PUDLO PUDLAT, *UNTITLED*, 1976/1977, COLOURED PENCIL, FELT PEN, & TEMPERA WASH, 57.2 × 76.2 cm (CAPE DORSET)

POLICY

HANDS OFF

Is "smart regulation" dumb for Canada's wilderness areas?

by Paul Webster *and* John Cathro

It started like a nasty marital spat flaring up in a crowded hotel lobby. It turned into a long series of angrier spats heard around the world. The antagonists were loggers and environmentalists, quarrelling over an Ireland-sized chunk of British Columbia labelled the Great Bear Rainforest. The loggers fumed about extremism and job protection. The environmentalists chained themselves to trees and wept for Mother Earth. The decade-long shoving match made headlines from Washington to Tokyo and was the source of countless news stories here in Canada.

There was a lot at stake. Covering some 6.5 million hectares, the Great Bear is the world's largest intact temperate coastal rainforest. The region includes the sensitive Haida Gwaii or Queen Charlotte Islands—home to the Haida First Nation—where protests in the 1980s launched a coastal conservation campaign. The area hosts extraordinarily rich biodiversity, including grizzlies and the famed white kermode or spirit bear, wolves, cougars, millions of migratory birds, and roughly 20 percent of the world's wild salmon.

After years of pitched battles between environmentalists and logging companies, a fragile, tentative truce was reached with the signing of a major conservation agreement early in 2006. The environmentalists won protection for many majestic valleys. The logging companies got an end to hostilities and better business stability. The First Nations got more say in how resources in their traditional territories are managed and used. And the BC and federal governments? They get to claim the relative peace as their own victory. But is it?

The fight over the Great Bear was a classic battle. Yet adroit government leadership, either federal or provincial, was strangely absent from the debate. Instead, throughout the years of protest, anger, and negotiation, government officials in Ottawa and Victoria acted like hesitant hotel managers with disruptive guests: they tried to hush the fuss without drawing too much attention to themselves.

In moving to the sidelines during wilderness-conservation battles such as Great Bear, Canadian governments aren't alone. In the US, Australia, and elsewhere, the centralized, interventionist models for environmental regulation crafted in the 1960s and 1970s have been fracturing along quietly deliberate lines for at least a decade, as senior bureaucrats engineered a powerful new consensus that has attracted almost no public attention. Much of the thinking behind this regulatory shift stems from "smart regulation," a concept exhaustively described in a 520-page treatise published in 1998. In *Smart Regulation: Designing Environmental Policy*, Neil Gunningham, an environmental law professor at the Australian National University, and Peter Grabosky, a criminologist at the same university, persuasively urged policy-makers to employ a "more imaginative, flexible and pluralistic approach to environmental regulation." Smart regulation, Gunningham and Grabosky wrote, will ensure that policies are "acceptable to business" by making governments do their "governing at a distance." Indeed, the approach will "remove, as far as possible, the target of special group influence (i.e., government) from the regulatory process."

First embraced by the Chrétien Liberals, and officially adopted by Paul Martin in 2005, smart regulation encourages interested groups—conservationists, corporations, and representatives of indigenous populations—to do the hard bargaining in the absence of parties with executive legal power and to then submit their resolutions to politicians. As prime minister, Martin established a smart regulation unit in the Privy Council Office. In 2004, the federal government's External Advisory Committee on Smart Regulation—composed mostly of corpor-

ate executives such as Rita Burak, chair of Ontario's Hydro One, and Richard Drouin, the former chair of Abitibi-Consolidated—recommended that government recast its regulatory system with advice from "SWAT teams" of industry advisers to try to ease regulatory bottlenecks, most notably those that hold up the exploitation of resources in Canada's Arctic wilderness areas.

Smart regulation is being refined by the Harper Conservatives as a key instrument in their drive to open up Arctic Canada for oil and gas companies. "Advantage Canada," the federal Conservatives' 2006 vision statement on economic competitiveness, promised to "finalize a new modern approach to smart regulation," and the 2007 budget earmarked $60 million to "cut in half the average regulatory review period for large natural resource projects from four years to about two years." Meanwhile, a scant $10 million was awarded for northern wilderness protection. Critics, including the Canadian Environmental Law Association, suggest that this amounts to deregulation and that a silent bureaucratic revolution is destined to put corporate ambitions ahead of environmental protection.

