Tłı̨chǫ Government v. Canada (Attorney General), 2015 NWTSC 9

Date: 2015 02 27
Docket: S-1-CV-2014-000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TŁĮCHǪ GOVERNMENT

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Respondents

REASONS FOR JUDGMENT

[1] This is an application for interlocutory injunctive relief pending final determination of this action.

[2] The Respondents will be described collectively as "Canada".

BACKGROUND

[3] On March 25, 2014, Bill C-15, now the *Northwest Territories Devolution Act,* SC 2014, c. 2, (the "*Devolution* Act") received Royal Assent. The provisions in issue in this case are not yet in force, but will come into force on a date to be set by Order-in-Council.[1]

[1] *Devolution Act,* s. 253(2)

[4] The *Devolution Act* is meant primarily to implement certain provisions of the *Northwest Territories Lands and Resources Devolution Agreement*. It also amends other pieces of legislation, including the *Mackenzie Valley Resource Management Act*, SC 1998, c. 25 (the "*MVRMA"*).

[5] Currently, the *MVRMA* provides for four land and water boards, each of which has jurisdiction over certain parts of the Northwest Territories' Mackenzie Valley. Among these is the Wek'èezhìi Land and Water Board (WLWB), which has jurisdiction over the Wek'èezhìi Management Area.[2] The Wek'èezhìi Management Area is a part of the traditional territory of the Tłı̨chǫ.

[6] The WLWB was created in fulfillment of one of Canada's commitments under the *Land Claims and Self-Government Agreement Among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada* (the "Tłı̨chǫ Agreement") executed on August 25, 2003. The Tłı̨chǫ Agreement is a modern day treaty which created and confirmed Aboriginal rights. These are, in turn, protected under s. 35 of the *Constitution Act, 1982*.

[7] Paragraph 22.3.2 of the Tłı̨chǫ Agreement is what provides for the creation of the WLWB, as follows:

> A board, to be called the Wek'èezhìi Land and Water Board, shall be established, on the effective date, by legislation, as an institution of public government, to regulate the use of land and water and the deposit of waste throughout Wek'èezhìi. . .

[8] The Tłı̨chǫ Agreement also specifies the composition of the WLWB and provides the Tłı̨chǫ Government is entitled to appoint half of the members, excluding the chairperson.[3]

[9] The legislation referred to in paragraph 22.3.2 of the Tłı̨chǫ Agreement and through which the WLWB is established is the *MVRMA*.[4] In addition to the WLWB, the *MVRMA* also establishes the Sahtu Land and Water Board[5] and the

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[2] *MVRMA*, ss. 58.1-60

[3] paragraph 22.3.3(b)

[4] *MVRMA*, s. 57.1

[5] *MVRMA*, s. 56

Gwich'in Land and Water Board,[6] which have jurisdiction over uses of land and water, and waste deposit, in their respective management areas.[7] Finally, the *MVRMA* creates the MacKenzie Valley Land and Water Board (the "MVLWB"), which regulates activities proposed to take place outside of the management areas over which the other three boards have jurisdiction or which will take place or have an effect in more than one area.[8]

[10] The changes to the *MVRMA* resulting from the *Devolution Act* include, *inter alia,* the elimination of the WLWB, with its authority being absorbed into a newly structured MVLWB.[9] The Sahtu and Gwich'in boards will be eliminated as well.

[11] Tłı̨chǫ participation in decisions affecting Wek'èezhìi will continue, through the re-structured MVLWB. As discussed below, however, the nature and extent of that participation will change.

[12] At present, a certain level of Tłı̨chǫ participation in decisions about land and water use in Wek'èezhìi is guaranteed by operation of the legislative framework. Section 57.1(2) of the *MVRMA* specifies the WLWB is to be composed of four members and one chairperson. Two of the four are appointed by the Tłı̨chǫ Government, as required under paragraph 22.3.3 (b) of the Tłı̨chǫ Agreement.[10] Section 57.1(4) provides a *quorum* consists of three members, or any larger number that is determined by the WLWB, and includes one of the members appointed by the Tłı̨chǫ Government and one of the members appointed by the federal Minister, other than the chairperson. Section 57.2 provides the WLWB's main office shall be located in Wek'èezhìi.

[13] Once the provisions of the *Devolution Act* amending the *MVRMA* come into force, the WLWB will cease to exist. The MVLWB will have eleven members, including seven appointed as follows: one member appointed by each of the Gwich'in First Nation, the Sahtu First Nation and the Tłı̨chǫ Government; two members appointed following consultation by the federal Minister with first

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[6] *MVRMA*, s. 54

[7] *MVRMA*, ss. 59 and 60

[8] Section 103(1)

[9] *Devolution Act,* s. 136

[10] This is subject to any agreement between the Tłı̨chǫ Government and an aboriginal people of Canada to whom section 35 of the *Constitution Act, 1982* applies, other than the Tłı̨chǫ First Nation

nations of the regions outside of the Gwich'in and Sahtu settlement areas and Wek'èezhìi; and two members nominated by the territorial Minister.[11] Accordingly, the Tłı̨chǫ Government will go from appointing two of a four-person panel, to one out of ten.[12]

[14] Participation by the Tłı̨chǫ Government's appointee to the MVLWB in decisions affecting Wek'èezhìi will no longer be guaranteed. What is contemplated in the amendments is the appointment of three-person panels from the main Board to hear and dispose of applications respecting proposed activities in the respective management areas of the Tłı̨chǫ Government, the Gwich'in and the Sahtu First Nations.[13] In the case of an application relating to Wek'èezhìi, the chairperson is to designate the member appointed by the Tłı̨chǫ Government, "if it is reasonable to do so".[14] This new provision, which is discretionary, also applies with respect to the board members nominated by the Gwich'in First Nation and the Sahtu First Nation on applications relating to the management areas described in their respective agreements.

