



# Uncertain Future

Natural resource governance in the Mackenzie River Valley remains a source of contention. BY QAJAO ROBINSON AND BEN HIEMSTRA

**THE GOVERNANCE OF** the Mackenzie Valley remains a source of contention, even four decades after Justice Thomas Berger was tasked with heading the Inquiry to investigate the impact of the proposed Mackenzie Valley Pipeline. The inquiry took place before the Aboriginal land claims in the valley were settled, and one of Berger's central recommendations in his renowned report, *Northern Frontier, Northern Homeland*, was to address these claims before constructing a pipeline.

Many of the First Nations of the valley now have comprehensive land claim agreements with the Crown. These agreements, along with the *Mackenzie River Resource Management Act*, established four land and water boards, with each board exercising jurisdiction over portions of the Mackenzie River Valley. These land and water boards include the Gwich'in Land and Water Board, the Sahtu Land and Water Board,

the Wek'èezhii Land and Water Board, and the Mackenzie Valley Land and Water Board. All of them govern and regulate the use of land and water in their respective jurisdictions through the consideration and issuance of Land Use Permits and Water Licences.

The Government of Canada recently passed legislation to amend the *Mackenzie Valley Resource Management Act* (MVRMA). This was done through the Northwest Territories *Devolution Act*, which received Royal Assent on March 25, 2014. These amendments to the MVRMA, once in force, will amalgamate the four boards into a single management board for the Mackenzie Valley. This legislation has faced fierce criticism from the Tłı̨chǫ Government, who has in turn launched legal proceedings against the Government of

Canada questioning the constitutionality of the *Devolution Act*.

On February 27, 2015, in the decision *Tłı̨chǫ Government v Canada (Attorney General)*, 2015 NWTSC 9, Justice Shaner of the Northwest Territories Supreme Court granted the Tłı̨chǫ interlocutory injunctive relief, thus delaying the Government of Canada from enacting these major structural changes to the

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resource management system in the Mackenzie River Valley.

At issue in this action is the Tłı̨chǫ's Wek'èezhii Land and Water Board. This board has jurisdiction over the

Wek'èezhii Management Area, and was established to fulfill 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"). This is a modern treaty protected through Section 35 of the *Constitution Act, 1982*.

The WLWB consists of four members and a chairperson, and two of the four members are appointed by the Tłı̨chǫ. However, if the amending provisions are permitted, the WLWB will cease to exist, and the Tłı̨chǫ will only have the authority to appoint a single member out of the new 10-member board that will manage the entire Mackenzie Valley.

The court found that the Tłı̨chǫ were entitled to injunctive relief because they had successfully established that:

- 1 there was a serious issue to be tried;
- 2 it would suffer irreparable harm should it not obtain the interlocutory relief; and

- 3 the balance of convenience and public interest favoured the relief.

Further, the court held that in order for the protection of constitutional rights to be meaningful, the courts must have the ability to ensure the enforcement of those rights. As such, it would be harmful if injunctive relief was not available to courts as against the Crown.

In reaching its decision the court found that although the federal government underwent a consultation process in advance of the amendments, irreparable harm would be done if the consultation was not conducted according to the Tłı̨chǫ Agreement and if the Tłı̨chǫ were subsequently restricted to the more limited role under the new management structure.

As a result of the decision, until a final determination is made in this action, the status quo will remain in the management and governance of the Mackenzie River Valley under all four existing boards, not just the WLWB.

The federal government has appealed this decision.

This decision raises the spectre of regulatory uncertainty in an area that is evolving quickly. Eventually the court will determine whether an amalgamation of the boards is constitutionally sound with respect to Aboriginal Treaty rights protected under Section 35 of the *Constitution Act, 1982* and the Crown's "Duty to Consult." However, it remains to be seen how the court will resolve the uncertainty with respect to regulation by the water board(s), which currently casts a shadow over Canada's most impressive river valley. WC



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