The creation of the Mackenzie Valley Environmental Impact Review Board

Historical setting

The Mackenzie Valley Environmental Impact Review Board (Review Board) can trace its roots back to the political coming-of-age of Mackenzie Valley Aboriginal groups which began in 1970 with the establishment of the Indian Brotherhood of the Northwest Territories (later the Dene Nation) and the Métis and Non Status Indian Association (later the Métis Nation). These groups took the position that even though treaties (Treaties 8 and 11) had been signed, the Aboriginal people had never knowingly given up ownership over their traditional lands in the valley—a position supported by Justice Morrow in 1973 when he listened to Dene elders throughout the Mackenzie Valley in response to a caveat placed on valley lands by Chief Francois Paulette on behalf of all Dene chiefs. Subsequently in 1976, the Government of Canada agreed to negotiate land claims with the Aboriginal people of Canada when it adopted a "Comprehensive Land Claims Policy."

Building on the premise that they were still the rightful owners of the land, Aboriginal politics coalesced around the issue of development of the land without their permission. Traditionally, Aboriginal people had close ties to the land. The forests, wildlife and bodies of water of the NWT were the basis of their livelihood of hunting, fishing and trapping, and also of their cultural and spiritual identity as a people. They worried that non-renewable resource development such as drilling for oil and gas or mining would destroy the land, threatening their traditional life-style and their identity as a people. They were also concerned that development was not providing benefits to the Dene people.

Securing access to the Athabasca Tar Sands in northern Alberta and oil in the Sahtu spurred the Government of Canada to make treaties 8 and 11 with the Aboriginal people of the Mackenzie Valley in 1899 and 1921, respectively. Here Major D.L. McKean is sampling oil from an Imperial Oil Well in Fort Norman, NWT June 1921. Photo copyright Canadian Department of the Interior

By the 1970s, the land in the Mackenzie Valley had already been impacted by mining and hydrocarbon exploration and development—all done without the participation of the Dene or Métis. A proposal to construct a major gas pipeline along the entire length of the Mackenzie Valley, and the subsequent appointment in 1973 of Justice Thomas Berger to conduct a hearing into the proposal, became the

Charlie Snowshoe, Freddie Greenland, Betty Menicoche and Louis Blondin in 1976 at a Yellowknife hearing during the Berger Inquiry into the proposed Mackenzie Valley Pipeline. Photo copyright R. Fumoleau*

rallying point for the budding Aboriginal political movement. The Dene and Métis won a major political victory when Justice Berger recommended a 10-year moratorium on pipeline construction in the Mackenzie Valley to allow land claims to be settled. The victory demonstrated that the environment assessment and review process was a significant way of influencing management decisions.

The Dene/Métis Comprehensive Land Claim

The Dene and Métis began to negotiate a comprehensive claim with the federal government in the early 1980s. The management of land and resources in the Mackenzie Valley formed a major part of these negotiations. In order to safeguard their traditional lifestyle, culture and spirituality, the Dene/Métis negotiators argued not only for outright ownership of certain lands, but for involvement in resource management throughout the valley.

As a result, the claim provided for the establishment of an integrated system of the land and water management for the settlement area (Mackenzie Valley), through the establishment of a series of comanagement boards in which the Dene/Métis and government would share decision-making power. These boards, to be paid for by the federal government, were to be established by federal legislation within two years of the enactment of the land claim settlement legislation.

One of these boards was to be an environmental impact review board. Under Section 28.3 of the Dene/Métis Comprehensive Land Claim, all development proposals in the Mackenzie Valley would be subject to environmental impact assessment and review by a board that had equal membership of Dene/Métis nominees, and of government nominees, excluding the chairperson.

Participation on the board was not, however, the only way the claim guaranteed Dene/Métis participation in the environmental assessment and review process. The claim also gave “designated Dene/Métis organizations,” as well as any government authority the right to refer a proposal for assessment, and ensured that any environment impact review board would consult with people in affected communities

Although the claim stopped short of giving the board the power to approve or disapprove development projects by making it an advisory board, it did give the board far-reaching authority over the assessment process. The terminology that described the powers of the board was general, with terms such as “significant adverse impact on the environment” and “significant public concern”

used as criteria for referring a development proposal to an environmental impact review. This would allow the board flexibility. In addition, an environmental review would not only consider the protection of the environment, but also the "protection of the existing and future, economic, social and cultural well being of the residents and communities in the settlement area," a clause which would open the door for the board's mandate to include socioeconomic considerations.