The Consultation Process

[15] The amendments to the *MVRMA* set out in the *Devolution Act* were preceded by a consultation process,[15] something expressly required by both the Tłı̨chǫ Agreement[16] and by the *MVRMA.*[17]

[16] "Consultation" is defined at paragraph 1.1.1 of the Tłı̨chǫ Agreement as follows:

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[11] *Devolution Act*, s. 136 (proposed new section 54)

[12] Exclusive of the chairperson in each case

[13] *supra*, s. 136 (proposed new section 56 of the *MVRMA)*

[14] *supra*, s. 136 (proposed new sections 56(2) and (3) of the *MVRMA*)

[15] The parties disagree on the sufficiency of the consultation process, including whether Canada gave "full and fair consideration" to the views of the Tłı̨chǫ Government before bringing forth the amendments. The question of whether the consultation process was sufficient is one of the main points in issue in this suit and it will fall to the trial judge to decide, ultimately, if the process was sufficient to discharge the Crown's obligation. However, the parties appear to be in substantial agreement on what steps were taken by Canada in consulting with the Tłı̨chǫ Government.

[16] At paragraph 22.3.15

[17] *MVRMA*, ss. 3-8

> "Consultation" means
>
> (a) The provision, to the person or group to be consulted of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;
>
> (b) The provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the person or group obliged to consult; and
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> (c) Full and fair consideration by the person or group obliged to consult of any views presented.

[17] On November 7, 2007 Canada, through its Minister of Indian Affairs and Northern Development, announced the *Northern Regulatory Improvement Initiative* and the appointment of Neil McCrank to lead it. Mr. McCrank ultimately prepared and submitted a review of the regulatory systems throughout the North entitled *Road to Improvement*[18] on May 20, 2008. In gathering data and preparing the report, Mr. McCrank met with a number of individuals and organizations, including representatives from the Tłı̨chǫ Government.[19]

[18] Mr. McCrank identified two options for improving the regulatory system. The first was to fundamentally restructure the regulatory regime in a manner that would require the agreement of all parties to amend comprehensive land claim agreements, as well as extensive amendments to the *MVRMA.* This would include elimination of the regional boards, including the WLWB, and transferring their authority and responsibility to the MVLWB.[20] The second was a less extensive restructuring which would not include the elimination of the regional boards.[21]

[19] Subsequently, in May of 2010, Canada announced its "Action Plan to Improve Regulatory Regimes". It appointed Mr. John Pollard as its Chief Negotiator. Mr. Pollard was also appointed to lead consultations and negotiations

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[18] McCrank, Neil, *Road to Improvement "The Review of the Regulatory Systems Across the North"* Ottawa: 2008, attached as Exhibit 22 to the Affidavit of John B. Zoe

[19] *supra,* at 85

[20] *supra,* pp. 14-17

[21] *supra,* pp. 17-18

with the Government of the Northwest Territories and Aboriginal governments and leadership respecting changes to the amendments to the *MVRMA.*

[20] Mr. Pollard met with representatives of the Tłı̨chǫ Government on a number of occasions between May of 2010 and November of 2012 as part of the consultation process. The Tłı̨chǫ Government maintained its objection to the elimination of the WLWB throughout and made its position on the proposed changes known.

THE PARTIES' POSITIONS

The Tłı̨chǫ Government

[21] The Tłı̨chǫ Government submits the amendments to the *MVRMA* which purport to eliminate the WLWB are unconstitutional because they violate protected treaty rights under the Tłı̨chǫ Agreement. Specifically, it argues the amendments violate the Tłı̨chǫ Government's right to effective and guaranteed participation in the co-management regime in Wek'èezhìi through the structure set up by Tłı̨chǫ Agreement and implemented through the *MVRMA.* It does not accept Canada's position that the elimination of the WLWB and transfer of its authorities is contemplated or permitted under the Tłı̨chǫ Agreement.

[22] The Tłı̨chǫ Government also claims Canada failed to properly discharge its duty to consult with it about the amendments before making them. It suggests Canada approached the consultation process having already firmly committed to its decision to overhaul the land and water regulatory regime in the Northwest Territories and with no genuine intention of giving full and fair consideration to the views of the Tłı̨chǫ Government as required by paragraph 1.1 of the Tłı̨chǫ Agreement.

[23] The Tłı̨chǫ Government brought this action by Statement of Claim on May 8, 2014. A variety of relief is requested in its Statement of Claim including declarations that certain portions of the *Devolution Act* are of no force or effect and an interim injunction to enjoin the Government of Canada or its ministers from taking steps to implement those provisions of the *Devolution Act* that will affect the WLWB or other appropriate injunctive relief.

[24] With respect to this application in particular, the Tłı̨chǫ Government seeks injunctive relief which would have the effect of the WLWB being exempt from the amendments pending a final determination of the parties' rights. It submits it will

suffer irreparable harm unless some form of interlocutory injunctive relief is granted. It also submits that should it ultimately succeed and an injunction has not been granted, the validity of decisions made by the newly structured MVLWB in the intervening period will be cast into doubt, thus harming the public interest in the long run.

Canada

[25] Canada argues it has fulfilled all procedural and substantive obligations, including consultation. It maintains it has the right under the Tłı̨chǫ Agreement to bring forth the amendments to the *MVRMA* set out in the *Devolution Act,* including elimination of the WLWB.

[26] With respect to consultation, Canada points to the process that was followed. It says the Tłı̨chǫ Government was provided with ample information on the proposed amendments to the *MVRMA* and ample time and opportunities to make its views known. It also points out that consultation, however meaningful, will not necessarily, nor is it required to, lead to consensus. Canada argues that it is clear that it listened to the Tłı̨chǫ Government during this process and gave full and fair consideration to its views.

[27] Canada says that notwithstanding the paragraph 22.3.2 of the Tłı̨chǫ Agreement, which states Canada "shall" establish the WLWB, paragraph 22.4.1 expressly contemplates and permits the elimination of the WLWB and the transfer of its responsibilities and authority to a larger board. That provision is as follows:

> Where legislation establishes any other land and water board with jurisdiction in an area larger than but including Wek'èezhìi ("the larger board"), it shall assume the powers and responsibilities of the Wek'èezhìi Land and Water Board. The provisions of the Agreement applicable to the Wek'èezhìi Land and Water Board apply to the larger board except 22.3.3, 22.3.4 and 22.3.6 to 22.3.9.

