NWT & NUNAVUT CHAMBER OF MINES

BRIEF

OF THE NORTHWEST TERRITORIES &
NUNAVUT CHAMBER OF MINES

TO THE

STANDING COMMITTEE ON ABORIGINAL
AFFAIRS AND NORTHERN DEVELOPMENT
OF THE HOUSE OF COMMONS

IN RELATION TO BILL C-15, THE NORTHWEST TERRITORIES DEVOLUTION ACT

Yellowknife, NT

January 27, 2014

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1. Introduction and Background

The Northwest Territories & Nunavut Chamber of Mines (Chamber of Mines) welcomes the opportunity to appear before the Standing Committee on Aboriginal Affairs and Northern Development of the House of Commons in response to Bill C-15, the proposed *Northwest Territories Devolution Act,* at the hearing to be held in Yellowknife on Monday, January 27. We appreciate having been allowed the opportunity to summarize, at that time, the comments, recommendations and concerns of the exploration and mining community in the Northwest Territories on the proposed legislation, and to expand on our testimony through the submission of this brief.

Bill C-15 is unquestionably a pivotal development in the legal, social and political evolution of the NWT through the devolution of extensive powers to the Government of the Northwest Territories over lands, waters and resources. However, the proposed legislation is likewise critically important for the changes that it will bring, or in some cases not bring, to the regulatory regime that governs mineral exploration and mine development, and other industrial initiatives, in the NWT. The amendments in question are those that the draft legislation proposes to make to the *Mackenzie Valley Resource Management Act* (MVRMA), the *Northwest Territories Waters Act* and the *Territorial Lands Act.*

The Chamber of Mines fully recognizes the importance of the devolution elements of the bill. Nonetheless, we have focussed our resources on the aspects of the draft legislation that we believe are of the greatest importance to the Chamber's members and to the future of the minerals industry in the NWT, namely the proposed amendments to the MVRMA.

2. Why Mining Matters to the NWT – Now and in the Future

For more than 80 years, the exploration and mining sector has played a pre-eminent role in the NWT by expanding its economy, promoting the development of significant infrastructure and providing a sound basis for the establishment and growth of its communities. Exploration and mining continue to the present day to provide extensive employment, training and business opportunities for northern residents, and confer significant additional economic benefits beyond the NWT on the other two territories and the provinces. In simple terms, without exploration and mining, the economy of NWT as we know it would simply not exist, given that exploration and mining is the largest single private sector contributor to the territorial economy.

The discovery of diamonds in the early 1990`s ushered in a new era of economic activity and prosperity for the NWT. The intervening years have seen unparalleled opportunities for training, employment and other benefits accruing to Aboriginal and other northern residents, an unequalled level of growth and participation for Aboriginal-owned businesses, and the provision of significant benefits for other Canadians. However, unless there is further investment to sustain these opportunities through continued responsible development of the NWT's mineral resources, the resulting benefits will not be sustainable.

This irrefutable fact emphasizes the critical need to ensure an attractive and certain investment climate that supports vigorous and responsible exploration for, and development, of the NWT's

significant mineral endowment, while protecting the environment, respecting the traditions of NWT residents and ensuring that northerners continue to enjoy the significant benefits that the minerals sector is uniquely capable of providing.

3. The NWT Mineral Development Strategy and Its Role After Devolution

With these objectives in mind, the Government of NWT, in partnership with the Chamber of Mines, completed the first-ever comprehensive *NWT Mineral Development Strategy*[1] that the GNWT formally announced on November 21, 2013. The strategy focuses on five key areas:

- creating a competitive edge;
- establishing a new regulatory environment for the NWT;
- enhancing Aboriginal engagement and capacity;
- promoting sustainability; and
- enriching workforce development and public awareness.

The exploration and mining sector enthusiastically supports these objectives. While striving for their fulfillment now, the minerals industry is particularly hopeful that the devolution of responsibility for lands, waters and resources to the Government of the NWT will make it all the more possible to achieve the goals of the strategy on a timely basis. Against that backdrop, the industry supports devolution, and welcomes the opportunities that devolution is expected to provide for the exploration and mining community to continue to contribute to the long-term economic and social development of the NWT.

