.

The injunction decision, in preserving the authority of the Tłı̨chǫ over their traditional lands and waters, confirmed that in cases affecting Indigenous rights, the federal government's days of unchecked power and unilateral action were over.

Background

On August 25, 2003, Canada, the Northwest Territories and the Tłı̨chǫ Government signed the Tłı̨chǫ Agreement. A decade in the making, the Agreement is unique among modern treaties in the Northwest Territories, as it is both a land claim and a self-government agreement. It was designed to ensure the *Tłı̨chǫ* will always have a meaningful decision-making role over the land and waters that have sustained them since time immemorial. The rights protected in the Agreement are also constitutionally protected through section 35 of the *Constitution Act, 1982.*

The Agreement commits to an ongoing role for the Tłı̨chǫ as co-managers and joint decision-makers through the Wek'èezhìi Land and Water Board (WLWB), established when the Government of Canada passed legislation to implement the Agreement in 2005. However, in the late 2000s, the government, without meaningful consultations, began to pursue "regulatory improvement" in the North. Then in 2013, over the objections of the Tłı̨chǫ Government and other Indigenous 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.*

In response to the *MVRMA* amendments, the Tłı̨chǫ Government filed a lawsuit against the Government of Canada on May 8, 2014. The lawsuit claimed that Canada's changes to the MVMRA were unconstitutional and breached the Tłı̨chǫ Agreement. (The suit did not challenge other parts of the *Devolution Act.*)

It was clear that the lawsuit would take years to resolve; meanwhile, the *MVRMA* amendments were set to take effect on April 1, 2015. The Tłı̨chǫ Government therefore took action to preserve the WLWB, its staff and institutional knowledge. An application filed in July 2014 asked the court to grant an injunction that would stop Canada from implementing its changes to the *MVRMA* before the Tłı̨chǫ Lawsuit had been brought to a conclusion. This application was argued in December 2014 before Justice Karan Shaner of the Northwest Territories Supreme Court.

The injunction decision

On February 27, 2015, Justice Shaner granted the Tłı̨chǫ Government an injunction that stopped Canada from moving ahead with the dissolution of the WLWB and the proposed creation of a "superboard" until the Tłı̨chǫ Lawsuit was complete. Justice Shaner found that:

1. The court had the authority to grant an injunction.

2. The injunction "passed" a legal test based on three key points:
   (a) that there was a serious constitutional question to be tried
   (b) that the Tłı̨chǫ Government would suffer irreparable harm if the injunction were not granted
   (c) that the public interest was served by maintaining the status quo.

The court ruled the Tłı̨chǫ Government was entitled to interlocutory injunctive relief and stated that it would issue an order suspending the effect of the relevant section of the *Devolution Act.*

Key implications

1. The court had the authority to grant an injunction.

The Government of Canada argued that the court was barred from issuing an injunction by the *Crown Liability and Proceedings Act*, as well as by the common law principle of Crown immunity. The court rejected this argument, noting that several decisions have held Crown immunity not to be a bar to injunctive relief in constitutional cases.

Canada also argued it was beyond the jurisdiction of the court to prohibit the Governor-in-Council from proclaiming an Order bringing the *MVRMA* amendments into force. The argument cited an established principle that the three branches of government – legislative, executive and judicial – must respect and not intrude on one another's spheres of activity. While the court agreed that it could not interfere in the legislative process, it noted that the *Devolution Act*, including the amendments within it, had already received Royal Assent. This meant the legislative stage had ended, and all that remained was for the executive branch to bring the amendments to the *MVRMA* into force.

The decision acknowledged that it was difficult to conceive of many situations in which it would be appropriate for a court to directly prohibit the executive branch from doing what Parliament had authorized it to do. However, this did not mean that the Tłı̨chǫ Government should be left without a remedy. Therefore the court ultimately concluded there was no jurisdictional barrier to granting an interlocutory injunction in this case.

> "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."
>
> – NORTHWEST TERRITORIES SUPREME COURT DECISION, PARA. 41

2. The Tłı̨chǫ Government claim met the legal test for an injunction.

Having determined that it had the jurisdiction to issue some form of injunctive relief, the court then considered the three conditions for determining whether an injunction was appropriate in this case:

(a) There was a serious constitutional question to be tried.

The Tłı̨chǫ Government argued that the general principles of treaty interpretation and the specific terms of the Tłı̨chǫ Agreement – as well as the Government of Canada's manner of consultation with the Tłı̨chǫ regarding the *MVRMA* amendments – 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 paragraph 22.4.1 of the Agreement, which states: "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 claimed it had complied with all consultation requirements.

