

18th Legislative Assembly of the Northwest Territories

Standing Committee on Economic Development and Environment

Committee Report on the Process Used
for Devolution Legislative Initiatives

Chair: Mr. Cory Vanthuyne

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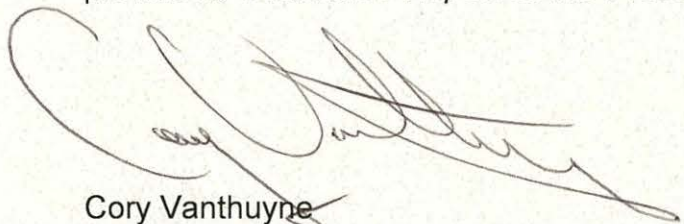
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AUG 19 2019

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Economic Development and Environment is pleased to provide its *Committee Report on the Process Used for Devolution Legislative Initiatives*.



Cory Vanthuyne
Chair, Standing Committee on
Economic Development and Environment

**STANDING COMMITTEE ON
ECONOMIC DEVELOPMENT AND ENVIRONMENT**

**REPORT ON THE PROCESS USED FOR DEVOLUTION LEGISLATIVE
INITIATIVES**

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**STANDING COMMITTEE ON
ECONOMIC DEVELOPMENT AND ENVIRONMENT**

**REPORT ON THE PROCESS USED FOR DEVOLUTION LEGISLATIVE
INITIATIVES**

INTRODUCTION

The Government of the Northwest Territories introduced seven bills in the winter sitting of 2019, pertaining to land and resource management. Some of the bills updated federal legislation that was inherited by the GNWT, and passed with virtually no changes (ie. “mirrored”) during the implementation of the 2014 Devolution Agreement, while others updated older statutes that had not been examined in many years. Bill 34: *Mineral Rights Act*, Bill 36: *Petroleum Resources Act*, Bill 37: *Oil and Gas Operations Act*, Bill 38: *Protected Areas Act*, Bill 39: *Environmental Rights Act*, Bill 44: *Forest Act* and Bill 46: *Public Land Act* were all referred to the Standing Committee on Economic Development and Environment for review.

The Committee held public meetings on the devolution-related legislation in Fort Smith, Hay River, K’atl’odeeche First Nation, Fort Simpson, Fort Providence, Behchokò, Inuvik, Norman Wells and Yellowknife over April, May and June of 2019. Numerous submissions were made on each bill, and vocal public interest was heard in most communities. For each bill, Committee considered the input received and assessed, with input from the Committee’s Law Clerk, ways that each bill could be amended to make improvements. The public submissions received with respect to each bill form part of the public record and are attached to the individual reports produced by the Committee for each bill reviewed.

The Committee appreciates the plain language materials supplied by the Ministers’ offices for the public hearings.

During its review of the devolution-related bills, Committee observed key themes or subject areas, specific to more than one bill. This report focuses on those themes and makes recommendations based on Committee’s observations, for the development and consideration of future devolution-related legislation. It is the Committee’s hope that these recommendations and observations will be of use to the 19th Assembly, to improve the process used by the incoming 19th

Legislative Assembly for the development and consideration of devolution-related bills.

Background

As part of the Devolution Agreement of 2014, multiple pieces of federal legislation were mirrored by the Government of the Northwest Territories (GNWT), to ensure consistency between regimes. This was done with the understanding that the GNWT would introduce made-in-the-north legislation over the course of the next few years.

In developing the new legislation, the GNWT created various forms of Technical Working Groups (the Department of Industry, Tourism and Investment called them “Technical Panels” while the Department of Lands did not use a co-development approach), which for the purposes of this report will be collectively referred to as TWGs, composed of staff from the sponsoring department, representatives of Indigenous Governments, and staff from regulatory boards and agencies that would be impacted by that legislation. While the Committee heard general satisfaction from these governments and organizations about their involvement in TWGs, there were concerns expressed over: when they were invited to participate in the TWGs; which bills required a TWG; the time allocated to do their work; involvement in the drafting of regulations; and confusion over the legislative process and the role of Standing Committees in reviewing legislation. This report will be looking at each issue, and providing recommendations on how to address these concerns.

WHEN A TECHNICAL WORKING GROUP SHOULD BE USED

The Committee is very supportive of the co-development process that is being created post-devolution. While there are challenges, these are surmountable. Indigenous Governments and relevant co-management authorities should and must be involved in the development of legislation that impacts their areas of authority.

