

SEEKING CERTAINTY

NEW APPROACHES TO LAND MANAGEMENT IN THE NORTHWEST TERRITORIES

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For The Honourable
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SUMMARY

What primarily sets the NWT's land management system apart from the rest of Canada is the extent to which its evolution has been shaped by multiple land claim agreements. Another distinctive feature is a high degree of community involvement in public consultations and decision-making. While the settlement of four independent claims has granted many northerners a guaranteed voice in land management, it has also created a proliferation of boards and processes that contribute to a relatively complex system.

Recommendations to improve this system made by previous audits and reviews seem to fall into three main schools along a spectrum of proposed change: 1. execute fundamental restructuring, 2. refine the status quo, or 3. give the system time to mature. This paper recommends short and medium-term improvements based on recurring themes along this spectrum as well as ideas inspired by a unique land use process from BC's Great Bear Rainforest that has triumphed over many chronic issues that preoccupy northern land managers. These recommendations encourage the federal government to fulfill its governance responsibilities with respect to land management, provide more consistent support to regulatory bodies, hasten the approval and implementation of land use plans, develop mechanisms to prevent conflict and resolve disputes, and support the NWT Board Forum in creating a streamlined system for reviewing development projects.

ABOUT THE AUTHOR

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Besides writing award-winning fiction and non-fiction books about northern lands and peoples, he specializes in translating complex issues of public interest into plain language discussion papers, samples of which include: *Greening The NWT Economy: Local Pathways To Territorial Prosperity*, prepared for Ecology North and *On the Frontlines of Climate Change: What's Really Happening in the Northwest Territories?* prepared for the Honorable Nick Sibbeston. The author can be reached at cygnus@theedge.ca.

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- Jamie Bastedo, Yellowknife, March 2010

INTRODUCTION

Untangling the knots

No matter where you look in Canada, land management – the cluster of processes that determine how lands and waters are used – is a complex business. Senator Nick Sibbeston has identified a need to help untangle the knots in the current land management regime in Canada's North, particularly in the Northwest Territories (NWT), where unfulfilled federal roles, unsettled land claims, and escalating development pressures have brought this region's land management system under close public scrutiny. Issues of complexity, capacity, and consistency dominate ongoing discussions on how to improve this system. Above all, everyone wants certainty, a notoriously elusive feature which, if established, could serve the best interests of all players – federal, territorial, and Aboriginal bodies that steer land management, industries looking for solid investment opportunities in the North, NWT residents who want a guaranteed voice in decisions affecting their livelihoods, lands and cultures, and all Canadians who desire a true balance between northern development and conservation priorities.

We have a common desire to get to good decisions by making processes more certain. Processes can be complex as long as they are predictable. Timeliness is also important, but not as important as certainty. The issue for industry is not so much that there are 200 steps to climb, but that we understand that there are a certain number of steps. Sometimes when we get to the top, there is another stairway that we didn't anticipate.

Elizabeth Swanson, Canadian Energy Pipeline Association¹

While the NWT may be ranked very high for its mineral potential, it consistently comes in at the bottom end of the scale for regulatory clarity and certainty. It will be regrettable if this trend is allowed to continue to the detriment of not only northerners but all Canadians.

Northwest Territories & Nunavut Chamber of Mines¹

Purpose and scope

This paper is meant to raise public awareness and promote constructive discussion on common issues surrounding the NWT's land management system. Focusing mostly on the Mackenzie Valley area, it first defines what sets this system apart from other regions, identifies appropriate yardsticks to measure success, and reviews what other studies have proposed as solutions. It then examines a unique land use process from BC's Great Bear Rainforest that has triumphed over many chronic issues that preoccupy northern land managers.

Insights gained from previously proposed solutions and lessons from the BC experience provide the foundation for recommending practical ways to help advance the evolution of land management in the NWT.

FOREWORD BY NICK SIBBESTON

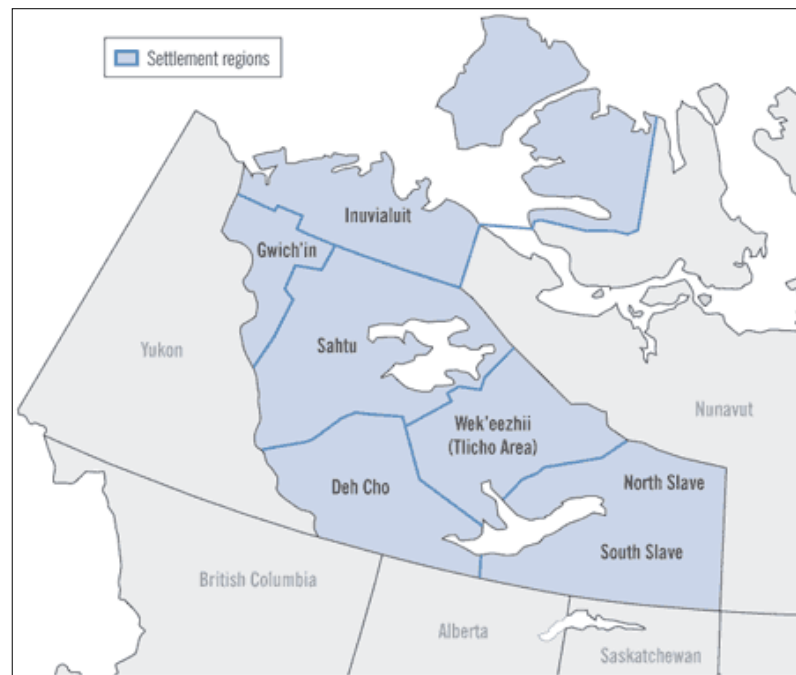
My uncle, Ted Trindell, looking towards the Nahanni Mountains once told me: "It's beautiful scenery but you can't eat it." That remark summarizes the challenges of reforming the NWT's land management practices. We need to preserve the environmental quality of our land while promoting sustainable development to support future generations. Our current system reflects the complex history of the north, especially the struggle for northerners and Aboriginal communities to have a say over both resource development and environmental protection. However, this system is too complex and needs to be simplified to ensure that decisions can be made in a timely, balanced and fair way. This paper offers suggestions on how to achieve that.