The court rejected Canada's arguments, finding its ability to rely on that one section of the Agreement was "far from a foregone conclusion." Indeed, the court noted (para. 62) that "a cursory review of the language in paragraph 22.4.1 reveals that it may be open to a number of interpretations." The court also held that in light of how the amendments to the *MVRMA* came about, the Tłı̨chǫ Government's argument that consultations were not meaningful, and that Canada failed to give full and fair consideration to its views, was not "trifling or frivolous" (para. 63). The court therefore concluded that there was a serious constitutional issue to be tried.

(b) The Tłı̨chǫ Government would suffer irreparable harm if the injunction were not granted.

The court accepted the Tłı̨chǫ Government's argument that it did not have to prove irreparable harm with absolute certainty but only had to establish reasonable likelihood. The court concluded that to hold otherwise would create an impossible standard in cases that sought to prevent the "often intangible and somewhat unpredictable types of harm which can flow from a breach of constitutional rights" (para. 68).

The Tłı̨chǫ Government also argued that Canada's failure to consult, in addition to breaching its treaty rights, led to a reasonable possibility that the Tłı̨chǫ would suffer irreparable harm if the injunction were refused. For instance, the Tłı̨chǫ Government would lose the opportunity to engage in meaningful negotiations and would have less 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 board members and staff over the previous decade.

Canada argued that no rights had been breached, as the federal government was entitled to eliminate the WLWB under the Tłı̨chǫ Agreement. Also, because a Tłı̨chǫ appointee to the new 11-member "superboard" might make decisions about Wek'èezhìi where it was "reasonable to do so," this "provided a strong measure of assurance" of Tłı̨chǫ participation. The court found this argument problematic, specifically the premise that Canada was entitled to eliminate the WLWB and transfer its authority and responsibility to the "superboard". As the court observed, this was the key issue to be determined in the Tłı̨chǫ Lawsuit.

The court therefore concluded that the changes met the irreparable harm threshold.

"Whether the Tłı̨chǫ 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

"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 Tłı̨chǫ Government participates in decisions respecting land and water use affecting Wek'èezhìi, I am satisfied the Tłı̨chǫ Government will suffer irreparable harm should injunctive relief not be granted pending final determination of the constitutional issues."

– INJUNCTION DECISION, PARA. 86

(c) The public interest was served by maintaining the status quo.

The Tłı̨chǫ Government advanced three arguments regarding this point:

— Because it was also a public government, the burden of establishing a broader public interest benefit should weigh less heavily than it would for a private applicant.

— The Tłı̨chǫ Government was only asking for the WLWB to be exempt from the *MVRMA* amendments – as opposed to asking for the amendments to be suspended entirely – so the presumed public interest in validly enacted legislation would be minimally impaired.

— By maintaining the WLWB, the court would preserve public access to a proven and effective decision-making body. It would also preserve confidence in the sanctity of treaty promises and the relationship between Canada and Indigenous peoples. And it would ensure legal and regulatory certainty with respect to land and water use in Wek'èezhìi. Maintaining the status quo would therefore clearly serve the public interest.

The court rejected the first two arguments but agreed with the Tłı̨chǫ Government's fundamental premise: maintaining the WLWB pending final determination of the Tłı̨chǫ Lawsuit would benefit the broader public interest. The court also accepted that granting an injunction would prevent a possible breach of the Tłı̨chǫ Agreement. In addition, the court agreed that if the legislation were ultimately held to be unconstitutional, the validity of any "superboard" decisions made in the interim regarding land and water use in Wek'èezhìi could be called into question.

The court concluded that avoiding such uncertainty was in the public interest – which tipped the balance of convenience toward granting the injunction.

Long-term impact

The effect of the injunction ruling was that the status quo would be maintained with respect to land and water management in the Northwest Territories until the Tłı̨chǫ Government's lawsuit was complete. The WLWB – as well as the Sahtu and Gwich'in regional land and water boards already in place under the *MVRMA* – were all preserved. The existing WLWB would continue to regulate activities in the areas of the Mackenzie Valley subject to its oversight.

Following the federal election of October 2015, the new Liberal government chose not to proceed with the proposed changes to the *MVRMA*. Consequently, the WLWB would maintain its responsibilities regarding the land and waters of Wek'èezhìi. With this return to the status quo, the lawsuit was resolved.

**This summary highlights key points of the 2015 injunction decision of the Supreme Court of the Tłı̨chǫ Government v Canada, 2015 NWTSC 09. The summary was prepared by Pape Salter Teillet LLP, legal counsel to the Tłı̨chǫ Government in this case, and reflects the opinions of the firm. It does not constitute legal advice.*

"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."

– GRAND CHIEF EDWARD "EDIIWA" ERASMUS, TŁı̨CHǪ GOVERNMENT