[28] With respect to this application specifically, Canada submits this Court may not issue an injunction to enjoin the Governor-in-Council from passing an Order-in-Council to bring the amendments into force. It puts forth two bases for this argument, specifically that there is a statutory prohibition against issuing injunctive relief against the Crown found in s. 22 of the *Crown Liability and Proceedings Act*, RSC 1985, c. 50; and issuing such relief would constitute an inappropriate intrusion by the Court into the executive's sphere of authority.

[29] Canada submits a further barrier to injunctive relief is that once the new legislative provisions are brought into force, their effect will be to replace the current provisions. It argues further that injunctive relief cannot resurrect "spent" legislation and so a legislative void would be created.

[30] Finally, Canada argues the Tłı̨chǫ Government does not meet the legal requirements for an interlocutory injunction in any event.

ISSUES

[31] The key issues in this application are:

A. Whether this Court has authority to grant interlocutory injunctive relief in these circumstances, specifically:

   i. Whether injunctive relief enjoining the Governor-in-Council from promulgating the Order-in-Council authorized under s. 253(2) of the *Devolution Act* is barred by Crown immunity legislation or the common law principle of Crown immunity; and

   ii. Whether issuing injunctive relief would be inappropriate interference with the legislative process.

B. If the Court does have the authority to issue injunctive relief, then the Court must determine whether that relief is appropriate. The Crown's point respecting the impact of injunctive relief in the face of "spent" legislation will be addressed within the discussion on the public interest as a factor in determining if injunctive relief should issue.

A. Authority to Grant Interlocutory Injunctive Relief

Is Injunctive Relief Barred by the Crown Liability and Proceedings Act or at Common Law?

[32] Canada submits that in promulgating an Order-in-Council, the Governor-in-Council is acting as the Crown and, accordingly, the *Crown Liability and Proceedings Act* applies to bar that relief.

[33] Section 22 of the *Crown Liability and Proceedings Act* provides as follows:

> **22.**(1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.
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> (2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.

[34] Canada relies on *Hogan et al v Newfoundland (Attorney General) et al*, 1998 Canlii 18727, 162 Nfld & PEIR 132 (Nfld SC)[22] and *Chief Mountain v HMTQ*, 2000 BCSC 659, aff'd 2000 BCCA 260 (CanLII) in support of its position.

[35] The applicants in *Hogan* sought an interlocutory injunction to prohibit the Governor General from proclaiming a constitutional amendment pursuant to s. 48 of the *Constitution Act, 1982* to the Terms of the Union between Newfoundland and Canada following the passage of resolutions by the provincial House of Assembly and the House of Commons and the Senate. Justice Orsborn determined that the proclamation which the applicants sought to enjoin was the equivalent of Royal Assent. With respect to the application of the Crown immunity legislation specifically, he stated:

> [59] Thus, in issuing the proclamation under s. 48 to amend Term 17, the Governor General is acting as the Crown. Indeed it would be more difficult to contemplate a circumstance in which the Governor General was more clearly acting as the Sovereign in Canada. Accordingly, s. 22 of the *Crown Liability Act* precludes this court from issuing an injunction to prevent the Governor General from issuing the proclamation.

[36] In *Chief Mountain* the applicants sought to enjoin the Queen's Privy Council for Canada and the Executive Council for British Columbia from bringing into force legislation to give effect to the Nisga'a Final Agreement. Although Williamson, J., dismissed the application, he nevertheless left open the possibility of Court intervention in an executive function, albeit in the "rarest of circumstances":

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[22] Overturned on other grounds: *Hogan v Newfoundland (Attorney General)*, 1998 Canlii 18115, 172 Nfld & PEIR 185 (CA)

> 7 I turn to the issue of whether the defendants are subject generally to an injunction in the circumstances which pertain here. I am satisfied that only in the rarest of circumstances should the court intervene in such an executive function. It is important to note that the injunction sought here would enjoin the executive from preparing the Orders-in-Council authorized by legislation passed in Parliament and in the Legislative Assembly. It cannot be said that the actions of the officials sought to be enjoined here could be unconstitutional.
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> 8 Indeed, Provincial and Federal statutes, as does the common law, prohibit a court from issuing an injunction against the Crown. See: *Crown Liability and Proceedings Act* R.S.C. 1985, c. C-50, *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, and *Musqueam Indian Band v. British Columbia* (July 2, 1987), Doc. Vancouver C873062 (B.C. S.C.), in which Southin J., as she then was, said at page 3:
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> > The principle that an injunction will not lie against the Crown, or an officer of the Crown acting lawfully in the performance of his duties, is deeply embedded in the law.

[37] In the years since *Hogan* and *Chief Mountain* were decided, a number of courts have held that neither Crown immunity legislation, nor the common law principle of Crown immunity are bars to granting injunctive relief against the Crown in cases where constitutional rights are in issue.

[38] In *Lord v Canada (Attorney General)*, 2000 CanLII 9079, [2000] 3 CNLR 69 (QC CA) the Québec Court of Appeal held (at paras 7-12) that traditional Crown immunity is constrained by the *Constitution Act, 1982* and that the Crown's right to act is absolute only in so far as there is no violation of constitutional rights. The Court based its reasoning in large part on ss. 32(1)(a) and 52(1) of the *Constitution Act, 1982* which provide, respectively, that the *Charter* applies to the Parliament and Government of Canada, and that the Constitution is the supreme law of Canada such that any law inconsistent with it is of no force or effect to the extent of that inconsistency. The Court noted this principle takes on even more significance in the case of s. 35 treaty rights.