The Committee understands that this process can be time-consuming, resource intensive and potentially frustrating for all parties involved. Patience and negotiation skills are required from all participants. Paramountcy of lands rights agreements is a given. The trick is to find ways to recognize and incorporate the

authority and jurisdiction of co-management authorities into bills governing such diverse and cross-cutting subjects as environmental rights, protected areas, and non-renewable resources.

The Committee heard from some participants in the TWGs that they hadn't been invited to participate from the start, which negatively impacted their ability to contribute meaningfully. Others expressed frustration that bills were presented as fully drafted, leading to some participants feeling that they were being asked to sign off on legislation they hadn't had a part in developing. There was dissatisfaction expressed that some legislation, such as *Bill 46: Public Land Act*, hadn't been submitted to a TWG at all.

The Committee was not in a position to meaningfully address these concerns. At each public meeting, the Committee was compelled to explain its role in the legislative process, and that the Committee was not responsible for sponsoring the bill, nor was it involved in the development of the legislation, and could not answer questions as to why a TWG was not given a more substantive role in developing any one of the bills before Committee. Similarly, the Committee was unable to provide an answer to how TWGs would be involved in the development of the regulations for each bill.

To address these concerns, the Committee makes the following recommendation:

Recommendation 1

The Standing Committee on Economic Development and Environment recommends that the Executive Council develop a protocol or protocols for engaging Indigenous Governments, co-management organizations and the Intergovernmental Council in the development of legislation governing land and resources and any related regulations.

It is the Committee's understanding that there are TWGs currently working on legislation that is to be introduced in the next Assembly. This gives Committee the impression that the use of TWGs is becoming a standard approach in the development of legislation. If this is to be the case, Indigenous Governments and co-management organizations should have greater certainty on when they will be called to provide input, so they can manage their internal resources accordingly. To that end, the Committee makes the following recommendation:

Recommendation 2

The Standing Committee on Economic Development and Environment recommends that the Government of the Northwest Territories develop a standard process and criteria for determining when a Technical Working Group is to be employed, and the membership thereof.

ADEQUATE TIME ALLOWED FOR TECHNICAL WORKING GROUP WORK

A common criticism the Committee heard regarding the TWG process was that participants were not given enough time to review the draft legislation before it was to be introduced in the Legislative Assembly. This led some to question whether their contributions would even be considered, and questioned whether the GNWT was acting in good faith. The Committee had no answer to these comments.

It is the Committee's view that once a TWG has been created, it should be allowed to do the work asked of it in a reasonable timeframe. For example, providing draft legislation and asking for comments at the same meeting is not reasonable. Participants must be given enough time to fully consider the material, and some may require direction from their respective governments or organizations. The capacity and resources of these partners should also be taken into consideration when setting a timeframe for response. These factors should be respected in order to insure that input received from TWG members is meaningful.

To address this concern, the Committee makes the following recommendation:

Recommendation 3

The Standing Committee on Economic Development and Environment recommends that when employing a Technical Working Group, adequate time and resources are allocated for the Technical Working Group to provide recommendations prior to the introduction of the legislation in the Legislative Assembly.

Concerns were also raised with the Committee about the number of Bills that the TWGs were being asked to review. While legislation can come from different

departments, and therefore the GNWT staff participating in TWGs will change depending on the department sponsoring the legislation, the Indigenous Governments or co-management bodies have fewer staff, and may rely on the same staff to represent their interests on all the TWGs. This can create a workload issue, both at the TWG level and, as was seen in the spring of 2019, at the Standing Committee stage.

Rushed legislation is not in the public interest. Community members who spoke at the Committee's public hearings raised concerns with the number of Bills being reviewed at each hearing. There was a general feeling that the Committee should have brought each Bill individually for public consultation. While that would have been the Committee's preference, time and resource constraints meant that the Committee was compelled to group Bills according to their sponsoring Minister for public review.

The plain language materials provided by Departments to assist Committee with the review of Bills were helpful. However, some of this material was not truly plain language, arrived very late and there was little to no promotion by the Departments of their Bills.

The Committee heard in almost every community it visited that there were substantial concerns with some of the legislation that the government had brought forward. Most notably, Bill 44: *Forest Act*, was widely viewed as unacceptable and that it should not have been rushed through a TWG for introduction in the winter 2019 session. The Committee commends the Minister of Environment and Natural Resources for acknowledging that Bill 44 wasn't ready, and for withdrawing the Bill in the spring 2019 session.

