

STATEMENT AT SECOND READING—KEVIN O'REILLY, MLA FRAME LAKE

Bill 39 Environmental Rights Act

February 26, 2019

MR. O'REILLY: Merci, Monsieur le President. I will not speak to the process that got us here with ENR, as I covered that in my previous remarks on Bill 38, but I will also provide some comments on the bill and concerns with what is there and what is missing.

The original Environmental Rights Act was passed as a private Member's bill by the Northwest Territories Legislative Assembly in 1990. The bill was sponsored by former Yellowknife Centre MLA Brian Lewis, who modelled his bill after a similar statute in the state of Michigan. I wish to recognize his important contribution to the public interest. The preamble to the original act sets out the special relationship we have with the land and establishes the right to a healthy environment, including ways to protect it as set out in the legislation. A process is set up for the public to request investigations by the Minister into the release of contaminants into the environment. The public automatically has standing for environmental prosecutions and civil suits to stop the release of contaminants into the natural environment. Whistleblower protections are also established under the act. The Minister is required to table an annual report in the House.

Two Yellowknife citizens, my friend Chris O'Brien and myself, requested the first investigation under this act on April 22, 1991. We asked the then-Minister of Renewable Resources to investigate the stack emissions from Giant Mine and impacts on the environment and human health. The initial response from the territorial government was to ask for more evidence of arsenic emissions, so we sent back a report generated by the government itself.

More than two years after the request for an investigation, a report was released in July 1993 confirming that trees were being damaged by sulphur dioxide around the Giant Mine. A human health assessment was conducted by the federal Department of Health and Welfare that concluded that there was no imminent health hazard from the sulphur dioxide but that arsenic is a known human carcinogen, and exposure to arsenic levels should be reduced to the lowest possible level. Unfortunately, government moves very slowly, and nothing was accomplished on controlling sulphur dioxide and arsenic air emissions before Giant Mine eventually closed in 1999.

I am sure, Mr. Speaker, we can all agree that we can fix this and do much better. That is what I hope for in this new bill, but I can assure everyone that there has not been avalanche of investigation requests.

For the current bill, the scope of the "Have Your Say" consultation was limited to the following general objectives:

- Extend the right to protect the environment;

- Reflect numerous well-accepted developments in land claims and Aboriginal and treaty rights, environmental law, human rights and international law;
- Ensure consistency with provisions and approaches in other NWT legislation;
- Clearly acknowledge what is meant by the right to a healthy environment; and
- Clearly acknowledge and emphasize the obligation of the GNWT to act in accordance with the public trust.

Mr. Speaker, this was an ambitious set of key components for the bill. Unfortunately, we have no idea what anyone said during ENR's consultation process because the Minister refused to share any of this information with committee, and there was no "What We Heard" report produced from the very limited final consultation.

What is in the new version of the Environmental Rights Act, which repeals and replaces the old statute? On the whole, it is very similar, perhaps too similar. Investigations can be done, prosecutions and civil court action can be commenced, whistleblower protection is still there, and there are two new features. A vague statement of environmental values is to be prepared, and some new reporting requirements are added.

The preamble is strengthened but, as we will see, there are very few ways in which environmental rights are clearly defined or made enforceable. For example, the right to healthy environment is not clearly defined, and there are no actual ways to force compliance or provide remedies. In the current version of the legislation, paramountcy is established over all other legislation, but that is removed in this bill.

Investigations under the current legislation can be requested by any two adults who are of the opinion that a contaminant has been, is being, or will be released. Under the new bill, investigations can be requested by one person, an adult resident in the NWT, but only on reasonable grounds that an act or an omission has caused or is likely to cause "significant" harm to the environment. No definition is provided for the word "significant".

Clearly the bill establishes a higher and much more difficult standard for investigations to be considered legitimate. Sworn statements are required, with names and addresses required of anyone who might be able to give evidence. We can expect these higher and more costly requirements to reduce access to investigations and create a barrier to enforcing this sort of environmental right. Likewise, the Minister will have the broad discretion to conduct or discontinue an investigation if the alleged action or omission is not likely to cause significant harm to the environment. Some appeal mechanisms should be built into the bill, in my opinion. In the bill, the right to begin a civil action against any person for an act or omission also requires proof of the significant harm to the environment.

Whistleblower protection is expanded to include employees who comply with or seek to enforce any legislation, regulation, or authorization, or who provide information for an investigation review or hearing, or who refuse to carry out an order or direction that would contravene legislation, regulation, or authorization. These are good things, but the only remedy seems to be a prosecution with fines increased from a maximum of

\$5,000 to \$250,000 and imprisonment from up to 90 days to up to one year in the new bill.

Under the bill, Cabinet shall prepare a statement of environmental values, including the right to a healthy environment and explain how those values will be integrated into decisions made by a department or a number of public bodies, including Aurora College, the Business Development and Investment Corporation, the NWT Housing Corporation, and the NWT Power Corporation. Ministers or the head of the additional listed bodies are to take every reasonable step to ensure that the environmental values are "considered" whenever decisions are made that might significantly affect the environment. There is that test again. No reporting on implementation of the statement of environmental values is required, and there does not appear to be any consequences for non-compliance.

A new requirement is created in the bill for State-of-the-Environment reporting within three years of coming into force or four years after the first report. The State-of-the-Environment report seems to look a lot like the cumulative impact monitoring report under the Mackenzie Valley Resources Management Act. While there is to be a period of public notice for this new report under the bill, the Minister is also required to prepare a written response to any public comments within 90 days. This looks interesting, but I am not sure that this really will amount to much in terms of environmental rights or changes.

That is all that there is in this bill, Mr. Speaker: some minor changes to what is currently in place. The higher standards for many of the elicited environmental rights appear to restrict access to the ability to exercise those rights that are set out. The only areas of improvement appear to be a longer preamble, including some additional whistleblower protection coverage, the unenforceable statement of environmental values, and state-of-the-environment reporting. No other means to enforce the vague rights alluded to in the preamble are found in the bill.

What is not in the bill is any kind of novel or even radical means of setting out environmental rights and means to exercise them. The federal Auditor General Act creates a requirement for sustainable development strategies for each federal department and agency. Those strategies are to be monitored and reported on. There is also a petition process established, whereby a resident of Canada can raise any matter related to sustainable development, and the Minister or head of the relevant departments or agencies are compelled to respond publicly.

Some other ideas that the bill could have considered include:

- The ability for the public to propose new policy;
- Non-court-based dispute resolution;
- Independent investigations of environmental complaints;
- Creation of government obligations to protect the environment;

- Specific procedural rights, such as public notice of changes to policy, regulation, and legislation, with opportunities for comment; and
- Restrictions on or even prohibitions against strategic lawsuits against public participation.

Lastly, many countries have begun to create constitutional environmental rights or even recognize the rights of nature as enforceable. It is not clear whether ENR seriously considered any of these approaches.

This bill needs a lot of work to improve access to environmental rights, and I look forward to working with my colleagues on the Standing Committee on Economic Development and Environment to hear what Indigenous governments, non-governmental organizations, industry, and the public have to say. Mahsi, Mr. Speaker.