Regulating for Resilience: Principled Flexibility and Environmental Co-Management in the Mackenzie Valley

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Abstract

The author examines the environmental regulatory regime in the Mackenzie Valley region of the Northwest Territories which includes the regulatory structure established by the Mackenzie Valley Resource Management Act and the private contractual instruments of environmental agreements, impact benefit agreements and socio-economic agreements. The author concludes that these instruments work together to form a complex regulatory system that is sometimes maladapted to the adaptive management framework necessary for effective regulation in an increasingly unstable arctic environment. The author argues that effective environmental management in the Mackenzie Valley requires a regulatory approach grounded in principled flexibility and shared environmental goals across a multiplicity of instruments. The Mackenzie Valley region is better suited than other regions to develop this approach due to its history of integrated resource management and co-management with Aboriginal people and because of the protections provided to Aboriginal rights by Section 35 of the Canadian constitution.

Keywords

Resource management; environmental regulation; resilience theory; adaptive management; Mackenzie Valley; co-management; impact benefits agreements; socio-economic agreements; environmental agreements, climate change.
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# Table of Contents

## Contents

Abstract ................................................................................................................................. i

Acknowledgments .................................................................................................................. ii

CHAPTER 1 .............................................................................................................................. 1

1 Introduction .......................................................................................................................... 1

CHAPTER TWO ......................................................................................................................... 9

2 Regulatory Theory ............................................................................................................. 9

2.1 Command and Control Regulation ................................................................................... 9

2.2 Deregulation .................................................................................................................. 10

2.3 Responsive Regulation .................................................................................................. 11

2.4 Dynamic Federalism ...................................................................................................... 13

2.5 New Governance Theory ............................................................................................... 14

2.6 Resilience Theory .......................................................................................................... 17

CHAPTER 3 ............................................................................................................................. 28

3 The Regulatory Regime Established in the Mackenzie Valley Region of the Northwest Territories ............................................................................................................ 28

3.1 A brief overview of Environmental Law in Canada and in the Northwest Territories ................................................................................................................................. 28

3.2 A Brief Overview of Aboriginal Law in the Northwest Territories............................... 30

3.3 MVRMA - Origin in Comprehensive Land Claims ........................................................ 33

3.4 Concluding Comments ................................................................................................. 46

CHAPTER 4 ............................................................................................................................. 48

4 ENVIRONMENTAL AGREEMENTS ................................................................................. 48

4.1 History of Environmental Agreements in the Mackenzie Valley ................................ 48

4.2 The Environmental Agreements ..................................................................................... 52

4.3 Advantages of Environmental Agreements .................................................................... 60

4.4 Disadvantages of Environmental Agreements ............................................................... 64

4.5 How Environmental Agreements Interact with the MVRMA Regulatory Process ................................................................................................................................. 65

4.6 How Environmental Agreements Interact with Impact Benefit Agreements ............... 67

CHAPTER 5 ............................................................................................................................. 69
5 IMPACT BENEFIT AGREEMENTS AND SOCIO-ECONOMIC AGREEMENTS 69
5.1 Impact Benefit Agreements (IBAS) ................................................................. 69
5.2 Socio-Economic Agreements (SEAs) ............................................................... 78
CHAPTER 6 ........................................................................................................... 85
6 ANALYSIS .......................................................................................................... 85
6.1 The Regulatory System in the Mackenzie Valley is operating as a complex and interactive system ......................................................... 85
6.2 The MVRMA regulatory regime does not necessarily promote adaptive management ...................................................................................... 87
6.3 One of the Key Tools required for the Transition to an Adaptive Management Regime is “Principled Flexibility” .............................................. 88
6.4 Conclusion ....................................................................................................... 95
CHAPTER 1

1 Introduction

“First Nations are Canadians last, best hope of protecting the land, water, sky and plants and animals for their future generations as well.”

The Canadian arctic is one of the most enigmatic regions on earth. This thesis focuses on the challenges of environmental regulation in northern Canada and suggests that some of the strategies developed in the arctic regions, particularly in the Mackenzie Valley region of the Northwest Territories (NWT), have the potential to assist regulators south of the 60th parallel.

This thesis accepts that climate change is a true environmental and social challenge, and the effects of climate change are felt disproportionately in the arctic. In 2004, the Ministers of the Arctic Council, an international body made up of representatives from arctic nations, released the Arctic Climate Impact Assessment (ACIA). More than 250 scientists and six circumpolar Indigenous peoples organizations participated in the ACIA, and the results of the study are disconcerting.

The ACIA confirmed that the arctic climate is warming rapidly, and that this is likely to result in large scale environmental consequences with global implications. This includes large scale and irreversible changes to the arctic terrain including shifting arctic vegetation zones with forests replacing existing tundra and tundra vegetation moving into polar deserts; Melting permafrost will significantly alter existing wetlands. The ACIA predicted significant changes in animal species’ diversity,

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1 Dr. Pam Palmater as quoted by Wab Kinew in his essay “Idle No More is Not Just an Indian Thing” reproduced in John Ralston Saul, The Comeback (Toronto: Penguin Canada Books, 2014) at 252.
ranges and distribution. In particular, the ACIA identified a major decline in arctic marine species such as polar bears, seals, walrus and some marine birds. Elevated ultraviolet radiation levels will affect people, plants and animals. The ACIA also noted that climate change is likely to have major economic and cultural impacts for Indigenous communities living in the Arctic. Since the release of the ACIA, the Arctic Monitoring and Assessment Program (AMAP) associated with the Arctic Council have released related studies that support these findings. These findings inform and are consistent with scientific studies done by the Government of the Northwest Territories.

Of particular importance to the Dene people in the Mackenzie Valley is the rapid decline of the caribou population. The caribou herd is a key source of sustenance and cultural meaning to the Dene people. The importance of caribou is described by the Sahtu Dene as follows:

“If one thing could be singled out that binds the people of DA@line most strongly to their land and heritage, it would be caribou. Many traditional stories show the wisdom and character of the caribou. The caribou have always been a staple of Dene subsistence and its seasonal migrations have determined people’s movements on the land.”

All of these factors, including the decline of the caribou, are irrevocably altering the physical and social landscape of the north. This thesis looks at strategies for

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4 AMAP released in 2015: (1) Freshwater Systems in a Changing Climate and (2) Human Health in the Arctic and in 2016: (1) Methane as an Arctic Climate Forcer and (2) Black Carbon and Ozone as an Arctic Climate Forcer which are available on their website at www.amap.no.

5 In 2008, the Government of the Northwest Territories released its Climate Change Report. That Report relies heavily on the findings in the ACIA and notes that the climate change impacts identified in the NWT report are consistent with the ACIA. GNWT, *NWT Climate Change Impacts and Adaptation Report* (2008) available online at www.enr.gov.nt.ca/sites/default/files/nwt_climate_change_impacts_and_adaptation_report.pdf at 6.


7 Taken from their website of the Deline First Nation at www.deline.ca/culture-and-community/deline-stories/importance-of-caribou (2016).
effective environmental regulation in a unique and challenging time characterized by uncertainty of the natural and social world. It argues that the status given to Aboriginal and Treaty rights under Section 35 of the Constitution provides additional environmental protections that will be important in fighting climate change, and that supporting and enabling Aboriginal people to exercise their traditional role in stewardship of the land is an important component in encouraging effective and resilient environmental management.

This thesis examines the regulatory regime operating in the Mackenzie Valley region of the Northwest Territories and its ability to effectively regulate a “new north” characterized by environmental and social instability. It defines the regulatory regime to include both the environmental legislative scheme, predominately the Mackenzie Valley Resource Management Act (MVRMA) and its related co-management board structures, and contractual agreements. The types of contractual agreements reviewed in this paper are environmental agreements that are directly concerned with environmental impacts, impact benefit agreements that are designed to flow benefits from development to the impacted Aboriginal groups, and socio-economic agreements that are intended to flow benefits and address impacts for all Northerners.

Academic literature on the regulatory regime in the Mackenzie Valley is divided into two discernible themes: (1) those who see the primary role of contractual agreements as addressing deficiencies in the Northern regulatory system, and (2) those who see the primary role of contractual agreements as increasing public participation in northern decision-making. Both these schools characterize the contractual agreements as augmenting or detracting from the existing regulatory system.

Members of the first school, Galbraith, Bradshaw and Rutherford conclude that

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contractual agreements in the Mackenzie Valley deliberately fill the gap and address the failings in the design and practice of the environmental assessment regime. These agreements create legally binding enforcement mechanisms for outstanding issues that otherwise lack a regulatory home. The agreements address mistrust by promoting cooperation and committing parties to establishing business relationships; they address capacity issues by ensuring that the government does not bear the entire financial burden of the increased demand on social and environmental services; and they address benefit related issues and support economic development.9 Affolder likewise argues that the value of environmental agreements is to allow parties to address deficiencies in the system in circumstances where there is no political will to address through other avenues.10

Several authors express concern that contractual agreements can undermine the environmental assessment process. Fidler and Hitch argue that the environmental assessment process is more transparent and better equipped to address both public interest issues and the interests of Aboriginal groups than private contractual agreements.11 Klein, Donihee and Stewart highlight the tension and possible overlap between the role of public government in addressing socio-economic matters through public processes and private negotiated agreements that also address the socio-economic impacts for the Aboriginal population. They conclude that the two processes (impact benefit agreements and economic impact assessment) can be complimentary provided that the regulator is able to develop a solid socio-economic impact assessment practice that could inform IBA negotiations.12

The second group of theorists focus on the role of contractual agreements in

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9 Lindsay Galbraith, Ben Bradshaw and Murray B Rutherford, “Towards a New Supra-Regulatory Approach to Environmental Assessment in Northern Canada” (March 2007) 25(1) Impact Assessment and Project Appraisal 27
increasing public participation in Northern decision-making. Lucas focuses on “bridging practices” which are processes that move participants further along the spectrum from procedural rights of participation to actual participation in the decision-making process. There is a key difference between administrative rights, which allow for participation within a defined system that may not be amenable to the types of actual outcomes being sought by the Aboriginal groups and the ability to determine actual outcomes. He argues that the co-management regime in the Mackenzie Valley is an example of a bridging practice that enhances local participation and accountability in the operation of the resource management process, but still does not give Aboriginal groups the right to determine the substantive outcome. The right to determine substantive outcomes may not be appropriate in all circumstances but it is more desirable in circumstances where Aboriginal groups are rightsholders and the key impacts will be felt on their traditional territory. Lucas argues that impact benefit agreements are one of the few instruments that secure substantive decision-making rights for Aboriginal people. In that way, they augment the existing system and create greater participatory rights.¹³

Graben similarly notes the Mackenzie Valley Environmental Impact Review Board consciously promotes increased collaboration between Aboriginal groups and industry and encourages the use of private agreements to give communities a greater participation in the licensing process.¹⁴ Both Graben and Lucas express concern regarding the limitations of addressing social needs through private contract where resorting to private contractual agreements could undermine the public process.

This academic work provides useful insights into the regulatory system but is

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limited by the tendency to view the contractual arrangements as “add-ons” to the MVRMA legislative regime with the capacity to either augment or undermine those environmental goals. This thesis demonstrates that that the regulatory regime in the Mackenzie Valley operates as a complex system. Various parts of the regulatory system interact with each other in ways that are sometimes complimentary and at other times conflicting. The regulatory regime in the Mackenzie Valley is more adaptive and promotes greater resilience because of the complex interaction between the legislative scheme established under the Mackenzie Valley Resource Management Act, contractual agreements and Aboriginal Law.

This thesis is ultimately concerned with how to most effectively regulate development in the Mackenzie Valley given the challenges of climate change. A central argument made in this thesis is that the adaptive capacity of the regime would be strengthened if the multiplicity of stakeholders/rightsholders/regulators in the Mackenzie Valley were guided by better articulated environmental goals and an environmental vision.

Central to this thesis is a lengthy review of several key theories of regulatory governance. These theories of regulatory governance are instrumental in understanding how the regulatory regime in the Mackenzie Valley functions to promote adaptive management, with the insights provided by responsible regulation theory, new governance theory, and resilience theory being particularly helpful. This paper is heavily influenced by the resilience theorists and their focus

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15 In this paper, I have used rightsholders to refer to Aboriginal groups who have Aboriginal and Treaty rights that are protected under Section 35 of the Canadian Constitution and stakeholders to refer to other interested parties, both Aboriginal and non-Aboriginal, whose interests would not be constitutionally protected. The extent to which Aboriginal groups should be dealt with as rightsholders as opposed to stakeholders is the subject of debate both domestically and internationally. See Sara L. Seck, “Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights” (2016) 12:1 McGill Journal of International Sustainable Development and Practice, forthcoming. Professor Seck makes a convincing argument for a broad definition of Aboriginal rights. This is advocated because of the vulnerability of Aboriginal peoples to development, and the gap created because the Canadian constitution does not recognize environmental rights as a separate and protected category of rights.
on the promotion of flexibility, adaptability and the fostering of resilience in a non-stationary environment.

This paper is divided into four Parts. Part one is a review of the theories of regulatory governance that may provide useful guidance on how to build a more adaptive and resilient regulatory regime in the Mackenzie Valley.

Part two discusses the importance of the *Mackenzie Valley Resource Management Act (MVRMA)* as the primary statute addressing the regulation of land and water in the Mackenzie Valley as well as the interaction of the *MVRMA* with Aboriginal law. This involves a review of both primary sources and academic sources.

Part Three examines the three types of contractual agreements most often utilized for resource development projects in the north. These are (1) impact benefit agreements, (2) socio-economic agreements, and (3) environmental agreements. I rely extensively on a review of the literature in discussing the environmental agreements associated with the Ekati, Diavik, and Snap Lake diamond mines. The discussion of environmental agreements associated with the Gahcho Kue Mine and Giant Mine Remediation Project is based on primary sources including the documents filed with the Mackenzie Valley Environmental Impact Review Board. The section on impact benefit agreements and socio-economic agreements is based predominantly on a literature review because impact benefit agreements are confidential agreements and largely unavailable.

Part Four analyzes how the regulatory regime in the Mackenzie Valley operates as a complex system, and identifies some of the characteristics of the regulatory regime which allows the components to work together to promote a more adaptive and resilient system.

This thesis highlights the reasons why the environmental regime in the Mackenzie Valley has the potential to provide a more adaptive and resilient model for
environmental regulation. These include: (1) the Mackenzie Valley Resource Management Act is an integrated resource management scheme and is less likely to compartmentalize environmental and social effects; (2) a focus on co-management allows it to incorporate different perspectives and world views, especially Aboriginal perspectives\textsuperscript{16}; (3) links to Aboriginal law and the modern land claims process makes the scheme less susceptible to political pressure and to the legal pressure to conform to administrative law principles which are often incompatible with adaptive management; and (4) contract law is used to augment the regulatory system in ways that often (although not always) builds in more flexibility and provides for additional input by Aboriginal peoples.

The key piece missing for effective environmental management in the Mackenzie Valley is principled flexibility. Principled flexibility allows for stronger, legally enforceable and institutionally supported goals with more flexibility on how to achieve these goals.\textsuperscript{17} Environmental and Aboriginal groups in the Mackenzie Valley do not share a sufficiently strong environmental and social purpose that is capable of sustaining an adaptive environmental governance system across a multiplicity of regulatory instruments. Without this underlying coordinating framework, the northern regulatory regime may become a jumble of legal and policy instruments with an unfortunate tendency towards over-bureaucratization. However, I am convinced that the regulatory regime in the north has the ability to transform environmental regulation when this final piece of principled flexibility is enabled.

\textsuperscript{16} Co-management is defined as the sharing of management power and responsibility between the government and local resource users. See F. Berkes, P. George and R. Preston, “Co-Management” (1991) 18(2) Alternatives 12 at 12. In the Mackenzie Valley, this involves power sharing with the Aboriginal people who are the primary resource users on their traditional territories.\textsuperscript{17} Robin Kundis Craig and Melinda Harm Benson. “Symposium: The Next Generation of Environmental and Resources Law: What has changed in Forty Years and What Needs to Change as a Result: Replacing Sustainability” (2013) 46 Akron LR 841 at 877.
CHAPTER TWO

2 Regulatory Theory

Regulatory theory and its role in resource development has been a topic of much academic discussion particularly since the late 1960s and 1970s, which saw both a growing awareness of environmental issues, and the rise and increasing complexity of the administrative state. Some of the major schools of thought providing insight into modes of environmental governance are outlined below. Ultimately, these schools of thought are not mutually exclusive and a successful regulatory system should draw insights from all. This paper pays particular attention to the resilience theory, which argues that adaptive management must be an integral part of any attempt to regulate complex environmental problems and is particularly compelling given the undeniable reality of climate change and the unpredictability of the current arctic environment.

2.1 Command and Control Regulation

Command and Control regulation starts from the premise that governments have the ability to command through law, and that they are then authorized to control the behavior of others through enforcement of those commands. Agencies are responsible for establishing prescriptive environmental standards, monitoring compliance with those standards and enforcing punitive sanctions for their violation.

Command and Control is a vital element of any regulatory system particularly in circumstances where it is important for government to establish and enforce environmental bottom lines or where you have insufficient corporate compliance. Historically, command and control regulation has been very successful in addressing pressing environmental issues that were amenable to this type of “big stick” approach. For example, this type of regulatory approach has been quite successful in
dealing with air and water pollution in situations where it has targeted point-source pollution and waste disposal practices.\(^\text{18}\)

Command and Control is a centralized system of regulation, and has been criticized for its "one size fits all" approach. Critics of command and control regulation argue that it is not suitable for managing large scale and complex environmental problems such as climate change. These types of complex problems require holistic, integrated, and at the same time localized eco-system approaches. This can be difficult to reconcile with command and control mechanisms that are centralized and designed to address a particular problem, without addressing the complex interactions that occur within eco-systems. Complex problems are not amenable to top-down solutions imposed by governments and usually require solutions that are more decentralized and sensitive to local and changing conditions.\(^\text{19}\)

Another key criticism of command and control regulation is its adversarial in nature. It has as a primary focus the imposition of penalties for non-compliance. This can provoke unproductive resistance from individuals and businesses rather than fostering a more collaborative approach to environmental management. The result is a system that is inefficient to operate and overly bureaucratic.\(^\text{20}\)

2.2 Deregulation

Deregulation theorists argue that current environmental regulation is excessive and hinders economic development. They argue that market forces can achieve desirable environmental outcomes as long as the market is properly constituted and the appropriate economic incentives are in place.

\(^\text{20}\) Ibid at 2.
Rosenblloom contends that environmental degradation occurs because the environment is not appropriately valued in the market place. There is an economic disconnect because the environment is seen as a “common pool” resource that is available for depletion without the costs of that depletion being given appropriate economic weight. Once environmental degradation is factored in as a cost of production, then market forces will correct this harm without the need for excessive regulation. Attempts to factor in environmental costs include pollution taxes such as “Cap and Trade” schemes that limit the amount of pollution that the state will authorize and makes the right to pollute an economically valuable and tradable commodity.

There are environmental costs to development and, if they are not acknowledged and factored in appropriately, those costs are often absorbed by the most vulnerable people in society. However, deregulation is often advanced in order to promote economic development through “smaller government”. This paper demonstrates that the presence of a strong regulator (although not necessarily more rules) is key to a strong environmental management regime in the Mackenzie Valley.

2.3 Responsive Regulation

This is a variation of the command and control model that allows and encourages corporate responsibility within a narrowly defined and heavily scrutinized environment. It has been an influential theory of environmental regulation since 1992 when Ian Ayres and John Braithwaite published their seminal work entitled Responsive Regulation: Transcending the De-regulation Debate.

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Braithwaite and Ayres propose a regulatory pyramid model. At the base of the pyramid is the more restorative, dialogue-based approach to ensuring compliance. As regulated parties move up the sanctions pyramid, increasingly more demanding interventions are involved. All parties understand that the ultimate sanctions available to the regulator are formidable. However, these sanctions are only used as a last resort if other approaches aimed at increasing the internal capacity of the regulated actors to resolve the issue are either unsuccessful or not feasible.23 Affolder describes responsive regulation as an ongoing process of moves and counter-moves fine tuned to the individual actors involved and their conduct.24

Braithwaite and Ayers argue that regulated actors see this type of regulatory model as more legitimate and procedurally fair and therefore compliance with the law is more likely. They contend that this system is more strategic and therefore less susceptible to system capacity overload.25

Barton holds that responsible regulation is transformative as it creates space for more than just the regulator and the regulated. The role of the concerned public can move from a peripheral role seeking to interpose itself in the relationship between government and the regulated agency into a more central part of the regulatory scheme.26

Braithwaite’s more recent work places increased emphasis on the importance of networking in the regulatory process. Braithwaite recognizes that public actors can play a significant role in placing pressure on the non-compliant. He identifies banks as powerful networking partners who are able to exert significant control over the

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23 Ibid. at 42.
25 Ayres and Braithwaite, Supra, note 22.
regulated. The current focus on social license, or the securing of community support as a prerequisite to development would also fall into this networking category. Affolder argues that this focus on networking may be overstated because of the divergent interests of networking partners, many of whom are single interest focused and may work at cross purposes with the regulator. For example, banks are primarily concerned with protecting their financial investment. They want finality in decision-making, which can work at cross-purposes with adaptive management.