[39] More recently, in *Lameman v Alberta*, 2013 ABCA 148, the Alberta Court of Appeal dealt with an argument by the Crown that s. 17 of the *Proceedings Against the Crown Act*, RSA 2000, c P-25, the equivalent to s. 22 of the federal *Crown Liability and Proceedings Act,* precludes courts from issuing injunctions against the Crown. The Court noted that notwithstanding the statutory prohibition, there is authority for granting interlocutory injunctions against the Crown in constitutional cases and it cited several decisions to illustrate the point, including:

Lord v Canada (Attorney General), supra; Bellegarde v Canada (Attorney General), 2002 FCT 1131 at paras 75-83, [2003] 1 CNLR 320, aff'd 2004 FCA 34, 235 DLR (4th) 763; *Snuneymuxw First Nation v British Columbia*, 2004 BCSC 205 at paras 58-69, 26 BCLR (4th) 360; *Douglas v Saskatchewan (Minister of Learning)*, 2005 SKQB 270 at para 5, [2006] 4 WWR 193; *Chief Allan Apsassin v Canada (Attorney General)*, 2007 BCSC 492 at paras 18-20; and *Ke-Kin-Is-Uqs v Minister of Forests of the Province of British Columbia*, 2005 BCSC 345 at para 58, [2005] 2 CNLR 138.

[40] The rationale for the principle that courts may issue interlocutory injunctive relief against the Crown in constitutional cases despite Crown immunity legislation was explained by Groberman, J., in *Snuneymuxw First Nation v British Columbia, supra:*

> [53] The plaintiffs argue that this statutory provision can have no effect where the Province lacks legislative jurisdiction over the subject matter. I agree with that proposition. The Province cannot shield itself from constitutional remedies by enacting legislation purporting to prevent them from being granted against it. Such legislation must, in pith and substance, be legislation going to the very matter that is *ultra vires* the Province. If authority be required for this point, reference may be had to the case of *Amax Potash Ltd. v. Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 S.C.R. 576.

[41] 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 the enforcement of those rights is not, in the end, a merely academic exercise. Accordingly, I find s. 22 of the *Crown Liability and Proceedings Act* does not bar interim injunctive relief from issuing against the Crown in these circumstances, nor is it barred by the traditional common law Crown immunity.

Jurisdiction to Enjoin the Governor-in-Counsel from Promulgating an Order-in-Council

[42] Canada submits that in promulgating Orders-in-Council, the Governor-in-Council is acting in a legislative capacity and it is beyond the jurisdiction of the courts to supervise or interfere with that legislative process. In support of its position Canada again relies on the reasoning in *Hogan* and *Chief Mountain.*

[43] In addition to his finding that the Crown immunity legislation created a statutory bar to injunctive relief, Orsborn, J., in *Hogan,* found the proclamation which the applicants sought to enjoin was in fact the equivalent of Royal Assent, the act which completes the legislative process. Justice Orsborn determined he was without jurisdiction to grant the relief because it would constitute inappropriate interference in that process, which was, in the absence of Royal Assent, incomplete.

[44] Similarly, in *Chief Mountain,* the legislative process was not complete. The bills in question were still being debated when the injunction application was made. Justice Williamson concluded that this fact, in and of itself, would prevent a court from issuing injunctive relief.

[45] There can be no dispute with conclusions reached in either *Hogan* and *Chief Mountain* on this point. They reflect the well-established principle that the courts, the legislature and the executive must respect each other's "legitimate sphere of activity": *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319 (at 389). That said, the facts in *Hogan* and *Chief Mountain* differ in one very important respect from those in this case: the *Devolution Act* has received Royal Assent and parts of it are already in force. The deliberative stage has ended and the law has been enacted. What remains is for the executive branch to act on the authority it has been granted by Parliament under s. 253(2) of the *Devolution Act* to bring the amendments to the *MVRMA* into force.

[46] The leading case on the power to proclaim legislation into the force and the ability of the courts to intervene in that exercise is *Reference re Criminal Law Amendment Act, 1968-69 (Canada),* [1970] SCR 777. In that case, the Supreme Court of Canada was asked to opine on the validity of the manner in which the executive exercised its power to bring into force amendments of the *Criminal Code.*

[47] The executive had exercised discretion and decided to bring into force some of the amendments ahead of others. Justice Judson found this decision was entirely within the purview of the executive branch (at 783):

> Once it has been ascertained that Parliament has given the executive a certain power, as it has done in this instance by virtue of s. 120, then it is beyond the power of Courts to review the manner in which the executive exercises its discretion. Courts cannot examine policy considerations animating the executive.

[48] In his own opinion, Laskin, J., concluded that supervising the "enactment" of legislation was beyond the Court's jurisdiction (at 801):

> I think we should be very wary of judicializing the exercise of the very broad executive power conferred by Parliament in this case when it relates to the bringing into force of legislation. We are involved here with the field of original enactment and not in any appreciable sense with that of interpretation. As has been aptly observed, "the enactment of a law involves both the determination of what the rule shall be and that such rule shall have the force of law": See *Rottschaefer, Constitutional Law, 1939, p. 73.*

[49] *Reference re Criminal Law Amendment Act, 1968-69 (Canada)* was decided some twelve years before the *Constitution Act, 1982,* came into being. There was, consequently, no need to consider the impact of executive action on constitutionally protected rights and indeed, neither the legislative, nor the executive branches of government were subject to the same constitutional constraints that now exist. Nevertheless, it is difficult to conceive of many circumstances where it would be appropriate for a court to enjoin directly the executive branch of government from doing that which has been directed and authorized by Parliament.

[50] This does not mean the Tłı̨chǫ Government should be left without a remedy. It may not be reasonable in the circumstances to enjoin directly the Governor-in-Council from promulgating Orders-in-Council, but there are other forms of relief which, though they may have the same result, do not directly interfere in the executive function.

[51] In *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 (SCC), McLachlin, J., stated the following with respect to the role of the courts in respect to constitutional issues (at para 136):

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

[52] Although these remarks were made in the context of a *Charter* analysis, they are, in my view, equally applicable in the context of s. 35 treaty rights and inform the role the courts must take in all cases where constitutionally protected rights may be at risk.