- Nick Sibbeston

Part 1 - LAND MANAGEMENT IN THE NWT

SETTING

With an area of almost 1.2 million square km, the NWT makes up approximately 12% of Canada. Its natural capital includes some of the Earth's cleanest air and waters, plus large, intact areas of productive boreal forest, wetlands, arctic tundra, and abundant wildlife. On the world stage, environmental quality in the NWT is unrivaled. Yet deteriorating trends linked to widespread climate change impacts and dramatic declines in caribou herds, which many northerners depend upon, are an increasing cause for public concern.



Aboriginal settlement areas in the NWT

This region is also richly blessed with globally significant mineral and petroleum resources which offer unmatched potential for economic development. However, limited infrastructure, dependence on air access or winter roads, and high energy costs strongly influence the extent to which these resources can be developed.

With a population of roughly 43,000, the NWT is home to less than 0.13% of Canadians. Most communities outside the capital of Yellowknife are small, remote, and dominated by a largely aboriginal population. Non-renewable resource development, combined with federal transfer payments, form the mainstay of the region's economy. Related service industries, limited forestry operations, land-based tourism, and traditional hunting and trapping activities contribute to the north's economic fabric.

For most northern residents, communities, and businesses, escalating transportation and energy expenses have raised the cost of living across the board in an already fragile economy that is buffeted by boom-bust cycles. Questions over climate change, shifting wildlife populations, water quality issues, and protected areas have put environmental issues on the front burner of public debate like never before. In this context, a clear and predictable land management system, which guarantees environmental protection while encouraging orderly economic progress, emerges as a key vehicle for achieving truly sustainable development in Canada's North. Helping to find that crucial balance between effective stewardship and efficient land management is what this paper is all about.

WHAT SETS US APART

Land management in the NWT displays some important and unique features, history, and processes that distinguish it from approaches used in other regions, both in northern and southern Canada.

Land Claims

What primarily sets the NWT's land management regime apart from the rest of Canada is the extent to which its evolution has been shaped by multiple land claim agreements. The signing of the Inuvialuit Final Agreement in 1984 marked the first land claim settlement in the NWT. It was followed in 1992 by the Gwich'in Comprehensive Land Claim Agreement, and, a year later, by the Sahtu Dene and Métis Comprehensive Land Claim Agreement. The T'licho Land Claims and Self-Government Agreement was signed in 2005. Three outstanding claims still under negotiation include the Dehcho First Nations, Akaitcho Dene First Nations, and Northwest Territory Métis Nation.

What undoubtedly makes the regulatory regime in the Northwest Territories different than southern Canada is the existence of settled land claims agreements which provide ownership and powers to Aboriginal groups over specific lands and resources, and a complex of treaty and Aboriginal rights in the unsettled claims regions which also involve specific lands and activities.

Scott Duke, Justice Canada²

In settled claim areas, aboriginal governments and communities hold constitutionally entrenched powers that give local people a substantial voice in the scale and pace of

resource development. Most of the NWT's land management bodies were created as a direct result of claim agreements, as was the *Mackenzie Valley Resource Management Act* (MVRMA), which established the legislative and regulatory framework for all but the Inuvialuit Settlement Region (ISR) which has its own land management system. The main components of this framework include land use planning, regulation – the issuance and enforcement of permits and licenses – and environmental impact assessment, as well as several regional boards that co-manage these processes.

The current system is much better than what we had in the 1970s. It is based on community knowledge and participation. Any changes we consider should not reduce the involvement of local people.

George Barnaby, Sahtu Land and Water Board³

Gwich'in, Sahtu, and Mackenzie Valley land and water boards receive permit or licence applications before any project can proceed. Projects limited to Gwich'in or Sahtu lands are handled by board for those regions. If a project crosses boundaries or is on land not covered by a settled claim, the Mackenzie Valley Land and Water Board takes over. Regional land use planning boards, established under the MVRMA, develop land use plans that identify land and water use priorities in each settlement area. All land and water boards are legally bound to abide by land use plans, that is, once they are approved by the federal and Territorial governments. Despite the benefits of this key decision-making tool, approved land use plans exist only for the Gwich'in Settlement Area. In the ISR, community conservation plans have been developed for lands surrounding each Inuvialuit community. Beyond these two regions, development decisions go forward without the guiding hand of land use plans, a situation which contributes to the shroud of uncertainty characterizing land management in the NWT.

The lack of land use plans in many areas of the NWT is a significant void that is adding increased complexity and uncertainty to environmental management processes.

NWT Environmental Audit⁴

Adding to this uncertainty is the lack of settled claims outside of the Gwich'in, Sahtu and Inuvialuit regions. A 2005 Audit of Regulatory Regimes in the MVRMA region concludes that, "much of the uncertainty of process being experienced is directly related to the absence of settled land claims."⁵ Similarly, in *Road to Improvement*, a high profile review of northern regulatory systems prepared for the Minister of INAC, Neil McCrank states that "the fact that a large part of the Northwest Territories is still awaiting land claim agreements inevitably leads to complexity and uncertainty in the regulatory regime".

Federal role

In the past, INAC and the NWT Water Board had primary authority over resource development. The signing of land claim agreements and the passage of the MVRMA

radically changed INAC'S role by introducing a completely new way of doing business in the NWT. No longer did the federal government directly control the issuing of permits and licences for land and water use. Nor was it responsible for assessing the potential environmental impacts of development. These processes now rested with the new boards which were largely left on their own by the federal government.