This thesis demonstrates that the presence of a strong regulator in the Mackenzie Valley resource management boards, and the threat that the Boards will impose mitigations on proponents in the event that they fail to reach agreements with stakeholders/rightsholders is key to the effectiveness of the Mackenzie Valley regulatory regime.

2.4 Dynamic Federalism

Dynamic federalism is a reaction against the prevailing American economic theory that there is an optimal level of government involvement to regulate any problem such that efficient regulation can only occur when the regulating entity fully internalize the costs and benefits of its policies. This has often been referred to as the “matching principle” and holds that regulatory authority should reside at the level of government that roughly matches the geographic scope of the problem so that national environmental issues are dealt with at the federal level and regional environmental issues are dealt with at the state or local level.

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27 John Braithwaite, “The Essence of Responsive Regulation” (2011) 44 UBC LR 475 (QL) at 51 and 52.
Dynamic federalism explicitly calls for the overlapping of federal, state and local authority such that any matter may presumptively be within the authority of two or more of federal and state and local governments. For example, federal governments may regulate local issues such as remediation of contaminated sites, and state and local governments may exercise their powers to develop policies on environmental issues of national and even international importance such as climate change. Furthermore, these authorities are not static but adaptive to the regulatory needs so that the level of government dealing with an environmental problem may flip between federal and state powers depending on the circumstances.\textsuperscript{30}

The flexible distribution of authority allows government to react more quickly and with less political jockeying, and promotes increased cooperation and synergy between agencies.\textsuperscript{31} Overlapping jurisdiction could also lead to inefficiencies and a lack of transparency as to ultimate authority and accountability.

Dynamic federalism is an American theory but it is included in this paper because it provides possible insights in dealing with Aboriginal governments as a Third or Fourth Level of government (federal, provincial, local and Aboriginal) within an ever-changing and more complex Canadian federalist system.

### 2.5 New Governance Theory

New Governance Theory provides a more participatory and collaborative model in which government, industry and other societal actors share responsibility for achieving policy objectives. Orly Lobel, in her seminal work on this topic, argues that the new governance model is intended to be an alternative to both state-based top down regulation and complete reliance on market-based norms by inventing

\textsuperscript{30} \textit{Ibid.} at 1796
flexible and responsive administrative practices that are more suited to the modern reality than either large bureaucracies or private market mechanisms.\textsuperscript{32}

Lobel identifies the following attributes as the organizing principles of the new governance model: (1) increased participation of non-state actors; (2) stakeholder collaboration; (3) diversity and competition; (4) decentralization and subsidiarity; (5) integration of policy domains; (6) flexibility and non-coerciveness; (7) adaptability and dynamic learning; and (8) legal orchestration among proliferated norm generating entities. With regards to the final principle, she argues that this is achieved through the interpenetration of policy boundaries, new public/private partnerships and next-generation policy strategies which are more inclusive such as negotiated rule-making, decentralized and dynamic problem solving, disclosure regimes and coordinated information collection.\textsuperscript{33}

Ruggie argues that corporate conduct is shaped by three distinct governance systems: (1) the system of public law and governance (domestic and international); (2) civil governance systems involving stakeholders/rightsholders affected by business enterprises and employing various social compliance mechanisms; and (3) corporate governance. He argues that often the public law system is not the dominant governance system at play and that stakeholder driven processes and internal corporate structures may be more effective in furthering policy goals.\textsuperscript{34} This suggests the need for a more collaborative regulatory model with increased interaction and greater synergies among various governance systems.

New Governance values the process of dialogue and collective decision-making. Graben develops the concept of ‘deliberative democracy’. Deliberative democracy is a process-oriented goal involving the generation of collective decisions via reasoned

\textsuperscript{33} Ibid. at 265-268.
debate among all concerned stakeholders. Holley, Gunningham and Shearing characterize new environmental governance as the collaboration between various stakeholders working together in furtherance of commonly agreed upon or mutually negotiated goals. The way that consensus is reached is as important as the outcome, although not every circumstance lends itself to this type of diffuse decision-making.

Ruhl identifies new governance theory as one of several adaptive management theories that is potentially transformative. He argues that new governance principles allow for more diverse responses to a problem by broadening the number of instruments involved in environmental governance, thus creating resilience.

Ruhl and Salzman caution that the focus on experimentation, collaboration and diversity encouraged by new governance theorists, may also increase uncertainty and blur lines of agency accountability. They state poetically that the potential for backfire increases with the number of agencies and diversity of instruments thrown at a problem potentially leading to “a glorious mess.”

This paper examines the importance of contractual agreements in expanding the northern regulatory regime and achieving environmental objectives. The response to climate change in the north needs to be coordinated, mutually reinforcing and oriented towards collective environmental goals. It will not be effective if it is simply a series of well-intentioned programs. New governance theory highlights the importance of engaging stakeholders/rights holders in dialogue and in the process of constructing a common vision that can span across these different regulatory instruments.

36 Holley, Gunningham and Shearing, Supra note 19 at 4.
38 Ruhl and Salzman, Supra note 31 at 106-107.
2.6 Resilience Theory

Resilience theorists argue that the current regulatory system can never adequately address the complexities of the natural and the social environment (and the complex interactions between the two). These theorists argue for an adaptive management approach to environmental regulation that has as its primary goal the promotion of flexibility, adaptability and the fostering of resilience. Resilience is the capacity of the system to absorb change and continue functioning. This is an emerging theory of environmental governance and therefore less established than the previously outlined theories. I outline below what I consider to be the key tenets of resilience theory.

2.6.1 The environment is a complex system and must be regulated as a complex system

The primary insight of resilience theory is that ecosystems are much more complex and interactive than previously acknowledged and that regulatory law is ill-suited to that fundamental reality.

Kundis Craig draws a fundamental distinction between 'complicated systems and complex systems. Complicated systems are notable because the elements of that system maintain an element of independence from each other and the system can be managed by its individual components. She argues that most environmental problems are not amenable to this kind of compartmentalization precisely because they arise in complex ecosystems and previous attempts to break environmental problems into sub-components have largely been unsuccessful. Complex systems are more dynamic, exhibit complex collective behavior, and respond more readily to their internal and external environments. These dynamic capabilities give ecosystems a certain degree of flexibility to cope with changes in this system.39 That

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resilience is part of what needs to be fostered and protected in environmental regulation.

2.6.2 Ecosystems exhibit a high degree of resilience, but are still evolving and capable of radical change

Holling, Gunderson and Ludwig argue that ecosystems are robust when they have functional diversity and special heterogeneity in the species and physical variables and landscapes. The stability domains that define the ecosystem are so large that external disturbances have to be extreme and/or persistent before the system transforms irreversibly into another system. Nonetheless nature is evolving and it is important to acknowledge and plan for the unpredictable dynamics in ecosystems, including the potential for radical change.40

Holling, Gunderson and Ludwig highlight that human society is also resilient in its interaction with the environment. Peoples' adaptive capabilities have made it possible not only to persist passively, but also to create and innovate when limits are reached. This includes the ability to develop successful remedial policies incrementally once the need becomes apparent. They argue that a primary goal of environmental governance is to develop resilience in both the natural and human systems.41 This involves fostering diversity and adaptability in both the natural and human systems so that these systems are better able to absorb change while still maintaining their fundamental characteristics.

Kundis Craig and Harm Benson argue that environmental regulation must also acknowledge and plan for the possibility of radical regime change resulting from climate change.42 This challenges some fundamental assumptions about environmental law, including sustainability.

41 Ibid at 18.
42 Kundis Craig and Harm Benson, Supra note 17 at 857-858.
2.6.3 Some resilience theorists challenge sustainability as a key organizing concept for environmental governance

A key focus of environmental regulation in recent years has been on sustainable development. Sustainable development is most often defined as “development that meets the needs of the present without compromising the ability of future generations to meet its own needs.” This definition is taken from the Bruntland Report, and has two key organizing concepts: (1) the limits on development imposed by the environment and (2) the priority should be given to the needs of the world’s poorest populations and to inter-generational equity.43

Dernbach correctly notes that sustainability is one of the most important ideas to have emerged from the twentieth century. He argues that sustainability-thinking involves a shift away from thinking about environmental costs to treating the environment as a source of environmental benefits and opportunities. The environment and society are interlinked such that continuing environmental degradation cannot promote human well-being.44 This requires structuring our economic and social development so that it does not further degrade the environment but rather, seeks to protect and restore the environment.

Kundis Craig and Harm Benson argue that sustainability is no longer a realistic environmental management strategy. They contend that sustainability is founded on an incorrect premise that the environment can be managed through a balancing of environmental and development factors. With proper resource management, there is always a way to return to an optimal state of the nature. This is based on a belief that nature is static and that baseline environmental conditions will remain more or less the same over long periods of time with minimal ecological complexity. Kundis

Craig and Harm Benson argue that climate change is a “game-changer” such that baseline conditions are no longer reliable indicators of future behavior and ecosystems may be transforming into new and irreversible states of being. This “non-stationarity” requires the displacement of sustainability goals with environmental goals aimed at encouraging resilience.45

Garmestani, Allen and Cabezas are resilience theorists that continue to advocate sustainability as a fundamental environmental policy goal. They note that fostering resilience is a key component of sustainability so that the two concepts can be mutually reinforcing.46

Denbrack and Cheever argue that sustainability and resilience are mutually reinforcing terms. Sustainability is a decision-making framework as well as an environmental goal. Within this decision-making framework, environmental protection must be integrated into decisions about social and economic development, and social justice and economic viability must be integrated into decisions about environmental quality. Resilience is an important consideration for sustainability. However, resilience does not have the same normative basis as sustainability. Decision makers should not ignore human well-being, persistent global poverty and social equity. Denbrack and Cheever argue that sustainability remains an important equitable concept that needs to be reinforced not undermined by resilience theory.47

Bosselmann identifies three factors that continue to make sustainable development politically relevant: (1) it provides an alternative narrative to the growth paradigm

45 Kundis Craig and Harm Benson, Supra note 17 at 856-862
which people in power cannot ignore; (2) the broad, ambiguous meaning of sustainable development makes it appealing to a wide group of interests who are able to draw on sustainable development for moral legitimacy; and (3) it links ecological, economic, and social issues and therefore encourages dialogue and concrete steps towards achieving sustainable development among diverse groups including industry, governments, and environmental non-government organizations.\(^{48}\) Bosselmann correctly identifies the political importance of the sustainable development movement in translating theory into concrete action. The broad process of dialogue and diverse decision-making also fosters a more flexible and adaptable approach to environmental management that reinforces resilience thinking.

\textbf{2.6.4 Current environmental decision-making is not well suited to address complex ecological issues}

Many resilience theorists are concerned that there is a fundamental disconnect between the regulatory problem that needs to be addressed and the regulatory tools employed by the regulator. Ruhl and Salzman argue that current environmental regulation erroneously regards environmental effects as homogeneous, linear and proportionally aggregated. This leads to a system that is heavily reliant on cost-benefit analysis, risk assessment and pre-decision assessment.\(^{49}\) Kundis Craig and Ruhl note that heavy reliance on these types of front-end analytical tools is misguided in a system characterized by constant change. The current system makes the erroneous assumption that there is a robust capacity to predict and assess market and non-market impacts of a proposed development when in fact that kind of up-front analysis is not feasible in a complex environmental system.\(^{50}\) A robust

\(^{48}\) Klaus Bosselmann, “The Concept of Sustainable Development” in Klaus Bosselmann, David Grinlinton and Prue Taylor eds. \textit{Environmental Law for a Sustainable Society} 2\textsuperscript{nd} ed. (New Zealand Centre for Environmental Law Monograph Series: Volume 1, 2013) at 96.

\(^{49}\) Ruhl and Salzman, \textit{Supra} note 31 at 66.

regulatory system needs the capacity to constantly assess and re-assess and to adapt accordingly.

In their scientific research, Holling and Meffe noted that management strategies often fail to account for the complexity of ecosystems. As a result of misguided management efforts, systems can gradually lose resilience and become less able to absorb disturbances. Garmestani, Allen and Cabezas are particularly critical of “single trait-maximization laws” that address complex ecological issues from a single standpoint. They argue that U.S. Endangered Species Act, 1973 failed as a regulatory strategy because it did not adequately take account for the complex interactions of endangered species within the eco-system. By focusing only on the species at risk, it actually created a system which was more vulnerable to development.

2.6.5 The modern regulatory system must incorporate adaptive management

Resilience theorists argue that adaptive management is key to effective environmental regulation of resources and the environment. Adaptive management recognizes the need to react to ongoing changes in the environment rather than assume a linear and static environmental response.

Arnold and Gunderson contend that adaptive regulation must recognize the complex relationship between ecosystems and social systems and aim to design structures, methods and processes that enhance the adaptive capacity of both the environmental and the social systems. They identify the key features of a more adaptive legal system as: (1) multiplicity of articulated goals; (2) polycentric, multimodal and integrationist structure; (3) adaptive measures based on flexibility,


52 Garmestani, Allen and Cabezas, Supra Note 46 at 1039-1040.
discretion, and regard for context; and (4) iterative legal-pluralist processes with feedback loops and accountability. Of particular interest is Arnold and Gunderson’s focus on polycentrism and multimodality. Polycentrism refers to a structure in which there are multiple centers or sources of authority. Multimodality refers to the use of multiple methods for achieving a policy goal in a way that aims to connect and integrate the various methods. Arnold and Gunderson write that both are features of adaptive law that make it possible to deal with complex environmental and social problems without breaking them down into sub-components and missing the larger picture.

Ruhl distinguishes between engineering resilience and ecological resilience in the design of regulatory instruments. Engineering resilience focuses on the return to the equilibrium state, and relies on the tools of reliability, efficiency, and quality control. Ecological resilience, in contrast, is measured by the amount of change that a system can absorb before it changes from one structural state to another. Ecological resilience relies on the tools of scalability (allowing the system to shift relevant temporal and spatial scales to adjust for changing conditions), modularity (allowing the system to shift functions and relationships within the system to adjust to changing conditions) and evolvability (fostering the capacity for the system to manage these shifts for extended periods of time).

Ruhl argues that a regulatory system must develop the adaptive capacity to move between resilience strategies (engineering and ecological resilience) as conditions change and there are shifts in variability and predictability. He argues that the current regime is currently designed for engineering resilience as reflected in the focus on pre-decision environmental assessment, cost-benefit analysis, records of decision and judicial review litigation. This is premised on a relatively static view of

54 Ibid at 12-18.
55 Ruhl, Supra note 37 at 1-7
nature. However, environmental variables such as climate change can lead to a situation where variability of change is high and predictability is low so that ecological resilience strategies offer an important enhancement of flexibility and should be the default for design purposes. 56

For example, the MVRMA is appropriately predicated on robust environmental assessment (engineering resilience). However, the environment is constantly changing and the challenge for northern regulators is to build into the system appropriate monitoring and follow-up in order to address unexpected environmental and social changes (ecological resilience). The regulatory system needs to be sufficiently flexible that it can allow for changes in mitigations in real time without the need for time consuming administrative law remedies.

2.6.6 Stakeholder engagement is an important element in managing for resilience

Resilience theorists stress the importance of stakeholder engagement in increasing flexibility and adaptability of the system. Stakeholder engagement can also be a critical element in establishing the political viability of a project.

Kundis Craig and Ruhl maintain that adaptive management theory has evolved into two main branches. The Decision-Theoretic model emphasizes working with relevant policy stakeholders to define the management problem but then relies on agency experts to develop the process models to guide decision-making. The Resilience-Experimentalist model emphasizes maintaining a shared understanding among the relevant policy stakeholders through a continuous process of learning, hypothesis testing and experimentation within the management-problem context. There is much greater emphasis on continued stakeholder involvement and multi-

56 Ibid.at 5-7. Ruhl is specifically referring to the American environmental regime but the MVRMA has a similar focus on engineering resilience.
party collaborative planning in the latter. In my experience, the Decision-Theoretic School is most often employed by government but shared regulation among a multiplicity of stakeholders/shareholders as is advocated in this paper, requires a shift to the Resilience-Experimentalist model.

Garmestani, Allen and Cabezas highlight the importance of “bridging organizations” in catalyzing the formation of policies that are flexible and reflective of resilience management. Examples of “bridging organizations” include (1) assessment teams, which are made up of actors across sectors in a socio-ecological system; (2) non-governmental organizations, which create an arena for trust-building, learning, conflict resolution and adaptive co-management; and (3) the scientific community which acts as a watchdog and facilitator for adaptive management.

Bridging organizations perform a fundamental role in adaptive management because that they are able to monitor the status of the socio-ecological system and can be a catalyst for rapid change if conditions are deteriorating. They also serve an important role in facilitating cross-scale linkages, improving communications and creating opportunities for collaboration within the system.

2.6.7 Law is also a complex adaptive system and is maladapted to resilience thinking

Adaptive management poses some formidable challenges for the legal system. It necessarily gives more discretion to decision-makers, which raises concerns regarding accountability. The lack of finality in decision-making is unnerving to investors and can potentially discourage investment. In addition, there is the potential for a lack of transparency given the multiplicity of regulatory actors and regulatory decisions.

57 Kundis Craig and Ruhl, Supra Note 50 at 7 and 17.
58 Garmestani, Allen and Cabezas Supra note 46 at 1050.
59 Ibid at 1049.
Kundis Craig and Ruhl contend that administrative law is resistant to this type of multi-stage adaptive decision-making. Kundis Craig and Ruhl identify concerns over (1) agency discretion, (2) lack of finality, (3) the potential for endless judicial review of numerous agency decisions, and (4) difficulty managing expectations of public input at all stages of “dial-turning”. These obstacles need to be addressed if administrative law is to meaningfully co-exist with adaptive management.\(^{60}\)

Arnold and Gunderson argue that an adaptive legal system would need to provide the right combination of adaptive flexibility and principled accountability of the decision-makers. They contend that discretionary decision-making is a necessary element of adaptive environmental management and that concerns regarding the arbitrary nature of discretion can be addressed through the development of appropriate and relevant standards to govern the exercise of discretion and to which decision-makers can be held accountable.\(^{61}\)

Kundis Craig and Harm Benson argue that this can be achieved through ‘principled flexibility’. This involves a focus on stronger, legally enforceable and institutionally supported goals but more flexibility on how these goals might be achieved and an increased ability to adapt to changing conditions.\(^{62}\)

Ruhl argues that law in itself is a complex adaptive system. This leads to the challenge of one complex adaptive system attempting to regulate another complex adaptive system. Ruhl believes that our legal regime is fundamentally incompatible with adaptive management strategies. Successfully working with the dynamic forces of complex adaptive natural and social systems demands an active and adaptive management regime that eschews optimization approaches seeking stability. Yet one of the goals of law is to establish and maintain relatively stable contexts within which other social systems (banking, health care, education) can operate over time.

\(^{60}\) Kundis Craig and Ruhl, \textit{Supra} note 50 at 40-49.
\(^{61}\) Arnold and Gunderson, \textit{Supra} note 53 at 29.
\(^{62}\) Kundis Craig and Harm Benson, \textit{Supra} note 17 at 877.
This concept is integral to the way that law has developed and continues to develop. It remains to be seen whether such disparate and conflicting goals can ever be reconciled.63

Stacey also argues that law is ill suited to environmental protection because the amount of executive discretion required to address complex environmental problems is incompatible with the rules of administrative decision-making. She argues that this incompatibility can be addressed through existing legal mechanisms and by treating environmental protection as an ongoing emergency.64

This paper will incorporate insights from all of the above theories but particularly from the schools of responsive regulation, new governance and resilience because of their particular focus on increasing adaptability and flexibility in environmental regulation and their focus on incorporating multiple stakeholders and rights holders into the overall management regime. These are key characteristics required for effective environmental management in the north.

