PAPE SALTER TEILLET LLP BARRISTERS AND SOLICITORS

Two Steps Forward After One Step Back: A Review of the Unilateral Changes to the MVRMA and the Development of Bill C-88

Paul Bachand

Partner, Pape Salter Teillet LLP

February 11, 2020

This Photo is licensed under CC BY-SA

Overview

- The Treaty Right to Co-Management
- The Wek'èezhìi Land and Water Board
- Superboard Provisions of the *Northwest Territories Devolution Act*
- The Tłı̨chǫ Injunction
- Bill C-88: Stronger Co-Management or Poison Pill?
- Lessons Learned

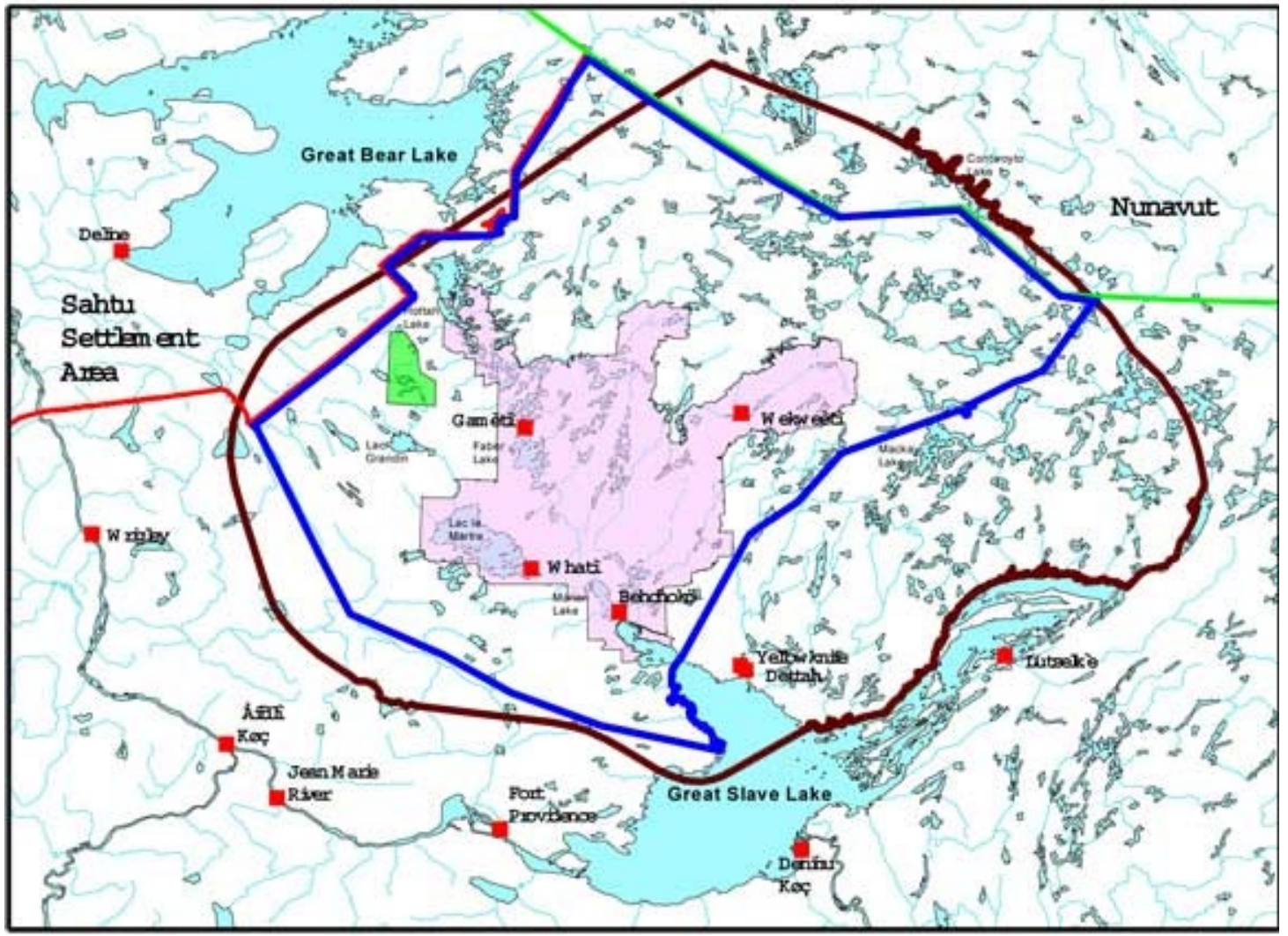
This Photo is licensed under CC BY-SA

The Treaty Right to Co-Management

- Set out in the Tłı̨chǫ Agreement and other modern treaties
- Reconciles the overlapping interests and legal jurisdiction of federal, territorial, and Indigenous governments
- The modern treaties establish regional land, water, and renewable resource boards on which all relevant governments are represented
- The co-management boards act are mandated to act in the public interest