With these considerations in mind, the Chamber of Mines has no comments or recommendations to offer at this time in relation to the provisions of Bill C-15 that give effect to the *Northwest Territories Lands and Resources Devolution Agreement*[2].

4. The Mineral Potential of the NWT – An Unfulfilled Promise

It has long been recognized that the NWT enjoys considerable mineral development potential, taking into account its extensive land mass, favourable geology and relatively limited extent of mineral exploration activity. At the same time, the NWT's remoteness, harsh climate and comparatively high cost of doing business present significant challenges.

Although these challenges are far from inconsequential, a diligent mineral explorer can nonetheless overcome them by adequate preparation, prudent use of available resources and ingenuity. However, given that these obstacles to exploration have been present throughout the 80-year history of such activities in the NWT, they do not explain, in and of themselves, the significant and accelerating decline in exploration spending that the NWT now has witnessed, particularly over the past decade.

[1] Available at http://www.iti.gov.nt.ca/sites/default/files/iti_mineral_development_strategy_2013_2014_wr.pdf
[2] Available at http://devolution.gov.nt.ca/wp-content/uploads/2013/09/Final-Devolution-Agreement.pdf

The *NWT Mineral Development Strategy* speaks forcefully to this issue and offers important insight:

> "…despite its excellent mineral potential, the NWT currently lags behind other Canadian jurisdictions in exploration investment. While the NWT landmass constitutes 13.5 per cent of Canada, the territory's total exploration expenditures have declined over the past five years to less than three per cent of the Canadian total.
>
> The contrast with Nunavut and Yukon is striking: Nunavut has attracted approximately four times as much exploration investment as the NWT and Yukon about twice as much. Furthermore, current NWT expenditures are largely for advanced exploration projects and deposit appraisal, with very few grassroots projects underway. This drop in grassroots exploration activity has provided a serious warning about the investment climate for exploration in the NWT…"[3].

The startling decline in exploration activity in the NWT has therefore been a recurrent theme in the submissions that the Chamber of Mines, the Prospectors & Developers Association of Canada (PDAC) and The Mining Association of Canada (MAC) have made in relation to reforming the regulatory regime that governs mineral exploration and mining activity in the NWT, especially over the past five years.

5. The Critical Need to Settle Land Claims and Undertake Regulatory Reform

While exploration spending in the NWT has continued to fall, Nunavut and Yukon have attracted substantial exploration investment over the same period of time. The resolution of Aboriginal land claims in Yukon and Nunavut has unquestionably played an important role in demonstrating the certainty and predictability that are essential to fostering a sufficient degree of confidence to justify the high-risk investments that mineral exploration programs require.

The exploration and mining sector has therefore consistently urged the federal and territorial governments to strive towards settling the outstanding claims in the NWT. We have placed particular emphasis on the fact that the unsettled land claim regions are known to offer some of the most promising mineral development potential.

Concurrently, the minerals industry has repeatedly urged the federal government to address a key factor widely acknowledged to have a significant deterrent effect on investment interest in the NWT, namely the regulatory regime that governs land access, mineral exploration and mine development. While a variety of statutes, regulations, rules and policies make up the regulatory mosaic, the MVRMA is by far the most important. As long as this regime is seen as burdensome, excessively lengthy, unduly expensive and unpredictable, the investment climate for mineral exploration in the NWT is unlikely to improve.

The industry has therefore lent its whole-hearted support to the initiatives of the federal government in this regard, starting with the *Northern Regulatory Improvement Initiative* led by

[3] Note 1, at page 11.

Mr. Neil McCrank, the Minister's Special Representative, in 2008[4]. The joint submission that the Chamber of Mines, the PDAC and MAC filed with Mr. McCrank set out a total of 18 specific recommendations, of which 10 pertained specifically to the MVRMA[5].