CHAPTER 3

3 The Regulatory Regime Established in the Mackenzie Valley Region of the Northwest Territories

This Chapter provides an overview of the environmental regulatory regime in the Mackenzie Valley as well as the interaction of that regime with Aboriginal law and particularly Section 35 of the Canadian Constitution.65

3.1 A brief overview of Environmental Law in Canada and in the Northwest Territories

Canada is a federal state with division of powers between the federal and provincial governments. The heads of powers for each government are set out in Sections 91 and 92 of the Canadian Constitution.66 The environment is not specifically identified as a head of power in the Canadian Constitution and as a result, neither the federal or provincial governments have exclusive jurisdiction over the environment. Instead, environmental jurisdiction is shared by the provincial and federal governments under other heads of powers including property and civil rights, criminal law, fisheries and oceans, shipping and natural resources. The federal government has constitutional responsibility for aboriginal issues, which is also a major influence on resource development and environmental issues in the north.

The Northwest Territories is not a province and does not have the constitutional powers set out in Section 92. However, the federal government has delegated powers normally exercised by the provinces to the government of the Northwest Territories though a number of Federal Acts, most notably the Northwest Territories Act.67 The Northwest Territories Act is not constitutionally protected and could be revoked by another Act of the federal parliament. Still, the Northwest Territories is evolving as an independent entity from the federal government and the Courts have

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66 Ibid.
67 Northwest Territories Act, SC 2014 c2, s2. This implements devolution and replaces Northwest Territories Act, RSC 1985, CN-27.
recognized that the NWT has a special province-like status.\(^{68}\) Since 1967, the NWT has been delegated responsibility for health care, education, social services, highways, airport administration and forestry management.

In April 2014, the federal government devolved the management of public land, water and resources from the Government of Canada to the Government of the Northwest Territories (GNWT). \(^{69}\) The GNWT will now have decision-making authority about the use of public land, water and resources in the NWT. As well, the GNWT will be entitled to 50\% of the resource revenue from development on public land in the NWT. \(^{70}\) This is a historic change that will greatly increase regional control over resource development in the north.

The key piece of environmental legislation in the Mackenzie Valley region of the NWT is the *Mackenzie Valley Resource Management Act* (MVRMA) \(^{71}\), which is an integrated resource management act dealing with the regulation of land and water in the NWT as well as environmental assessment. The *MVRMA* is still federal legislation, but a number of responsibilities and decision-making authorities held by the federal Minister under the *MVRMA*, including the authority of approve Type A water licenses, the designation of inspectors, the holding of security and powers, and many of the duties and functions related to environmental assessment were delegated to the GNWT. \(^{72}\) The GNWT considers this delegated authority to be an interim step and has negotiated a review of these provisions in the devolution


\(^{69}\) Bill C-15, *Northwest Territories Devolution Act*, 2\(^{nd}\) Sess, 41\(^{st}\) Parl, 2014 (royal assent 2014-03-25). In addition to the provisions dealing with devolution, Bill C-15 contained numerous amendments to the *MVRMA*.


\(^{71}\) Supra, Note 8.

\(^{72}\) A copy of the delegation letter from federal Minister of Aboriginal Affairs and Northern Development, Bernard Valcourt to Territorial Ministers Michael Miltenerberger and Robert McLeod dated March 27, 2014 is available on the Mackenzie Valley Land and Water Board website at https://www.mvlwb.com/sites/default/documents/Devo.
agreement in five years.73 The GNWT ultimately would like to make the MVRMA territorial legislation.

The MVRMA will be scrutinized in the next five years as the GNWT decides the direction of resource development in the north. This provides a unique opportunity to re-visit some of the operating principles of the MVRMA, and perhaps address, as this paper argues, the need for more strategic vision on global environmental issues and the need to develop a regulatory strategy that prioritizes adaptive management strategies and acknowledges resilience in eco-systems as an environmental goal.

3.2 A Brief Overview of Aboriginal Law in the Northwest Territories

3.2.1 The MVRMA Co-Management Regime as a Treaty Right

The operation of the MVRMA is profoundly influenced by its interaction with Section 35 of the Canadian Constitution. Section 35 recognizes and affirms the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada. The Supreme Court of Canada has interpreted Section 35 as requiring the federal and territorial governments to justify the infringement of an aboriginal right in accordance with the constitutional test set out in the case of R v. Sparrow.74

It is well recognized that resource development projects frequently infringe on Aboriginal and Treaty rights. Section 35 provides an incentive to the governments to work through environmental issues with the aboriginal population in order to avoid conflict and constitutional litigation on the interpretation of Aboriginal and Treaty rights.

74 R. v. Sparrow [1990] 1 SCR 1075. The Sparrow decision places the onus on the Crown seeking to infringe on aboriginal rights to establish (1) that the objective behind the infringement is valid, substantial and compelling and (2) that the infringement is consistent with the Honour of the Crown.
There is also an argument that the co-management regime established under the MVRMA is an existing Treaty right that is constitutionally protected under Section 35. The argument is based on the fact that (1) the co-management regime was established pursuant to the Sahtu, Gwich’in and Tlicho land claim agreements75 and (2) these land claim agreements are modern treaties.

The matter is currently before the Courts. The Tlicho government has commenced an action to prevent the federal Government from implementing amendments to the MVRMA which would eliminate the regional Land and Water Boards. The authority of the regional boards would be absorbed into a restructured Mackenzie Valley Land and Water Board that still allows for substantial Aboriginal membership on the new Board. The Tlicho claim that the Wek’eezhii Land and Water Board is protected by the co-management provisions in the land claim. The Supreme Court of the Northwest Territories has granted an injunction finding that there was a significant constitutional issue to be heard.76 The federal government appealed that injunction but subsequently announced that the action would not proceed further.77

3.2.2 The Duty to Consult

Section 35 has also been interpreted by the Supreme Court of Canada to include an obligation on the Crown to consult with aboriginal people before engaging in conduct that might adversely affect their Aboriginal rights or title. In some circumstances, this may include a corresponding duty to accommodate aboriginal concerns.78 In the resource management context, this could include imposing terms and conditions in permits to protect aboriginal rights or interests, or paying compensation.

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75 This is discussed in more detail in Paragraph 3.3.
77 Guy Quenneville, “Canada pauses legal fight to launch NWT land and water superboard”, CBC (11 December 2015) online at www.cbc.ca.
Resource development permits in the Mackenzie Valley frequently impact Aboriginal rights (particularly Aboriginal rights to harvest wildlife) and trigger the government’s obligation to consult with affected Aboriginal groups. This has the potential to be a time-consuming and politically charged process. However, the Supreme Court of Canada has also indicated that the Federal Government can, in appropriate circumstances, rely on its statutory processes in order to fulfill the duty to consult.\textsuperscript{79}

This Federal Court considered the link between the \textit{MVRMA} and Section 35 in \textit{Ka’a’Gee Tu First Nation v. Canada (Attorney General)}. \textsuperscript{80} The Federal Court found that the \textit{MVRMA} process provided a significant opportunity for consultation with Aboriginal groups on Section 35 issues. However, the process was flawed because the federal and territorial ministers did not consult with affected Aboriginal groups prior to modifying a decision of The Mackenzie Valley Environmental Impact Review Board (MVEIRB) under Section 130 even though there was no statutory requirement that they do so. They struck down the decision and required the ministers to further consult with the Aboriginal group.

The federal and territorial governments rely on the \textit{MVRMA} board process to meet the majority of their Section 35 consultation obligations. As a result, the federal and territorial governments must ensure that the board processes provide significant opportunities for Aboriginal engagement. This provides an incentive for those governments to build capacity for the Aboriginal communities to participate in the hearings and to provide participant funding to ensure that the board processes allow for meaningful Aboriginal consultation. As well, it creates an incentive for the federal and territorial governments to encourage developers to enter into contractual agreements with Aboriginal groups (impact benefit agreements, environmental agreements). Those contractual agreements often contain accommodations for impacts to Aboriginal and Treaty rights which the federal and

\footnotesize{\textsuperscript{79} Mikisew Cree First Nation v. Canada [2005] 3 SCR 550.  
\textsuperscript{80} Ka’a’Gee Tu First Nation v. Canada (Attorney General) 2007 FC 763.}
territorial governments under Section 35 must be satisfied are appropriate as part of their fiduciary obligations to the Aboriginal peoples.

3.2.3 The Mackenzie Valley Resource Management Act (NWT)

Environmental regulation in the Mackenzie Valley region of the Northwest Territories is governed primarily by the *MVRMA*. Land use permits and water licenses are issued pursuant to the *MVRMA*. Other authorizations are issued pursuant to both federal and territorial legislation. Fisheries authorizations are issued pursuant to the federal *Fisheries Act*\(^\text{81}\) and timber cutting permits are issued pursuant to the territorial *Forest Management Act*.\(^\text{82}\) The environmental assessment procedure under the *MVRMA* is triggered by an application for a permit under either federal or territorial legislation. Once the recommendations of the environmental assessment panel are accepted by the federal and territorial government, they become binding on all federal and territorial officials exercising their authority, under both federal and territorial legislation.\(^\text{83}\) In this way, the *MVRMA* works with other legislation to form the environmental regulatory system.

3.3 MVRMA - Origin in Comprehensive Land Claims

The *MVRMA* was enacted in 1998 to implement the federal government’s land claim obligations. It applies in the Mackenzie Valley region of the Northwest Territories, which corresponds generally to the ancestral lands of the Dene peoples located within the boundaries of the Northwest Territories.\(^\text{84}\) Excluded are those from the

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\(^{81}\) R.S.C. 1985, C.F-14.
\(^{82}\) R.S.N.W.T. 2009, C.16.
\(^{83}\) Section 131(5), *MVRMA*. Ministers are required to “carry out the decision to the extent of their respective authorities”.
\(^{84}\) The Mackenzie Valley is defined in the Gwich’in Comprehensive Land claim as the area within the Northwest Territories that is bounded on the south by the 60th parallel of latitude excluding the area of Wood Buffalo National Park; on the west by the border between the Northwest Territories and Yukon Territory; on the north by the boundary of the Western Arctic Region; and on the east by the boundary of the settlement area of the Tungavik Federation of Nunavut. The Gwich’in Comprehensive Land Claim was
Western Arctic Region of the Northwest Territories, which comprises the ancestral lands of the Inuvialuit, a distinct Aboriginal group from the Dene. The Inuvialuit have a different environmental management regime as negotiated in the Inuvialuit Land Claim Agreement.\textsuperscript{85}

The \textit{MVRMA} is primarily designed to address integrated resource management. The \textit{MVRMA} is intended to address resource development in the fragile arctic ecosystem, which extends beyond the traditional territory of any one aboriginal group. Aboriginal property and other distributive issues are addressed in other initiatives such as land claim negotiations and impact benefit agreements. John Donihee, legal counsel to the \textit{MVRMA} boards, suggests that this was a deliberate decision on the part of the Aboriginal groups who had experience with large scale development in the North. They identified the need for a broader approach to resource development that recognized that the arctic eco-system transcended aboriginal settlement boundaries.\textsuperscript{86}

The \textit{MVRMA} addresses the federal government’s obligations to (1) establish an integrated and coordinated system of land and water management and (2) to establish a co-management regime with Aboriginal peoples as first negotiated in the Gwich’in Comprehensive Land Claim and the Sahtu Dene and Metis Comprehensive Land Claim.\textsuperscript{87} The federal government subsequently entered into a Comprehensive Land Claim and Self-government Agreement with the Tlicho government, and the \textit{MVMRA} was amended in order to include the federal government’s obligations to

\textsuperscript{85} The Western Arctic Claim – the Inuvialuit Final Agreement was signed on June 5, 1984 and came into force as the \textit{Western Arctic (Inuvialuit) Land Claims Act} SC 1984, c 24.
\textsuperscript{86} John Donihee, “Implementing Co-Management Legislation in the Mackenzie Valley” (Calgary: Canadian Institute of Resources Law, 2001) at 5.
\textsuperscript{87} The Gwich’in Comprehensive Land Claim was signed on September 6, 1992 and came into force as the \textit{Gwi’chin Land Claim Settlement Act SC 1992}, c.53; The Sahtu Dene and Metis Comprehensive Land Claim was signed on September 6, 1993 and came into force as the \textit{Sahtu Dene and Metis Land Claim Settlement Act}, SC 1994, c.27.
the Tlicho and to add provisions that specifically recognized the functions of the Tlicho government.88

The Gwich’in Comprehensive Land Claim provides some insight as to the Parties’ understanding of the co-management regime to be established. Paragraph 1.17 sets as a key objective “To provide the Gwich’in the right to participate in the decision-making concerning the use, management, and conservation of land, water and resources.” However, this is not meant to be an equal power-sharing arrangement between governments and Aboriginal groups. Paragraph 24.1.1 (c) clearly establishes that the ultimate jurisdiction for the regulation of land and water continues to rest with the Federal and Territorial governments.89

There are three main Aboriginal groups in the NWT that still do not have settled land claims (Deh cho, Akaitcho, Yellowknives). The practice has been to nominate representatives from the unrepresented groups to the Mackenzie Valley Environmental Impact Review Board and the Mackenzie Valley Land and Water Board while the government continues to negotiate land claims with those Aboriginal groups. This is not always well received.90 In 2007, the Deh cho First Nation refused to nominate members to the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board in protest. They did not always recognize the legitimacy of the MVRMA boards.91

Ultimately, the Federal Government would like to have one integrated resource management regime that includes all of the Aboriginal groups in the NWT. Some Aboriginal groups object that they are being pressured to adopt a model of resource management that they did not negotiate. For example, the Deh cho advocate for a

88 The Tli’cho Comprehensive Land Claim Agreement, which was signed on August 25, 2003 and came into force as the Tli’cho Land Claims and Self-Government Act, SC, 2005, c. 1.
89 Supra, Note 87.
90 The provisions allowing the Federal and Territorial Ministers to nominate members are contained in Sections 99(4) (MVLWB) and Section 112 (MVEIRB), MVRMA.
Deh cho Resource Management Authority with similar powers to the Mackenzie Valley Boards but operating as a stand-alone regime. Christensen and Grant similarly observed that the Deh cho and the Akaitcho have resisted inclusion in the MVRMA because of concerns that they were not adequately consulted in the drafting of the legislation and were forced into the MVRMA as a pre-determined legislative arrangement. The authors express concern that Aboriginal groups without settled land claims were not given the same kind of decision-making power in the drafting processes as those with settled claims.

3.3.1 MVRMA – Objectives and Legislative scheme

The objectives of the MVRMA are largely process-oriented and involve the balancing of competing interests rather than identifying clear policy priorities. There is no overarching purposive section in the MVRMA although there are some purposive statements associated with particular Parts of the Act.

The Mackenzie Valley Land and Water Board on its website states that the regulatory regime in the NWT it based on two principles: (1) integration and coordination, and (2) co-management of resources between governments and Aboriginal groups. This is generally supported by the legislative scheme in the MVRMA and in the references to the land claim obligations set out in the Preamble. These are, however, decision-making frameworks as opposed to environmental goals.

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92 See Grand Chief Herb Norwegian, “Statement to the Aboriginal Affairs and Northern Development Committee on Bill C-15,” January 27, 2014 available online at http://openparliament.ca/aboriginal-affairs/41/2/10/grand-chief-herb-norwegian-1/only/.
94 There are general purposive statements contained in Sections 9.1, 101, 114, 115 and 117(3)(d) of the MVRMA.
95 Mackenzie Valley Land and Water Board website at http://mvlwb.com/content/co-management.
Alternatives North and Ecology North, two prominent environmental NGOs, described the political and legislative objectives of the *MVRMA* as “co-management of the NWT’s land and waters, through an integrated regional and territorial-level system of environmental planning and assessment and regulatory review.” For Graben, there are two key objectives of the *MVRMA*: (1) effective resource management, and (2) power sharing with Aboriginal groups. She argues that the Treaties assume that both these objectives will be accomplished through the incorporation of Aboriginal persons in the decision-making process.

These sources generally agree that the key focus of the *MVRMA* regime is on process. There is minimal guidance within the legislation on strategic environmental goals. This lack of emphasis on strategic environmental goals was identified by the Canadian Arctic Resources Committee (CARC) early in the legislative process and is noted in their submission to the Standing Committee on the *MVRMA*. CARC supported the objective of integrated resource management but recommended that the Bill be re-drafted to acknowledge that integrated resource management is not the end goal but is designed to promote overall environmental objectives, particularly healthy ecosystems. They recommended that the objective clauses of the Bill be specifically informed by the precautionary and sustainability principles. They argued for a move away from process-oriented reform and argued for increased focus on strategic environmental goals.

The *MVRMA* is noteworthy for its lack of overt focus on sustainability. This is unusual in modern environmental protection legislation, particularly following the

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96 Alternatives North and Ecology North, “Brief to the Standing Committee on Aboriginal Affairs and Northern Development Regarding Section 4 of Bill C-15,” January 17, 2014 available online at www.alternativesnorth.ca.
99 The only direct reference to sustainability is found in Section 117(3)(d) which is not prominent in the legislation and only applies to environmental impact review, not environmental impact assessment.
Rio Declaration, which brought sustainability to prominence internationally as a key environmental principle that was frequently reflected in domestic legislation.\textsuperscript{100}

The environmental assessment provisions in the \textit{MVRMA} displaced the environmental assessment provisions in the 1992 \textbf{Canadian Environmental Assessment Act (CEAA)}. There were some obvious similarities between the two regimes. For example, they take a similar approach to environmental assessment and the factors that need to be considered in determining an adverse impact on the environment and much of the \textit{MVRMA} process was modeled on \textit{CEAA}.\textsuperscript{101}

When the \textit{MVRMA} was enacted \textit{CEAA} 1992 contained several direct references to sustainable development. For example, the Preamble to \textit{CEAA} identified the importance of integrating environmental factors and decision-making processes in a manner that promotes sustainable development. Section 4(1)(b) of \textit{CEAA} identified one of the purposes of the Act is to “encourage responsible authorities to take actions and promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy”.\textsuperscript{102} These overarching purposive statements are not in the \textit{MVRMA}, suggesting that the decision not to focus on sustainability in the \textit{MVRMA} may have been a deliberate choice. One of the key deficiencies with the \textit{MVRMA} is the lack of strategic guidance on addressing global environmental issues. Sustainability is not necessarily the only appropriate goal. However, it is important to have some shared environmental goals that are reflected

\textsuperscript{101} For a discussion of other similarities between \textit{CEAA} (1992 version) and the \textit{MVRMA} see Graben, \textit{Supra} Note 24.
\textsuperscript{102} The old \textbf{Canadian Environmental Assessment Act}, S.C. 1992, c.37 was repealed in 2012 and replaced by the \textbf{Canadian Environmental Assessment Act, 2012}, S.C. 2012, c.19, s52). In the 1992 version, there were two references to sustainable development in the preamble and it was clearly identified as a key environmental goal. The 2012 version removed all references to sustainable development from the preamble, although it continued to reference sustainable development in the purposive section – now section 4(1)(b). The new federal government of Justin Trudeau has initiated a review of \textit{CEAA, 2012} and was critical of the revisions of \textit{CEAA} during the election campaign. There may be a move back towards a broader definition of environmental goals including sustainability in environmental legislation.
in legislation and therefore provide some legislative structure to principled flexibility.

Galbraith, Bradshaw and Rutherford argue that, while sustainable development is not a stated goal in the MVRMA, it is identified by the Mackenzie Valley Land and Water Board as a goal in practice.103 While this is a practical solution, it is not an adequate substitute for legislative guidance because it is dependent on the political leanings of the Board and could change over time, or as a result of pressure emanating from a particular project. It also provides no legal basis for judicial review should the Board not consider the issue of sustainability. Most importantly, it signals a lack of conversation and consensus about where we are collectively headed. The lack of a reference to environmental goals, including sustainability, in the legislation is a key weakness.

3.3.2 The MVRMA Board Structures

Overview of the Co-Management Boards
The MVRMA establishes three types of boards as part of its regulatory management scheme to deal with (1) land and water regulation, (2) environmental assessment, and (3) land use planning.104 A very innovative feature of the MVRMA is that Part 6 provides for the creation of a Cumulative Impacts Monitoring Program (the CIMP) and an environmental audit to be conducted every five years.105 This suggests a focus on adaptive management, which has unfortunately not quite met expectations.