While the claim provided for legislation to establish exemptions to the process of environmental assessment, it also gave the board authority to over-ride those exemptions if "it (the development proposal) is considered to be of special environmental concern by reason of its cumulative effects or otherwise." In addition to recommending approval or rejection of development proposals, the board could also set conditions for approval.

In effect, the board would have full power to decide whether any development proposal should be submitted to an environmental assessment and review, including a full-scale public review. If the board decided not to review a project, the federal government would be able to over-ride this decision by forcing a review. However, the government would not be able to veto a board decision to subject a project to review.

The environmental assessment provisions of the Dene/Métis Agreement In Principle, as well as similar provisions in other claims (e.g. the Nunavut Land Claim Agreement) negotiated in the same period, were ground breaking in that the federal government agreed to share its authority over the environmental assessment process with Aboriginal people. This was a significant departure from the existing Environmental Assessment Review Process it would replace. Operated by the Federal Environmental Review Office, the existing process was completely federally-controlled. [The Federal Environmental Review Office was replaced by the Canadian Environment Assessment Agency, after the *Canadian Environmental Assessment Act* was brought into force in 1995.]

Georges Erasmus and Herb Norwegian at a 1980 Dene National Assembly in Drum Lake, NWT. The Dene Nation represented the Dene during negotiations for the Dene/Métis Comprehensive Land Claim. Photo copyright R. Fumoleau

However, as an advisory body the Environment Impact Assessment Board proposed in the Dene/Métis claim stopped short of being a final decision maker. And, even though it is a body established by legislation, it cannot be dissolved through the repeal of that same legislation unless the land claim is also amended.

Breakdown of the Dene/Métis Claim: *the negotiation of regional claims*

The final agreement of the Dene/Métis Comprehensive Claim was initialed, and scheduled to be ratified by the Dene/Métis, in 1990. However, before ratification could take place, a Dene/Métis Assembly called for the re-negotiation of some of the claim's fundamental aspects. When the federal government refused to re-open negotiations, the agreement, as well as the Aboriginal alliance which had negotiated it, broke down.

Instead, the federal government acceded to requests from the Mackenzie Delta Tribal Council (the Gwich'in) and the Sahtu Tribal Council, and agreed to negotiate settlements, based on the 1990 comprehensive claim, with any of the five regional claimant groups that were covered by the 1990 Agreement. Both the Gwich'in and Sahtu regions quickly negotiated regional claims, with the Gwich'in claim coming into effect in December, 1992, and the Sahtu claim in June, 1994.

Both Gwich'in and Sahtu adopted the resource management provisions from the 1990 Dene/Métis claim which provided for an integrated Mackenzie Valley system of water and land management through the establishment of a variety of comanagement boards, one of which was to be an environmental impact review board. These claims did, however, add one more step to the assessment process: "a preliminary screening of development proposals by a government department or board, in order to determine whether any assessment is required."

Similar to the Dene/Métis claim, the regional claims provided for board membership of 50 per cent appointees to be nominated by the land claimant organizations, and 50 per cent government appointees, excluding the chairperson. In addition, public review panels would consist 50 per cent Gwich'in or Sahtu nominees if the development proposal was in their respective areas, and if it was partially in the Gwich'in or Sahtu settlement area, there should be at least one nominee from the area.

The disintegration of the Dene/Métis Comprehensive Land Claim into a series of regional claims presented challenges to the concept of developing an integrated regulatory regime throughout the Mackenzie Valley. This principle of an integrated regime was upheld by both the Gwich'in (Section 24) and Sahtu claims (Section 25), and indeed once the Gwich'in claim was enacted by legislation, the Government of Canada was required to begin the process of establishing this regime—but the process of establishing bodies, including the environmental impact review board, that would have authority throughout the valley was to go ahead without the participation of other affected claimant groups which were taking much longer to negotiate settlements.

The *Mackenzie Valley Resource Management Act*

In 1993, shortly after the finalization of

the Gwich'in claim, the federal government established a working group, known as the Gwich'in Working Group, consisting of representatives from the federal Department of Indian Affairs and Northern Development, the Government of the Northwest Territories and the Gwich'in to set up the land and water management regime called for by the claim. A Sahtu representative joined the group after the Sahtu claim became effective in 1994, and the group became known as the Gwich'in/Sahtu Working Group.