Our three industry associations subsequently participated in a two-day workshop held in Yellowknife in October 2011 in relation to the amendment of the MVRMA. On our own initiative, we subsequently filed a detailed brief with the Minister of Aboriginal Affairs and Northern Development in May 2012 that included specific proposed amendments to the statute. This document was preceded by a meeting in March of that year with the Minister of Aboriginal Affairs and Northern Development at the annual PDAC convention in Toronto.

More recently, our three industry associations jointly provided detailed comments and recommendations in response to the two consultation drafts of the proposed MVRMA amendments that were made available for our confidential review in May and August of 2013. Following those submissions, we discussed our views on the proposed amendments during a day-long workshop held in Ottawa with officials of Aboriginal Affairs and Northern Development Canada (AANDC) in late October.

In light of this history, the Chamber of Mines wishes to commend the federal government for advancing the regulatory regime agenda through the amendments to the MVRMA that have now been incorporated in Bill C-15. We are gratified to see that a number of these amendments are responsive to proposals and recommendations that were put forward in our past industry submissions.

At the same time, however, we maintain that further work is required to modify the MVRMA and the regulatory regime that it creates in order to establish an investment climate that, consistent with the *NWT Mineral Development Strategy*, will enable the NWT to enjoy its full potential for mineral exploration and mine development.

6. Positive Amendments to the MVRMA in Bill C-15

6.1 Timelines and Timeframes

The definitive timelines proposed in Bill C-15 for the environmental assessment and environmental impact review processes under the MVRMA are viewed as a meaningful step forward, even though we have recommended to Aboriginal Affairs and Northern Development Canada (AANDC) that the approximately 24-month period allocated for the completion of an environmental assessment could be made briefer.

Despite this reservation, we welcome the inclusion of timelines in the legislation. Nonetheless, we had hoped that the new timelines, when taken together, would give effect to what we understand to be the global objective of the federal government, namely

[4] *Road to Improvement, available at* http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/road_improvement-e/ri08-eng.pdf

[5] The joint industry association submission is available at http://www.miningnorth.com/_rsc/site-content/library/NRII%20(Table%20of%20Contents,%20Body,%20Appendices%20A%20to%20C).pdf

that environmental assessments in northern Canada should be capable of being completed, on a beginning to end basis, within 12 to 24 months.

Unfortunately, the proposed amendments fail to meet this standard in cases where a project is made subject to both an environmental assessment and a subsequent environmental impact review, the latter being the most intense level of examination for a development proposal under the MVRMA. In these circumstances, the timelines proposed in Bill C-15 could allow more than four years in order to reach the final and conclusive completion of the environmental impact review.

We acknowledge that the proposed amendments include a provision whereby assessment activities conducted during one stage of the process can be considered, and may be relied on, in a subsequent stage of the process. Nonetheless, this provision does not definitively eliminate the spectre of an overall timeframe of more than four years.

We therefore wish to propose an amendment to ensure greater timeliness and efficiency, by authorizing the Mackenzie Valley Environmental Impact Review Board (MVEIRB) the flexibility to advance a development proposal from the environmental assessment stage to an environmental impact review more rapidly. As explained below, we believe that this recommendation is consistent with the way in which the Supreme Court of the NWT has interpreted the MVRMA.

The case that we are referring to is *De Beers Canada Inc. v. Mackenzie Valley Environmental Impact Review Board et al.*.[6] In its judgment, the Supreme Court of the NWT observed that the MVRMA is "...structured in a way that creates potential overlaps between the [environmental assessment] process and the [environmental impact review process]." The court went on to state, in essence, that the MVEIRB was not bound, in all cases, to exhaustively complete an environmental assessment before having the discretion to order that the development in question undergo an environmental impact review.