The MVRMA Boards are frequently referred to as co-management boards as a result of the requirement for aboriginal membership. While the Federal Minister of the Department of Indian and Northern Affairs Canada (INAC) appoints all members of these regulatory boards, half of the members are nominated by First Nations and

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103 Galbraith, Bradshaw and Rutherford, Supra Note 9 at 36.
104 Part II of the MVRMA establishes the land use planning boards; Part 4 establishes the Mackenzie Valley Land and Water Board and Part 5 establishes the Mackenzie Valley Environmental Impact Review Board.
105 Sections 146-147 (cumulative impact monitoring); Section 148 -150 (environmental monitoring), MVRMA.
half are nominated by the Governments (federal and territorial).\textsuperscript{106} In most instances, the Chair is appointed by the Federal Minister from persons nominated from a majority of the members.\textsuperscript{107} However, once appointed, all members of the Board, including the aboriginal members, have an obligation to act in the broader public interest.\textsuperscript{108} The Federal Minister has the ability to give binding policy direction to all three Boards.\textsuperscript{109}

The Mackenzie Valley Land and Water Board and the Mackenzie Valley Environmental Impact Review Boards are institutions of public government. They have the rights and responsibilities that are the forefront of independent administrative decision-making. They are granted the powers, rights and privileges of a superior court with respect to attendance and examination of witnesses and the production and inspection of documents.\textsuperscript{110} MVRMA Board decisions are subject to judicial review by the Supreme Court of the Northwest Territories.\textsuperscript{111}

Most major resource management decisions still require Ministerial approval. Aboriginal groups do not have a veto but are given a strong voice in the decision-making process. In practice, Ministers exercising powers under the \textit{MVRMA} have shown a high degree of deference to decisions made by the Mackenzie Valley Boards. There is remarkably little litigation involving the \textit{MVRMA} brought by the Aboriginal groups attesting to the perceived legitimacy of the regime.

\section*{3.3.3 Resource Management Boards Under the MVRMA}

\textsuperscript{106} Section 36(2) (Gwich’in Land Use Planning Board); Section 38(2) (Sahtu Land Use Planning Board); Section 99(4) (Mackenzie Valley Land and Water Board); Section 112(2)(Mackenzie Valley Environmental Impact Review Board), \textit{MVRMA}.

\textsuperscript{107} Section 12, \textit{MVRMA}.

\textsuperscript{108} Section 9.1, \textit{MVRMA} establishes that the Boards were created to act in the broader public interest for the benefit of residents of the Mackenzie Valley and other Canadians.

\textsuperscript{109} Section 83, \textit{MVRMA}. The Federal Minister was previously only able to give binding policy direction to the Mackenzie Valley Environmental Impact Review Board. The April 1, 2014 amendments allow him to give policy direction to all \textit{MVRMA} Boards.

\textsuperscript{110} Section 25, \textit{MVRMA}.

\textsuperscript{111} Section 32, \textit{MVRMA}. 
Land and Water Regulation

The Mackenzie Valley Land and Water Board (MVLWB) is responsible for regulating land and water usage and the deposit of waste within the Mackenzie Valley. Land use permits are issued by the MVLWB in accordance with the *Mackenzie Valley Land Use Regulations*. Land Use Permits do not require the approval of the Federal or Territorial Minister.

The MVLWB is responsible for licensing the use of water and the deposit of waste in water. The MVLWB issue Type A water licenses and Type B water licenses after public hearings but require the approval of the Federal or Territorial Minister. While the Minister is able to approve or reject the issuance of the license, they are not authorized to substitute an alternative decision.

The MVLWB is also responsible for the preliminary screenings of proposals for development (where applications for a land use permit or water license are submitted) and for referring the matter to the Mackenzie Valley Environmental Impact Review Board for environmental assessment where it determines that the proposal for development might have a significant adverse impact on the environment or might be a cause of public concern. The Gwich’in and Sahtu First Nations and the Tli’cho governments also have the power to refer a matter to environmental assessment on their own motion if the development occurs in their settlement area or might have an impact on their settlement area. Environmental assessment is a lengthy and costly process for industry and often they would rather address the Aboriginal concerns through private contract or elsewhere rather than have the matter referred to environmental assessment where the Aboriginal people will seek to rely on the MVEIRB’s powers to address their concerns through recommended mitigated measures.

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112 SOR/98-429, Sections 22, 23.
113 Section 72.13, *MVRMA*.
114 Section 124, *MVRMA*.
115 Section 126(2), *MVRMA*. 
Environmental Assessment

Resource development in the Mackenzie Valley is heavily dependent on the process of ex ante environmental assessment. This is understandable as many of the proposed projects in the northern context are expansive and decisions taken at the early stages such as identifying the footprint of the project can have far-reaching and irreversible consequences. Environmental assessments must be conducted in circumstances where the project may have a significant adverse impact or be a cause for public concern.\textsuperscript{116} Environmental assessments may also be conducted by the Mackenzie Valley Environmental Impact Review Board (MVEIRB) on its own motion, or by referral by the territorial or federal government or by the Gwich'in or Sahtu First Nations, or by the Tli Cho government if the project is within their settlement area or likely to impact it.\textsuperscript{117} Environmental impact reviews are more in depth than an environmental assessment and require the appointment of a Review Panel.\textsuperscript{118}

The Mackenzie Valley Environmental Impact Review Board (MVEIRB) is the main body in the Mackenzie Valley responsible for the environmental assessment and environmental impact review of developments.\textsuperscript{119} MVEIRB is responsible for evaluating the impacts of a development and making recommendations to the federal and territorial Governments as to whether or not the project should proceed and, if so, what mitigative measures ought to be imposed.\textsuperscript{120} Environmental assessment includes an evaluation of the social, economic and cultural impacts of the Project.\textsuperscript{121}

\textsuperscript{116} Section 125, \textit{MVRMA}.
\textsuperscript{117} Section 126, \textit{MVRMA}.
\textsuperscript{118} Section 132, \textit{MVRMA}.
\textsuperscript{119} Section 114, \textit{MVRMA}.
\textsuperscript{120} Section 128, \textit{MVRMA} (environmental assessment); Section 134, \textit{MVRMA} (environmental impact review).
\textsuperscript{121} Section 115, \textit{MVRMA} states that the processes established under Part V of the Act must have regard to "(b) the protection of the social, cultural, and economic well being of residents and communities in the Mackenzie Valley; and (c) the importance of conservation to the well-being and way of life of Aboriginal peoples in Canada to whom Section 35 of the Constitution Act applies, and
Ultimate decision-making authority continues to rest with the federal and territorial Governments. However, these governments cannot reject the recommendation of MVEIRB on environmental assessment without ordering an environmental impact review.\textsuperscript{122} The governments are also required to consult with the MVEIRB if they wish to modify any of the recommended mitigative measures.\textsuperscript{123} Once the recommendation is accepted, it becomes binding on all government departments and agencies and First Nations.\textsuperscript{124}

The Board process has provisions and practices that allow for Aboriginal participation beyond that of other engaged stakeholders. Hearings are frequently held in Aboriginal communities with translation provided. Section 115.1 requires that the Review Board consider any traditional knowledge and scientific information that is related. This section therefore puts Aboriginal traditional knowledge (at least theoretically) on par with other scientific data.

The MVEIRB has been very progressive in requiring Aboriginal engagement as part of its process and in addressing Aboriginal concerns in its recommendations. Industry often prefers to address Aboriginal concerns from the outset rather than facing an acrimonious environmental assessment process where mitigations are more likely to be imposed on them by MVEIRB without the flexibility to look for mutually acceptable solutions with the Aboriginal groups. The environmental assessment process, therefore, provides Aboriginal people with significant political power and is a major impetus towards developers moving to address Aboriginal concerns through private contract.
**Land Use Planning**

Land use planning is completed by regional land use planning boards that were established as part of the Settled Land Claim processes. Part II of the *MVRMA* establishes the Gwich’in Land Use Planning Board and the Sahtu Land Use Planning Board. These Boards are responsible for preparing and adopting a Land Use Plan for the Gwich’in and Sahtu Settlement area as well as monitoring implementation of the plan, and considering applications for exemptions to the plan where authorized.\(^{125}\) Land Use Plans must also be approved by the federal and territorial Ministers, both of whom have discretion whether to approve the plan or not.\(^ {126}\) Once the plan is approved then all government, government agencies and First Nations must carry out their powers in accordance with the land use plan.\(^ {127}\)

There are approved land use plans in place for both the Gwich’in and the Sahtu Settlement areas. There is also a Tlicho land use plan which applies only to Tlicho owned lands, and which is administered separately from the *MVRMA* regime.

Land use planning is extremely important in making decisions about development in a rational manner that is less likely to be impacted by immediate concerns.

The limitation of the land use planning under the *MVRMA* is that it only applies to settlement lands. The Northwest Territories Protected Areas Strategy (PAS) is the missing piece. PAS was conceived as a comprehensive land use planning exercise designed to take place outside of the *MVRMA* structure but nevertheless informing *MVRMA* decision makers about land use decisions for the entire NWT. The PAS outlines a community-based process to establish a network of protected areas within each of the 45 ecoregions within the NWT. The PAS was signed in 1999 and contains representation from regional Aboriginal organizations, the Federal and Territorial governments, environmental non-governmental organizations and

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125 Section 41, 44 *MVRMA*
126 Section 43, *MVRMA*
127 Section 46, *MVRMA*
industry. The PAS has been relatively inactive in recent years, but it is anticipated that the process may be revitalized after devolution when the GNWT assumes full control over the administration of the PAS. The PAS process is extremely important for adaptive management because it is a multi-stakeholder forum and it allows for ongoing and adaptive land use planning.

Cumulative Impacts Monitoring Program
Another important co-management initiative under the MVRMA is the Cumulative Impacts Monitoring Program (CIMP). The monitoring program is an obligation contained in the Sahtu, Gwich’in and Tlicho comprehensive land claim agreements as well as a statutory requirement under Part 6 of the MVRMA. The CIMP is a source of environmental monitoring and research. The program was established in 1999 and coordinates, conducts, and funds the collection, analysis, and reporting of information related to environmental conditions in the NWT. It is particularly focused on cumulative impacts and environmental trends. From an adaptive management point of view, it is extremely progressive to have this type of feedback loop expressly stated in the legislation and given further legal weight because of its inclusion in the land claim agreements.

Section 146 of the MVRMA requires the federal and territorial governments to collect and analyze scientific data, traditional knowledge, and other pertinent information for the purpose of monitoring cumulative impacts.

CIMP is an important tool for ensuring that Aboriginal traditional knowledge, as well as other scientific data is gathered and made available to decision-makers so that they may evaluate cumulative impacts and make decisions that are adaptive

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128 For more information, see the PAS website online at www.nwtpas.ca.
129 Prior to devolution, PAS was administered by AANDC and GNWT collectively. After devolution, the PAS is administered by the GNWT and expertise that was in AANDC will now be housed within the GNWT.
130 Supra, Note 37.
and informed by changing conditions as witnessed and understood by the Aboriginal groups that live there. The CIMP has adopted a community-based approach to monitoring and places considerable emphasis on aboriginal traditional knowledge.\textsuperscript{132}

Unfortunately, funding for the CIMP program has been inconsistent. Neil McCrank, the Minister’s Special Representative for the Northern Regulatory Improvement Initiative recommended in his influential report that that the Federal Government commit to the CIMP and that it specifically commit funds for this purpose.\textsuperscript{133} The GNWT has assumed responsibility for CIMP following devolution and appears to be placing increased resources into the program.\textsuperscript{134}

3.4 Concluding Comments

The 2010 Northwest Territories Environmental Audit found that the Land and Water Boards and the Mackenzie Valley Environmental Impact Review Board were generally effective in protecting the environment.\textsuperscript{135} As conventionally understood, the MVRMA is doing a respectable job of environmental management on operational matters. It includes rigorous environmental assessment and licensing processes that are generally applied in a consistent and fair manner. The co-management structure allows for significant Aboriginal participation both in the hearing process and as members of the Boards. Aboriginal traditional knowledge is an important component in decision-making. However, some of the more adaptive components of the MVRMA, particularly cumulative impacts monitoring, and some aspects of land

\textsuperscript{132} Ibid.
\textsuperscript{133} Indian and Northern Affairs Canada, Road to Improvement: The Review of the Regulatory Systems Across the North by Neil McCrank (Ottawa: Minister of Public Works and Government Services Canada, 2008) recommendation number 5 at 22 (the McCrank Report).
\textsuperscript{134} In 2016, the Government of the Northwest Territories published the NWT CIMP Action Plan 2016-2020 available on line at www.enr.gov.nt.ca/programs/nwt-cimp/about-us.
\textsuperscript{135} Aboriginal Affairs and Northern Development Canada and Federal Interlocutor for Metis and Non-Status Indians, 2010 Northwest Territories Environment Audit, (Ottawa: AANDC, March 2011). Section 148 of the MVRMA requires an independent environmental audit every five years and sets out the requirements for that audit.
use planning have not been operationalized. The MVRMA relies heavily on environmental assessment and up-front decision-making (the tools of engineering resilience) and provides insufficient focus on monitoring and follow-up (the tools of ecological resilience).

The next chapter discusses how private contracts have developed outside of the MVRMA to address Aboriginal and other stakeholder interests. These private contracts sometimes increase the overall flexibility and adaptability of the regulatory system and provide an important value enhancement in support of adaptive management.
CHAPTER 4

4 ENVIRONMENTAL AGREEMENTS

This chapter discusses environmental agreements, which are the contractual instrument most commonly used to regulate the environmental impacts of large northern projects. The content of environmental agreements varies but they can be broadly defined as negotiated and enforceable contracts dealing with environmental matters. Environmental agreements are primarily aimed at promoting the environmental integrity of the Project. They address Aboriginal participation issues and build social license for the Project. This is different from impact benefit agreements and socio-economic agreements, which are primarily concerned with the distribution of wealth and benefits from the Project. It is not uncommon to have all three of these Agreements associated with the same Project.

The purpose of this section is not to discuss the individual environmental agreements in detail but to focus on the importance of environmental agreements in establishing independent monitoring agencies as key players in the Mackenzie Valley regulatory regime and in promoting increased Aboriginal involvement in environmental regulation.

4.1 History of Environmental Agreements in the Mackenzie Valley

Environmental agreements in the Mackenzie Valley developed in tandem with the Canadian diamond mining industry. Canada first became a diamond producer when the Ekati diamond mine opened in the Mackenzie Valley in 1998. By 2003, Canada had become the world’s third largest diamond producer. Ekati’s average production over its 20-year life is expected to be 3 to 5 million carats per year or in other terms, approximately about 3% of the world diamond production by volume. Diavik
Diamond Mine started production in 2003 and is expected to peak at 11 million carats per year, representing about 6% of the world supply. Snap Lake Diamond Mine was the only completely underground diamond mine in the Mackenzie Valley and did not fare nearly as well. It opened in 2008 and produced for seven years without turning a profit before being placed into care in maintenance in 2016.

Gahcho Kue diamond mine is slated to begin production in the last quarter of 2016. It is expected to have an output of about 4.5 million carats per year over its twelve-year life span.\textsuperscript{136}

The diamond mines are extremely important for the northern economy. Natural Resources Canada asserts that the Canadian diamond mining industry employs approximately 2,650 people in mine operations and another 1,500 in support industries (maintenance, catering and transport). Aboriginal persons generally make up 30 to 40 per cent of the mining workforce.\textsuperscript{137}

Environmental agreements were negotiated to address the environmental impacts of these massive, high-value diamond mines being developed over a relatively short time period in the pristine arctic wilderness. This was a driver for both Industry and Aboriginal groups who were motivated to find novel solutions to environmental issues in order to capitalize on these economic opportunities. Environmental Agreements subsequently became the norm for large projects in the Mackenzie Valley.

Several Aboriginal groups in the Mackenzie Valley had recently completed Comprehensive Land Claim Agreements with the Federal Government when the time came to negotiate the Environmental Agreements and Impact Benefit Agreements for the diamond mines. The Gwich’in Comprehensive Land Claim Agreement, Sahtu Dene and Metis Comprehensive Land Claim Agreement, and Tlicho Comprehensive Land Claim Agreements were signed in 1992, 1993 and 2003, respectively.

\textsuperscript{136} Natural Resources Canada, \textit{Canada: A Diamond Producing Nation} last modified March 31, 2016 and available online at www.nrcan.gc.ca/mining-materials/diamonds/15972. (Natural Resources Canada); and Diamond Mines in Canada available online at Geology.com.

\textsuperscript{137} Ibid, Natural Resources Canada.
respectively.\textsuperscript{138} These Aboriginal groups were experienced negotiators and were well-equipped to negotiate environmental agreements with the large multi-national diamond companies. It should also be noted that diamonds were first discovered in the NWT in the mid-1980s and the potential resource potential of the North, particularly the diamond and oil and gas resource potential, was an important stimulus to the negotiations of the Comprehensive Land Claim Agreements.

The first environmental agreement negotiated in the Mackenzie Valley was for the Ekati diamond mine operated by BHP Diamond Company in 1997.\textsuperscript{139} Environmental agreements were also negotiated in fairly quick succession for the Diavik (2000)\textsuperscript{140}, and Snap Lake diamond mines (2004).\textsuperscript{141} Each of these environmental agreements established independent monitoring agencies for their respective Project funded by industry. The Monitoring agencies had two distinct functions: (1) to perform an independent oversight role with responsibilities for reviewing and commenting on technical data; and (2) to promote aboriginal participation in environmental monitoring and follow-up. The environmental agreements also filled a regulatory gap with regards to financial security for remediation of environmental harm.\textsuperscript{142}

A review of academic literature on this topic demonstrates considerable interest when the environmental agreements were signed for the Ekati, Diavik and Snap Lake mines and then relatively little interest in the environmental agreements for subsequent projects. This paper reviews the academic literature on the Ekati, Diavik

\begin{footnotesize}
\textsuperscript{138} Land Claim Agreements, \textit{Supra}, Note 87.
\textsuperscript{139} The Ekati Environmental Agreement is available at monitoringagency.net/ResourceCentre/Environmental Agreement/tabid/87/Default.aspx.
\textsuperscript{140} The Diavik Environmental Agreement is available online at emab.ca/Portals/0/Documents/diavik_enviro_agree.pdf.
\textsuperscript{141} The Snap Lake Environmental Agreement is available online at s Isla.ca/documents/misc.documents/2004/DeBeers-Final-Environmental-Agreement.
\textsuperscript{142} The Government of the Northwest Territories has recently assumed control of the security deposits previously held by the federal government and has established a new office to oversee securities for mining and gas activities. Soon there may no longer be a need to address security issues in environmental agreements. See Richard, Gleeson, “NWT Mine Securities – ‘a work in progress’, officials say”, \textit{CBC} (14 November 2014) online: www.cbc.ca/news/canada/north.
\end{footnotesize}
and Snap Lake diamond mine projects and then discusses recent developments in environmental agreements arising from the Gahcho Kue diamond mine project and the Giant Mine Remediation Project.

Over time, there has been a shift away from scientific and technical oversight to an increased focus on the role of Aboriginal engagement. This engagement includes the monitoring and follow-up process as well as areas of particular areas of interest to the Aboriginal population. The Giant Mine Remediation Project environmental agreement is an interesting study which arose from a particular set of historical circumstances and which allows for the inclusion of a Non-Government Organization as part of the environmental agreement for the first time.\textsuperscript{143}

The environmental agreements for Ekati, Diavik and Snap Lake diamond mines set out a series of guiding principles that identify key environmental goals. These principles include adaptive management, the precautionary principle and the importance of considering both traditional knowledge combined with scientific information. The Diavik and Snap Lake environmental agreements specifically identify sustainable development as a guiding principle.\textsuperscript{144}

The Giant Mine Remediation Project environmental agreement has a much different context and sustainable development is arguably not applicable in the context of remediation. The Giant Mine Remediation Project environmental agreement identifies adaptive management and the importance of considering both traditional knowledge and western science as guiding principles.\textsuperscript{145} These guiding principles are potentially important in constructing the environmental coordinating framework for the Mackenzie Valley. There is a noticeable lack of provisions in the

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\textsuperscript{143} The Giant Mine Remediation Project Environmental Agreement signed June 17, 2015 is available online at www.aadnc-aandc.gc.ca/eng/1434642382836/1434642437416.
\textsuperscript{144} Ekati, Diavik and Snap Lake Environmental Agreements, Section 1.2 – Guiding Principles. It is interesting that the section number is the same in all three agreements suggesting a template approach.
\textsuperscript{145} Giant Mine Remediation Project Environmental Agreement, Section 2.4
environmental agreements that attempt to establish environmental priorities based on Dene values.

4.2 The Environmental Agreements

4.2.1 Ekati Environmental Agreement

The Ekati Environmental Agreement was the first environmental agreement negotiated in the Mackenzie Valley. This agreement was negotiated by the Government of Canada, the Government of the Northwest Territories, and BHP Diamond Company (BHP).