[53] There are unique circumstances of this case. In addition to there being constitutionally protected rights in issue, the impugned legislation has received Royal Assent, but is not yet in force. Assuming, of course, that there is a proper foundation made out for injunctive relief, one of the options open to the Court is to issue injunctive relief suspending the operation of the provisions of the *Devolution Act* which empower the Governor-in-Council to bring the amendments in issue into force.

[54] Accordingly, I find that there are no barriers to the Court granting injunctive relief in this case, should it be demonstrated that such relief is warranted.

B. Entitlement to Interlocutory Injunctive Relief

[55] The parties agree the legal test for an interlocutory injunction in a constitutional case is that which was set out in *Manitoba (Attorney General) v Metropolitan Stores Ltd.* [1987] 1 SCR 110 and subsequently in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311 (herein "*RJR-MacDonald 1994"*); *Harper v. Canada (Attorney General)* [2000] 2 SCR 764, and others.

[56] There are three aspects to the test, all of which must be satisfied before interlocutory injunctive relief can issue. An applicant must demonstrate: first, that there is a serious constitutional question to be tried; second, that the applicant will suffer irreparable harm if the injunction is not granted; and third, that the balance of convenience favours the injunction.

[57] In considering the balance of convenience in constitutional cases, the Court must start with the presumption that the law in question – in this case, the provisions of the *Devolution Act* which will amend the *MVRMA* to, *inter alia*, eliminate the WLWB and create the new board structure – will produce a public good and serve a valid public purpose: *RJR-MacDonald 1994* at 348-49; *Harper v Canada* at 770. It is only in clear cases that applications for interlocutory injunctive relief restraining enforcement of a law on grounds of alleged unconstitutionality will succeed: *Harper v Canada* at 771.

[58] Canada submits none of the three branches of the legal test for interlocutory injunctive relief have been satisfied. The Tłı̨chǫ Government submits they have.

Is there a Serious Constitutional Issue to be Tried?

[59] Canada argues there is no serious question to be tried. As noted above, it takes the position that it has met all substantive and procedural requirements of the Agreement applicable to amending the MVRMA to eliminate the WLWB and change the regulatory structure, including the manner in which the Tłı̨chǫ Government participates in that structure. It also argues the Tłı̨chǫ Agreement expressly and clearly contemplates the possibility of legislation to eliminate the WLWB.

[60] The Tłı̨chǫ Government submits the principles of treaty interpretation and the terms of the Tłı̨chǫ Agreement itself, as well as the manner in which Canada purported to consult with the Tłı̨chǫ Government about the amendments, give rise to a serious question about the constitutional validity of the amendments to the *MVRMA* insofar as they affect the Tłı̨chǫ Government. Combined, it argues, these point to a serious constitutional question, specifically, whether the amendments violate its constitutionally protected treaty rights under the Tłı̨chǫ Agreement.

[61] The threshold for determining if there is a serious constitutional issue to be determined is relatively low. An applicant is not required to demonstrate a high likelihood of success in the suit. This is not the appropriate context in which to try the issue. The task at hand is for the judge to whom the application is made to conduct a preliminary assessment of the merits. If the judge is satisfied the matter is not frivolous or vexatious, the next step is to proceed to consideration of the questions of irreparable harm and the balance of convenience: *RJR-MacDonald 1994* at 337-38.

[62] Canada has put forth the reasons it believes its actions are permitted by the terms of the Tłı̨chǫ Agreement, pointing to paragraph 22.4.1, set out above, which contemplates the creation of "any other land and water board". While the merits of this argument have not been, nor can they be, fully explored at this juncture, that Canada may rely on this provision to eliminate the WLWB is far from a foregone conclusion. This is particularly so in light of what appears to be mandatory and specific language in paragraph 22.3.2, which provides that the WLWB "shall" be established, compared to what appears to be less specific language in paragraph 22.4.1. Indeed, a cursory review of the language in paragraph 22.4.1 reveals that it

may be open to a number of interpretations, including the creation of a larger board in addition to the WLWB.

[63] Similarly, Canada's view that it has satisfied the consultation requirements is not shared by the Tłı̨chǫ Government. There is no question that a consultation process did take place, but the Tłı̨chǫ Government's concern is that the process was not meaningful and Canada did not give full and fair consideration to the Tłı̨chǫ Government's concerns, as it is required to do under the Tłı̨chǫ Agreement. Again, it would not be appropriate for the Court to determine conclusively at this point in the proceedings whether Canada either met or breached its consultation obligation. Given the history of how these amendments to the regulatory structure in the *MVRMA* came about, however, the Tłı̨chǫ Government's concerns cannot be said to be trifling or frivolous.

[64] What is clear is that the parties' positions are legitimately in conflict and, like the vast majority of actions that come before courts, neither party's case is beyond question. 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 of great importance to the parties and the stakes for both are high. Certainly, there a serious constitutional issue to be tried and as such, the Tłı̨chǫ Government has satisfied this branch of the test.

Will there be Irreparable Harm if the Interim Injunctive Relief is not Granted?

[65] In assessing whether irreparable harm will ensue should interlocutory relief not be granted, the Court is concerned with the nature of the harm, rather than its breadth or magnitude. Irreparable harm is harm which cannot be cured or adequately compensated by damages, thus requiring maintenance of the *status quo* pending final determination of the dispute: *RJR-MacDonald 1994* at paragraph 59.

[66] The Tłı̨chǫ Government submitted two authorities in which it was held an applicant need not prove that irreparable harm is an absolute certainty, but rather that it is sufficient to demonstrate a reasonable likelihood or probability of irreparable harm: *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries),* [2005] CNLR 63 at para 45; and *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 at para 49; 108 OR (3d) 647.