Based on the land and water management provisions in the land claim agreements, the group set out to establish principles and guidelines for the legislation that would eventually be known as the Mackenzie Valley Resource Management Act (MVRMA). The MVRMA would establish and set out operating procedures for two territory-wide boards (the Mackenzie Valley Environmental Impact Review Board and the Mackenzie Valley Land and Water Board), and four regional comanagement boards (Gwich'in Land and Water Board; Sahtu Land and Water Board; Gwich'in Land Use Planning Board; Sahtu Land-Use Planning Board), provided for in the Gwich'in and Sahtu Agreements.

The original intention was that the working group would be finished its work in time for the MVRMA to become law by June, 1994, in accordance with the schedule set out in the Gwich'in implementation plan. It quickly became obvious that this 1994 deadline was unrealistic and more time would be needed. Soon after the

Parliament Buildings, Ottawa. This is where the Gwich'in, Sahtu and Tlicho land-claim agreements, and the MVRMA became law. Photo copyright Parks Canada

1994 deadline passed, however, the Gwich'in sued the Federal Government for $1 million for delaying the implementation of the land management provisions of the land claim. In the ensuing legal action, the federal government agreed to pay Gwich'in costs on further negotiations to draft the legislation.

As the group began to draft the guidelines, it became apparent the process and issues were more complex than originally anticipated, and the group decided it needed to be involved in turning the guidelines into legislative language. Consequently, they received permission from the federal cabinet to draft the actual legislation. Two legislative drafters (one French, one English) from Justice Canada worked with the group, making the drafting of the legislation a negotiated process—a very unique process in Canada. The accepted practice is not to involve third parties in legislation until after it has been presented for first reading in Parliament. In this case, it was felt that third parties should be part of the drafting process because the legislation

involved the rights of the third parties.

The working group was tasked with transforming the general provisions of the land claims agreements into specifics that would form a workable land management regime. To do this, gaps in land claims agreements had to be identified and all land management legislation minutely examined. The three-tiered environmental assessment system needed to be set up in such a way that there was no duplication between the duties of the various boards.

Often the three parties at the table had conflicting interests, with the representatives from the Aboriginal groups emphasizing consultation, conservation and authority for Aboriginal people, while government representatives (which represented the general public and industry) pushed for fewer restrictions on development and a quicker process. Exhaustive negotiation was required to achieve a balance between the differing interests. In the end the language of the legislation was left deliberately broad to ensure maximum involvement for Aboriginal people, and to ensure that all uses of land that could possibly have an impact would be subject to the proper environmental assessments.

Because of the dramatic changes in land management that were being negotiated, jurisdictional issues continued to arise within the federal government. At one point, for example, negotiations were stalled for several months while Indian and Northern Affairs Canada negotiated with Canadian Environmental Assessment Agency on its role in the environmental assessment in the Mackenzie Valley. Canadian Environmental Assessment Agency which replaced the Federal Environmental Review Office as the federal body in charge of environmental assessment in 1995 argued it should have the dominant role in Mackenzie Valley environment assessment. Aboriginal groups and the Government of the Northwest Territories, however, interpreted the land claims agreements as giving the dominant role to the Review Board. The issue was eventually resolved in favour of northern interests, and the Review Board became the major environmental assessment body in the Mackenzie Valley.

Because few people involved had backgrounds in environmental assessments, the negotiations also served as an educational process. Indian and Northern Affairs Canada, as the department that had been managing land in the NWT for years fell into the dual, but conflicting role of educator and negotiator, and this presented obvious difficulties. On two occasions, Indian and Northern Affairs Canada attempted to surmount these difficulties by convening sessions as workshops. For one workshop on cumulative impacts monitoring, Indian and Northern Affairs Canada gave each party at the table the funds to hire four consultants, then hired a mediator to facilitate consensus on each point being negotiated.

The negotiations carried on from 1993 until the bill was finally presented in Parliament

in 1997, and the group undertook clause by clause reviews of more than 30 drafts. They met for three day sessions that often went on into the wee hours of the morning, four or five times a year. The meetings were often piggybacked onto other occasions, and the Indian and Northern Affairs Canada team traveled to various locations when a majority of those involved in negotiations were gathering for other meetings: Inuvik, Yellowknife, Fort McPherson, Calgary, Edmonton, Whitehorse, Ottawa.