The Ekati Agreement establishes an Independent Environmental Monitoring Agency (IEMA). IEMA consists of seven directors, four of whom are nominated by Aboriginal groups. IEMA is intended to provide independent advice to both BHP and the federal and territorial government on environmental matters. There is no obligation on either BHP or the federal or territorial governments to follow the advice yet, there is enhanced accountability as the parties must provide reasons if they fail to follow IEMA’s recommendations. The Aboriginal groups are not parties to the environmental agreement and therefore have no ability to enforce the provisions of the environmental agreement in contract law.

BHP is required to file an annual environmental impact report that evaluates the ongoing impacts of the operations and the effectiveness of the mitigation measures already in place. BHP must also file an updated environmental management plan that addresses BHP’s plan to address environmental impacts moving forward. These reports are reviewed by IEMA, which then has the responsibility to advise the

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146 For an excellent discussion of the Ekati, Diavik and Snap Lake Agreements see Ciaran O’Faircheallaigh, Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up and Environmental Management of Major Projects (Calgary: Canadian Institute of Resources Law, 2006) at pages 11-48. This section relies very heavily on O’Faircheallaigh for the discussion of the Ekati, Diavik and Snap Lake Environmental Agreements.

147 Ekati Environmental Agreement, Article 4.
federal and territorial governments on the sufficiency of the reports. These
governments have the authority to require that BHP remedy deficiencies in the
Environmental Impact Report and Environmental Management Plans. They can also
access security monies to remedy any deficiencies that BHP fails to address.148

4.2.2 Diavik Environmental Agreement

The Diavik Agreement was negotiated by the Government of Canada, the
Government of the Northwest Territories, Diavik Diamond Mines Inc. (Diavik), and
five Aboriginal groups.149 As parties to the Diavik environmental agreement, the
Aboriginal groups have the legal ability to enforce their rights under the
environmental agreement, a circumstance which was noticeably absent in the Ekati
environmental agreement.

The Diavik environmental agreement establishes another parallel Environmental
Monitoring Advisory Board (EMAB).150 EMAB operates in an advisory capacity to
review the Reports provided by Diavik and provides recommendations to both
Diavik and the federal and territorial governments. Board membership consists of
one representative nominated individually by each of the five Aboriginal groups, the
federal government, the territorial government and Diavik.151 The EMAB also
contains security arrangements and conditions by which the federal and territorial
governments can access security monies to remedy any deficiencies that Diavik fails
to address.152

148 Ekati Environmental Agreement, Article 9.
149 Aboriginal parties to the Diavik Environmental Agreement are Dogrib Treaty 11 Council, Lutsel
K’e Dene Band, Yellowknives Dene First Nation, North Slave Metis Alliance and Kitikmeot Inuit
Association.
150 Diavik Environmental Agreement, Article 4.
151 Diavik Environmental Agreement Article 4.5. There are provisions for participation on the Board by the
Government of Nunavut or for members to appoint public representatives that could include environmental
interest groups, although these provisions have not been utilized.
152 Diavik Environmental Agreement, Article 15.
O’Faircheallaigh identifies two key differences between IEMA, the monitoring agency established under the Ekati environmental agreement and EMAB. EMAB places increased emphasis on its community liaison role and less emphasis on its oversight role. EMAB members tend to have more experience in community leadership and public administration and less experience in the scientific and technical aspects of environmental regulation. This presumably reflects the perceived need to encourage more Aboriginal and community input into the monitoring and follow-up process and perhaps more faith in the MVRMA boards to competently address the scientific and technical issues.

Secondly, IEMA provides very detailed assessments on a wide range of environmental issues. EMAB places increased emphasis on identifying and monitoring areas of key interest and importance to Aboriginal board members and Aboriginal communities. On most other environmental issues, EMAB is more deferential to the regulatory authorities. EMAB provides more general oversight to ensure that the relevant regulatory authorities are adequately performing their regulatory role particularly with regards to monitoring and follow-up but is less likely than IEMA to duplicate existing regulatory processes.

4.2.3 Snap Lake Environmental Agreement

The Snap Lake Environmental Agreement was signed by the Government of Canada, the Government of the Northwest Territories, four Aboriginal groups, and De Beers Canada Mining Inc. (De Beers). The Environmental Agreement established the Snap Lake Environmental Monitoring Agency (SLEMA), which also operates in an advisory capacity to both De Beers and federal and territorial governments to review the reports and provide recommendations.

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153 O’Faircheallaigh, Supra Note 146 at 32 -33.
154 Ibid. at 34
155 Aboriginal Parties to the Snap Lake EA include Dogrib Treaty 11 Council, Lutsel K’e Dene Band, Yellowknives Dene Frist Nation and the North Slave Metis Alliance.
156 Snap Lake Environmental Agreement, Article 4.
The Snap Lake Environmental Agreement gives the Aboriginal groups much greater control over the operations of the monitoring agency that the previous environmental agreements. SLEMA consists of four components: (1) a Core Group of representatives from each of the four Aboriginal Parties to the Snap Lake Environmental Agreement and not government or industry; (2) a Science and Technical Panel; (3) two traditional knowledge working groups; and (4) a Secretariat. The Core Group is responsible for the overall governance of SLEMA. This means that the work priorities and the process of SLEMA is largely set by the Aboriginal signatories to the environmental agreement.

All of the commitments made by De Beers during the Snap Lake Environmental Assessment process are attached as a Schedule to the Snap Lake Environmental Agreement. Arguably, this allows the Aboriginal parties who are signatories to the Snap Lake Environmental Agreement to take legal action under the environmental agreement to enforce De Beer’s commitments made during the course of the environmental assessment rather than relying solely on the regulator. The federal and territorial governments are able to access De Beers’s Security Deposits to remedy a deficiency. This creates a regulatory home for environmental assessment provisions that fall outside other regulatory permits, and perhaps leads to a more efficient enforcement of those provisions.

The Snap Lake Agreement contemplated the merging of the three environmental monitoring agencies. The agreement acknowledges the cumulative impacts of the three mines including the possible cost and workload efficiencies that could be realized by not maintaining three separate bureaucratic structures performing similar work in the same area. However, resistance from the other diamond companies to such a merger has made this approach unfeasible. This left the Snap

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157 Snap Lake Environmental Agreement, Article 5.3.
158 Snap Lake Environmental Agreement, Article 12.
Lake Environmental Monitoring Agency (SLEMA), which was intended to be a temporary agency, with a funding deficit which the three big diamond companies collectively have been unwilling to address.\textsuperscript{159} It also left a gap in terms of addressing the cumulative impacts of diamond mining in the north.

The Snap Lake Mine was placed into care and maintenance on December 4, 2016 citing falling commodity prices and ongoing water issues at the mine site.\textsuperscript{160}

\subsection*{4.2.4 Gahcho Kue Mine—Ni Hadi Yati}

The Gahcho Kue Mine does not have an environmental agreement. Instead, the Aboriginal groups and Industry put forward a novel alternative, which they termed Ni Hadi Yati.

The proposal for Ni Hadi Yati was presented to the Mackenzie Valley Environmental Impact Review Board (MVEIRB) during the environmental assessment of the Gahcho Kue diamond mine in a joint submission made by four Aboriginal groups and De Beers Canada Inc.\textsuperscript{161} Ni Hadi Yati translates to “Words that Watch the Land” or “People Watching the Land Together”. It is intended as a legally binding contractual agreement between the Aboriginal groups and De Beers and does not include the federal or territorial governments.

Ni Hadi Yati is largely an engagement mechanism between the Aboriginal groups and De Beers intended to last for the life of the Project. It allows the Aboriginal groups to identify their technical review needs and access technical review expertise. The goal is to allow the Aboriginal groups to be more meaningfully informed on specific areas of interest.

\textsuperscript{159} Affolder, \textit{Supra} Note 10 at 169.
\textsuperscript{160} “NWT’s Snap Lake Diamond Mine halts Operations, Debeers Says” \textit{CBC} (4 December 2015) online: www.cbc.ca.
\textsuperscript{161} Letter from the Deninu Kue First Nation, Tlicho Government, Lutsel K’e Dene First Nation, Yellowknife Dene First Nation, and De Beers Canada Inc. to Chuck Hubert, Senior Environmental Assessment Offices, MVEIRB dated December 20, 2012 and available online at www.reviewboard.ca
Ni Hadi Yati does not establish an independent oversight body nor does it contemplate an independent enforcement role for the Aboriginal groups. It is intended to ensure that participating Aboriginal groups are well placed to inform and engage within existing regulatory processes and to establish an ongoing working relationship between Industry and Aboriginal groups. While Ni Hadi Yati did not specify a role for the federal or territorial governments, it was clearly anticipated that government departments would actively participate by lending their technical expertise in support of Ni Hadi Yati.

The Mackenzie Valley Environmental Impact Review Board (MVEIRB) accepted the role of Ni Hadi Yati in mitigating the environmental impacts of the project. MVEIRB did not address Ni Hadi Yati in its identification of binding mitigation measures because the Aboriginal parties and the developer had already committed to negotiate a contract to implement Ni Hadi Yati and government agencies had committed to contributing technical expertise at the hearing.162 This approach was criticized by all four of the Aboriginal groups who advocated a more direct link to the regulatory process with a provision in place to address alternatives should negotiation of a future Agreement between De Beers and the Aboriginal groups prove unsuccessful.163 The Aboriginal groups were in support of the proposal put forward at the hearing but they felt that they needed the ongoing threat of the exercise of regulatory power in order to bolster their negotiating powers and ensure implementation of the proposal. To this author’s knowledge, no formal agreement for Ni Hadi Yati had been entered into. It may simply be that it is a private Agreement and therefore not publicly available, which also raises questions regarding transparency and accountability when it is addressing mitigations to environmental impacts identified at a public hearing.

4.2.5 Giant Mine Remediation Project Environmental Agreement

Between 1948 and 2004, Giant Mine was a major economic driver for Yellowknife and the Northwest Territories. It was a very profitable gold mine and for decades, the primary employer in the City of Yellowknife. Unfortunately, it is also the most contaminated site in Canada. When the mine closed and the company went bankrupt, attention focused on the environmental issues left behind, notably the 237,000 tons of arsenic trioxide stored in the underground chambers.\textsuperscript{164} Arsenic trioxide is a lethal by-product of extracting ore from gold and is highly toxic. Remediation efforts at the mine site are estimated to cost approximately one billion dollars.\textsuperscript{165} Giant Mine had environmental issues throughout the life of the project, particularly related to air and water quality. It has left a legacy of mistrust and anger with the Aboriginal groups in the NWT, particularly the Yellowknives Dene First Nation who lived in close proximity to the mine site and were disproportionately affected by the environmental impacts while not benefiting from the wealth generated from the mine.\textsuperscript{166}

The Giant Mine remediation efforts have resulted in an environmental agreement that was signed not only with the Aboriginal groups but also with several other stakeholders including a major northern environmental public interest group. It established another monitoring agency with oversight responsibilities for the remediation.

At the environmental assessment hearing, the Mackenzie Valley Environmental Impact Review Board (MVEIRB) was concerned by a lack of confidence in the federal remediation team. This lack of confidence was expressed by the

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\textsuperscript{164} Indigenous and Northern Affairs Canada, “Giant Mine Remediation Project” available online at www.aandc.gc.ca/eng/110010027364/1100100027365.
\textsuperscript{165} The Economist, “Giant Headache”, (27 September 2014) online: www.economist.com.
\end{flushleft}
Yellowknives Dene First Nation and other community groups. This lack of confidence stemmed from the federal government playing a dual role in the remediation both as the proponent of the project and as a key regulator which key stakeholders/riightholders felt resulted in a lack of independent oversight. 167

To address this issue, MVEIRB recommended in its environmental assessment report that the Government of Canada and the Government of the Northwest Territories negotiate a legally binding environmental agreement in order to create an independent oversight body. MVEIRB identified that the activities of the oversight body were to include: (1) monitoring the developers’ activities, (2) considering the adequacy of funding for the Project and ongoing research, (3) providing advice to the Developer, regulators and government on monitoring and mitigation, and (4) sharing the oversight body’s conclusions with the general public and potentially affected communities in a culturally appropriate manner. They stated that membership on the oversight committee should include, not only affected Aboriginal groups, but also the environmental public interest group, Alternatives North.168 MVEIRB’s recommendation was initially not well received by federal government but was ultimately accepted and implemented.169

The Giant Mine Remediation Project environmental agreement was signed on June 17, 2015 with an established budget for the Oversight Body of $900,000.00 per year.170 The environmental agreement establishes a broader coalition of stakeholders participating in the oversight body including the City of Yellowknife, Yellowknives Dene First Nation, North Slave Metis, and Alternatives North. This demonstrates the capacity of environmental agreements to incorporate more diverse interests and perspectives, especially from the environmental movement. It remains to be seen whether that potential creativity will be realized or undermined.

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167 MVEIRB Gahcho Kue Report, Supra Note 162 at 81 and 82.
168 Ibid. Measures 7 and 8 at 93.
170 Giant Mine Environmental Agreement, Article 11. Funding consists of $650,000.00 general operating budget and $250,000.00 in research funding.
4.3 Advantages of Environmental Agreements

4.3.1 Environmental Agreements Address Weaknesses in The Environmental Assessment System Particularly in Monitoring and Follow-Up.

One of the key benefits of environmental agreements is that they have the potential to address weaknesses in the implementation and enforcement mechanisms in the existing regulatory system. This is important due to the heavy reliance on predictive modeling and up-front decision-making (engineering resilience) inherent in environmental assessment. This model of decision-making is increasingly unreliable in an unstable arctic ecosystem and it is important to strengthen the monitoring and follow-up capacity of the system to ensure that modeling assumptions are challenged, and where proven incorrect, corrective action is taken.

Galbraith, Bradshaw and Rutherford identify several deficiencies in the environmental assessment regime in the Mackenzie Valley including: (1) a failure to employ adequate project-specific follow up, (2) a failure to garner adequate trust among stakeholders; and (3) a lack of capacity for public participation. They argue convincingly that all of these issues can potentially be addressed through Environmental Agreements.\(^\text{171}\)

O’Faircheallaigh notes that environmental agreements are important because they allow for follow-up on predicted impacts through mechanisms like Aboriginal monitoring programs. He argues that the need for these kinds of checks on predicted impacts is fundamentally important because environmental assessments rely heavily on environmental predictions which are by necessity based on probabilities and therefore, lack certainty. The up-front decision making is designed

\(^{171}\) Galbraith, Bradshaw and Rutherford, Supra Note 9 at 36.
to allow the decision maker to make as informed a decision as possible in advance of
the project but can never be entirely accurate.\textsuperscript{172} He notes elsewhere that follow-up
is critical to adaptive management particularly when dealing with complex,
dynamic, environmental and social systems with impacts that are difficult to
predict.\textsuperscript{173}

Another key benefit of environmental agreements is that they are pragmatic and can
allow for greater flexibility than the legislative regime. Affolder conducted an
extensive review of the Ekati Environmental Agreement and concluded that the
main benefit of environmental contracting is that it provides the ability to initiate “a
fix” in small bite-size chunks rather than addressing a gap in the regulatory system,
which is often politically unviable.\textsuperscript{174} It is also worth noting that these “bite-size”
changes may be initiated by Aboriginal groups who can instigate the small fix but
not the broader legislative solution. A good example of a small fix might be the
decision to address securities in the environmental agreements rather than wait for
a legislative solution for the Mackenzie Valley.

O’Faircheallaigh argues that the decentralized decision-making process in
environmental agreements creates opportunities for learning and adaptation within
the regulatory system. Parties then have the flexibility to combine elements of
different approaches and institutional designs in addressing specific concerns.\textsuperscript{175}

Affolder challenges this assumption, arguing that there is little evidence that the
environmental agreements promote flexibility and creativity. Instead, she holds that
environmental agreements often create highly bureaucratic structures which are
detrimental to this kind of experimentalism.\textsuperscript{176} However, Affolder based her

\begin{flushleft}
\textsuperscript{173} O’Faircheallaigh, \textit{Supra} Note 146 at 2.
\textsuperscript{174} Affolder, \textit{Supra} Note 10 at 180.
\textsuperscript{175} O’Faircheallaigh, \textit{Supra} Note 146 at 74.
\textsuperscript{176} Affolder, \textit{Supra} Note 10 at 180.
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research primarily on the Ekati experience whereas some of the more creative experiments with the environmental agreements are the relatively recent Ni Hadi Yati (Gahcho Kue) and the Giant Mine Remediation Project environmental agreement.

My review of the five main environmental agreements suggests that there is room for experimentalism and creativity in addressing monitoring and follow-up. There is definitely an evolution in the agreements as they move away from an expansive watch-dog function that often duplicates the role of the MVRMA boards and other regulators to a more defined role that is more responsive to the particular concerns and priorities identified by Aboriginal parties. Ni Hadi Yati broke from the monitoring agency model altogether and remains an important experiment in alternative models.

4.3.2 Environmental Agreements allow for the development of a community based forum and encourage Aboriginal participation.

Environmental agreements provide a community-based forum for reviewing the project and establishes a formal relationship between stakeholders and the Industry. Kennett conducted in-depth interviews of key stakeholders/rightsholders involved with the BHP and Diavik Environmental Agreements. He notes that most of the stakeholders/rightsholders that he interviewed felt that the existing regulatory regime was not particularly well-suited for this type of collaborative community-based forum and that environmental agreements were helpful in addressing this issue.177

O’Faircheallaigh argues that the need for a community-based forum is particularly important for Aboriginal communities because of their historic marginalization from environmental management of the lands and resources located in their

177 S.A. Kennet “Project Specific Environmental Agreements in the NWT: Review of Issues and Options.” (Calgary: Canadian Institute of Resources Law, 2001) at 7-8. (fix this).
Environmental agreements formalize Aboriginal participation and ensure access to the technical expertise that they need in order to effectively participate at the regulatory stage as well as provides a remedy for lack of Aboriginal involvement in the on-going decision-making process once the environmental assessment is completed.

Affolder writes that environmental agreements have an important role in addressing issues of stakeholder/rightsholder confidence in the process. She notes that the multiple and conflicting roles can undermine a government’s ability to operate as an environmental regulator, and has created the public perception that independent oversight is required. The need for an independent player stems from the government acting as a regulator when it plays a role in attracting mining investment and benefits financially from investment in the North. This lack of stakeholder/rightsholder confidence was particularly evident in the Giant Mine contaminated site clean-up where the federal and territorial governments were also the project’s proponent. MVEIRB identified this as a key reason why it recommended that an environmental agreement be developed for the clean-up.

Aboriginal groups have been successful in using environmental agreements to establish a direct relationship with Industry and to expand their role in the ongoing monitoring and mitigation of projects that is not afforded to them in the conventional regulatory process and which fits with their aspirations for co-management and self-government. Ni Hadi Yati clearly demonstrated that the Aboriginal groups saw their ongoing relationship with the diamond company as a primary benefit of the environmental agreement and were willing to depart from the agency structure developed in the first environmental agreements (Ekati, Diavik and Snap Lake) in favour of a more collaborative model. This is also reflective of the

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178 O’Farcheallaigh, *Supra* Note 146 at 1.
179 Affolder, *Supra* Note 10 at 160.
180 MVEIRB Giant Mine Report, *Supra* Note 162 at 81 and 82.
confidence of the Aboriginal group in the MVRMA boards to fulfill their regulatory role.

One of the most exciting developments is the inclusion of Alternatives North, a prominent northern environmental NGO, as a party to the Giant Mine Remediation Project environmental agreement. The Giant Mine Remediation Project environmental agreement brings Alternatives North into the dialogue in an official and legal capacity as they are signatories to the environmental agreement. An effective regulatory regime in the North must include all stakeholders/rightsholders, including the NGOs. The northern environmental movement will be important players in constructing an environmental vision for the Mackenzie Valley. It should be noted that this expanded conversation among stakeholders/rightsholders was also happening in a less official capacity as Kevin O’Reilly was the Executive Director of IEMA (Ekati) for many years and also a prominent member of the Yellowknife-based Environmental NGO Ecology North.181

4.4 Disadvantages of Environmental Agreements

The primary criticism of the northern environmental agreements is the proliferation of stand-alone monitoring agencies and their associated bureaucratic structures.182 These types of monitoring agencies are costly to maintain and the bureaucratic structures can make it difficult to respond quickly and appropriately as issues arise. The Snap Lake Environmental Agreement contemplated a regional structure for all of the diamond mines. When that regional structure did not emerge, it undermined the sustainability of the independent agency approach as well as the ability of the stand-alone monitoring agencies to address cumulative effects.