[67] Justice C.J. Brown, in *Wahgoshig*, described the reason for this:

> [49] Absolute certainty of irreparable harm is not always required. Indeed, Canadian courts have recognized that absolute certainty of irreparable harm may not be possible where the duty to consult and accommodate have not been met *as there is often a lack of precise knowledge about the impact of a project on culture, rights, values and how these can be avoided or mitigated. . .* [emphasis added]

[68] Both *Homalco* and *Wahgoshig* were cases where the applicants alleged there was a breach of the duty to consult. In my view, however, the proposition that an applicant need show only a reasonably likelihood of irreparable harm is applicable to any case where a breach of a constitutional right is alleged. 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.

[69] Quantifying the financial damage that may flow from the breach of a constitutionally protected right is a difficult exercise. Justice Sopinka discussed the reason for this in *RJR-MacDonald 1994* at 341-42:

> The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.
>
> This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

[70] This analysis was applied in *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2003 NUCJ 1 at paras 43-45; [2004] 1 WWR 122. In that case, Nunavut

Tunngavik sought an interlocutory injunction to stay the application of firearms registration legislation to Inuit beneficiaries under the *Nunavut Land Claims Agreement*. It was alleged the legislation violated treaty rights protected under s.35 of the *Constitution Act, 1982*. Justice Kilpatrick found that although there were certain damages that might be sustained to Inuit beneficiaries which could be calculated, such as fees arising from compliance with the licensing regulations, others, including loss of enjoyment of culture or the traditional Inuit lifestyle, were not quantifiable in practical terms. He concluded:

> 45 The same concerns identified by the Supreme Court of Canada with respect to damage quantification for *Charter* breaches apply with equal, if not greater force to alleged breaches of treaty rights protected by s.35(1) of the *Constitution Act* (1982). The law in this area remains very uncertain. On an interlocutory application of this kind, this Court has no means of measuring the extent of damage to "intangibles". For this reason, it is appropriate to follow the Supreme Court's guidance in *RJR-MacDonald Inc.* and assume that the damage flowing from the alleged breach of treaty rights will be irreparable.

[71] A breach of the duty to consult may result in irreparable harm. Consultation in a manner that conforms to the legal obligations of the consulting party must occur before the impugned activity takes place. As it is aimed at fostering agreement, consultation which occurs after the fact will likely be largely meaningless and the harm that ensues cannot be compensated through damages: *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 CNLR 152 para 89; *Ta'an Kwach'an Council v Yukon*, 2008 YKSC 54 at para 50, [2008] YJ No 52, [2008] 4 CNLR 222.

[72] The Tłı̨chǫ Government submits the alleged breach of the duty to consult, as well as the alleged breach of its treaty rights under the Tłı̨chǫ Agreement, give rise to the reasonable possibility of irreparable harm, which will manifest in a number of ways.

[73] If it is ultimately determined that Canada failed to fulfill its obligations to consult as required under the Tłı̨chǫ Agreement, ie., that it did not give full and fair considerations to the Tłı̨chǫ Government's concerns, the opportunity to engage in meaningful negotiations will be lost, as will the opportunity to reach a negotiated solution. The changes, which include dismantling the regulatory infrastructure through which the Tłı̨chǫ Government participates in decisions affecting Wek'èezhìi, will take effect without consultation having occurred in the manner

required by the treaty. This loss cannot be quantified and would constitute irreparable harm.

[74] The Tłı̨chǫ Government submits the elimination of the WLWB and the new structure of the MVLWB necessarily means it will play a diminished role in managing the Wek'èezhìi area. Decisions affecting the area pending determination of this suit will no longer be entrusted to a board where it is guaranteed that half the members are chosen and appointed by the Tłı̨chǫ Government. Instead, as noted above, the Tłı̨chǫ Government appointee will be able to appoint one member to a panel of eleven.

[75] The amendments contemplate a role for the Tłı̨chǫ Government appointee on smaller panels appointed to hear and determine applications affecting Wek'èezhìi, but this is not guaranteed, as it is currently. The amendments provide that should the Chairperson decide it is not reasonable to do so, he or she may decline to appoint the Tłı̨chǫ Government member to the panel. The Tłı̨chǫ Government would have no control over the manner in the chairperson exercises this discretionary power.

[76] The Tłı̨chǫ Government suggests the elimination of the WLWB will necessarily result in unquantifiable, intangible and irreparable losses occasioned by staff and board members leaving, taking with them institutional knowledge and skill sets accumulated over many years. It argues that should the Tłı̨chǫ Government ultimately prevail in this suit, the harm caused by these losses would be profound. The WLWB would have to rebuild its corporate knowledge base, possibly from scratch, thus compromising the ability of the Tłı̨chǫ Government to make effective and appropriate decisions in matters affecting Wek'èezhìi.

[77] In *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, (1995) 169 AR 195 (CA); 1995 ABCA 260, the Alberta Court of Appeal determined that dismantling a system of school and education administration through regulation would cause irreparable harm. Much like the case at bar, the *Whitecourt* case arose out of a government decision to increase efficiency and effectiveness in the delivery and governance of education through a restructuring plan. Part of that plan was to reduce the number of boards of school trustees through a process of regionalization. The school district sought an injunction to exempt it from the implementation of a number of Orders-in-Council which would effect the changes, claiming they violated constitutionally protected denominational education rights.

[78] On appeal, the school district made arguments which are on all-fours with those the Tłı̨chǫ Government has advanced in this application. The school district argued the mere fact that the school boards would be dissolved constituted irreparable harm because others could make decisions in their stead. The new regions were to be much larger than existing districts and there was a concern the new governing bodies might not appreciate local interests. The Alberta Court of Appeal determined that this would cause irreparable harm:

> [29] In our view, evidence of actual harm is unnecessary where the alleged harm relates to the abolishment of the entity alleging it, and the substitution of another administrative body. Reconstitution of that entity could not fully redress prejudice arising from the period of its non-existence. Harm arising from the effects of changes in policy or philosophy is not fully reversible. Though the policy or philosophy may ultimately be reversed, those adversely affected by it during the interim cannot be wholly compensated. Ratepayers whose elected representatives would be deposed, students who may not be allowed to progress in accordance with their competency, aboriginal students whose special interests may not be adequately represented, and students and parents whose religious philosophy may be compromised, even on a temporary basis, would all suffer harm of the sort which is not compensable.
>
> [30] Harm in the form of administrative disruption and inconvenience may not be recoverable even though quantifiable, because the Crown may not be liable for its unconstitutional acts. That includes re-negotiation of collective agreements, re-assignment of staff, travelling time of staff, and changes to school programs.