While only Gwich'in and Sahtu representatives were involved in the negotiations, the various drafts of the legislation were distributed as information items to Aboriginal groups still negotiating land claims and self-government agreements, the NWT Chamber of Mines and the Canadian Association of Petroleum Producers. When it became apparent that the Tlicho were making progress toward a settlement, they were invited to observe the negotiating sessions—an offer they accepted. Other Aboriginal organizations and industry groups did not have a formal role in the negotiations, but sometimes were able to provide comments on an informal basis. After the negotiations were mostly completed, Indian and Northern Affairs Canada conducted an informational tour throughout the Mackenzie Valley, holding open houses in Inuvik, Fort Good Hope, Norman Wells, Yellowknife, Fort Simpson and Fort Smith.

To facilitate the participation of nominees from other land claim groups, the Act stopped short of listing the number of members to the Review Board, stating only that it should be not less than seven (Section 112) and that at least half of the appointees would be first nations nominees, with at least one Gwich'in, and one Sahtu nominee. It was anticipated that the Act would be amended to reflect the provisions in future agreements between the first nations and the federal government as they became finalized.

The Act was introduced in the Parliament of Canada as Bill C-80 on December 12, 1996, but only received one reading before an election was called and it died on the order paper (giving the working group more time to fine-tune details of the bill). It was re-introduced as Bill C-6 on September 26, 1997, made it through all the stages, received Royal Assent on June 18, 1998 and became effective on December 22, 1998.

Opposition to the MVRMA

While the MVRMA set up institutions to govern land management throughout the NWT (with the exception of the Inuvialuit Settlement Area), Aboriginal groups still negotiating land claims were not invited to take part in the process. Representatives of the Dehcho First Nations, the Akaitcho Territory Dene First Nations, the South Slave Métis Tribal Council and the Métis Nation all opposed the legislation before the Standing Committee on Indian Affairs and Northern Development when it reviewed Bill C-6 in December, 1997 and January, 1998.

They opposed the establishment of a land

and water management regime that would affect their areas without their participation. While they conceded the federal obligations under the Gwich'in and Sahtu land claims, they felt these claims should not have jurisdiction beyond the borders of their settlement areas, and that land and water management should be negotiated within the various processes. The regime that was to be established by the MVRMA prejudiced their negotiations, they felt.

The legislation was also opposed by the NWT Chamber of Mines which felt the regime it was setting was complex, unworkable and presented a serious deterrent to mineral exploration in the NWT. Industry argued the legislation would unnecessarily lengthen the permitting and environmental assessment process.

Setting up the Review Board

About six months before the MVRMA was first presented in parliament in December, 1996, five board members-in-waiting (a Gwich'in nominee, a Sahtu nominee, two government nominees and a chairperson), were named to become members of the Review Board as soon as the legislation passed. The number was two short of the seven members stipulated in Section 112 of the MVRMA. Both the Akaitcho and Dehcho declined to make nominations to the board, as these groups continued to dispute the board's legality. The Tlicho, however, made a nomination to the prospective board in 1997, and by the time the board was formally established with the enactment of the legislation in December, 1998, it had seven members.

The prospective board members, as well as representatives from the nominating parties, made up a working group tasked with training the board members and carrying out the logistics of setting up the board. The group began its work in mid-1996, in anticipation that the MVRMA would be enacted during the first half of 1997. However, when the original legislation died on the order paper due to an unexpected federal election in 1997, the legislation was held up by a year and a half, giving the working more time to do its preparatory work. The group was disbanded when the legislation came into effect in 1998, and the prospective board members were formally appointed to the board.

A requirement in Section 159 of the MVRMA that the board review environmental assessments that were outstanding under the Canadian Environmental Assessment Agency regime was a significant early challenge. This meant the board had to hire environmental consultants and begin work before it had a complete understanding of its responsibilities. In 1998, the Review Board commented on

Review Board members at a 2001 public hearing for the environmental assessment of the expansion of BHP's Ekati Diamond Mine.

22 transition projects, the largest of which was the Diavik Comprehensive Study, and in these commentaries began to lay the groundwork for how it would interpret its duties.

The MVRMA represented a huge shift in power, and issues related to this transition dogged the early work of the Review Board in the period just before and just after the passage of the legislation, as each entity tried to define its niche in the new relationship. At first Indian and Northern Affairs retained the NWT Water Board model and wanted to continue to write technical reviews etc. The Review Board, however, was determined to maintain the independence given to it by legislation, and while it wanted technical advice from the Indian and Northern Affairs Canada, it wanted to control the process.

In time, however, as the two entities came to better understand their roles under the new regime, their relationship stabilized, and continues to evolve.

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