Now operating within the context of the MVRMA, the Department retains ultimate authority over approving Land Use Plans, environmental reviews and assessments, and Type A water licenses. It is also responsible for appointing board members and protecting wider national interests. Beyond this, the MVRMA makes it clear that, in the Mackenzie Valley, the federal government exerts no additional regulatory control through the Canadian Environmental Assessment Act (CEAA). The foremost federal assessment tool for most of Canada, this Act no longer applies here except in Wood Buffalo National Park and for projects that span the NWT's boundaries. For instance the proposed Mackenzie Gas Pipeline, which would extend into Alberta, triggered the creation of the Joint Review Panel (JRP) that was administered by the federal government under CEAA.

Since the MVRMA's enactment in 1998, INAC decided that, in the spirit of handing over genuine control, the best course was to basically leave the boards on their own. Unfortunately, this lack of federal direction and support eroded the boards' capacity to fulfill their duties while contributing significantly to a general climate of uncertainty, both with respect to how land is managed and, in turn, to industry's willingness to invest in the North.

The Department decided to keep its involvement [with boards] to a minimum given the need to assure Aboriginal peoples of the NWT that the federal government was sincere in relinquishing control. That decision has resulted in ambiguity surrounding the regulation of non-renewable resources, which has raised the uncertainty that the process will be applied consistently.

Auditor General of Canada⁶

Public input

Aboriginal people in the NWT worked long and hard to entrench their rights to provide local input on resource development decisions. The proactive nature of community involvement and the great degree to which the public can influence these decisions is another distinctive feature characterizing land management in the NWT.

Public consultation demands have increased dramatically, in part due to MVRMA stipulations as well as an increase in development activity. Despite improvements in community involvement, these demands create several systemic challenges including fuzzy expectations for public consultation, and communication difficulties related to differences in culture, language and education. As well, the extensive amount of information generated during regulatory processes – which often overlap – can overload the capacity of local communities to meaningfully participate.

This focus on public involvement has provided value to the regulatory regime, but the current method of participation has come with a significant administrative and communication burden for all participants.

NWT Environmental Audit⁷

Complexity

From a land management perspective, life is simpler in the Yukon where, unlike the NWT, several regional claim settlements fall under an umbrella agreement, creating fewer boards with a more unified mandate. A much broader devolution of resource management powers in the Yukon further enhances clarity over roles and certainty over land ownership. The same could be said for Nunavut where a single region-wide claim settlement created a simpler system with greater operational certainty. In the NWT, the settlement of four independent claims – with three more waiting in the wings – created a proliferation of boards and processes that contribute to a relatively more complex regulatory regime. Future devolution of greater resource management powers may add another layer of complexity to this regime.

Regulatory processes are much more complex here in Canada, especially with land claims. Abroad, I might consult a lawyer or a regulatory expert five times a year. Here it is almost daily.

Glen Bishop, CAPP-ConocoPhillips⁸

Some argue that the current degree of complexity in the NWT is generally unworkable. Neil McCrank, for instance, concludes that, “a regulatory structure has been created with too many regulatory bodies that do not – and will not – have the capacity to perform their duties.”⁹ Others acknowledge that while varying degrees of complexity exist across the NWT, this is an necessary byproduct of land claims which can sort itself out as the system matures.

While the MVRMA and ISR regulatory processes are evolving and have varying degrees of complexity, these processes are not substantively more complex than other jurisdictions.

NWT Environmental Audit¹⁰

An evolving system

The MVRMA regulatory regime is a relatively new system which continues to evolve and mature as boards gain operational experience, gradually build their capacities, and learn from each other. With over 25 years to mature, the ISR process has progressed beyond many of the initial challenges, frustrations and uncertainties still faced in parts of the Mackenzie Valley.

Currently, regulation may not be functioning exactly as intended. Clearly there are some growing pains, which is not unusual as the system is relatively new. Also, this regulatory system is unique. We have a responsibility to shape its evolution to respond to northern needs. There is much room for improvement.

Bob Bailey, Government of the Northwest Territories¹¹

A major force in shaping the evolution of land management across the NWT is the NWT Board Forum which brings together regulatory players from both the Mackenzie Valley and Inuvialuit Settlement Region. The purpose of this unique forum is to improve communication between its members, resolve common issues, and share expertise. It also provides industry and government with a structured forum for collaborative engagement with all of the NWT's co-management boards.

We [have] an initiative to develop consistent policies, procedures and practices on how we do our business throughout the Mackenzie Valley...The goal is to provide certainty again for all our clients – industry, First Nations, communities, and all stakeholders and participants – involved in our processes.

Willard Hagen, Chair MVLWB¹²

MEASURES OF SUCCESS

Land management in the NWT has come under close public scrutiny over the past five years as a result of several high level audits and reviews triggered by federal legislation or Cabinet Directives. These studies based their evaluations on a variety of criteria which seem to cluster around two distinct concepts: effectiveness and efficiency. The 2005 regulatory audit required by the MVRMA, for example, focused on how *effectively* the NWT's land management regime had protected the environment from significant impacts. In contrast, the regulatory review conducted in 2008 by Neil McCrank on behalf of the Minister of INAC focused primarily on the *efficiency* of this regime with respect to streamlining the overall process and reducing perceived impacts on northern investment. What follows is a blend of many of these criteria to provide a more balanced yardstick against which to evaluate the NWT's land management structures and processes and contribute to their ongoing evolution.

I've heard from industry that it's becoming impossible to do business in the NWT – it's too complex, it's too unpredictable, it's inconsistent, there are no timelines, there are no standards, and if you don't have those rules, how does one make a recommendation to make the investment that is required to do business in this part of the world?

Neil McCrank, *Road to Improvement*¹³

✓ Understandable

Clearly defined processes understood by all players including regulators, developers, government representatives, and the public.

✓ Neutral and Fair

Neutral with respect to whether or not development proceeds and is fair to all players.