However, the 19th Assembly will likely have multiple devolution-related bills, which could face the same issues. To address the concerns noted above, the Committee makes the following recommendations:

Recommendation 4

The Standing Committee on Economic Development and Environment recommends that when the Government of the Northwest Territories is preparing complex bills of significant public interest, the Government should coordinate with the appropriate Standing Committee on the introduction of such bills to allow the public and Standing Committees to adequately consider the implications of each bill.

Recommendation 5

The Standing Committee on Economic Development and Environment recommends that standards should be developed for the production of plain language materials to assist Committees and the public in the review of bills, including appropriate reading levels, timelines for distribution and what role the sponsoring department has in promoting proposed legislation.

WHEN IS A TECHNICAL WORKING GROUP'S WORK COMPLETE?

The Committee appreciates that the TWGs are relatively new, and that their role and use in the legislative process is still evolving. The Committee heard a prevailing consensus that it was a useful and productive exercise, one that should continue in the future. However, the Committee also heard that many Indigenous Governments do not see the work as complete once a Bill has been introduced in the Legislative Assembly. This was apparent to the Committee in the number of submissions made by Indigenous Governments and co-management bodies on the various pieces of legislation.

Some of these submissions indicated full support for legislation, and encouraged the Standing Committee to expedite its work to get the legislation passed. Others expressed concern about various provisions and wanted the Committee to take the time to amend the legislation. Still others suggested that they should be called as witnesses during the legislative process, to further advance their position. Some felt the Committee was the last opportunity to address the outstanding concerns from the TWG stage that had not been addressed due to time constraints.

Finally, Committee heard confusion as to why Committee was undertaking a review process when certain members of the public and groups had already been asked for input. It is important for all those who engage with government on the development of a bill to understand that that bill may be amended by Standing Committee at the appropriate stage in the legislative process. Having a clear understanding of the process will help to manage expectations and assist participants to better understand how their input may be used.

Therefore, the Committee makes the following recommendation:

Recommendation 6

The Standing Committee on Economic Development and Environment recommends that each Technical Working Group receive a comprehensive briefing on the legislative process and where the Technical Working Group fits within that process. This briefing should make it clear to participants that each bill undergoes a two-stage process, involving public consultation and development at the bill-development stage, led by the sponsoring Minister, and a second in-depth review, led by Standing Committees, once a bill is introduced in the Legislative Assembly, which can include public hearings, research and independent analysis.

The Committee heard from numerous Indigenous Governments and co-management organizations that they appreciated the co-operative drafting process that was used by the GNWT in drafting the bills administered by the Departments of Environment and Natural Resources and Industry, Tourism and Investment, and that they want to see a similar process used for the development of regulations. The Committee has been left with the impression from Ministers that it is their intention to have Indigenous Government involvement in at least some aspects of the regulation-making process, however the Committee has not received any formal indication of this.

Accordingly, the Committee makes the following recommendation:

Recommendation 7

Pursuant to Recommendation 1, the Standing Committee on Economic Development and Environment recommends that the Government of the Northwest Territories develop a standard process for how regulations will be developed for legislation that was developed under a Technical Working Group.

As an evolving practice, and one that appears likely to continue in the future, the Committee is of the opinion that there is merit in learning from participants in recent TWGs regarding what worked well what needs to be improved, what changes should be incorporated and what, if anything, should be left out. If any mistakes have been made, the GNWT should be seeking information about how to avoid repeating them. Accordingly, the Committee makes the following recommendation:

Recommendation 8

The Standing Committee on Economic Development and Environment recommends that when a Technical Working Group is used in the drafting process, the Government of the Northwest Territories conduct a collaborative lessons learned exercise with Technical Working Group members, at the conclusion of the process, to provide recommendations on how it could be improved for future legislation.

ROLE OF THE PUBLIC IN POST-DEVOLUTION LEGISLATIVE INITIATIVES

The Committee notes the contribution of the public in improving the Bills, both at the Committee review stage and earlier during stakeholder engagement conducted by the departments. The Committee also notes the expressed interest in the public continuing to be involved through the review of draft regulations.

