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Bill C-88 Will Finally Eliminate the MVRMA "Superboard" … But Where's the Rest?

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Case Commented On: Bill C-88, *An Act to amend the Mackenzie Valley Resource Management Act and the Canada Petroleum Resources Act and to make consequential amendments to other Acts*

The Trudeau Government recently tabled Bill C-88, *An Act to amend the Mackenzie Valley Resource Management Act and the Canada Petroleum Resources Act and to make consequential amendments to other Acts*. This post focuses on the amendments to the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 (MVRMA). The primary purpose of this portion of the Bill is to reverse several controversial amendments to the MVRMA. The Harper Government enacted these changes in 2014 as part of a broader suite of reforms to implement devolution in the Northwest Territories (NWT). These amendments sought to reform regulatory review bodies and co-management boards in the NWT by creating a "superboard"; however, the litigation discussed below stymied those plans. This post provides context around Bill C-88, summarizes the superboard litigation, and comments on an unfulfilled government commitment to conduct a broader review of northern assessment regimes.

2014 Amendments & Tlicho Law Suit

The 2014 amendments, included as part of the *Northwest Territories Devolution Act*, SC 2014, c 2 (*Devolution Act*), were part of a broader law reform package to legislate devolution in the NWT. An important part of the reforms sought to modify the process for review and approval of major resource projects in the Mackenzie Valley Region by creating a "superboard" and eliminating the land and water boards in each of the NWT land claim agreement areas (Gwich'in, Sahtu and Tlicho). These amendments were part of the federal and territorial governments' attempt to selectively implement the recommendations of the "McCrank Report" (formally entitled Road to Improvement) that came out of the Northern Regulatory Improvement Initiative. The *Devolution Act* received Royal Assent in March 2014.

Throughout the consultation process for these amendments, the Tlicho, Sahtu and Gwich'in objected to the elimination of their respective land and water boards. Soon after the *Devolution Act* passed, the Tlicho brought an action in the Supreme Court of the Northwest Territories requesting declarations that certain portions of the *Devolution Act* are of no force or effect and an interim injunction to enjoin Canada from taking steps to implement the provisions of the *Devolution Act* that affect the Wek'èezhìi Land and Water Board (and the Sahtu eventually took a similar step). The court was persuaded by a number of the Tlicho arguments, including the assertion that eliminating the Wek'èezhìi Land and Water Board (and, by extension, those under

the other modern treaties) would be unconstitutional because it would violate treaty rights in the Tlicho Agreement. Specifically, the Tlicho Government argued that the amendments violated the Tlicho's right to effective and guaranteed participation in the NWT co-management regime in Wek'èezhìi through the structure set up by Tłı̨chǫ Agreement and implemented through the MVRMA. On February 27, 2015 the Court released its decision in *Tłı̨chǫ Government v. Canada (Attorney General)*, 2015 NWTSC 9, granting the injunction and ordering suspension of the contentious amendments (paras 105-106). In March 2015, the Harper Government appealed that decision. Owing to the Court order, however, no changes took place to the structure of the land and water boards.

Post-Litigation Developments and Bill C-88

Soon after the 2015 election, the Trudeau Government indicated that it would put the appeal on hold and work with NWT First Nations to remove the disputed amendments from the MVRMA. It is worth noting that at the same time, the federal government also began working with Yukon First Nations to remove contested reforms to the *Yukon Environment and Socio-Economic Assessment Act*, SC 2003, c 7 by the Harper Government and litigated by Yukon First Nations. This led to Bill C-17, which received Royal Assent on December 14, 2017 and rescinded those reforms.

Bill C-88 has been moving on a similar track to Bill C-17, but more slowly. Reasons for the slower pace are not clear; but, in any event, the Bill was finally tabled and received first reading on November 8, 2018. In short, Bill C-88 proposes to repeal the provisions of the *Devolution Act* that would have restructured the four land and water boards in the Mackenzie Valley. This would retain the current board structure consisting of the Mackenzie Valley Land and Water Board and the modern treaty groups' respective land and water boards. The Bill also re-introduces regulatory provisions that were included in the Devolution Act, including a new Administrative Monetary Penalties regime, but did not come into force following the court injunction (listed in this Backgrounder).

This is likely welcome news by NWT First Nations and helpful certainty for government and industry alike. However, more change is coming. Or, at least the federal government committed to a broader review of MVRMA but has yet to follow through.

The Case of the Missing Reviews of Northern Assessment Regimes

Bill C-88 does not contain not the full extent of changes expected for the MVRMA; it is a set of relatively narrow and targeted amendments (and as such will likely proceed quickly through the House of Commons). The federal government has actually committed to broader review of northern assessment legislation. In summer 2016, when the government was initiating the Review of Federal and Environmental Processes, there was commitment to this broader review. At the very start of that process, the government explicitly committed to more. The Draft Terms of Reference for the Expert Panel (link no longer available) indicated the following:

> The Minister of Indigenous and Northern Affairs has launched a process to amend northern environmental assessment regimes. As CEAA 2012 has limited application in the north, matters related to northern environmental assessment regimes will be redirected as appropriate to the process launched by the Minister of Indigenous and Northern Affairs to

> amend northern regimes. Matters relating to northern environmental assessment regimes are outside the mandate of this Panel. (emphasis added)

The Final Expert Panel Terms of Reference stated similar:

> Proposed amendments to the Yukon Environmental and Socio-economic Assessment Act have already been introduced in Parliament. Indigenous and Northern Affairs Canada will continue to work with Aboriginal and territorial governments on this front. The Minister of Indigenous and Northern Affairs intends to launch a process soon to work with all applicable First Nations and the territorial government in Northwest Territories to identify possible solutions related to the Mackenzie Valley Resource Management Act. (emphasis added)

Today, more than two years later, the government has taken few, if any, steps beyond the targeted reversal of the litigated amendments.

In the meantime, there are at least two developments likely to push this review into motion, and one that may stall it further. First, there is Bill C-69 which, once it proceeds through the Senate (it already passed in the House of Commons), will overhaul the federal assessment regime and shift it from environmental assessment to "impact assessment". Though changes proposed in Bill C-69 would not be as dramatic as the changes brought in during the 2012 overhaul, the Bill still contains a number of important shifts, as explained in a number of posts by ABlawg contributors. While the northern assessment regimes are distinct and different from the federal regime (indeed, for the most part the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 does not apply North of 60º), the federal statute has traditionally cast a long shadow northward. As such, if Bill C-69 passes, there may be some motivation, particularly on the part of the federal government, to review the MVRMA with an eye to achieving some congruency with the new statute.

Second, it has been nearly five years since finalizing the NWT Devolution Agreement, meaning 2019 is the year parties committed to review the MVRMA-related provisions of the Agreement (para 3.18). Perhaps more than Bill C-69, this should finally move the government to act on its commitment to a broader MVRMA review.

Finally, 2019 is a federal election year and also an election year in the NWT. It is unclear how far and how fast governments will want to push the MVRMA review during an election year. Further delay, or at least a very slow pace, is entirely foreseeable.

Whenever the broader MVRMA review gets going, it is likely that the government will approach the matter and engage with First Nations with more sensitivity and better listening than the process leading to the 2014 changes. Presumably the government learned some lessons from the Yukon and NWT First Nations' court challenges in 2014.

If 2019 wasn't shaping up to be interesting enough on the environmental and natural resources law front, Bill C-88 adds yet another dimension to watch.

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