Affolder notes that the independent monitoring agencies have done a reasonable job of environmental monitoring but they have failed to achieve transformational levels

181 Mr. O’Reilly is currently sitting as a Member of the Legislative Assembly representing the Range Lake riding in Yellowknife.
182 Kennett, Supra Note 177 at 6.
of aboriginal participation in environmental management.\textsuperscript{183} The agenda for independent monitoring and follow-up is increasingly set by Aboriginal groups. While less focus is now being placed on the technical aspects of monitoring and follow-up, the trend is to concentrate more on Aboriginal participation and identification of issues. There may be an irreconcilable tension between the “watch dog” functions of the independent monitoring agencies and the participatory and collaborative goals of Aboriginal peoples.

Another key criticism of environmental agreements is that they may undermine the regulatory system and distort the lines of regulatory authority. This is addressed in detail below.

4.5 How Environmental Agreements Interact with the \textit{MVRMA} Regulatory Process

The interaction of environmental agreements with the MVRMA regulatory process is complex. In reviewing the process, it is clear that the environmental agreements are not voluntary.\textsuperscript{184} The expectation of MVEIRB that companies engage with Aboriginal groups to address impacts has legitimized the use of environmental agreements by Industry.\textsuperscript{185} Additionally, the MVEIRB frequently uses the environmental assessment process to compel companies to enter into environmental agreements as was evidenced in the Snap Lake and Giant Mine Environmental assessment processes. Those cases resulted in a recommendation from MVEIRB for an environmental agreement, which was ultimately accepted by the Responsible Ministers and became a condition of approval of the Project. The Aboriginal groups expressed concerns that they are less able to negotiate a strong environmental agreement for Gahcho Kue mine because MVEIRB had not required the negotiation

\textsuperscript{183} Affolder, \textit{Supra} Note 10 at 178. Affolder refers specifically to the Ekati Environmental Agreement but her comments also apply to the Diavik and Snap Lake Environmental Agreements.
\textsuperscript{184} Affolder, \textit{Supra} Note 10 at 71-172 provides additional argument why environmental agreements are not voluntary.
\textsuperscript{185} Graben, \textit{Supra} Note 14 at 206-207. Graben argues that the MVEIRB successfully uses its rule making powers in order to promote private agreements.
of an environmental agreement as part of the terms of approval and had not identified regulatory alternatives to a negotiated environmental agreement.

One of the key concerns with environmental agreements is that they could serve to undermine the regulatory system by allowing issues that should be confronted and remedied within the regulatory system to be addressed through environmental agreements.\(^{186}\) Kennett interviewed a number of key stakeholders/rightsholders who noted that proponent commitments are best enforced through established regulatory instruments and processes, and that the inability of the regulatory system to identify and capture undertakings should be addressed through changes to the regulatory system and not through environmental agreements.\(^{187}\)

Affolder argues that the reliance on environmental agreements may actually be stifling the creativity of the regulators to address issues within the established regulatory system.\(^{188}\) She believes that the Land and Water Board is more effective in ensuring compliance particularly when dealing with smaller breaches because it has more tools at its disposal including the ability to stop work or withdraw licenses.\(^{189}\) The Land and Water Boards are also independent tribunals operating at arm’s length from government and therefore are less influenced by political considerations.

Industry has also expressed concern that the independent monitoring agencies result in unnecessary complexity and a lack of transparency not conducive to maximizing environmental outcomes. There is some suggestion that monitoring agencies may actually confuse the lines of accountability and allow government

\(^{186}\) Security arrangements are a good example of an issue that perhaps should have been addressed through legislation. The author is aware that air quality issues and the effect of low level flights on wildlife have also been addressed through environmental agreements because of ambiguity as to whether they are under Federal or Territorial jurisdiction.

\(^{187}\) Kennett, supra Note 177 at 12.

\(^{188}\) Affolder, supra Note 10 at 174.

\(^{189}\) Ibid at 168.
regulators to avoid some of the responsibility under more conventional regulatory regimes.\textsuperscript{190}

Aboriginal participation in environmental monitoring and follow-up is also impacted by the environmental agreements. Aboriginal groups may be less likely to participate in the public process because they are able to assert their influence with Industry outside of the regulatory system and are able to address these issues through environmental agreements. This is particularly true when the public processes are seen by the Aboriginal groups to be culturally inappropriate. Administrative decision-making with its focus on evidence and top down decisions regarding development is very different from consensus decision making at the community level that is more familiar to many Dene people.

4.6 How Environmental Agreements Interact with Impact Benefit Agreements

It is unclear how the environmental agreements interplay with the impact benefit agreements. A number of Aboriginal groups have entered into two legally binding agreements with Industry, an environmental agreement and an impact benefit agreement, to address the environmental and social impacts of the same project on the community. This raises concerns regarding conflicting interests. The impact benefit agreements provide the Aboriginal groups with monetary payments and economic and business opportunities in exchange for their support for the development. The environmental agreements provide the Aboriginal groups with a monitoring and oversight role. Aboriginal groups may be reluctant to criticize the environmental performance of the company when they have an economic interest in supporting that company. The company could seek to rely on the support provisions of the impact benefit agreement to diminish Aboriginal opposition to their operations. This contradiction is less readily apparent because the commitments and obligations are contained in two separate instruments.

\textsuperscript{190} O’Faircheallaigh, Supra Note 146 at 18. These concerns were expressed to O’Faircheallaigh by BHPB in a private interview.
Bosselmann notes that one of the key goals of sustainable development is the integration of environmental conservation and social and economic development into one single policy area.\textsuperscript{191} It would be preferable to combine the environmental agreement and the impact benefit agreement into one integrated document. This would highlight the complex social, economic and environmental systems and allow for decision making which is more integrated and reflective of the arctic reality. There are practical disincentives to this approach including the culture of confidentiality around the impact benefit agreements\textsuperscript{192}, issues of timing, and there may not be a complete overlap between parties to the environmental agreement and Parties to the impact benefit agreement.

\textsuperscript{191} Bosselmann, \textit{Supra} Note 48 at 101.

\textsuperscript{192} This is discussed in further detail in Chapter 5.1.3.
CHAPTER 5

5 IMPACT BENEFIT AGREEMENTS AND SOCIO-ECONOMIC AGREEMENTS

This Chapter examines the other two types of contractual agreements commonly used to regulate large projects in the Mackenzie Valley. Impact Benefit Agreements (IBAs) address the flow of benefits from industry directly to affected Aboriginal groups, and Socio-Economic Agreements (SEAs) address the flow of benefits from industry to all northerners and to the Government of the Northwest Territories.

The objective of this chapter is not to provide an exhaustive study of these Agreements but to discuss how they interact with other parts of the regulatory system and to consider their potential to increase the overall resilience of the system. Because this paper is primarily concerned with environmental governance and not the redistribution of wealth (other than incidental to environmental governance), it is not my intention to provide more than a cursory overview of this topic.

5.1 Impact Benefit Agreements (IBAS)

IBAs are privately negotiated agreements between industry and Aboriginal communities and are seen as an accommodation for impacts on rights and a key element in the industry’s attempt to obtain a social license. Generally, the Aboriginal group accepts some restrictions on their Aboriginal rights and title, and often agrees to provide access to their lands in exchange for economic benefits from the company and increased influence in matters relating to how the development proceeds. IBAs are private agreements and are generally not publicly available. IBAs are now a standard expectation for development projects in the Northwest Territories.
IBAs in the Mackenzie Valley usually involve cash payments to Aboriginal groups as compensation for impacts to the Aboriginal group arising from the Project. They also contain economic benefits such as preferential hiring, business opportunities, training, and monies for improvements to community infrastructure. IBAs can also be used to address environmental concerns and to create environmental monitoring schemes although larger projects in the Mackenzie Valley often have a separate Environmental Agreement. Increasingly, Aboriginal groups have been negotiating more lucrative IBAs that contain profit-sharing schemes or create equity interests.

5.1.1 IBAs and the Modern Land Claim Process

The requirement to negotiate an IBA often arises from Land Claim Agreements, particularly when the company requires access to Aboriginal lands for commercial purposes or in circumstances where the Aboriginal groups has title to the subsurface rights. There is no equivalent legal requirement for an IBA in the unsettled land claim areas, although a prudent developer would still seek Aboriginal support. On some occasions (example, transboundary projects), the unsettled groups have been able to leverage power of the settled claims to their advantage. When negotiations between Lutsel K’e and DeBeers became strained during the Gahcho Kue diamond

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194 For Gahcho Kue diamond mine, the Lutsel k’e Dene First Nation negotiated flexible payments that allowed them to receive a portion of the company’s profits from the mine as opposed to the customary fixed payments. See Guy Quenneville, “No More Mr. Nice Guy” Upere Business (10 January 2013) online at upherebusiness.ca/post/75061707886; Avalon minerals offered Lutsel K’e a 3.3 per cent equity interest in the Nechalacho rare earth minerals mine with a total of 10 per cent to all of the First Nations in the vicinity of the mine. See Eva Holland. “Staking the Claim” (2013) online at upherebusiness.ca/post/33848006611.

195 Tlicho Agreement, Supra, Note 88. The Tlicho First Nation has title to 39000 square kilometers of lands including the subsurface rights. Any developer wanting to pursue development on those lands must obtain Tlicho consent. (Chapter 18.1.1). In addition, there are Tlicho lands where the Tlicho exercise their Aboriginal and Treaty rights but do not hold title in fee simple. Chapter 19.4.6 states that anyone requiring access to Tlicho lands for commercial purposes beyond a threshold level is required to obtain the agreement of the Tlicho government. If no agreement is reached, the parties may resort to the dispute resolution mechanisms (Chapter 6).
mine negotiations, Lutsel K’e First Nation and the Yellowknives Dene First Nations made arrangements to work cooperatively with the Tli’chó First Nation as they knew that DeBeers was legally required to negotiate an agreement with the Tli’chó First Nation under the Tli’chó land claim agreement. By leveraging the Tli’chó First Nation’s expanded powers under the land claim agreement, they were able to negotiate to the benefit the broader Dene communities.

The North Slave Metis have adopted a strategy of negotiating IBAs with industry in an attempt to further their legitimacy and desire for recognition by the Federal and Territorial Governments. Industry is often more willing to negotiate with the North Slave Metis as stakeholders and are less concerned with their status as rights-holders. The North Slave Metis hope that this increased profile and access to financial resources through the IBAs will strengthen their overall political position and further their claims to lands and resources.

5.1.2 Benefits of IBAs

Aboriginal groups in the Mackenzie Valley support IBAs as they align more closely with the Aboriginal groups’ aspirations of self-government. As well, IBAs recognize Aboriginal groups as stewards of the land. IBAs allow for a more direct relationship between the Aboriginal groups and industry without the federal or territorial Government acting as intermediary. Fidler and Hitch correctly identify that this new relationship is more compatible with the stated Aboriginal goals of economic and political autonomy.

IBAs are also important in supporting economic development. There are some solid benefits to the company in entering into an IBA that include the opportunity to establish long-term and productive relationships with the adjacent Aboriginal community. This can be an important part of the company securing the social

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196 Guy Quenneville, “No More Mr. Nice Guy” Uphere Business (10 January 2013) online at upherebusiness.ca/post/750617078864 at 4.
197 Fidler and Hitch, Supra Note 11 at 56.
license to operate and avoiding local opposition to the project.\footnote{198} IBAs allow the proponent to obtain employment and services from the community, which can be vital for companies operating in remote northern locations.\footnote{199} The ability to access employment and services locally rather than flying them in from southern locations can be important to the commercial viability of the project.

Through IBAS, developers are often able to access Aboriginal local knowledge on environmental, archeological and other matters significant to the projects’ development, construction and operation.\footnote{200} Accessing this traditional knowledge base is critical in ensuring that the company is able to successfully navigate the regulatory hearings and promotes better environmental and social planning.

IBAs should play an important part of “boom-bust” planning and allow Aboriginal communities to direct profits from the mine towards transition planning. O’Faircheallaigh notes that long-term planning is critical due to the finite nature of mineral resources and the instability of mineral markets. Without proper planning, mine closure can result in economic and social dislocation and seriously delay community development.\footnote{201}

IBAs also address regional discrepancies by ensuring that negative impacts from development are not felt disproportionately at the local level while the benefits from the development are largely directed towards centralized governments.\footnote{202} IBAs give the impacted Aboriginal groups more power to address their issues directly with industry and to secure direct benefits from the project for development that occurs within their traditional territory.

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\footnote{198} Sandra Gogal, Richard Riegert and JoAnn Jamieson. “Aboriginal Impact and Benefit Agreements: Practical Considerations” (2005) 43 Alta. L. Rev. 129 at paragraph 42. \\
\footnote{199} \textit{Ibid} at paragraph 42. \\
\footnote{200} Brad Gilmour and Bruce Mellett. “The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations” (2013) 51:2 Alta L. Rev. 385 at paragraph 70. \\
\footnote{201} Ciaran O’Faircheallaigh, “Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon” (2013) 44:2 Community Development 222 at 226. \\
\footnote{202} \textit{Ibid} at 225-226.
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5.1.3 Disadvantages of IBAs

Since IBAs are privately negotiated contracts, there is no fixed content to an IBA and the parties are theoretically able to craft an agreement that is flexible and meets the specific needs of the project involved. In reality however, the tacit acceptance of standardized content of IBAs can result in exceedingly homogenous agreements that may reduce the effectiveness of the IBAs for Aboriginal groups.  

The potential creativity of the IBAs and their ability to facilitate an authentic relationship with Industry can be limited by the bureaucratic nature of the process.

IBAs are privately negotiated contracts and they have the potential to be unfair and reflect an imbalance in the parties’ negotiating powers. As a result, some scholars argue that the federal and territorial governments should have a role in ensuring that Aboriginal people have the financial resources and access to sufficient information to leverage a fair deal. Some northern Aboriginal groups have also commented on the difficulties inherent in dealing with big companies without adequate government support. Still, other Aboriginal groups are very sophisticated in their approach to negotiating IBAs given their extensive experience in land claim negotiations.

Aboriginal groups who are left out of IBAs will often look to the MVRMA Boards to address socio-economic impacts as part of their regulatory process. They will

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203 This is discussed in Ken J. Caine and Naomi Krogman, “Powerful or Just Plain Power-full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 Organization & Environment 76 at 81-89.
204 Sosa and Keenan, “Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada” (Canadian Law Association, 2001) as discussed by Fidler and Hitch, Supra Note 11 at 58.
205 Deninu Kue First Nation wants equal voice in mining projects”, CBC News (22 January 2015). Chief Louis Balsillie of the Deninu Kue First Nation noted that the FN was required to negotiate an IBA with De Beers for the Gahcho Kue mine with little help from the federal and territorial governments. Chief Balsillie stated that the FN had to fight for over a decade with De Beers to negotiate the IBA, and no other FN has been required to bring so much evidence in support of their rights on the land.
206 See Quenneville, Supra Note 196 that highlights the sophisticated negotiating approach of the Lutsel K’e Dene First Nation.
sometimes argue that the Crown has inadequately consulted and accommodated them for impacts to their Aboriginal and Treaty rights as required under Section 35. However, these safeguards require a significant expenditure of resources for Aboriginal groups that is often not practical, especially for smaller projects. Sometimes the Government of the Northwest Territories will look to address the Aboriginal interests as part of their Socio-Economic Agreement.

Timing may be a serious issue. IBA negotiations often occur relatively late in the development process leaving Aboriginal groups with the belief that they are not able to slow down the pace of development and that they are left with no options other than negotiating the maximum benefit flowing to the community from the inevitable development.207

Much of the criticism of IBAS stems from two commonly negotiated terms of those agreements—confidentiality clauses and support clauses.

Confidentiality Clauses
IBAs usually contain a confidentiality clause that restricts communication of IBAs to anyone outside of the negotiation process or the beneficiary process. Many scholars have been critical of this restriction as contrary to principles of openness and transparency and an obstacle to coherent environmental planning. Keeping observed in 1999 that benefit requirements vary from land claim to land claim in a way that is difficult to justify suggesting that development proponents benefit from this secret negotiation, given that Aboriginal groups have unequal capacity to participate.208

Aboriginal groups in the Mackenzie Valley are increasingly successful in circumventing the confidentiality issue. This includes conducting joint negotiating

207 Caine and Krogman, Supra Note 203 at 85.
sessions with multiple Aboriginal groups present, and it is now common to negotiate a grandfathering clause that provides an opportunity for an Aboriginal group to renegotiate a term in the event that the company offers a more lucrative deal to another First Nation group.\(^{209}\)

Aboriginal groups have also shown a willingness to breach the confidentiality terms when deemed appropriate. This is demonstrated by the decision of the Norman Wells Land Corporation in 2006 to release the terms of the Imperial Oil Mackenzie Gas pipeline IBA to the media. This decision resulted in little reprisal from the company.\(^{210}\)

Gilmour and Millet argue that the confidentiality clauses actually work to industry's disadvantage by preventing them from relying on the IBAs and the negotiations around the IBAs to satisfy the delegated procedural requirements of Section 35 Crown consultation.\(^{211}\) This suggests that Aboriginal law is altering the balance of power in the negotiations of IBAs at least in so far as securing a more level playing field for Aboriginal people.

**Support Clauses**

Support clauses prevent an Aboriginal group from participating in activities that oppose the Project. This often includes a commitment to avoid litigation and will sometimes establish an alternative dispute resolution process as part of the IBA. It could also include a ban against opposing the project at the regulatory stage and against political opposition to the project such as protests. The support provisions

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\(^{209}\) In the IBA negotiations with Avalon, the Tlicho, Yellowknives Dene and the Deninu Kue’ and Lutsel K’e held joint negotiating sessions, although each group ultimately entered into its own IBA. The grandfathering clause has also been negotiated by the Lutsel K’e FN See Quenneville, \textit{Supra} Note 196 at 3.

\(^{210}\) This incident is discussed in Caine and Krogman, \textit{Supra} Note 203 at 77.

\(^{211}\) Gilmour and Mellett, \textit{Supra} Note 200 at paragraphs 53-58. The Supreme Court of Canada has stated that proponents have no legal duty to consult with Aboriginal peoples. However, prior to or concurrent with Crown consultation, the Crown may delegate certain procedural aspects to the Proponent. This would include such things as early engagement and information sharing. \textit{Haida Nation v. British Columbia (Minister of Forests)} 2004 SCC 73. The Crown also relies on mitigations developed by Industry when assessing whether there has been adequate accommodation for impacts to Aboriginal and Treaty rights.
typically also prohibit an Aboriginal group from withholding key project input such as land access or the co-operation necessary to complete required studies.\textsuperscript{212} It may also contain an acknowledgement that the Crown’s consultation obligations have been fulfilled, although the legality of this type of provision would be questionable given the constitutional basis for the duty.

Critics have argued that these support provisions limit the Aboriginal groups rights to object to new information that comes to light as the development proceeds or to socio-economic impacts that do not unfold as expected.\textsuperscript{213} This author believes that the Aboriginal groups are sufficiently enfranchised under the Land Claim Agreements, the co-management regime under the \textit{MVRMA}, and Section 35 of the Canadian constitution that they are no longer willing to accept these limitations in the IBA. The bigger danger is that local leaders see the money stemming from the IBAs and adopt a short-term view of development that allows for an immediate influx of money into the community at the expense of more sustainable development practices.\textsuperscript{214}

\subsection{5.1.4 How IBAs Interact with the MVRMA Environmental Assessment Process}

There is a complex relationship between the environmental assessment processes and IBAs. Caine and Krogman conclude that IBAs in the Mackenzie Valley are negotiated and ratified by Aboriginal groups and industries as part of an emerging accessory to land-claim mandated environmental impact assessment processes.\textsuperscript{215}

Every proponent that applies for a regulatory license in the Mackenzie Valley is screened by the Mackenzie Valley Environmental Impact Review Board and in cases

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid} at paragraphs 25-31.
\item Caine and Krogman, \textit{Supra} Note 203 at 86.
\item Caine and Krogman, \textit{Supra} Note 203 at 78.
\end{enumerate}
\end{footnotesize}
where the project has the potential for significant adverse impacts or be of public concern, may be referred to environmental assessment. Additionally, the Gwich’in, Sahtu and Tlicho First Nations have the authority to refer projects for environmental assessment if they are to be carried out in their settlement areas or, if they might have an environmental impact on that area. Environmental assessment in the Mackenzie Valley is a rigorous process and can be both time-consuming and expensive for the proponent.

The environmental assessment and regulatory process strongly encourages companies to resolve their issues with the Aboriginal groups, which may include the negotiation of IBAs. A company with a good relationship with the Aboriginal groups may be able to avoid an environmental assessment on a smaller development that might otherwise have been referred by the Mackenzie Valley Land and Water Board because of public concern or which could have been referred directly by the Aboriginal group if there were unresolved issues.

