

## **Summary: “The Road to Improvement” by Neil McCrank**

*In 2007, Chuck Strahl, Minister of Indian Affairs and Northern Development, requested Neil McCrank, Q.C., an engineer, lawyer, former Crown prosecutor, and one-time Deputy Minister of Justice of Alberta and Chairman of Alberta's Energy Board, to prepare a report recommending how to improve the regulatory system in Canada's three northern territories. The result was a 140-page report, entitled "The Road to Improvement", of which this is a summary. Mr. McCrank is now a member of Borden Ladner Gervais LLP in its Calgary office and is chairman of the Firm's "Team North".*

### **Introduction**

On April 1, 2007, the Cabinet of Canada released its Directive on Streamlining Regulation. Its objective is to initiate the establishment of Canada as a best-in-class regulator. The Directive states that the development and implementation of Canadian regulations will be predicated on efficiency and effectiveness. Furthermore, regulators will be directed to improve timelines by focusing resources on larger, more significant regulatory proposals while holding the Government accountable and ensuring the safety of Canadians.

With the Cabinet Directive providing the backdrop, and increasing criticism of northern regulatory regimes providing the impetus, Indian and Northern Affairs developed the Northern Regulatory Improvement Initiative. The Northern Regulatory Improvement Initiative has a two-fold approach: first, in the short and long term, operational-level improvements to areas of federal responsibility; second, in the long term, implementation of an improved regulatory agenda. The longer-term approach included a plan to examine the current regulatory systems for non-renewable resources in Northern Canada and to make a process to make improvements.

This report is in response to the Cabinet Directive and to the Northern Regulatory Improvement Initiative.

### **Issues**

The regulatory systems in the North were developed to ensure the orderly and responsible management of the region's significant renewable and non-renewable resources. They were created from the settlement of comprehensive land claim agreements in the Yukon, Northwest Territories and Nunavut. Many regulatory bodies in the Northwest Territories have been established based on these agreements, as has the *Mackenzie Valley Resource Management Act*.

While no regulatory bodies escape complaints, the complexity and the lack of capacity of the regulatory systems in the North have attracted a greater degree of justified criticism than a typical regulatory body. A number of these criticisms can be addressed through process and system improvements, which are detailed below. However, some of the concerns call into question the very structure of the regulatory systems in the North, especially in the Northwest Territories.

The complexity and the capacity of the regulatory system in the Northwest Territories was examined to determine if its many issues could be addressed in the absence of a fundamental restructuring, which ultimately did not prove possible. This report recommends two options to restructure that basically amalgamate the land use permitting and water licensing functions under a single board for the Mackenzie Valley. This approach would address the complexity and the capacity issues inherent to the current model by making more efficient use of expenditures and administrative resources. It would also allow for administrative practices to be understandable and consistent.

If these recommendations on restructuring and improvements are implemented, the regulatory systems in the North will be able to ensure orderly and responsible development of its resources. It should be noted that while the report includes recommendations that impact on Nunavut and Yukon, this critical assessment is focussed on the Northwest Territories and, in particular, the area covered by the *Mackenzie Valley Resource Management Act*.

### **Assessment of Current System**

In order to make recommendations to improve the current regulatory systems in the North, it is first necessary to list the objectives of an effective, efficient and fair regulatory system. This list provides the foundation for the recommendations for improvement detailed below. An ideal regulatory system exemplifies the following qualities:

- Understandable;
- Neutral;
- Clear Mandate;
- Open and Transparent Process;
- Fair Process;
- Timelines;
- Consistent and Predictable;
- Accountable;
- Capacity;
- Coordinated;
- Establish Rules.

In assessing the current regulatory systems, in particular those that govern the Northwest Territories such as the *Mackenzie Valley Resource Management Act*, it should be noted that the administrators of all of the regulatory bodies in the North are making a genuine and serious attempt to perform their role in the public interest. However, there are limitations, structural or otherwise, that prevent this regulatory system from achieving the qualities of a model system.

#### *Objectives Met in the Current System*

Once the current regulatory process is engaged, it achieves the objectives of being open, transparent and fair.

#### *Objectives Not Met in the Current System*

It is my observation that many of the model objectives are not met by the current regime on a consistent basis. It is also my opinion that these shortcomings *can be addressed* within the existing framework by implementing the following recommendations.

The current system lacks the following qualities:

- Neutral;
- Clear Mandate;
- Timelines;
- Consistent and Predictable;
- Accountable;
- Coordinated; and
- Establish Rules

### *Objectives That Cannot Be Met in the Current System*

Two objectives of a model regulatory system, understandable and capacity, *cannot be achieved* by the current system. These objectives are connected; the proliferation of regulatory bodies creates complexity and a lack of understanding, as well as the extreme difficulty of developing the proper capacity of these bodies.