[79] Canada argues the Tłı̨chǫ Government has not established it will suffer irreparable harm should the interlocutory relief not be granted.

[80] With respect to the possibility of job losses for current employees of the WLWB, Canada points to s. 244 of the *Devolution Act*, which provides employees of the regional panels will continue as employees under the re-structured MVLWB. It also submits that any wages lost by those employees would be compensable by money damages, quantified through principles of contract, labour and employment law, and, accordingly, they are not irreparable. Canada points out that the Tłı̨chǫ Government would not have standing to make claims related to the private employment situations of any of employees of the WLWB in any event, as these would be losses of the employees, and not the Tłı̨chǫ Government or the WLWB.

[81] Canada appears to have misinterpreted or mischaracterized the Tłı̨chǫ Government's argument on this. Nowhere in either its written or oral submissions did the Tłı̨chǫ Government suggests the losses that displaced employees might incur personally would constitute irreparable harm. Its point is, rather, that irreparable harm will accrue to the WLWB and the Tłı̨chǫ Government because, in part, staff and board members who leave because of its elimination will take with them highly specialized skills and knowledge about the Wek'èezhìi management area.

[82] Canada also suggests one of the Tłı̨chǫ Government's arguments in support of its case for irreparable harm is that the newly structured MVLWB would make erroneous decisions. It says there is no basis for assuming this would happen that, in any event, if future decisions were erroneous, the harm occasioned would not be irreparable and they would be subject to judicial review.

[83] Again, the Tłı̨chǫ Government does not appear to be suggesting the decisions of the newly structured MVLWB would necessarily be erroneous. What it does suggest is that if the current regime in not maintained pending the final outcome of this case, decisions affecting Wek'èezhìi will be made with significantly less – or, possibly, no - participation by the Tłı̨chǫ Government's appointees. Should that occur, the opportunity to participate in those decisions in the manner in which it does now, will be forever lost.

[84] Finally, Canada argues that no rights have been breached under the Tłı̨chǫ Agreement because it specifically permits the elimination of the WLWB and its replacement with a larger board, pursuant to paragraph 22.4.1. In turn, paragraph 22.4.2 provides that at least one member of that larger board shall be an appointee of the Tłı̨chǫ Government and this is reflected in the amendments to the *MVRMA* under the *Devolution Act* respecting the constitution of the revised MVLWB.[23] Canada also argues that with the amendments the *MVRMA* will "provide a strong measure of assurance" that the Tłı̨chǫ Government's appointee will participate in any panel making decisions on projects located in Wek'èezhìi by requiring the chairperson to designate that person to the panel "if it is reasonable to do so".

[85] As discussed in the context of irreparable harm, however, the problem with this argument is it assumes Canada's position that the Tłı̨chǫ Agreement permits

[23] *Devolution Act*, s. 136 (proposed new section 54(1)(d))

the elimination of the WLWB and the transfer of its authority and responsibility to a larger board is the correct one. That is, however, a central issue in this suit.

[86] 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. Accordingly, I move to the consideration of the final branch of the test.

The Public Interest and the Balance of Convenience

[87] As noted, this branch of the test requires the court to determine which of the two parties will suffer more harm if the injunction is granted or not granted, as the case may be. Where the constitutional validity of legislation is challenged, the public interest must be taken into account, and generally weighs heavily, in determining the answer.

[88] Canada is not required to prove there will be harm to the public interest should the injunction be granted.

[89] Three arguments are advanced by the Tłı̨chǫ Government. The first is that because it is also a public government, the burden of demonstrating a benefit to the public interest flowing from the injunctive relief is less onerous than for a private party. Second, it also submits its preference for relief is that the WLWB be exempted from the application of the legislation, which would impair minimally Canada's ability to implement the amendments. This, in turn, makes public interest a less critical consideration than it might otherwise be. Finally, the Tłı̨chǫ Government submits that in any event, this is a case where the public interest will clearly benefit from preservation of the *status quo.*

[90] The Tłı̨chǫ Government's argument that the burden of showing a benefit to the public interest in injunctive relief is lessened because of its own public government status is based on the proposition, articulated in *RJR-McDonald 1994* (at 344-45), that a private party applicant, such as a commercial enterprise, will typically advance interests much narrow than the broader public interest. The Tłı̨chǫ Government characterizes itself as an order of government, with a mandate to represent its constituents and promote and regulate a broad array of public

interests and legal and social structures. As its counsel pointed out, the Tłı̨chǫ Government may enact laws in relation to a number of things, including, the protection of lands, fishing and harvesting allocations, child and family services, education, wills and estates, social assistance, housing, the solemnization of marriage and taxation.[24]

[91] While there is no doubt the Tłı̨chǫ Government is an order of government, this does not relieve it of the need to demonstrate granting injunctive relief will serve the public interest. It is not a party's private or public nature which gives rise to the need for an applicant to demonstrate the public interest will be served by injunctive relief in a constitutional matter. Rather, this requirement arises out of the presumption, at this stage of a proceeding, that a validly enacted, but challenged, law, will produce a public good: *Harper v Canada* at 770; *RJR-MacDonald 1994* at 348-49.

[92] I turn now to the argument that the nature of the relief sought diminishes the importance of the public interest as a factor in determining the balance of convenience.