The regulatory system is there to decide whether the development is going to take place responsibly, but it should not be either encouraging or dissuading development. That's up to our political leaders in the north and those who live in the north to make that decision.

Neil McCrank, Road to Improvement¹⁴

✓ **Transparent**

Transparent processes that openly share information.

✓ **Timelines**

Decisions are made in a timely manner according to a known, predictable schedule.

The time required to go through any regulatory process is a key issue. We need timelines and the discipline to keep to them.

Gordon Peeling, Mining Association of Canada¹⁵

✓ **Consistent and Predictable**

Decisions are consistent and predictable when presented with similar development scenarios.

✓ **Accountable**

All bodies and processes are accountable to their founding legislation, mandates, and associated governance policies; clearly spelled out roles, responsibilities, and lines of authority.

✓ **Capacity**

Adequate funding, expertise, and information to fulfill all roles and components of the process. Builds capacity among all players.

Boards should be properly resourced, and there should be permanent mechanisms to fund the Boards, and to nurture, train and support them.

Gordon Peeling, Mining Association of Canada¹⁶

✓ **Information**

Integrates environmental, economic, social and cultural information. Makes full use of traditional knowledge. Promotes standardized collection, storage, and retrieval of data which is easily accessible.

✓ **Consultation**

Clear and consistent requirements and protocols for consultation which are scaled to match development and potential impacts.

✓ **Coordinated**

Planning, regulatory, and assessment activities are coordinated to avoid duplication and delays.

✓ **Collaboration**

Diverse stakeholders work jointly to pool resources, share expertise, increase efficiency, and promote dialogue. Builds constructive relationships based on mutual trust, respect and appreciation of different perspectives and values

We're here to stay and want to be partners through increased communication and collaboration.

Violet Camsell-Blondin, Wek'èezhì Land and Water Board¹⁷

Regular dialogue is important. It is critical that boards be aware of companies' good practices. Dialogue can contribute to setting clear thresholds, expectations and timelines.

Philip Bousquet, Prospectors and Developers Association of Canada¹⁸

✓ Conflict prevention

Includes mechanisms to prevent conflict and resolve disputes.

We have a complex business to run, and I can stand to learn from others.

Patrick Borbey, INAC¹⁹

✓ Regulatory and policy framework

Includes a "full toolbox" of supporting regulations, policies, and operational guidelines.

First we need to get all the pieces of the integrated resource management system working and then look at broader problems and improvements to the regulatory system.

Walter Bayha, Sahtu Renewable Resource Board²⁰

✓ Rules and enforcement

Clear, consistent and enforceable rules apply to regulated parties. Conditions approved during planning, regulatory, and assessment processes are implemented and complied with.

Ideally, [boards] and enforcement agencies should work collaboratively to identify appropriate conditions and follow-up on the enforcement of those conditions.

NWT Environmental Audit²¹

✓ Aboriginal rights

Respects all land claim provisions and Treaty rights.

Land Claims are enshrined in the Constitution and we cannot change the regulatory system without respecting this.

Tim Goos, Environment Canada²³

✓ Evaluation and evolution

Incorporates periodic audits and reviews to promote improvement. Evolves through continuous learning and adaptation.

Give the existing system a chance to grow & succeed.

Participant, Northern Regulatory Improvement Initiative Workshop²⁴

✓ Vision

Common vision and goals shared by all players.

The ultimate goal for all people of the North is to balance the interests of industry, the unique rights of Aboriginal people, and the protection of the environment.

Scott Duke, Justice Canada²⁵

SYSTEMIC CHALLENGES

A variety of sources including government auditors, northern boards, industry, First Nations, and non-government organizations have used different combinations of these criteria to evaluate land management in the NWT, depending on their focus. When packaged together and viewed through different perspectives, these criteria, which appear in bold below, point to several systemic challenges that all parties can rally around to improve the system.

In *Road to Improvement – The Review of Regulatory Systems in the North*, Neil McCrank gave high marks to the NWT's regulatory system with respect to being **transparent** and **fair**. Beyond this, he had little overall praise, an assessment which has sparked much attention to this highly publicized report.

With respect to the system being **understandable**, McCrank gave it a failing grade. He concluded that "the proliferation of regulatory bodies creates complexity and lack of understanding."²⁶ He cited the lack operational definitions for such key "trigger terms" such as "significant impacts" and "public concern" as a major source of confusion. A 2007 Auditor General's review of the role of INAC in non-renewable resource development raised similar concerns regarding "qualified language" and recommended that the Department work with MVRMA boards to clarify these terms.²⁷ While still outstanding, this issue is being addressed through the NWT Board Forum where guidelines based on the *Canadian Environmental Assessment Act* are the focus of ongoing dialogue.

McCrank also gave the regulatory system a failing grade with respect to **capacity**, again blaming the proliferation of boards as the root problem. In his opinion, "it is not possible to expect that this capacity issue will improve as more comprehensive land claim agreements are settled and, hence, more regulatory bodies are created."²⁸ According to the 2005 Environmental Audit, capacity issues, especially at the community level, are indeed among "the most commonly cited and forcefully stated challenges to the NWT regulatory process".²⁹ Board representatives often speak of inadequate funds, training, and information as factors that erode capacity as well as the sheer volume of work they face. The capacity of boards to perform their duties has been hampered also by protracted delays in nominating members, a process solely controlled by the Minister of INAC. The capacity issue has its roots at many levels and, as Neil McCrank admits, this is "actually a continuum of issues, and no one part of the system should become the scapegoat."³⁰

Appointments to the Board are slow and the process is unpredictable. It is a challenge to meet regularly to deal with the volume of work, and this delays decision-making. The WLWB has never been at full capacity.