Alternatively, if a project is referred to environmental assessment, and most major projects are because of the potential for significant adverse environmental impacts, the process is much more streamlined if the Aboriginal groups are co-operative with the proponent. There is reduced delay at the hearing, and the proponents are better able to access the information that they need in order to prepare the documentation for the hearing, including the Developers Assessment Report and the traditional knowledge study.

Finally, the IBAs give the proponents and the Aboriginal groups more control over the final outcome. Without an IBA, the parties may have the mitigations imposed on them as part of the regulatory process and often the regulatory body cannot award to an Aboriginal group the types of benefits that can be negotiated through the

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216 MVRMA, Section 125.
217 MVRMA, Section 126 (2)(b)(c).
IBA. In the Environmental Assessment process, mitigations are recommended by the Review Board, and once accepted by the Minister, become binding to the extent of the regulators authority. Regulatory terms can be cumbersome to alter and lack the flexibility of the IBA process which encourages more of an ongoing relationship between the signatories.

Gilmour and Mellett argue that the regulatory process can, at times, be used by industry to pressure the Aboriginal group into entering into an IBA. A company that has done the necessary work to support a strong regulatory application and that can demonstrate adequate engagement of the affected First Nations is better able to negotiate a favorable deal and is in a better position to walk away from a bad deal because they can use the regulatory process as an alternative forum. Gogal, Riegert and Jamieson note that a proponent may also be required by the Environmental Assessment or regulatory authority to negotiate an IBA with affected Aboriginal communities as part of its recommended mitigations.

5.2 Socio-Economic Agreements (SEAs)

SEAs are agreements between the Government of the Northwest Territories and industry that address benefits for northerners arising from important resource projects. Both SEAs and IBAs are benefit agreements but the SEA is intended to address the broader public interest whereas IBAS are focused exclusively on Aboriginal beneficiaries and reflect their interests and priorities. SEA negotiations are a public process and the final agreements are readily available to the public and to the regulators. There is a SEA in effect for each of the four diamond mines, and the Mackenzie Gas Project.

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218 The Mackenzie Valley Environmental Impact Review Board is not bound by the terms of an IBA and can recommend other mitigative measures, but they will show deference to an Agreement which has been negotiated by the Aboriginal groups and industry.
219 Gilmour and Mellett, Supra Note 203 at Paragraph 66.
220 Gogal, Riegert and Jamieson, Supra Note 199 at paragraphs 31-42.
5.2.1 Benefits of SEAs

SEAs normally address benefit issues such as priority hiring for northerners, establishment of training and apprenticeship programs with targets for aboriginal and northern trainees, and other business opportunities for NWT businesses and sub-contractors.

SEAs ensure that the Government of the Northwest Territories (GNWT) does not bear the entire financial burden of the increased demand on social and environmental services resulting from a project. Issues addressed in SEAs include the increased cost to the NWT resulting from access to health services by non-northerners and the responsibility of industry to provide services to its employees, particularly its out-of-territory employees such as housing and routine medical services.

SEAs also provide for the ongoing monitoring of socio-economic impacts and establishes processes to address the monitoring results. The SEA for Gahcho Kue diamond mine requires that: (1) the GNWT report annually on the socio-economic impacts of the mine and (2) that De Beers report annually on the commitments that it has made to address those socio-economic impacts. Both parties have committed to meet annually with representatives of Aboriginal groups and communities and to respond within 90 days to concerns raised during that engagement process. Beyond the requirement of a formal response, there is no requirement to implement any of the recommendations made at these community meetings. This is an important first step in establishing feedback loops on socio-economic impacts which have largely been lacking in the environmental assessment process. It also acknowledges that the management of socio-economic impacts is a shared government, industry and community responsibility. The lack of an accountability framework beyond the

221 Galbraith, Bradshaw and Rutherford, Supra Note 9 at 37.

222 Gahcho Kue Project Socio Economic Agreement signed June 28, 2013 and available online at www.iti.gov.nt.ca/sites/default/files/debeers_agreement_0.pdf at 24-28.
requirement to respond means that SEAs are unable to deliver substantive outcomes in decision-making.

5.2.2 Disadvantages of SEAs

A primary issue with SEAs is that they have been political and aspirational in nature. SEAs have tended to reiterate existing legal obligations, such as obligations to respect human rights or a commitment to employment equity. While this may be useful in further encouraging industry compliance with its existing legal obligations, it does not create any further legal entitlement. 223

SEAs also tend to contain industry commitments that are vague, or so broad and general that it would be difficult for the GNWT to demonstrate a lack of industry compliance. Many SEAs contain targets for the companies as opposed to firm commitments. Many fail to include penalties when industry does not comply with the provisions.

Another problem with the SEAS is that the public beneficiaries of the Agreement are often not parties to it and therefore do not have legal standing to enforce their rights under the agreement. They must rely on the GNWT to take their case forward, a decision that is subject to political pressures.224 The SEAs have been inconsistent on whether Aboriginal groups are included under the SEA. Two of the SEAs contemplate that Aboriginal groups may become parties to the Agreement (Diavik and Snap Lake Agreements.). Other Agreements do not make provision for Aboriginal organizations to become parties to the Agreements. (Ekati, Mackenzie Gas Project, and Gahcho Kue Agreements).

223 Ciaran, O’Faircheallaigh, “Independent Review of the Mackenzie Gas Project Socio-Economic Agreement” prepared for Alternatives North as part of its submissions to the Joint Review Panel at the environmental impact review hearings, June 2007 and available online at www.alternativesnorth.ca at 2.
5.2.3 How SEAs Interact with IBAs

SEAs may prevent Aboriginal peoples from addressing socio-economic issues that genuinely concern them in their IBAS because those issues are seen as a territorial or federal government responsibility. This may be beneficial to industry since it is able to avoid dealing with Aboriginal concerns on a community level where the impacts are actually felt in favour of a more regional approach.

Caine and Krogman demonstrate through their research that Aboriginal people are immensely concerned about social issues including: (1) language retention, (2) use of traditional knowledge and (3) maintaining connections to the land. Yet these culturally compatible notions of social development are subverted in the IBAs to key capitalist indicators of benefits, employment, training and business opportunities. Craine and Krogman argue that the IBAs could do much more to support aboriginal culture, but that industry has been reluctant to address social and cultural impacts of development largely because this is seen as a federal and territorial government responsibility. They note that the fact that these issues are addressed in SEAs gives legitimacy to this position.225

Steven Nitah, negotiator for the Lutsul K’e Band discussed a similar issue in a recent interview. The community of Lutsul K’e recognized that students were not graduating with the equivalent of a grade ten education, which was the minimum that they required in order to quality for entry-level apprenticeship programs with De Beers. The community wanted De Beers to provide the financial resources to supplement an additional teacher’s wage and increase the educational capacity in the community. However, they were informed that the policies of De Beers and the GNWT would not allow for such an arrangement.226 The GNWT was reluctant to relinquish its authority over education, which is a core territorial government function. However, the Band is in the unenviable position of being dissatisfied with

225 Caine and Krogman, Supra Note 203 at page 87.
226 Quenneville, Supra Note 196.
the educational system, and being denied the ability to directly address this issue through their IBA. This is augmented by a sense of urgency as they attempt to capitalize on an opportunity that is finite in nature. Arguably, the Band does have a right to address education as part of a broader right of self-government but that does not assist it in the present dilemma.

5.2.4 How SEAs Interact with MVRMA Environmental Assessment Process

The Government of the Northwest Territories commonly asks Mackenzie Valley Environmental Impact Review Board (MVEIRB) to recommend a SEA as part of the environmental impact assessment so that economic commitments made by the company at the hearing are fulfilled.227 The SEA can augment the environmental assessment process by creating contractual obligations that could not otherwise be addressed in regulatory instruments and which do not fit easily with the EA process. These obligations include socio-economic monitoring and follow-up and adaptive management of the social system. The SEA also allows the MVEIRB to address the benefits of development, which it is otherwise not well-equipped to do.228

For example, in the Gahcho Kue environmental impact review, the MVEIRB found as follows:

“Based on the evidence and information provided, it is the opinion of the panel that the effects are not likely to be significant provided the developer implements its commitments including the negotiation and implementation of a socio-economic agreement with the GNWT.”229

227 Northern Developers Ministers Forum, Benefit Agreements in Canada’s North (August 2013) available online at http://books.scholarsportal.info/viewdoc.html?id=641771 at 73-75. The Diavik SEA and the Snap Lake SEA were both negotiated at least in part to satisfy the Environmental Assessment Review Panel’s recommendations. This is discussed by Banks, Supra Note 224 at 5.
228 Lindsay Galbraith, Understanding the Need for Supraregulatory Agreements in Environmental Assessment: An Evaluation from Northwest Territories Canada (Masters Thesis, Simon Fraser University, Department of Geography, 2005) [unpublished] at 84-85. Galbraith argues that SEAS stem from the perceived deficiencies of an EA process in providing for economic benefits.
229 Gahcho Kue Report, Supra Note 162 at 142.
This provides an opening where the GNWT may be able to negotiate additional benefits that are not otherwise available through the environmental assessment process.

SEAs negotiated in tandem with the environmental assessment hearing can be very effective. However, SEAs are sometimes completed in advance of the completion of the EA. SEAs completed in advance of the MVEIRB report can undermine the environmental assessment process by providing a series of mitigation measures which have been identified outside of the environmental assessment process and which are implemented by contract before the MVEIRB has had the opportunity to provide its recommendations. This does not prevent MVEIRB from identifying additional mitigations but it creates bureaucratic duplication and may require either amendment of the SEA or creation of additional enforcement mechanisms to implement Board recommendations thus contributing another layer of bureaucracy to an already complex regulatory system. MVEIRB, if presented with a SEA in advance of their recommendations may be more likely to accept the negotiated contract than to provide its preferred option in order to avoid duplication and regulatory confusion.

5.2.5 How SEAS Interact with the Division of Powers Between the Federal and Territorial Government

One of the key issues for the GNWT in negotiating the SEAs was its own relative lack of power within the overall regulatory process. The federal government set the terms for resource development on federal Crown lands and received the royalties from the use of these lands whereas the social and economic burden fell disproportionately to the GNWT. Galbraith argues that the SEAs were designed to mend this economic disparity between the federal and territorial governments by

\[230\] For example, the SEA for the MGP was completed January 19, 2007, almost a year before the completion of the hearings and two years in advance of the release of the Joint Review Panel’s report, released December 2009.
trying to secure greater economic benefits for the GNWT directly from the developer.\textsuperscript{231}

With the transfer of federal Crown lands to the GNWT as part of the devolution process, the GNWT has more regulatory tools at their disposal, including the ability to set the terms of land leases on Crown lands. It remains to be seen whether the GNWT will continue its reliance on SEAs or will prefer to streamline the process by addressing socio-economic issues in other regulatory instruments.

\textsuperscript{231} Galbraith, \textit{Supra} Note 228 at 84-85.
CHAPTER 6

6 ANALYSIS

This Chapter argues that the key to a truly adaptive regulatory system is principled flexibility. It argues that many of the regime characteristics supportive of principled flexibility are present in the Mackenzie Valley, largely because the northern regulatory regime is integrally linked to the Aboriginal land claim process and receives much of its strength and resilience from its connections with Aboriginal rightsholders.

6.1 The Regulatory System in the Mackenzie Valley is operating as a complex and interactive system

This is one of the main insights of this paper. Resilience theory distinguishes between complicated systems and complex systems. Complicated systems are notable because the elements of that system maintain an element of independence from each other and the system can be managed by its individual components. Complex systems in contrast are more dynamic, exhibit complex collective behaviours and respond more readily to their internal and external environments.

The arctic environment operates as a complex and interactive system. The environmental impacts resulting from climate change are far-reaching where the environment continues to evolve and adapt. This evolution is a subject for scientific analysis and much has been written on the subject.

This paper provides some insight into how the regulatory system in the Mackenzie Valley operates as a complex whole. It highlights the ways that the impact benefit agreements, environmental agreements, and socio-economic agreements are not discrete contractual instruments but interact with each other and with the MVRMA
regulatory regime in order to regulate the project. This sometimes results in good
governance in support of adaptive management, but in other instances it is ill suited
for the task.

For example, industry may enter into an Impact Benefit Agreement or an
Environmental Agreement in advance of an environmental assessment hearing in
order to garner Aboriginal support for the Project and increase the likelihood of
success at the hearing and to avoid having the regulatory Board impose measures to
address impacts identified by the Aboriginal group at the hearing which are
unpalatable to industry. This can be advantageous because it allows industry and
the Aboriginal groups to be creative and find responsive solutions for that
community. At other times, it can be maladaptive if it means that evidence that
should before the MVRMA Board in order to allow them to fully assess the impacts of
the project and the adequacy of the environmental and social mitigations is not
brought forward. Agreements made in the Impact Benefit Agreement may support
economic development at the expense of environmental protection and may be
entered into by the Aboriginal groups before the full impacts of the project are
understood. Additionally, there is also a negative democratic impact as public
hearing processes are subverted to private negotiations.

Aboriginal rights and their legal protections is also a key element in this complex
regulatory environment. Section 35 is a driver for the federal and territorial
governments. They encourage the use of contractual instruments in order to meet
their legal obligation to ensure accommodation of impacts to Aboriginal and Treaty
rights. Section 35 is a driver for industry to enter into impact benefit agreements
and environmental agreements. They want to avoid delays if Aboriginal and Treaty
rights are not adequately accommodated by the federal and territorial governments
and avoid unnecessary conflict with the Aboriginal groups. The Aboriginal groups
use this system to further their environmental and economic interests. Their ability
to launch court challenges if their rights are not accommodated is a powerful part of
the overall regulatory regime.
Understanding that the contractual instruments are part of the overall complex regulatory system allows all interested parties including Aboriginal groups to think more strategically about how to use them. Understanding that the regulatory regime is a complex system highlights the need for a principled approach that can apply across the multiplicity of instruments that now make up the regulatory regime. This is necessary to avoid a maladaptive system where a multiplicity of immediate interests is reflected in a jumble of regulatory instruments that ultimately undermine the broader environmental goals.

6.2 The *MVRMA* regulatory regime does not necessarily promote adaptive management

The *MVRMA* was found by the auditors in the 2015 Northwest Territories Environmental Audit to be generally effective in protecting the environment and it remains an example of Canadian environmental best practices. However, the *MVRMA*, like most environmental legislation in Canada, ultimately adopts a relatively static view of the environment and relies on regulatory tools which are not well-suited for adaptive management particularly in a changing environment which resists the concept of a single state of environmental optimality.

Characteristics of the *MVRMA* system which are focused on engineering resilience and maladapted to adapted management include a heavy focus on pre-construction environmental assessment, risk management, and cost-benefit analysis.

Some of the sections of the *MVRMA* which could potentially have made it more progressive and fostered adaptive management were never fully implemented like the Cumulative Impacts Monitoring Program, and some of the land use planning

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232GNWT, 2015 *Northwest Territories Environment Audit*, (Yellowknife: ENR, March 2016). available online at www.enr.gov.nt.ca/sites/default/files/2015-environmental-audit at ES1-2. Section 148 of the *MVRMA* requires an independent environmental audit every five years and sets out the requirements for that audit.
initiatives including the Protected Areas Strategy. There has been progress on land use planning identified in the 2015 Environmental audit but it continued to be identified by the auditors as a foundational challenge. The MVRMA alone cannot adequately address adaptive management issues because of structural constraints associated with being an institution of public government bound by the rules of administrative fairness. It is important to protect the rights of the Parties in a public process. However, there is a heavily reliance on advance decision-making predicated on reliable baseline data. Decision-makers are limited in their exercise of discretion by the mandates established by legislation, and the process for altering a decision is administratively onerous and often relies on the Proponent to make the application. These can be unfortunate limitations in a non-stationary environment. The regulatory system relies on the contractual agreements to increase the overall adaptability of the system and address some of the key limitations.

6.3 One of the Key Tools required for the Transition to an Adaptive Management Regime is “Principled Flexibility”

Central to the functioning of an adaptive management regime is the need for “principled flexibility”.

This concept is developed in the literature by the resilience theorists Kundis Craig and Harm Benson. For them, ‘principled flexibility’ involves a focus on stronger, legally enforceable and institutionally supported goals within the regulatory system, but more flexibility and discretion is given to the decision-maker on how to achieve those goals.

Arnold and Gunderson similarly argue that an adaptive legal system would need to provide the right mix of adaptive flexibility and principled accountability of the

233 Ibid. at ES-1.
234 Kundis Craig and Harm Benson, Supra Note 17 at 877.
decision-makers. They suggest that discretionary decision-making is a necessary element of adaptive environmental management and that concerns regarding the arbitrary nature of discretion can be addressed through the development of appropriate and relevant standards to govern the exercise of discretion and to which decision-makers can be held accountable.\(^{235}\)

Those theorists position principled flexibility solely within the statutory framework. It is a legislated solution to a regulatory problem. I argue that principled flexibility must extend beyond government decision-making to other stakeholders/rightsholders because those groups play a key regulatory role. It should apply to diverse regulatory instruments like environmental agreements, impact benefit agreements, and socio-economic agreements. Principled flexibility would need to be guided by shared values or a shared culture of environmental management as there is often no legislative authority for the contractual agreements.

This insight draws heavily from resilience theory but also from new governance theory which advocates a more collaborative model of decision-making with an increased focus on process, consensus, and shared responsibilities among many actors aimed at achieving policy objectives. Many of the foundational principles also come from Aboriginal law such as the reconciliation of Aboriginal and non-Aboriginal world views on environmental stewardship and the recognition of Aboriginal people as rights holders with legal rights both procedural and substantive on issues involving environmental stewardship on their traditional lands.

The key missing element for the effective functioning of the regulatory system in the Mackenzie Valley is a shared culture of adaptive management and a social and environmental coordinating framework that would exist across the multiplicity of

\(^{235}\) Arnold and Gunderson, Supra Note 53 at 29.
instruments and ensure that these instruments work together in order to promote sound environmental management.

This shared vision is especially important because contractual agreements are entered into by parties pursuing special interests that are sometimes only peripherally related to environmental protection. Impact Benefit Agreements are primarily aimed at securing economic benefits for Aboriginal peoples. As such, there is significant potential for these types of instruments to work at cross-purposes to environmental protection if their integration into the overall regulatory regime is not adequately understood and managed.

In the remainder of this paper, I argue that the Mackenzie Valley region of the NWT is ideally suited to develop this principled flexibility. Many of the characteristics of the Mackenzie Valley regulatory system, often developed because of the involvement of Aboriginal rightsholders, are supportive of adaptive management and the development of a shared environmental coordinating framework.

6.3.1 The MVRMA regime was designed as an integrated management regime

The MVRMA is forward thinking legislation because of its key goals of integration, co-ordination and co-management. The MVRMA establishes an integrated management regime that takes a more holistic view of the environment than elsewhere in Canada. It includes a focus not only on the environment but also on the social and cultural effects of developments. This reflects the Aboriginal peoples preference for a more integrated approach to environmental management that they successfully negotiated into their Land Claim Agreements. This goal will be better realized when some key sections of the legislation including the sections on land use planning and cumulative impacts monitoring and follow-up are more fully implemented.
There is potential to enhance this integrated approach to environmental management through the use of the contractual agreements. However, currently the contractual instruments do not always support this approach. The separation of impact benefits and environmental impacts into separate contractual agreements is not supportive of an environmental vision that takes an integrated approach to social and environmental impacts and obscures their complex interactions.

6.3.2 The MVRMA regime implements a government commitment to co-management of the Mackenzie Valley with the Aboriginal Peoples

The MVRMA was designed to implement the federal government’s commitment to co-management with the Aboriginal people in the Mackenzie Valley. There are progressive features aimed at increasing Aboriginal participation. The legislation does a good job in encouraging Aboriginal participation at regulatory hearings and attempts to incorporate Aboriginal traditional knowledge into decision-making on par with Western science.

The MVRMA is also incorporates Aboriginal persons into decision-making. There are provisions requiring that membership of the MVRMA Boards be comprised of Aboriginal peoples. Ultimate decision-making on most issues continues to rest with the federal and territorial governments. However, those Governments are not able to vary an MVEIRB decision without consulting with the Board members, and are not able to reject an environmental assessment recommendation by the Board without ordering an environmental impact review. The Boards have significant power under this regime and Aboriginal people have a very real presence on those Boards. As noted elsewhere, the federal and territorial governments rarely override a Board decision.