This Photo is licensed under CC BY-SA

The Treaty Right to Co-Management

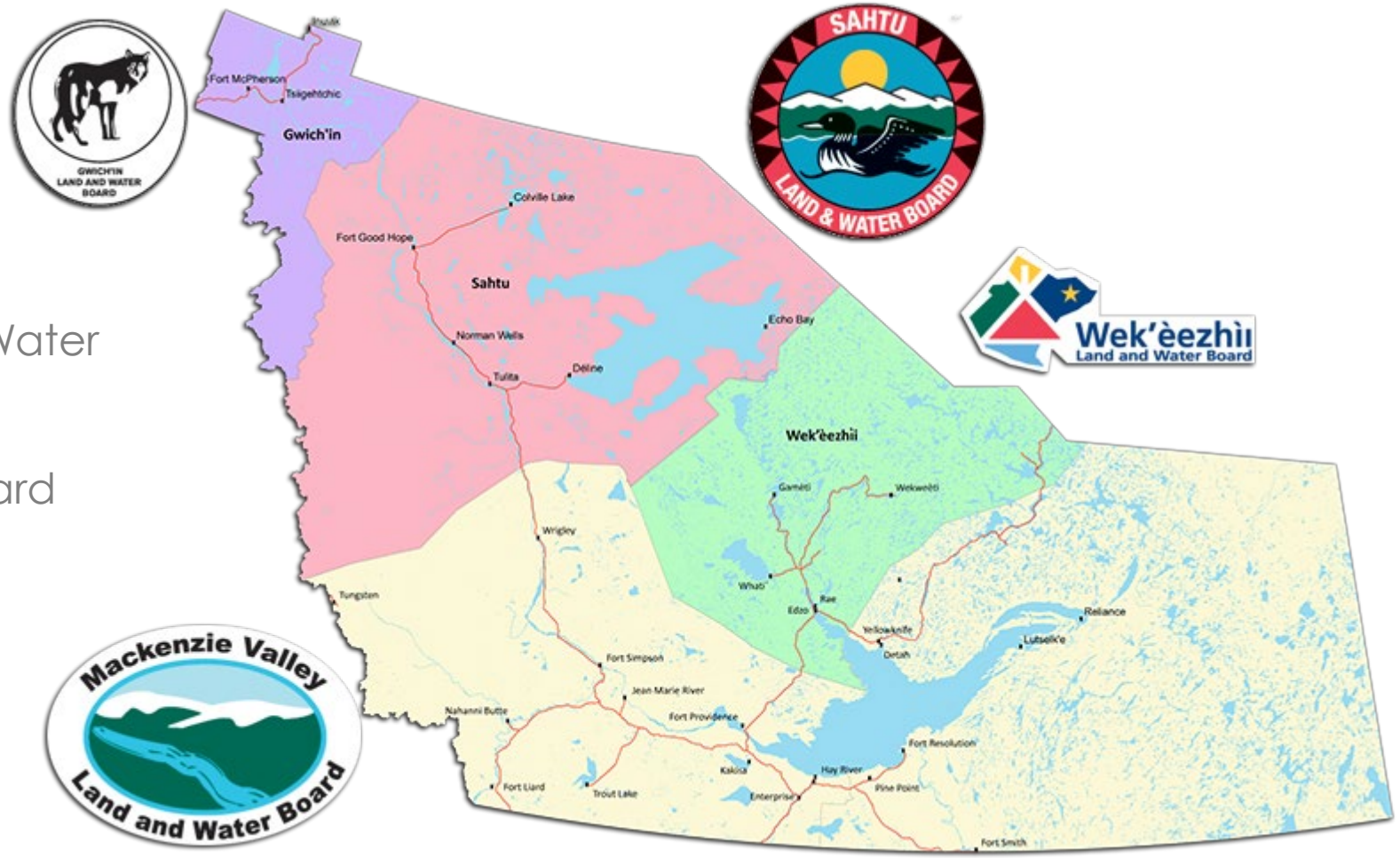


Legend

- Mǫwhì Gogha Dè Nıı̨tłèè boundary
- Wek'èezhìı boundary
- Nunavut boundary
- Sahtu Settlement Area boundary
- Tı̨chǫ Lands
- Ezǫdzìtì