Violet Camsell-Blondin, Wek'èezhìi Land and Water Board (WLWB)³¹

McCrank suggested that **neutrality** is not consistently upheld by regulatory bodies throughout the Mackenzie Valley, and concludes that this is due to board members "who exhibit a bias towards or against resource development." He felt that, "this is particularly so when members are appointed as representatives of a particular group – and the orientation and training to eliminate that bias has been inadequate." These conclusions have not been universally hailed in the NWT. Some critics feel that McCrank's emphasis on efficiency over effectiveness, and the lack of publicly available terms of reference for his study, suggest a lack of neutrality on his part. Such views reflect how adversarial land management issues have become in the North.

While we acknowledge that there may be some areas of the environmental management system that require real improvement, [Mr. McCrank's] assignment appears to be one of attempting to tip this balance in favour of private interests.

Ben McDonald, Alternatives North³²

To be both effective *and* efficient, the **regulatory and policy framework** enabling land management should include a "full toolbox" of supporting regulations, policies, and operational guidelines. All major reviews of the NWT regime point to the lack of clear regulatory tools to assess social, economic and cultural development impacts as a major shortcoming. Under the current system, and without formal tools to address these important issues, communities and industry are left to invent their own assessment mechanisms which adds considerable strain and uncertainty to the system. The 2007 Auditor General's report highlights several other areas where federal responsibilities have fallen short including:

- providing guidance on key terms in the legislation,
- establishing regulations for water quality, and
- ensuring boards have the necessary resources to carry out their functions.

The absence of direction on standards for water can raise the risk of confusion and uncertainty over the stringency of the requirements that applicants are to meet in order to have their applications approved.

Auditor General of Canada³³

With respect to **consistency** and **predictability**, McCrank stated that, "the perception is that often the regulatory bodies are not consistent when confronted with identical facts. This leads to a belief that the system is unpredictable." Like capacity, issues related to consistency and predictability spring up along a continuum of authority which includes both the boards and the federal government that supports them.

It would help if different departments would work together to provide consistent statements and recommendations.

Violet Camsell-Blondin, Wek'èezhìi Land and Water Board³⁴

Industry participants maintain that the unwarranted reference of development applications for environmental assessment is inconsistent [and] these referrals are not always evidence-based.

Northwest Territories & Nunavut Chamber of Mines³⁵

Next to capacity, issues surrounding **timelines** are among the most common challenges raised by all players. Some regulatory bodies have specific timelines, for instance the standard development review periods range from 42 days for a land use permit to 90 days for a water licence. McCrank states that, in general, the overall system seems to be stressed and is not able to deliver timely decisions, resulting in delayed or indefinitely suspended development projects. "In other instances there does not appear to be any real attempt to set timelines."³⁶ In contrast, the Environmental Audit stated that, "data suggests that the time taken by the Mackenzie Valley Impact Review Board (MVEIRB) to develop Reports on Environmental Assessment is reasonable."³⁷ This report goes on to cite several administrative and procedural bottlenecks arising from within Aboriginal, Territorial, and federal agencies that have caused unnecessary delays. These include prolonged board nominations, board appointments, and approvals by the Minister of INAC.

I recall being in this room several years ago with proponents from Paramount Resources on day 78 of a 42- day review process.

Gord van Tighem, Mayor of Yellowknife³⁸

It takes too long to get Ministerial approvals after all the work has been done.

Participant, Northern Regulatory Improvement Initiative Workshop³⁹

Setting Timelines , Yukon Style

The Yukon Environmental and Social Assessment Act (YESAA) and associated polices provide for specific timeframes for the project approval process. The length of time is dependent on the initial application's completeness and the complexity and size of the project being proposed.

YESAA was developed jointly by federal, Territorial and First Nations governments with extensive input from industry, environmental organizations and the public. It took almost eight years to complete the work but the final result has been widely accepted by all stakeholders.

Extensive use of on-line systems, both to submit proposals and carry out the review and consultation process, allows for relatively efficient and quick approvals. For example, small projects in the Yukon take between 7 and 15 weeks for review, larger projects such as mines or major roads between 1 and 2 years, and very large projects, like major pipelines, between 3 and 5 years. This represents about half the time it would take to review similar projects in the NWT.

In 2005, the Auditor General wrote that, "good reporting begins with a clear understanding of all **accountability** relationships. Before the boards can develop appropriate accountability reports, there is a need for clear direction from the government on the roles and responsibilities of the boards."⁴⁰ Most critiques of the NWT regime agree that such clear direction is lacking, due in large part to INAC's "hands-off" approach with respect to board guidance and operational support. McCrank went so far as to suggest that ambiguities in the interpretation of board mandates have resulted in "serious allegations that the regulatory bodies are tempted to act outside of their mandates."⁴¹ The MVRMA requires that boards be accountable not only for financial performance but also for the way in which they manage their responsibilities and decisions. The Auditor General recommended that INAC work more closely with boards to help them clarify their mandate, vision, and mission; identify strategies for achieving them; and develop corresponding performance measures for reporting.

McCrank accuses many of the regulatory bodies of not establishing a reasonably complete set of **rules** and guidelines but states that "this is something that comes with maturity." A common theme is that **enforcement** of the rules that have been established is inconsistent which, in McCrank's opinion leads to "a general disrespect of the system."⁴² Of particular concern to many stakeholders is the lack of statutory thresholds or "triggers" with respect to exactly when an environmental review should go beyond preliminary screening to a full environmental assessment and, beyond that, to an environmental impact review.

The terms "public concern" and "significant public concern" appear in at least eight separate provisions of the MVRMA and play a pivotal role in the overall regulatory regime. However, the legislation neither defines these terms nor provides any guidance as to their proper interpretation or application...These gaps have given rise to significant uncertainty, inefficiency and undue effort on the part of both applicants as well as those who administer the regime.