We respectfully submit that the proposed amendments to the MVRMA should minimize the risk of a four-year timeframe to undertake both an environmental assessment and a subsequent environmental impact review. Taking into account the judicial guidance given in the *De Beers* case, we recommend that the following provision be added to section 128:

> **(1.1) Despite subsection 128(1), where the Review Board forms the opinion, before completing an environmental assessment for a development proposal, that the proposal should undergo an environmental impact review, the Review Board shall be entitled to order such a review, even though the environmental assessment has not yet been completed.**

As noted by the court in *De Beers*, this approach is consistent with the requirement under section 115 that the Part 5 process in the MVRMA should be carried out in a "timely and expeditious manner". As likewise observed by the court, this proposal is also consistent

[6] Available at http://www.justice.gov.nt.ca/dbtw-wpd/textbase/judgments/pdfs/2007nwtsc24.pdf

with interpreting the powers of the MVEIRB in a manner that affords the Board "...the flexibility it needs to carry out its broad and complex mandate."

In conclusion, given the potential overlap between an environmental assessment and an environmental impact review, we submit that the underlying goals of the MVRMA and the federal government's objectives for regulatory reform are better served by removing the requirement to complete a full environmental assessment in cases where the MVEIRB concludes, on the evidence before it, that an environmental impact review will inevitably be required.

We therefore urge the Standing Committee to incorporate our proposed amendment into Bill C-15.

6.2 Consolidation of the Land and Water Boards

The exploration and mining sector is respectful of the concerns of Aboriginal organizations and governments in relation to the proposed restructuring of the land and water boards to create a single entity. At the same time, however, we recognize that the underlying land claims and self-government agreements authorize the federal government to proceed in this fashion.

With the goal of making a constructive contribution to the on-going dialogue that surrounds this proposal, the industry submissions to AANDC made earlier this year have included the following recommendations:

(a) that the amalgamation of the land and water boards into the Mackenzie Valley Land and Water Board be carried out with minimal adverse impact on the positive working relationships that the holders of permits and licences have now established with the existing regional panels;

(b) that steps be taken to ensure that the amalgamated land and water board maintains a strong regional presence; and

(c) that ways be found to ensure that members of the Mackenzie Valley Land and Water Board who are nominated by the Aboriginal organizations and governments are afforded an appropriate opportunity for involvement in reviewing and assessing development proposals that are within their respective settlement areas or likely to affect those areas.

The proposed amendments to the MVRMA appear to reflect these recommendations. They give the Chairperson the discretion to designate three or more members of the Mackenzie Valley Land and Water Board to dispose of an application in respect of a licence, permit or other authorization. More importantly, however, subsection 56(3) provides that, "...if it is reasonable to do so...", the Chairperson may designate the member of the Board appointed from the Sahtu or Gwich'in Settlement Areas to a panel

that is constituted in relation to an application related to lands or waters within their respective areas.

In addition, the proposed amendments authorize the corresponding procedure for designation of additional board members in relation to an application in respect of Wek'eezhii, or in relation to an application that relates to a region of the Mackenzie Valley external to the two settlement areas or Wek'eezhii.

The minerals industry recommended earlier this year that a mechanism of this kind be incorporated in the MVRMA, taking into account that a similar mechanism was included in the recently established *NWT Surface Rights Board Act*[7]. It is therefore gratifying to note that the proposed amendments encompass this concept.

The Chamber of Mines acknowledges that the amalgamation of the land and water boards continues to raise concerns within the broader NWT community. Nonetheless, it is encouraging to note that AANDC has affirmed its intention to develop a careful implementation strategy designed to limit any adverse impact on proponents, to work with Aboriginal organizations to ensure that a strong Aboriginal voice is maintained, to ensure that the expertise developed to date at the regional level will be maintained, and to consider retention of a regional presence for the amalgamated board.

6.3 Mechanism for Amendment of a "Development Certificate"

The requirement for a proponent to secure a "development certificate" following completion of an environmental assessment or an environmental impact review is one of the most recent proposed amendments to the MVRMA. In response, the exploration and mining sector strongly recommended that the draft legislation incorporate a mechanism that would allow for the reconsideration and amendment of the conditions of such a certificate.