Margot Priest, a legal consultant who helped introduce smart regulation themes to Ottawa policy circles in the 1980s and 1990s, says its purpose "is to design government programs in ways that make compliance more likely" while maintaining strict enforcement procedures. The Canadian Environmental Protection Act (CEPA), a law redrafted in 1999 to serve as the federal government's environmental charter, stands as a shining example of applied smart regulation principles built on promises of strict enforcement. But Priest says CEPA has been weakly enforced, and she should know: as the chief review officer hearing appeals of Environmental Protection Compliance Orders issued under CEPA, she laments, "I do nothing." In the years since CEPA was proclaimed, she says, enforcement officials have rarely prosecuted violators.

David Boyd, author of *Unnatural Law: Rethinking Canadian Law and Policy*, a 2003 scholarly critique of Canadian environmental laws, says that smart regulation offers politicians the means to turn environmental laws into dead letters. Boyd served as the sustainability adviser in Paul Martin's Privy Council Office and suggests that weak enforcement of the CEPA is just part of the problem. "What people in Ottawa call smart regulation is really a bastardization of the concept as it was originally intended," Boyd says.

Seen from a distance, smart regulation falls within the category of "voluntary solutions," an approach that sounds good on paper but that is unlikely to consistently resolve disputes between environmentalists and First Nations groups, whose land title may or may not be secure and whose economic needs often make them susceptible to inducements from extracting corporations. In short, many believe that the application of smart regulation strategies will lead to compromises in which the ultimate loser will be the environment.

Despite such worries, the Great Bear deal in January 2006 seemed to powerfully endorse smart regulation. The agreement was reached by letting the loggers, environmentalists, and First Nations hammer out their differences among themselves. That same month, BC Liberal premier Gordon Campbell committed to a wilderness protection program designed to safeguard more than 100 distinct areas on the central and north coast of the province. Economic activity outside these protected areas in the Great Bear will be planned using an "ecosystem-based management" approach to be adopted by March 2009. Dallas Smith, a native leader instrumental in the Great Bear negotiations, has said this will help "preserve our cultural values while maintaining the balance between the ecological and economic values that is necessary for healthy communities."

Along with the nearly two million protected hectares in the Great Bear came an unprecedented, privately financed economic development fund. The Conservation Investments and Incentives Initiative (CIII) is supported by $60 million of private and foundation capital to be used by more than twenty coastal First Nations communities for conservation management. The BC government contributed an additional $30 million, giving Premier Campbell a seat on stage alongside industry, conservation, and First Nations leaders for the celebratory announcement. Nearly a full year later, in January 2007, the Harper government chimed in with $30 million. Dallas Smith recognizes the significance of the private financial contribution in highlighting the diminished and delayed role played by governments: "It was only a matter of time," he says, "before they got around to privatizing the environment." Merran Smith of Forest Ethics said that the lack of government leadership on the Great Bear dispute amounted to a "revolution" against Canadian wilderness protection.

Today, even with all the money and fanfare, fears remain that the Great Bear deal will not hold. Ian McAllister, former head of the Raincoast Conservation Foundation, says forest companies are now ripping through old growth forests with renewed violence in order to strip them before upcoming deadlines to end the most aggressive clearcutting practices. Timber cutting in the region has increased over 20 percent since 2003 and is above the ten-year average, even though 30 percent of the land base has been protected from harvesting. "I have not seen anything like the amount of helicopters, logging crews, and log barges on the central and north coast in many years," says McAllister. His principal complaint is that the deal is based on politics rather than science. The Vancouver-based David Suzuki Foundation argues that the Great Bear agreement represents "a critical step," but insists on the need for the politically accountable commitments only governments can make. The Great Bear, it seems, might have to be saved all over again. Not a healthy portent for the fate of the Canadian Arctic.

The Nunavut government is projecting revenues of ***$1.05 billion*** *for 2007–08, of which* ***$966 million****, or* ***95%****, will come from the federal government.*

For decades, both Liberal and Conservative governments have been eager to see the Mackenzie River region open to development, and for the natural gas lodged there and out in the Beaufort Sea to be shipped by pipelines to markets in the south. In 1977, the Liberals hoped that the Mackenzie Valley Pipeline Inquiry would pave the way, and that its vision of Canada as a northern nation would be realized. Instead, after careful study, BC Supreme Court justice Thomas Berger recommended a ten-year moratorium on Mackenzie development, effectively squashing the dream.