Northwest Territories & Nunavut Chamber of Mines⁴³

In spite of these ambiguities, an independent audit noted that, although more projects have been subject to environmental assessment since the MVRMA was passed, this is due to increases in development activity and to smaller projects being reviewed. It concludes that, "where smaller projects were subject to environmental assessment, these referrals appear to be warranted based on the identification of environmental concerns."⁴⁴ The audit goes on to praise the MVEIRB for developing clearer, more streamlined procedures for project scoping and assessment.

In some circumstances, uncertainty exists with respect to the enforceability and responsibility for enforcement of permit and licence conditions...leading to gaps in the monitoring and enforcement of land use permits, water licences and wildlife management.

NWT Environmental Audit⁴⁵

Part 2 – LAND MANAGEMENT IN BC's GREAT BEAR RAINFOREST

SETTING

British Columbia's Central and North Coasts, dubbed the "Great Bear Rainforest" by environmental groups, stretches about 400 kilometres along the province's western shore, from the deeply incised coast which hugs Vancouver Island all the way to the southern tip of the Alaska Panhandle. At 6.4 million hectares, or about one third the size of the Deh Cho region, this area includes some of the most scenic and environmentally sensitive lands and waters in BC. Its remarkable



biological productivity – about 40% higher than tropical rainforests – makes its valleys prime grizzly and black bear habitat. The extraordinary "Spirit" bear, a white or *Kermode*⁴⁶ variation of the black bear, is almost exclusively found on BC's North Coast and was the inspiration behind the region's evocative name.

The richness of this coastal ecosystem gave rise to diverse Aboriginal cultures that have thrived in the rainforest for thousands of years and today make up half of the region's population. The area from BC's Central Coast to the Haida Gwaii archipelago is home to 25 distinct coastal First Nations.

This region is also rich in forest, fish and mineral resources and has tremendous potential for tourism. Throughout much of the last century, the wealth of these resources supported numerous pulp mills, sawmills, logging camps, fish canneries and

mines which fed the coastal economy. By the early 1990s, the era of intensive resource exploitation had waned, resulting in a slumping economy and widespread unemployment, typical of a boom-bust resource frontier. The region's economic focus shifted to finding more sustainable forms of community-based development.

PROCESS

As economic indicators took a dive in the early 1990s, land use conflicts flared among government, industry, First Nations, and environmentalists, all of whom had a stake in this sensitive and resource-rich region. Blockades, international boycotts, and smear campaigns created a "War of the Woods" that brought all logging to a standstill. Yet, after many years of hard work and tough negotiations, a dramatic breakthrough in land management yielded a new agreement that now has the full support of all four groups.

British Columbia is on the cutting edge globally when it comes to new approaches to the changing relationship between natural resources, the environment and people.

Linda Coady, Vice president, Macmillan Bloedel⁴⁷

It's a conservation model that other parts of the world can look to, a model that shows how protection of ecological values and human wellbeing can be advanced without undermining each other.

Stephanie Goodwin, Greenpeace⁴⁸

This remarkable turnaround began in 1997 when the BC government launched a multistakeholder land and resource management planning process (LRMP) for the Central Coast region. Four years later a similar process began for the North Coast. In 1999 forest companies and environmental groups realized that confrontation was leading nowhere and began to focus on solutions rather than problems. The environmentalists halted their campaigns against forest companies. Limited timber harvesting resumed in several dozen agreed upon areas. In 2001 this unique alliance – known as the Joint Solutions Project or JSP – allowed companies and environmental groups to resolve major issues while providing joint input to the LRMP process.

Further negotiations, kept on track by shared planning principles, clear consultation protocols, a fair and transparent process, and a collaborative, win-win vision eventually led to an approved Land Use Plan for the entire Great Bear region which was announced by Premier Gordon Campbell in February, 2006.

This innovative planning process produced a number of goals including the creation a comprehensive network of protected areas covering one third of the region. These include over 100 conservancies, a unique land designation which gives top priority to the preservation of biological diversity and First Nation values. They exclude commercial logging, mining, and hydro developments while encouraging First Nations to pursue low-impact economic activities that protect biodiversity. Other protected

areas, called Biodiversity, Tourism and Mining Areas, or BTMAs, cover 5% of the region and exclude logging and hydro projects while permitting mining and tourism.

Another major planning goal was a commitment to ecosystem-based management, or EBM, outside of protected areas. New legal rules and policies were created to govern industrial practices, enhance environmental performance, and protect First Nation values. Appropriate levels of development for specific areas were determined by blending the best ecosystem science – gathered by the Coast Information Team, a special group of independent scientists jointly commissioned by all parties – with local knowledge from First Nation communities. Unlike traditional approaches to land management, EBM is designed to continually evolve by applying new knowledge and experience through a process known as adaptive management.

Government-to-government decision-making

A crucial leap forward in the Great Bear planning process came with the forging of a "New Relationship" between the BC government and First Nations. It created new government-to-government mechanisms for negotiating resource management agreements. Clear decision-making protocols required that land use planning recommendations be subject to these negotiations prior to a final decision by the provincial Cabinet. The goal was to "Ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner including the primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations."

A third major goal of the Great Bear planning process was to rebuild the economies of coastal communities. A central principle of this transition was that the conservation of ecological and cultural values could attract investment. In 2008 the \$120 million Coast Opportunities Fund was created to help build local business capacity and seed a conservation-based economy. Half of these funds were raised from private charitable sources and half from the federal and provincial governments. The fund is designed to support environmentally responsible economic development initiatives for First Nations in the Great Bear Rainforest.

The path for implementing these goals was officially completed on March 31, 2009 with the signing of a fully ratified agreement. It was hailed by BC's Agriculture and Lands Minister, Ron Cantelon⁴⁹ as "an unprecedented collaboration" among First Nations, industry, community leaders, and environmental groups which sets an "example for the world in one of the largest coordinated land use planning efforts on record."