The MVRMA regime is process oriented and modeled on the old Canadian 
Environmental Assessment Act. It allows Aboriginal peoples greater participatory rights within the Western model of environmental regulation, and greater power to
influence environmental decisions. It does not re-define the regulatory process to be more reflective of Aboriginal values or question whether there is a better model for addressing complex northern issues.

Aboriginal groups have used environmental agreements and impact benefit agreements to redefine their relationship with developers. They have successfully negotiated increased input and influence into decision-making through these contractual agreements. This augments their power under the legislation and allows them input into decision throughout the life of the project.

6.3.3 The MVRMA Boards Exert a Strong Regulatory Presence

This paper has demonstrated that the MVRMA Boards are fundamentally important in supporting the northern regulatory regime. Braithwaite and Ayers were correct in advocating for a strong regulator whose threat of sanctions compels parties to reach negotiated settlements.\textsuperscript{236} The existence of a strong regulator ensures that cooperation by developers is not voluntary although parties are encouraged to think creatively about how the desired outcomes might be achieved.

The MVRMA Boards have considerable influence in the Mackenzie Valley. The MVRMA operationalizes the co-management regime agreed to in the land-claim agreements and enjoys a very high level of legitimacy with the northern Aboriginal groups and the federal and territorial governments. They are rarely the final decision-maker but the federal and territorial governments rarely override Board decisions.

Parties to the contractual instruments know that these Boards will accord them some flexibility to address the environmental and social impacts but in the event that they are not successful in resolving these issues, the Board will either deal with it themselves and impose the solution through mitigative measures attached to

\begin{footnote}
\textsuperscript{236} Ayers and Braithwaite, \textit{Supra} Note 22.
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licenses or sometimes require an acceptable contractual solution as a prerequisite for receiving regulatory approval.

It is naive to expect that the contractual instruments will be completely voluntary. The presence of the Boards as a substitute regulator if negotiations are unsuccessful is an important component in allowing environmental agreements, *IBAs, SEAs* and to operate effectively. The MVEIRB has also been a key facilitator in the dialogue among the various stakeholders/rightsholders because of the legitimacy that it has with all parties. I envision that the *MVRMA* boards would continue to have an important role in reinforcing the principles of a shared environmental vision developed as part of principled flexibility.

6.3.4 *Section 35 of the Constitution Act enhances the authority of the MVRMA Boards and resists attempts to increase administrative efficiency at the expense of adaptive management*

Section 35 plays a significant role in protecting the uniqueness of the northern regime. One of the reasons that the federal and territorial governments support the current regime is because they want to rely on the board process to satisfy the Crown’s legal duty to consult with Aboriginal people under Section 35. Companies enter into contracts because they want to avoid delays resulting from litigation resulting from the Crown’s failure to fulfil their Section 35 obligations.

Law is not always supportive of adaptive management. Ruhl argues convincingly that the rule of law exists to establish relatively stable contexts within which other social systems can operate over time.\(^{237}\) This would include a stable environment within which industry can safely operate to maximize revenue. This results in legal pressure to move away from more diverse models of decision and to look for more transparency, certainty and finality in decision–making. These are important

\(^{237}\) Ruhl, *Supra* Note 63 at 2.
principles of administrative law but they are not always compatible with adaptive management or fostering ecological resilience.

In the Mackenzie Valley, the application of Section 35 has been relatively successful in maintaining the co-management structure established in the legislation and protecting it from subsequent legislative or policy efforts to alter the MVRMA structure to foster greater administrative efficiency. This is partly because of the link between the land claim agreements and the co-management structure in the MVRMA and the constitutional protections that follow from that association. The MVRMA Boards are not the only forum that the Aboriginal groups have to advance their Aboriginal and Treaty rights which often includes their environmental rights. There would likely be more dissatisfaction with the bureaucratic nature of the MVRMA if the Aboriginal groups did not have access to the court system as an alternate way to advance their rights through the application of Section 35.

The Canadian constitution does not provide stand-alone protection for environmental rights. This means that Aboriginal groups have access to legal avenues that are not available to non-Aboriginal people in order to pursue their environmental interests. This has forced the environmental groups into a meaningful dialogue with Aboriginal groups in order to bring forward the environmental agenda. One of the reasons that Ecology North was successful in pushing the boundaries and gaining inclusion in the Giant Mine Environmental Agreement was likely the productive working relationship that it had developed with the Yellowknives Dene.

6.3.5 There is a strong precedent in the Mackenzie Valley for the use of contractual instruments as part of the overall regulatory regime

Aboriginal groups have been successful in securing substantial economic and social benefits through contractual agreements. Through environmental agreements, they

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238 Tlicho Government v. The Attorney General of Canada et al., Supra Note 76 discussed at 2.2.1.
are able to hold government and industry accountable for environmental stewardship and promote more collaborative environmental management. Other stakeholders including environmental groups and the territorial and federal governments have benefited from these types of agreements.

Contractual agreements can be less bureaucratic and potentially provide valuable adaptability enhancements to the overall regulatory system. Attributes of contractual agreements that might allow them to enhance the adaptive management regime include: (1) they are less constrained by the statutory framework and administrative structure and therefore may promote flexibility and creativity in problem-solving; (2) contractual arrangements can foster an ongoing relationship between stakeholders/rightsholders which allows for greater collaboration over time; (3) contractual arrangements are arguably more easily amended to meet changing conditions; and (4) the proliferation of instruments and potential for greater and more varied stakeholder involvement can allow for more localized decisions catering to the environmental and social needs of a particular region. We have seen all of these attributes at play at various times in the Mackenzie Valley.

There are undoubtedly challenges with contractual agreements that are outlined earlier in this paper. However, there is also the potential to create a stronger regulatory system. The key is principled flexibility so that parties can use contractual agreements to construct a system with more of an underlying rationality for how the parts fit together.

6.4 Conclusion

The author has argued in this paper that the regulatory regime in the Mackenzie Valley should be characterized by a new approach to adaptive management that allows for and encourages a multiplicity of regulatory instruments including private contractual instruments. The paper has also demonstrated that the Mackenzie
Valley regime is already well suited to developing this type of a modern environmental regime because of the characteristics outlined in the previous paragraphs. However, in order for this multiplicity of instruments to succeed as a coherent environmental governance structure and not result in an incoherent legal and policy jumble, there must be principled flexibility.

This principled flexibility requires a shared environmental vision or culture which exists across stakeholders and which ensures that there is an underlying rationality to the multiplicity of instruments so that they are not working at cross-purposes. The author believes that environmental governance in the Mackenzie Valley could be greatly strengthened if more attention was given to the development of an environmental vision separate from the process-oriented goals of integration, co-ordination and co-management.

What would this environmental coordinating framework look like? Sustainability is the key western tool for encouraging environmental and social goal-based decision making, and this author is convinced that sustainability principles will be prominent in constructing this environmental vision for the Mackenzie Valley. Resilience is also a key principle given the instability of the arctic ecosystems and the importance of meeting the challenges of climate change in a practical way.

Bosselmann argues that environmental ethics can broadly be divided into two main schools of thought. Anthropocentric theorists rely upon traditional Western values based on human welfare or human rights. The environment is an instrument of value in achieving those other goals. The focus therefore is on seeking compromise and trade-offs in order to maximize human outcomes. Non-anthropocentric theorists argue that the non-human environment has an intrinsic value irrespective of human needs. Bosselmann argues that the latter approach allows for a stronger approach to sustainable development because it allows economic and social development within the parameters of ecology rather than always looking for
compromises in order to maximize outcomes.\textsuperscript{239} Neither of these perspectives reflect traditional Dene world views which does not conceive of a separation between the human world and the non-human world.

The Dene are the original residents of the Mackenzie Valley and their environmental vision will be fundamentally important in developing the principles of environmental management in the North. The Dene are often more receptive to the idea of multiple ways of knowing than their non-Aboriginal colleagues. Grand Chief Jimmy Bruneau famously commented that the Tlicho people needed to be educated in both the Dene ways and the ways of the Whites so that they can be “strong like two people.”\textsuperscript{240}

Dene environmental goals will likely involve a more traditional understanding of the place of both human and other-than-human inhabitants within nature and within the complex web of relationships that make up the Dene lands. The Tlicho Dene refers to the lands on which they reside as the “de” which has a cultural context very different from Western concepts of land. Philip Zoe, a member of the Tlicho Dene described the de in the following terms:

“There are no empty spaces. All spaces are used by something, fox, fish, trees, humans, winds, northern lights. It might look empty, but all of the De is used”.\textsuperscript{241}

For the Tlicho Dene, maintaining the total web of relationships within the de is vital to both the survival of the de and the continual rebirth of all that has spirit.\textsuperscript{242}

This is potentially transformative because Western tradition has lost most of its understanding of the interconnection between humans and the lands and it may not be possible to regulate a complex ecosystem without regaining that consciousness.

\textsuperscript{239} Bosselmann, \textit{Supra} Note 48 at 105.
\textsuperscript{240} This famous quote is reproduced by Allice Legat in “Walking the Land, Feeding the Fire: Knowledge and Stewardship Among the Tlicho Dene” 2012 (Tucson: University of Arizona Press) at 62. Legat provides a more detailed analysis of the reasons why the Tlicho Dene are receptive to "knowing two ways" at 30-32.
\textsuperscript{241} Ibid. at 96.
\textsuperscript{242} Ibid at 31.
From a practical point of view, it is important to incorporate Dene values. Many of the contractual agreements are entered into between industry and the Dene and it is simply not possible to have a principled approach to environmental governance across these instruments without an environmental vision that resonates with the Dene. If you accept that the regulatory regime in the Mackenzie Valley is broader than just the legislative scheme, then the environmental coordinating framework needs to be greater than merely sustainability. It is beyond the scope of this paper to discuss just what an environmental coordinating framework for the north would look like. However, I would like to offer some comments on the possible path forward.

Julia Black provides some interesting insights on the role of regulatory conversation in the overall regulatory process. She defines regulatory conversations as “the communications that occur between regulators, regulated, and others involved in the regulatory process concerning the operation of the regulatory system.” 243 Black argues that regulation is a communicative process. Discourse forms the basis of regulation in the following ways: (1) it builds understanding and definitions of both problems and acceptable and appropriate solutions; (2) it builds operational categories; and (3) it produces the identities of and relationship between actors in the process. This communicative process is functional in that it is designed to meet certain ends, and coordinating in that it produces shared meaning as to regulatory norms and social practices which are then translated into action.244

Black also develops the concept of interpretive communities. Interpretive communities in the regulatory context are characterized by a shared understanding and commitment to the goals of the regulatory system and a shared understanding of the way that conflicts, inconsistencies and trade-offs may be addressed. Black argues that the normative commitment to the goals and values of the regulatory

244 Ibid at 164-165
process fostered by interpretive communities may be essential for regulatory effectiveness. This is similar to the concept of principled flexibility as developed in this paper.

Black emphasizes the role of “storylines” in regulatory discourse. Storylines simplify and distil complex scientific issues such as climate change into more accessible narratives. This allows a wide variety of disciplines to talk to each other and contribute knowledge on the same subject matter. Overtime, storylines may become ritualized and are used to rationalize a particular approach to what seems like a coherent problem. Storylines create coalitions among stakeholders, but also create shared knowledge and influence action.

What does this mean for regulation in the Mackenzie Valley? Dialogue is fundamentally important because it creates opportunities for regulatory conversations and for consensus-building among the stakeholders. This paper has demonstrated that the northern regulatory system is a complex system with important elements of that system operating outside of but interacting with the legislative framework. We need to rationalize the various elements of the system so that they work together in support of sound environmental management principles. This requires interpretive communities that include Aboriginal and non-Aboriginal people and which are committed to a shared vision so that they can institute a cooperative framework across a multiplicity of instruments. This is what I refer to as principled flexibility. Otherwise, you run the risk that the instruments will work at cross-purposes or just constitute a jumble of instruments that don’t lead us towards any particular environmental goal.

We also need to be cognizant of our storylines and ensure that those storylines allow space for Dene world views to be part of the collective shared knowledge and that they move us towards actions which are acceptable to the Dene people.

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245 Ibid at 176
246 Ibid at 188.
very important that we do not create different storylines, an Aboriginal and a Non-Aboriginal storyline, that are irreconcilable and unable to talk to each other.

These environmental narratives need not be identical but they need to work together in the interest of strong environmental management. Practically, this may not be such a daunting task. The Dene understand the importance of fighting climate change and the science behind it. Non-Aboriginal people recognize that the current strategy for fighting climate change has not been effective. There has been some promising work by Albert Marshall from the Mi’kmaq Nation on “Two Eyed Seeing” and strategies for incorporating both Indigenous knowledge and traditional Western knowledge into decision-making processes. Marshall argues that a person with knowledge of two systems can uniquely combine the two knowledges and that this new creative thinking is essential in addressing an environmental crisis.247 “Two eyed seeing” requires a fundamental acceptance that knowledge is culturally created – and that other cultures can have equally valid systems of knowledge. If we can make that leap, then reconciliation of the two knowledge systems may not be that difficult. One of the key differences will be in how we value the land and how we reconcile the use of valued ecosystem components as a key scientific tool while promoting an understanding of the land as its own complex and spiritual system.248

It is important to support Dene project initiatives which focus on re-connecting Dene people to their traditional knowledge and to help preserve Indigenous culture and stewardship to the land. For example, the Indigenous guardians programs in

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247 A full discussion is beyond the scope of this paper. For more information see Cheryl Bartlett, Albert Marshall and Murdena Marshall, “Two-Eyed Seeing and other lessons learned within a co-learning journey of bringing together Indigenous and mainstream knowledges and ways of knowing” (2012) 2(4) Journal of Environmental Studies and Sciences DOI:10.1007/s13412-012-0086-8.

248 Another example worth examining would be the experience of Greenpeace and the Inuit communities. Greenpeace was instrumental in organizing a boycott of seal products in the 1976 with devastating economic and cultural results for Inuit economies. The Inuit felt strongly that the boycott was unfair and failed to respect their traditional way of life and misconstrued their relationship with the environment. Greenpeace has been working hard to repair this relationship including issuance of an apology and publication of a Greenpeace Canada policy of Indigenous rights. There are lessons to be learned from this experience on the work of reconciliation. More information is available online at http://www.greenpeace.org/canada/en/blog/Blogentry/greenpeace-to-canadas-aboriginal-peoples-work/blog/53339/.
the NWT partners young people with older community members to patrol the land and water, monitoring changes in water quality, sediments and wildlife. The Deh Sho K’ehondi program run by the Deh Cho First Nations is similar with an increased focus on using Dene language and culture to rebuild relationships with the land. I am particularly interested in the interconnection between language and traditional views of stewardship of the land. The revitalization of the Dene language is potentially transformative for environmental stewardship as much of the Dene knowledge of the land is captured in their language.

Legislators should also look for ways to incorporate Dene environmental goals and environmental management strategies into legislation. This has been done elsewhere. The Resource Management Act in New Zealand requires that all decision-makers managing the use, development and protection of natural and physical resources under that Act must have particular regard to kaitiakitanga. Kaitiakitanga is a Maori term that references traditional environmental guardianship in accordance with Maori values. The Environmental Goals and Sustainable Prosperity Act (EGSPA) in Nova Scotia references Netukulimk as one of the guiding principles in managing the environment and the economy. Netukulimk is a Mi’kmaq expression of environmental guardianship principles which focuses on the preservation of resources for future generations. Nova Scotia also very recently passed an updated Mineral Resources Act, which requires the Minister to...

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249 Jimmy Thompson, “Excellent results from NWT Indigenous guardians programs”, CBC (05 November 2016) available online at cbc.ca.

250 Wab Kinew describes how physicists from American universities would engage in dialogue with Indigenous knowledge keepers from the Anisanaabe FN. These dialogues were premised on the awareness that many Indigenous languages describe the natural world in terms of process, action and flux. This view of the world reflected the reality posited by contemporary physics more closely than static, noun-based English. See Wab Kinew, The Reason You Walk (Toronto: Penguin Books Inc., 2015) at 115. Kinew was referencing the Algonquian languages of southern Canada not the Athabascan languages in the Canadian north. However, it demonstrates the importance of language in influencing our world view and suggests that Aboriginal languages may allow us to develop more fluid views of the environment which are more reflective of how ecosystems actually work.

251 Resource Management Act 1999 (NZ),1991/69, Sections 2(1) and 7(a).

252 Environmental Goals and Sustainable Prosperity Act, S.N.S. 2007, C7, s1, Section 3(d).
consider the principles and goals referred to *EGSPA* including the Mi’kmaq concept of Netukulimk when making a decision.253

It is important to include Aboriginal environmental goals and environmental management strategies in legislation. It gives these concepts legitimacy and ensures that they are part of the regional and national storyline. It also creates legal rights because people exercising powers under those Acts become legally obligated to engage with those principles and strategies as part of their decision-making process. This may be an awkward due to uncertainty around what the term means and how it might properly be considered but it will evolve over time. Because legislation is only part of the overall regulatory framework, Aboriginal people might also consider the inclusion of Aboriginal environmental goals and environmental management strategies in other contractually binding instruments such as environmental agreements and impact benefit agreements. Ni Hadi Yati, the contractually binding arrangement with De Beers for the Gahcho Kue Mine, has possibilities for encouraging this type of dynamism and further study of that program would be warranted.254

The Government of the Northwest Territories has assumed control over lands and resources under devolution. As a result, it will need to revise its legislation and could use that opportunity to include more references to Dene environmental goals and Dene environmental management strategies.

The process of negotiated rule making and its application in the Mackenzie Valley may also be worth exploring. Negotiated rule making allows a regulatory agency to work closely with the party being regulated and other stakeholders to design rules that carefully balanced the interests of diverse parties. It is aimed at achieving consensus among parties on how a rule ought to be structured. Advocates of negotiated rulemaking argue that it improves rule quality, reduces transaction costs

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253 Mineral Resources Act, S.N.S. 2016, C3, Section 2(2).
254 See Paragraph 4.2.4
and increases legitimacy.\textsuperscript{255} At least one study has also shown that the interaction between stakeholders in the process builds relationships and increases commitment to a successful result.\textsuperscript{256}

Negotiated rule making is beneficial to the extent that it encourages dialogue and understanding among participants as they attempt to resolve issues in a manner that is acceptable to all of their interests. It has the potential to promote shared environmental goals and responsibilities among culturally diverse parties. It also gives the Dene an increased voice in the regulatory process that is appropriate given their status as rightsholders. The MVRMA boards have processes that are inclusive of Aboriginal peoples but negotiated rule making goes further and encourages the parties to look for solutions outside of prescribed administrative solutions and builds more immediate relationships between parties. Negotiated rule making is also available to other regulators such as the Department of Fisheries and Oceans, or the GNWT. Negotiated rule making would be a complimentary process to the regulatory process, and a strong regulator is a necessary component in the process to ensure that the solutions arrived at by the parties meet the requirements of effective environmental management.

This might be the ultimate strength of the Mackenzie Valley regime – that it can build tools to incorporate the goals of sustainability and also to develop a shared vision that is broader, and more creative, and is respectful of the land and the inter-relationship of those who live on the land from both a Dene and a westernized perspective. This is the principled vision that allows for a regulatory framework that is more flexible, creative and adaptive but which also delivers on environmental protection.

\textsuperscript{256} Ibid. at 87.
The Mackenzie Valley regime serves as a model for what is possible elsewhere in the country and suggests that adaptive capacity may be enhanced not decreased with the multiplicity of instruments provided that there is principled flexibility – and that supporting and enabling Aboriginal people to exercise their traditional role in stewardship of the land is an important component in encouraging effective and resilient environmental management.
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# Curriculum Vitae

**Name:** Heather Potter

**Post-secondary Education and Degrees:**

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<thead>
<tr>
<th>University</th>
<th>Location</th>
<th>Degree</th>
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<tbody>
<tr>
<td>Wilfrid Laurier University</td>
<td>Waterloo, Ontario, Canada</td>
<td>1989 B.A.</td>
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<tr>
<td>York University</td>
<td>Toronto, Ontario, Canada</td>
<td>1990 M.A.</td>
</tr>
<tr>
<td>Dalhousie University</td>
<td>Halifax, Nova Scotia, Canada</td>
<td>1994 LLB.</td>
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**Honours and Awards:**

- Province of Ontario Graduate Scholarship 1989

**Related Work Experience**

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<tr>
<th>Position</th>
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<tr>
<td>Director of Aboriginal Consultation</td>
<td>Office of Aboriginal Affairs</td>
<td>2015-2016</td>
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<tr>
<td>Deputy Regional Director General – Arctic Region</td>
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<tr>
<td>Legal Counsel</td>
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