*In 2003, mining companies spent **$92.7 million** on mineral exploration and deposit appraisal in Nunavut. In 2007, they expect to spend **$225.2 million**.*

Berger's ruling was understandable. Today, a full environmental assessment is needed—that is, one that properly considers the impact of over 600 natural gas well sites, massive gas derricks and flare stacks, roughly 60,000 kilometres of seismic lines, and nearly 4,000 kilometres of feeder pipelines leading into the big Mackenzie and Alaska pipelines. Such an assessment would reveal a development that would transform the region into something akin to south Texas at its oil heyday. And yet, then minister of Indian and northern affairs Jim Prentice, in a 2006 speech to the Canadian Energy Pipeline Association said, "Stars have certainly aligned to make the long-held dream of both the Mackenzie Valley Pipeline and the Alaska Pipeline very real." Says David Boyd about this last frontier: "The federal Liberals were obsessed with making Mackenzie happen. The Conservatives appear to be as well."

Despite industry consultants' reports that the Mackenzie pipeline will spawn sixty new gas fields within the first two years of operation, the legally required federal environmental assessment currently underway is limited to just three "anchor fields" and the pipeline itself. Stephen Hazell, the executive director of the Sierra Club of Canada, describes the federal decision to largely ignore the cumulative impact of multiple fields as "a fundamental error." He warns: "It is not just a pipeline. It represents the industrialization of the Arctic. They know that there is going to be an explosion of gas fields."

Hazell notes that the federal government is pouring money into the Mackenzie project, with $300 million earmarked for regulatory streamlining and $200 million for community outreach. Generous industry loans and royalty deals are under discussion. Meanwhile, federal and territorial officials are issuing resource permits that award energy companies legal access to wilderness areas before an overall conservation plan is in place. For the oil industry, which was estimated to have paid less than 6 percent in royalty taxes on $2.7 billion worth of resources extracted from the Northwest Territories in 2004, the Arctic promises much larger profits. In return for an investment of $16.2 billion, Shell, ExxonMobil (and its subsidiary Imperial Oil), and ConocoPhillips will lay principal claim to at least $40 billion worth of gas, says the Pembina Institute. Environmental groups have been accorded a scant $2.3 million to hire land-use experts and attend hearings across the north, where travel is astronomically expensive.

A thorough study of the cumulative impacts of the Mackenzie development proposals has been conducted by the Canadian Arctic Resources Committee, a Yellowknife- and Ottawa-based environmental group. Graphic illustrations in their report show the blank expanses of Canada's northern wilderness transformed into industrial zones veined with pipelines, roads, airstrips, and gas fields. Petr Cizek, the land-use planner who conducted the study, argues that the federal government's environmental assessment "couldn't more blatantly ignore the cumulative impact." After more than a decade serving as a land-use consultant to the Dehcho First Nation—on whose ancestral territory much of the industrialization is planned—Cizek says that environmentalists have become beholden to native leaders who increasingly view industrialization as a highly lucrative inevitability. Of the three First Nations and one Inuvialuit group who would be deeply affected by developing Mackenzie, only the Dehcho have called for ambitious wilderness conservation guarantees. In early 2007, Jim Prentice notified the Dehcho that their land-use plan was unacceptable.

"The tragedy," says Cizek, "is that, thanks to the federal abdication of responsibility along with the timidity of the environmental groups, conservation won't be achieved, or even properly asked for." He is concerned that the Arctic could turn into what he characterizes as a Great Bear-style arrangement where environmentalists beholden to First Nations leaders allow conservation goals to be winnowed down under industry pressure.

Cizek is particularly critical of the Canadian Boreal Initiative, which has united ForestEthics, World Wildlife Fund Canada, and the Canadian Parks and Wilderness Society with native bands and oil and forestry corporations to lobby for conservation targets while refraining from overall opposition to the Mackenzie project. They are asking for at least half of Canada's boreal forests to be protected. As of late spring, Ottawa had committed to protecting at most 20 percent. Among Canada's major environmental groups, only the Sierra Club has taken a clear stand against the Mackenzie developments.

As with the Great Bear controversy, the need for interventionist government leadership—and the politically accountable commitments only governments can make—seems increasingly necessary in the Arctic. But governments determined to promote northern industrialization are sticking with smart regulation strategies—and leaving wilderness initiatives in the hands of activist groups, First Nations, and resource companies, in the belief that this approach will expedite development. The debate over Canada's last great wilderness area warrants the proper federal public hearing required under federal law, even if this does not square with smart regulation principles. Conservation must not be left to matters of chance or political and economic opportunism.*