LESSONS FROM THE GREAT BEAR RAINFOREST

The key to this land management success story was having dedicated and creative negotiators who tackled old problems in new ways. Leadership at the highest levels was essential. Everyone involved had something to gain from the settlement. Industry wanted an opportunity to do business, even if on a much smaller area of land.

Environmentalists wanted the most critical habitats and watersheds protected. First Nations wanted a stronger voice in land use decisions and fuller participation in the economy. Government wanted an end to conflict. All of these goals were addressed in the agreement which holds many potential lessons for improved land management throughout BC and beyond.

Finding a solution in the Great Bear Rainforest was a pioneering effort. The solution was built one step at a time without a blueprint to guide all the players, but at this point the lessons learned can point the way for others in similar circumstances.

Patrick Armstrong, *Conflict Resolution in BC's Great Bear Rainforest*⁵⁰

Now that implementation of the Great Bear agreement is in full swing, several key players have recognized the value of reflecting on their experience to draw out practical lessons for others tackling similar land use issues. The insights which follow were gathered from personal interviews and a review of published literature. They include voices from industry, government, environmental groups, and First Nations and are grouped under some of the same measures of success used to examine land management in the NWT.

Neutral and Fair

- Ensure that agreements between parties deliver something to and expect something from each interest — this is the rule of *quid pro quo*⁵¹ (literally, from the Latin, “this for that”).

Transparent

- Clearly document agreements in writing in order to establish an institutional memory and reduce the likelihood of future conflicts.⁵²

Timelines

- Create a set of milestones that all parties can agree to. Progress against these milestones should be independently monitored and publicly reported.⁵³

Accountable

- Don't seek to undermine the power and influence held by others, make use of it by linking influence with accountability.⁵⁴
- Avoid wishful thinking while remaining open minded. Recognize that all parties will be subject to scrutiny. Expect the unexpected, including within your own organization. Admit mistakes immediately.⁵⁵

Capacity

- Do not expect quick results. Be prepared to invest sufficient resources, both human and financial.⁵⁶
- Be prepared for changing personnel. Develop an effective and efficient means to transmit learning so that time is not lost in bringing new people up to date with what has already occurred.⁵⁷

Conservation financing meant more than simply injecting money into the local economy – an approach that had been tried unsuccessfully in the past. Instead it linked clear, lasting conservation commitments to new investments supporting innovative new businesses and building conservation management capacity in First Nations communities.

Merren Smith, ForestEthics and Art Sterrit, Coastal First Nations⁵⁸

Information

- Utilize the best available information and make it widely available. Make sure that all parties have access to and utilize the same data sets on compatible platforms.⁵⁹
- Invest in shared research and projects. On more than one occasion, potential obstacles to agreement were resolved when opposing parties jointly retained independent experts to offer advice, undertook shared fact-finding initiatives or pilot projects, and used the results to inform new perspectives.⁶⁰

Consultation

- Long lasting, sustainable outcomes require support from all stakeholders. Any group with the ability to influence the durability of the agreement must be included in the process. Expect to find allies in unexpected places, and problems arising from those you consider allies.⁶¹

Collaboration

- Practice empathy, recognizing that to do so includes both understanding another's situations, attitudes, concerns and motives and sharing your own. Getting to agreement tends to require more listening than speaking.⁶²
- Build relationships with people, not with organizations. Institutions don't make change, people do. New ideas only get into organizations when individuals bring them in.⁶³
- Use diversity. Build alliances of strange bedfellows. Get out of your box. Be creative.⁶⁴

A real turning point for moving forward was when individuals – whether from First Nations, environmental groups, or forest companies – began actually listening to one another, rather than seeing meetings simply as opportunities to state demands.

Merren Smith, ForestEthics⁶⁵

Conflict prevention

- Work diligently to differentiate between positions and interests. Be prepared to use mediation to identify common goals and interests, and as a means of resolving disputes when they arise.⁶⁶
- Be patient, and get good help. Once we realized the power of a diverse alliance, we worked hard to bring conflicting partners to the table. The involvement of professional mediators and facilitators made possible many conversations that would otherwise never have happened.⁶⁷
- Deal with problems promptly. Do not allow them to fester.⁶⁸
- If you plan to oppose something, be prepared to provide a constructive alternative.⁶⁹
- Control your ego. [Know] when to let go of the need for recognition. There is nothing to be gained in arguing over who really deserves the credit, and indeed there is much to celebrate in the fact that so many people feel a sense of ownership.⁷⁰
- Adopt a problem-solving rather than confrontational approach.⁷¹

Winning at all costs is not durable. There were times we could have won more, beat people over the head. But we learned that this is not durable. This is about relationships. We're in this negotiation for a long time and you need to maintain the relationships.

Art Sterrit, Coastal First Nations⁷²

Rules and Enforcement

- Establish a set of agreed principles to guide planning. Refer to the principles throughout the process as a measure of progress and to ensure things remain on track.⁷³

Aboriginal rights

- Establish mechanisms for shared decision-making related to land use planning and resource management which require direct, high level discussions between First Nations and government prior to final approval.⁷⁴

Evaluation and evolution

- Leadership means expanding the concept of what is possible. It means carefully stewarding the hope of future success. It is [the] evolution in leadership – far more than innovations in process or institutions – that ultimately will enable us to find common ground.⁷⁵

Maybe the lesson is really about time. You don't create this scale of change overnight. In order to make it happen you need to know you're in it for the long haul, and you have to have endurance. People are learning as they go along and that is why you can't jump the stages. It is a process of discovery.

Jody Holmes, Rainforest Solutions Project⁷⁶

Vision

- Be bold. Articulate a compelling vision of change.⁷⁷
- Relate what ever happens in the short term (and your response) to the desired long-term outcomes. Be strategic in your thinking, and take the long view.⁷⁸
- Stay positive. Persistent optimism is infectious.⁷⁹

The key is to share your vision in a way that can give others optimism. This takes extreme confidence. As First Nations leaders shared their vision with their communities, it built optimism. These are communities that have not seen a lot of hope lately, but they could feel that confidence in the vision.