There is no clear public process for regulation-making by the GNWT, which in the Committee's opinion is inconsistent with the commitment to Open Government. Both the *Petroleum Resources Act* and the *Oil and Gas Operations Act* contain provisions that require the publication of regulations in the NWT Gazette with a

period for public comment. The Committee feels this approach should be adopted for all legislation dealing with land and resources.

Recommendation 9

The Standing Committee on Economic Development and Environment recommends that the Government of the Northwest Territories engage the public and interested stakeholders during the development of post-devolution legislation and regulations, and that a public process is needed for the notification and public comment on regulations.

THE ROLE OF STANDING COMMITTEE

The Committee faced numerous questions on why there were public consultations being conducted when Indigenous Governments had already been involved in the development of the legislation, and, for most of the bills, had already indicated their support of the final bill. Concerns were also raised with Committee regarding amendments altering what had been agreed to at the TWG stage.

It is the Committee's role to review proposed legislation, conduct public consultation where the Committee feels it is warranted, and to propose amendments that in the Committee's view improve the bill. The Committee is not bound by any agreements privately made between the GNWT and others when proposing amendments. The sponsoring Minister can choose to not concur with Committee amendments, and a public debate can then follow in the Legislative Assembly.

Committee does not mean to imply that it is insensitive to the wishes of Indigenous Governments and other participants of TWGs. However, consistent with parliamentary procedure the Committee is also responsible for gathering feedback from members of the public, many of whom may not have been actively represented at the TWG stage. The Committee must also take their views into consideration when developing amendments. It is Committee's opinion that, should the GNWT adopt Committee's Recommendation 6 of this report, this may alleviate some of the concerns the Committee heard from TWG participants.

The Committee also wishes to note that it learned more of the TWG process during its public consultations from the participants than it had from the GNWT. The Committee found comments from TWG participants to be very helpful in framing how some of the bills were drafted, and why specific provisions were worded the way they were. The Committee thanks all those who took the time to appear at the Committee's public hearings for answering Committee's questions.

However, the Committee was unable to answer questions regarding why some bills did not have a TWG established, and were drafted solely by the GNWT. It is unclear to the Committee what rationale was used to determine when a TWG would be employed, and when it was not needed. To address this, the Committee makes the following recommendation:

Recommendation 10

The Standing Committee on Economic Development and Environment recommends that, should a bill be excluded from a Technical Working Group process, the Minister responsible for the bill advise the appropriate Standing Committee at the earliest possible opportunity, along with the rationale for the exclusion.

During the course of its legislative reviews, it became clear that the public, IGOs and departmental staff have various levels of understanding as to the legislative process and Standing Committees' role within that process. Committees can and should play a significant role in ensuring that legislation is developed in accordance with the principles of good governance including the Northwest Territories Intergovernmental Agreement on Lands and Resources Management.

Each of the three departments sponsoring post-devolution Bills had different approaches to working with Committee. Promised updates were not delivered, Bills were substantially different than what was presented in legislative proposals, and when briefings were provided, they were often just before a Bill's introduction.

A Committee's role in co-development will largely depend on the complexity of the legislation at hand, but Ministers need to find ways to better involve Committee. There should be no impediments to Committee getting briefed as the legislative initiatives develop and important policy matters emerge. Committee should have a role in defining GNWT's positions during the co-development process. If Committee is kept informed, the public review of such

Bills will be made more efficient and effective. Therefore, the Committee makes the following recommendation:

Recommendation 11

The Standing Committee on Economic Development and Environment recommends that when legislation is being developed using a Technical Working Group, that the appropriate Standing Committee work with appropriate Minister to establish an agreed upon way of keeping the Committee informed of progress, key issues and a way to have input into significant policy discussions.

During the course of the Committee's review of oil and gas legislation, it was identified after the Committee had proposed amendments that federal consent was required, and in fact had already been received, for the bill as drafted. This does not constrain the Committee from seeking amendments to the affected clauses, but will require the GNWT to seek concurrence from the federal government again. To prevent such confusion from occurring in the future, the Committee makes the following recommendation:

Recommendation 12

The Standing Committee on Economic Development and Environment recommends that should any portion of a bill require federal concurrence, a statement to this effect be included in the legislative proposal, and further, that the relevant clauses be identified at the time of introduction to the appropriate Standing Committee.

In the future, a bill should not be submitted to the federal government for their concurrence until after it has been reported back to the House following Committee's review.