The Treaty Right to Co-Management

- Four regional land and water boards are established by the *Mackenzie Valley Resource Management Act* ("MVRMA"):
  - Mackenzie Valley Land and Water Board
  - Gwich'in Land and Water Board
  - Sahtu Land and Water Board
  - The Wek'èezhìi Land and Water Board



The Wek'èezhìi Land and Water Board

- Operational since August 4, 2005—the effective date of the Tłı̨chǫ Agreement

22.3.2

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 […] The legislation may provide for any matter not specified in this chapter in a manner consistent with this chapter […]

The Wek'èezhìi Land and Water Board

- Jurisdiction over land (including subsurface resources), water, and deposits of waste within its management area
- Administers permitting and licensing systems
- Tłı̨chǫ Government appoints 50 percent of the members

This Photo is licensed under CC BY-SA

The Wek'èezhìi Land and Water Board

- Objectives — Wek'èezhìi Land and Water Board

58.1 The Wek'èezhìi Land and Water Board shall regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area.

This Photo is licensed under CC BY-SA

Trouble on the Horizon

- Harper government signals intent to fundamentally change the make-up of NWT Land and Water Boards by forcing an amalgamation into one "Superboard".
- Tłı̨cho̱ appointees would only represent 33 percent of the land and water regulation decision making body for Wek'èezhìi.
- This would have been inconsistent with Tłı̨cho̱ co-management rights and interest in the Agreement.
- Tłı̨cho̱ warned that the proposed changes were contrary to the Tłı̨cho̱ Agreement, but warning was not heeded

This Photo is licensed under CC BY

Unilateral Changes to the MVRMA

- The Harper Government passed the *Northwest Territories Devolution Act* ("*Devolution Act*") in 2014 against objections from Tłı̨chǫ Government and other Indigenous governments
- The *Devolution Act* would also have amended the MVRMA to combine the four regional land and water boards into a single "Superboard"
- Tłı̨chǫ representation would have dropped from 2/4 to 1/10, with no guarantee that Tłı̨chǫ Government's single appointee would be involved in decisions affecting Wek'èezhìi

This Photo is licensed under CC BY-SA

The Tłı̨chǫ Injunction

- Tłı̨chǫ Government brought a successful injunction motion in February 2015
- Shaner J of the Supreme Court of the Northwest Territories suspended the operation of s. 253(2) of the *Devolution Act*, which would have allowed the executive branch of government to bring the MVRMA amendments into effect
- The Court held that there was a serious constitutional issue to be tried and harm flowing from the violation of constitutional rights would be irreparable "given the WLWB is the vehicle by which the Tłı̨chǫ Government participates in decisions respecting land and water use affecting Wek'èezhìi"
- The Court concluded that the balance of convenience and the public interest both favoured an injunction

The Development of Bill C-88

- The Trudeau Government consulted with Tłı̨chǫ Government and other Indigenous governments following the 2015 election
- Bill C-88 was introduced in November 2018 to repeal the "Superboard" provisions of the *Devolution Act*

This Photo is licensed under CC BY-SA

Strengthening the Co-Management System

- Bill C-88 also reintroduced other regulatory provisions that were suspended as part of the injunction but had broad support from both industry and Indigenous governments. Among other things, it provides for:
  - An enforceable development certificate scheme
  - Strengthening of board procedures and compliance tools (e.g. costs/fines)
  - Development of regulations regarding Indigenous consultation
  - Clarification on equal representation of Indigenous and public governments
  - Regional studies of existing and future development

A "Poison Pill"?

- Bill C-88 also amended the *Canada Petroleum Resource Act*
- The amendments codified the federal cabinet's ability to make orders prohibiting offshore oil and gas activities in the Arctic
- This created political issues for a bill that otherwise had virtually universal support in the North

This Photo is licensed under CC BY

Bill C-88 received Royal Assent

- The Tłı̨chǫ injunction remained in effect until Bill C-88 received Royal Assent on June 21, 2019

This Photo is licensed under CC BY-SA

LESSONS LEARNED

- Be involved in treaty implementation
- Fill your positions on boards
- Be vigilant
- Beware government trojan horses – treaty violations packaged inside otherwise acceptable policy developments

This Photo is licensed under CC BY-SA

THANK YOU

- Questions?

This Photo is licensed under CC BY-SA