[93] Applications for interlocutory injunctive relief in constitutional cases fall into two categories: the suspension cases and the exemption cases. Exemption cases are those where an applicant is exempt from the application of the impugned legislation, but the legislation continues to apply generally. Suspension cases are those where the application of the legislation is suspended entirely. Public interest is a less critical factor in exemption cases. This was confirmed in *RJR-MacDonald 1994* at 346-47:

> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when* the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 1983 CanLII 1001 (AB QB), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 1985 CanLII 778 (BC CA), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

[24] Tłı̨chǫ Agreement, *supra*, Chapter 7

[94] The Tłı̨chǫ Government did not limit the relief it is seeking to exemption from the legislation, but it stated that is its preference. What the Tłı̨chǫ Government prefers, however, and what is possible are two different things. Regardless of its intentions, this is a "suspension" case. This is due to the manner in which the legislation is drafted.

[95] The way the amending provisions are structured frustrates the Court's ability to exempt the WLWB. Part 4 of the *Devolution Act*, in which the amendments to the *MVRMA* are found, is an "all or nothing" proposition. It does not purport simply to eliminate the WLWB. Instead, the provisions therein remove and replace large portions of the *MVRMA* in a general manner. Included with the elimination of the WLWB, for example, is the elimination of the Gwich'in and Sahtu boards and the elimination of the "management area" from the definitions, as well as changes to the composition of the MVLWB. Attempting to carve out an exemption for the WLWB would see the Court going beyond interpretation and into the realm of drafting legislation, something that it is beyond its scope of authority.

[96] That suspension cases are treated with more caution does not mean relief is unavailable should it be warranted, however. The basis upon which it is more difficult to secure interim injunctive relief in suspension cases is that all out suspension will, in many cases, lead to disruption for a large number of people and, consequently, be detrimental to the public interest. In this case, however, the impact of a remedy suspending the enforcement of the impugned provisions of the *Devolution Act* would be tempered by reason that this legislation, though enacted, is not yet in force. As such, the current infrastructure would remain in place until the amendments are proclaimed. Granting an injunction would cause delay, but it would not disrupt the current regulatory system. See: *Whitecourt Roman Catholic Separate School District No. 94*, at para 41.

[97] The Tłı̨chǫ Government suggests maintaining the WLWB pending final determination of the suit would benefit the public interest in a number of ways. It would provide ongoing access to the WLWB which, it argues, has been functional and effective throughout its existence. Further, granting an injunction would preserve confidence in the sanctity of treaty promises and in the treaty relationship between Canada and Aboriginal people generally. Finally, granting an injunction would ensure legal and regulatory certainty with respect to land and water use in Wek'èezhìi.

[98] The WLWB may well be a highly functional and effective entity; but, there is no evidence to show that this structure serves the public interest better than

would the larger board contemplated by the amendments to the *MVRMA*. Indeed, for the Court to make that determination would require it to inquire into and render an opinion on Canada's policy choices and whether it is governing well. Such an inquiry would be an improper intrusion into the realm of government.

[99] The two other arguments respecting the benefit to the public interest are more compelling.

[100] While recognizing that at this stage the parties' rights have yet to be determined, the Tłı̨chǫ Government has raised a reasonable possibility that Canada has overstepped the bounds of what it is permitted to do under the Tłı̨chǫ Agreement. Should this Court ultimately determine Canada is wrong in its interpretation of the Tłı̨chǫ Agreement, there is a reasonable likelihood the Tłı̨chǫ Government will suffer the irreparable losses noted earlier as a result of a breach of a constitutionally protected right. In my view, there is a very real public interest benefit that derives from protecting the *status quo* where it has been demonstrated that there is a serious constitutional issue to be tried and that irreparable harm could result from the breach of a constitutionally protected right. This is particularly so where the legislation, if it is indeed found to be unconstitutional, will have the effect of dismantling and disrupting existing infrastructure which will then have to be rebuilt.

[101] With respect to the issue of regulatory uncertainty, if there is ultimately a finding that the new legislation is constitutionally invalid and WLWB is reconstituted after having been dismantled, the validity of decisions made by the MVLWB in the intervening period as they pertain to Wek'èezhìi could be in question. Certainty in the law, including certainty in the authority of public boards and tribunals to make valid decisions, is a fundamental part of the way our regulatory systems function. Uncertainty can lead to any number of results which are not in the public interest, not the least of which is the possibility of legal challenge to a public body's authority and the need to re-hear complicated and costly applications.

[102] An injunction which would have the effect of suspending the proclamation of the new provisions would avoid this uncertainty entirely. So long as the current legislation is not replaced with the impugned provisions of the *Devolution Act*, the existing regulatory regime, and in particular the authority of the various land and water boards thereunder, remains. This is most certainly in the public interest.

[103] The balance of convenience favours granting injunctive relief and moreover, the public interest will be served by it. If the relief is not granted, the risk for the Tłı̨chǫ Government is that even if it ultimately succeeds in this suit, its constitutionally protected rights will nevertheless be violated and the harm that would flow from that is irreparable. In particular, its ability to participate in decisions affecting Wek'èezhìi, in the manner it feels it is entitled to participate in those decisions, will be disrupted. This could have far-reaching and long-term effects due to the risk of the irreparable harm described above.

[104] The risk for Canada is, by contrast, significantly less. Should Canada succeed, the effect of the injunctive relief will be limited to a delay in implementing the new regulatory structure for developments in the Mackenzie Valley.

CONCLUSION

[105] The Tłı̨chǫ Government has established there is a serious issue to be tried; that it will suffer irreparable harm should it not obtain interlocutory injunctive relief; and that the balance of convenience and public interest favours the relief. Therefore, injunctive relief should be granted.

[106] An order will issue suspending the effect of s. 253(2) of the *Northwest Territories Devolution Act, supra.* The order shall take effect immediately and shall remain in effect until final disposition of this case by the Court or further order, whichever shall first occur.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
27th day of February, 2015

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S-1-CV-2014 000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

TŁĮCHǪ GOVERNMENT

Applicant/Plaintiff

-and-

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Respondents/Defendants

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER