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

BILL 46: PUBLIC LAND ACT
March 12, 2019

MR. O'REILLY: Merci, Monsieur le President. I was sort of afraid this was going to happen. I will speak to the process that resulted in the bill. I will also provide some comments on it and concerns with what is there and what is missing.

This is a much-needed bill to bring together two separate land management regimes that were created by the GNWT for small pockets around communities and by the federal government for the vast areas outside communities. The latter system was mirrored in GNWT legislation at devolution and most of the federal lands staff from former Aboriginal Affairs and Northern Development Canada were simply shifted over the GNWT and the newly created Department of Lands.

The Department of Lands led the effort to develop revisions to the two land laws; the Commissioner's Land Act and the Northwest Territories Lands Act. The Commissioner's Land Act was originally based on the federal Territorial Lands Act, which dates back to the 1950s. Over the years, the Commissioner's Land Act evolved to enable the GNWT to respond to the NWT's needs, primarily in the areas of communities and recreational land use. The Commissioner's Land Act governs the disposition of surface rights and land use within and around most communities, as well as the land used for public airports and highways.

The Northwest Territories Lands Act evolved to respond to different needs, primarily for land uses related to larger scale commercial activities and natural resource development. The Northwest Territories Lands Act primarily governs the disposition of surface rights outside communities, as well as dispositions of subsurface rights throughout the NWT including subsurface rights that are underlying Commissioner's land.

There are two separate land administration units within the Department of Lands. When I checked the website yesterday, there are eight staff in what is known as the Commissioner's Land Administration and 12 in the Territorial Land Administration. Some of the jobs even have the same titles.

A public engagement discussion paper was released on June 1, 2017, to address one or more of the following goals:

- Align provisions in the two land laws;
- Enhance consistency in their application;
- Improve clarity relating to legislative authority;
- Modernize legislation by removing or updating out-dated provisions or terminology;
- Minimize operational challenges in land administration;

- Ensure legislation reflects current risks, practices, and standards; and
- Provide clarity and transparency to land users.

The discussion paper noted: "Addressing administrative and technical issues in legislation now will help to improve land administration practices in the short term. Meanwhile, broader discussions that include further policy and legislative analysis about the future of a more integrated and modern land management regime for the Northwest Territories can continue."

Eight specific areas were proposed for amendments to begin to bring together the two land administration systems as follows:

- Application of the two acts;
- Authority to transfer and reserve land for government use;
- Limits to authority to dispose of land;
- Financial assurances and securities;
- Granular resources;
- Enforcement, offences, and punishments; and
- Miscellaneous options for harmonization, modernization, and/or clarification.

Bringing together the lands administration and laws was not part of the discussion paper and not part of the legislative proposal that committee received.

A "what we heard" report was released on October 17, 2017. Lands described the public participation in the engagement process as good. Substantial input was gathered through open houses, meetings with Indigenous governments and organizations and other interested parties, online submissions, and correspondence. The government said that, overall, participants indicated support for the initiative to review and improve the two land acts.

The actual submissions are not found on the Lands website. It is not clear what, if any, consultations were had with Indigenous government organizations as required under several land rights agreements, the devolution agreement, and under constitutional common law. The process that Department of Lands used is a complete mystery.

It has been radio silence from Lands since the fall of 2017 until this bill arrived yesterday. The Minister and his department has shared nothing with the Standing Committee on Economic Development and Environment on the development of this bill. It is not clear how we went from a set of targeted changes to the two lands laws to the complete repeal and replace approach in this bill. There is no evidence of any co-drafting with Indigenous governments. Astonishing as that sounds, the government has again completely bypassed committee. Somebody has some explaining to do. That is not to say this is a bad idea, but clearly, consensus government demands more

transparency and the courtesy of informing regular MLAs of what is going on, more lessons that can learned from our post-devolution experience.

Lands has not produced any plain-language materials for this bill. This needs to happen very quickly as the public needs help to participate democratically in the review of Bill 46.

I will now turn to the principles and merit of the Bill.

Many have called for the integration of our two separate land administration systems, and this bill will do that. However, it does little if anything towards developing an open and transparent system that would be based on best practices or lessons learned from other jurisdictions. It is a straightforward, "business as usual" approach that actually takes some steps backwards as I will show.