LEGISLATIVE ISSUES

While the Committee does not recommend the GNWT introduce this number of bills in a short time frame again, the concurrent review of so many bills at one time has allowed the Committee to catch several inconsistencies between the various bills that may have otherwise been less obvious.

As an example, definitions for “land, resources and self-government agreements” varied between bills, even those sponsored by the same department. This often led to presentations or submissions to Committee flagging that the bill is inconsistent with existing legislation, such as the *Wildlife Act*, and motions to amend had to be drafted to ensure consistency. To address this matter going forward, the Committee makes the following recommendation:

Recommendation 13

The Standing Committee on Economic Development and Environment recommends that devolution-related legislation and regulations use consistent terms and definitions.

Another issue that the Committee grappled with on multiple bills was transparency and the right of the public to access information. Some bills included public registries, but limited the information contained therein. Others omitted them entirely, arguing that similar information should be available elsewhere. This is of grave concern to the Committee, especially given the *Open Government Policy* that was enacted by this government. Specifically, the Committee considered principles 2 and 6, as set out in the policy, in its deliberations:

(2) Government data, information, and decision-making should be accessible in a way that is responsive to the needs and expectations of NWT residents.

(6) Access to government data, information and dialogue should be timely, simple, and available across multiple platforms.

Robust, easily accessible public registries were felt to be the best and simplest way to ensure information is accessible, available, and can be made public without undue cost or workload. The Committee heard numerous concerns from the public, especially on bills that during the public consultation conducted by the department had included a public registry, but the final bill did not. The Committee’s attention was directed to the Ontario *Environmental Bill of Rights* registry as an example that provides a single-window approach that could be followed in the NWT.

The Committee spent time on each bill before it, pulling out where decision points were made, to ensure that these could be captured in a public registry. To

ensure that open government is enshrined in legislation, as well as in policy, the Committee makes the following recommendation:

Recommendation 14

The Standing Committee on Economic Development and Environment recommends that the Government of the Northwest Territories develop greater consistency in making information public, including looking at how to make the various public registries enacted by law consistent, coherent and comprehensive.

During the review of the devolution-related bills, Committee heard complaints that the bills lacked preambles or purpose statements. Both of these tools can add value to legislation by helping to describe the intent of the legislation and helping with judicial interpretation. Preambles and purpose statements differ, in that a preamble to bill does not form part of the bill, and therefore is not a legislative requirement once a bill is passed. A purpose statement, on the other hand, forms part of the bill and is likely to be more practical in its application, than a preamble, which tends to be aspirational in nature.

Once a bill has had second reading and been referred to Committee for review, Committee may not add a preamble where one is not already present in the bill. The only option left to Committee, in an attempt to be responsive to the public's concerns, is to propose the inclusion of a purpose statement in a bill, even where a preamble may have been more appropriate.

Accordingly, Committee makes the following recommendation:

Recommendation 15

The Standing Committee on Economic Development and Environment recommends that, for each legislative initiative, the GNWT consider the need for the inclusion of preamble or purpose statement in the proposed bill and determine whether or not either is warranted, advising the Standing Committee of its decision and rationale at the legislative proposal stage.

This will enable the Committee to give consideration to this aspect of the proposed legislation and will alert Committee, in advance of the first reading of

the bill, to prepare for the inclusion of a preamble in a bill where Committee feels strongly that the proposed legislation would benefit from one.

Finally, Rule 100(5) of the *Rules of the Legislative Assembly of the Northwest Territories* requires Cabinet, in response to a motion by the Committee, to table a comprehensive response that addresses the Committee report and any related motions adopted by the House.

As required by this rule, the Committee usually includes a recommendation in each report, which is moved as a motion in the House, requesting a response from government within 120 days. Given that the 18th Legislative Assembly will dissolve prior to the conclusion of the 120 day time period allowed by the rules, the Committee has opted to forego this recommendation.

Given the extent of public interest in this Bill, the Committee nonetheless requests, to the extent it is possible before the dissolution of the 18th Assembly and for the public record, that government provide a response to this recommendation, even of a preliminary nature, that the Committee may publicly disclose.

CONCLUSION

The Committee thanks all those who took the time to appear before Committee to share their thoughts on the various pieces of legislation. The Committee hopes that the recommendations made in this report will improve the co-development process and lead to greater cooperation, understanding and ultimately, better legislation for the people of the Northwest Territories.

This concludes the Standing Committee's Report.