It is clearly understood that this system was created to ensure that the residents of the North have significant input in the development process. However, this concept has led to unintended consequences, most particularly a regulatory system that is not able to consistently perform its role in a responsible, consistent manner. There are currently an unsustainable number of boards and regulatory authorities that have jurisdiction as a result of the comprehensive land claim agreements.

Therefore, in my opinion, the objectives of having an understandable regulatory system with sufficient capacity will continue to be compromised in the current regulatory system.

### **Restructuring Proposal**

In order to meet all of the objectives of a model regulatory system, it will be necessary in the Mackenzie Valley to:

1. restructure; and
2. accept and implement the recommendations made in this report.

It should be noted that this restructuring proposal is not meant to diminish or reduce the influence that Aboriginal people have on resource management in the North. Rather, it is meant as an attempt to allow for this influence in a practical way, while at the same time enabling responsible resource development through an effective regulatory system.

There are two options for consideration:

1. Option 1 outlines a fundamental restructuring that would require the agreement of all parties to amend the comprehensive land claim agreements and the *Mackenzie Valley Resource Management Act*.
2. Option 2 outlines a less extensive restructuring which may require some amendments to the *Mackenzie Valley Resource Management Act*.

### *Option 1*

Any fundamental restructuring would involve five components:

1. The completion of the Land Use Plans in the Mackenzie Valley.
2. The designation of the Mackenzie Valley Land and Water Board as the *only* Land and Water Board in the Valley.
3. Sufficient funding of the Mackenzie Valley Land and Water Board to allow it to carry out its responsibilities.
4. A recognition by the federal government that the Mackenzie Valley Land and Water Board will become the final decision maker on those matters within its jurisdiction.
5. A recognition by the federal government that the Mackenzie Valley Environmental Impact Review Board will become the final recommending body on those matters within its jurisdiction.

Any fundamental restructuring would require the agreement of all of the parties to the comprehensive land claim agreements. These agreements are constitutionally protected and hence cannot be amended without all affected parties being in agreement.

This option will require a significant paradigm shift in thinking for all involved, and the transition may take time. However, this option would provide for local input through the completion of the Land Use Plans and through membership in the two Mackenzie Valley-wide expert Boards. It would also provide for greater northern control through final decision making at the Board level and less complexity. Finally, it would address capacity issues for the two Boards.

### *Option 2*

This restructuring recommendation would involve the same components as Option 1, but would not include the discontinuation of the regional Land and Water Boards. However, to accomplish the objective of ensuring the proper capacity for the regulatory system, it is recommended that the regional boards be designated as administrative boards only, with no quasi-judicial responsibilities.

The Mackenzie Valley Land and Water Board would be restructured to:

- a. Provide a quasi-judicial function for disputes that arise at the regional board level; and
- b. Provide an appeal mechanism for decisions made at the regional board level.

The main disadvantages to this option would be the continuing complexity that would otherwise be eliminated by Option 1, and the continuing expenditure of funds at the regional board level that would not be directed to the more central expert boards.

## **Recommendations for Improvements**

A number of improvements must be implemented in order to maximize the efficiency and effectiveness of the Northern regulatory regimes. The recommendations can be placed in 4 categories: Policy and Management Frameworks; Process Improvements; Legislative and Regulatory Amendments; and Federal Government Role.

In terms of Policy and Management Frameworks, improvements must be made with regards to Land Use Plans, Consultation with communities and Aboriginals, Impact Benefit Agreements, Environmental Agreements, capacity, Security Deposits and the Free Entry System.

In terms of Process Improvements, changes must be effected with regards to performance measures, water quality and effluent standards, triggers for environmental assessment, and enforcement.

In terms of Legislative and Regulatory amendments, improvements must be made with regards to the *Mackenzie Valley Resource Management Act* and Surface Rights Legislation.

Finally, in terms of the role of the Federal Government, improvements must be made with regards to appointments, Minister's Directives, Ministerial Review, and coordination of federal responsibilities.

## **Conclusion**

Northern Canada has the potential to manage its non-renewable resources in the public interest if it balances the economic and social benefits of development with the need to provide for the protection of the environment. A key component in that process is the regulatory framework of the three territories, in particular the Northwest Territories. This report and its recommendations are an attempt to balance all of the above interests while recommending a regulatory system that is efficient, effective and responsive.

It is my sincere hope that my comments and recommendations reflect the collective wisdom of all of the stakeholders that were consulted. It has been my great honour and privilege to have had the opportunity to work alongside these very passionate, dedicated and committed people North of 60.

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