Virtually all of the other resource management bills we have seen in this sitting contain an extensive preamble with broad commitments and principles that relate to sustainability, balancing rights and interests, intergenerational equity, and similar aspirations. There is nothing of the sort in this bill. This is a surprising omission, given the much-lauded Land Use and Sustainability Framework, which is in search of a means for implementation. This bill could have helped serve that purpose. There is no recognition of the polluter pays principle, and I will have more to say about the financial security provisions of the bill. There is no overall purpose section or statement in the bill. For example, the purpose of the bill should be to provide for the orderly stewardship and development of lands to benefit current and future generations. As a land use planner by profession, I find this absence of purpose rather disturbing.

I recognize that this bill is dealing with lands that are owned and managed by GNWT, but there is no recognition of Indigenous governments or co-management anywhere except for the standard non-derogation clause and the ability to withdraw lands for the purpose of completing land rights agreements. In the less than 24 hours I have had to review the bill, I could not find any provisions for the Minister to enter into agreements for collaborative or coordinated land management with other governments or bodies. This is one of the stated purposes of the Intergovernmental Council, but that body is not mentioned in the bill, either. It is like a template was lifted off a shelf somewhere and tweaked for our circumstances, but not terribly well.

There is no provision in the bill for a public registry to track land transactions and allow for transparency and accountability in terms of land management. While the Protected Areas Bill makes much of its public registry, there is nothing similar here. There is no requirement for public notice of land leases or land dispositions to anyone, including Indigenous governments, community governments, or the public. This could possibly be done through regulations. How about an annual report from the Minister on land administration in the spirit of open government? That is not contained in the bill, either.

One of the most serious issues in this bill is the failure to incorporate the polluter pays principle. Financial security related to temporary or other land uses is at the total discretion of the Minister. The Minister "may" require security as determined with regulations. Not only does this not help achieve the mandate commitment to prevent

public liabilities, it is actually a step backwards. The Commissioner's Land Act now contains a clause that financial security is mandatory for commercial and industrial land users. This hard-fought amendment came into effect on April 1, 2014, as a result of a public review of amendments to the Commissioner's Lands Act that I participated in as a private citizen. Regular MLAs of the day worked with the Minister and made that change. The GNWT had taken a $23-million hit because of its failure to ask for any financial security in the surface lease covering the Giant Mine.

This is just one example of many financial perils that could threaten public finances if security provisions are lacking in this bill. Why would we give the Minister the authority to repeat that mistake and not make financial security mandatory? Why would we want to roll back the clock and give the Minister the discretion to ignore the polluter pays principle? Lastly on this subject, it's not clear to me how the lessons learned or the principles from the recent Redwater case at the Supreme Court of Canada have been incorporated into this bill. That's something I had expected that the Minister would review very carefully.

Another very serious issue with this bill is the tremendous regulation-making authority for Cabinet and the Minister. That's the pattern we have seen with almost all the post-devolution resource management and environmental legislation. Is this to centralize power in the Executive, a reflection of the hurried drafting, or lack of creativity in creating proper checks and balances? I just don't know. It's not clear how or why the authority over regulations was split in this bill between Cabinet and the Minister, but there is a detailed list of subject matters for regulations that covers four of the 33 pages. I don't think I've ever seen a longer list, Mr. Speaker, in legislation. This is reminiscent of the empty Mineral Resources Act, where virtually all the detail and authority is hived off into regulations that will take years to develop, possibly behind closed doors. If the objective with this bill is to establish a clear, consistent, and accountable land management system, leaving that much discretion and detail in the hands of Cabinet and the Minister is a bad idea.

I am of the view that this bill needs a lot of work to bring it around or to reflect our reality of living in a partnership of public and Indigenous governments, to build in public purpose, accountability and transparency. We can and must do better in terms of land management.

I will look forward to working with my colleagues on the Standing Committee on Economic Development and Environment, if we can fit all of this work in, now, to hear what Indigenous governments, non-governmental organizations, industry, and the public have to say about improving this very important piece of legislation. Mahsi, Mr. Speaker.