Art Sterrit, Coastal First Nations⁸⁰

We experienced moments of doubt, anguish, and anger. But despair was never an option. All parties shared the expectation of success. That kept our hope alive throughout the process.

Wally Eamer, former LRMP negotiator for the BC government⁸¹

Part 3 – LOOKING AHEAD

CONCLUSIONS

BC's Great Bear experience represents a remarkable shift in traditional thinking about land management which the North can definitely learn from. Unique collaborations, pioneering science, and sophisticated decision-making processes all played key roles in contributing to the success of this process. But the hard-earned lessons described above suggest that "softer" dimensions of the Great Bear process were equally critical to its success. Major players repeatedly stressed the importance of building relationships, promoting innovation, sharing a vision, and kindling hope.

Innovation became a key factor. Initially, we had been told to play by the rules. But as the power dynamics shifted, we all came to see that the old 'rules' – the policies, processes and programs – could not take us to a new future. We worked together to invent new paths forward, creating new processes and programs.

Merren Smith, ForestEthics⁸²

Accomplishments in the Great Bear Rainforest demonstrate several key land management insights that could help guide improvements to the way lands and waters are managed in the NWT.

- Genuine collaboration based on mutual trust and joint problem-solving can greatly reduce conflicts and build durable pathways to consensus.
- A coordinated, regional approach can enhance both the efficiency and effectiveness of land use planning and resource management processes.
- Protected areas and surrounding zones more open to development can be planned and managed together as an integrated and complementary matrix.
- A shared vision of sustainability can help strengthen support, maintain momentum, and generate optimism among diverse stakeholders.
- Environmental conservation and economic development are best planned in tandem, to their mutual benefit.
- Regular involvement of leadership at the highest level among all major players can help remove major obstacles to progress.
- Investments to help build land management capacity and conservation-based economies are possible through both public and private funding sources.

The time is right to apply similar thinking to the NWT's land management systems. In November, 2007, INAC launched the Northern Regulatory Improvement Initiative which led to the McCrank report and, in February 2010, a renewed commitment to respond to its recommendations.

It is essential that we maximize the potential benefits of resource-development projects, while protecting the environment, and to do that we must have predictable, effective and efficient regulatory systems across the North.

Honourable Chuck Strahl, Minister of INAC⁸³

The release of the Joint Review Panel's report on the Mackenzie Gas Project in December 2009 adds further momentum to land management reform as it includes several innovative recommendations supporting "higher quality and accelerated decision making on future development opportunities."⁸⁴ A federally legislated, independent audit of the *Mackenzie Valley Resource Management Act* presents a

further opportunity to explore current problems with the system and how to fix them. The Sahtu, Gwich'in and Tlicho agreements call for similar audits of land use processes administered under their claims, offering further opportunities for positive change.

RECOMMENDATIONS

Recommendations from previous audits and reviews of the NWT's land management system seem to fall into three main schools along a spectrum of proposed change:

1. Execute fundamental restructuring;
2. Refine the status quo; or
3. Give the system time to mature.

The recommendations which follow were derived from recurring themes along this spectrum as well as relevant ideas from BC's Great Bear experience.

Short term

- Fulfill federal governance responsibilities while respecting the achievements of northern and aboriginal people in gaining control over land use decision processes.

Land Claims are enshrined in the Constitution and we cannot change the regulatory system without respecting this. The spirit and intent of Land Claims is to have Regional bodies and they are probably here to stay.

Tim Goos, Environment Canada⁸⁵

- Provide sustained and appropriate multi-year funding to all regulatory bodies responsible for land management.
- Establish consistent and timely protocols for appointing members to regulatory Boards.

Any amendments to the MVRMA would require all parties to agree. All parties need to accept co-management.

Violet Camsell-Blondin, Wek'èezhìi Land and Water Board⁸⁶

- Provide sufficient resources and networking opportunities to the NWT Board Forum to strengthen its role in promoting collaborative engagement among the NWT's co-management boards, industry, and government.
- Establish clear guidelines, protocols and timelines for streamlining the development application process.

- Examine the consultation processes associated with land management to identify those elements that are working well and those that need further revision and support.
- Evaluate the capacity of Aboriginal communities to participate in all phases of the land management process – including land use planning, environmental impact assessment, and regulation.
- Develop and support mechanisms to prevent conflict and resolve disputes, including the use of professional independent mediation where required.

Medium term

- The absence of regional land use plans in the Mackenzie Valley is a major stumbling block within the NWT regulatory regime. Plan development, approval, and implementation processes should be revitalized through sufficient government resources to support local capacity building and collaborative participation among all key players.

With an approved Land Use Plan for the Gwich'in region, the regulatory process is almost too easy.

Willard Hagen, Mackenzie Valley Land and Water Board⁸⁷

- Identify and fill gaps in the legal, regulatory, and policy framework which supports land management, particularly with respect to expected environmental standards, operational definitions, and water quality.
- Support the NWT Board Forum in creating a streamlined system for reviewing development projects that enhances coordination among federal and territorial departments and regulatory agencies, and provides for timely and effective public consultation processes.

VISION OF THE FUTURE

This paper is meant to add momentum to initiatives already underway by governments, aboriginal organizations, corporate leaders, and communities. Together they are helping to craft a clearer, more certain path for land management in the NWT. Though this transition will involve some new ways of doing business, with trials and lessons along the way, the outcome over the long term cannot help but be positive since, as the BC example so clearly shows, all parties can benefit from increased collaboration, better coordination, a broader regional focus, and a shared vision. Those players that adapt well to the challenges ahead will be leading by example. In the process, they will help define an improved land management system that we all need today, tomorrow, and for future generations of northerners.

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