The objective is to ensure an appropriate degree of flexibility, consistent with the principles of adaptive management, and to minimize the need for a project to undergo a second all-encompassing assessment where unintended circumstances or unexpected conditions have arisen after the original assessment and the approval of the project.

It is therefore gratifying to see that Bill C-15 incorporates such a mechanism, and that it appears to be generally modelled on the mechanism for the amendment of a "project certificate" under the *Nunavut Planning and Project Assessment Act*.[8] We understand that the final decision to accept or reject the revised conditions in a development certificate will rest with the federal Minister and the responsible ministers in much the same way as is presently the case under section 130 of the MVRMA, the "consult to modify" provision.

[7] *Northwest Territories Surface Rights Board Act*, S.C. 2013, c. 14, s. 11.
[8] *Nunavut Planning and Project Assessment Act*, S.C., c. 14, s. 2

6.4 Expanded Ministerial Powers to Issue Policy Directions

In the joint industry association submission of February 2008 to the *Northern Regulatory Improvement Initiative*[9], the Chamber of Mines, the PDAC and MAC recommended that the MVRMA be amended to authorize the Minister of Aboriginal Affairs and Northern Development to issue "policy directions" to the MVEIRB as well as to the land and water boards. It is therefore gratifying to see that the proposed amendments to the MVRMA provide this power, and also authorize the Minister to issue policy directions to the Gwich'in Land Use Planning Board and the Sahtu Land Use Planning Board.

7. Regulatory Reforms Not Addressed by the MVRMA Amendments

7.1 Unwarranted Referral to Environmental Assessment

Mineral explorers have consistently identified the unwarranted referral of preliminary (or "grass roots") exploration projects to environmental assessment under the MVRMA as the single most significant deterrent to exploration investment in the NWT. To the knowledge of the Chamber of Mines, this practice is unique to the NWT and therefore represents a significant competitive disadvantage in relation to other jurisdictions in Canada, including Nunavut and Yukon.

This view of the current situation is evidently widespread throughout the business community as exemplified by the news release that the NWT Chamber of Commerce issued on December 3, 2013. In that document, the president of the Chamber of Commerce stated that when "...you've got grassroots exploration projects being referred for full-blown environmental assessment....it isn't hard to tell the system needs modernizing".

Unfortunately, the proposed amendments to the MVRMA do nothing to eliminate this over-arching impediment to realizing the mineral exploration potential of the NWT, which is especially prevalent in the areas of unsettled land claims. Stated differently, the proposed amendments fail to establish effective thresholds to counter-act the long-standing trend to refer preliminary exploration projects to environmental assessment, despite the lack of any significant risk of adverse impacts on the natural or social environment that could reasonably be expected from such projects.

Starting with its 2008 submission to Mr. Neil McCrank[10], the exploration and mining sector has repeatedly emphasized to AANDC at every available opportunity the critical need to resolve this situation. Particular emphasis has been placed on implementing clear standards to ensure that "public concern", a principal trigger for referral of a project to environmental assessment, is evaluated on an objective, balanced and consistent basis.

In their May 2012 submission to the former Minister of Aboriginal Affairs and Northern Development, the Chamber of Mines, the PDAC and MAC put forward proposed

[9] Note 5 at page 26.
[10] Note 5 at pages 9-11 and pages 25-26.

amendments to the MVRMA to address the "public concern" issue. As no response was made to these proposals, they were repeated in the submission made in October of this year in response to the consultation draft of the MVRMA amendments that the department provided in August 2013. AANDC has since indicated, more than 18 months after the industry`s proposed amendments were first put forward, that in their view the suggested amendments are not acceptable.

The exploration and mining sector fully respects the underlying land claims agreements, and understands that amendments to the MVRMA must be consistent with those constitutionally protected documents. Nonetheless, we maintain that devoting time, money and resources to the environmental assessment of short-term exploration projects that present little, if any, risk to the natural and social environments does not serve the interests of northerners. Moreover, this practice will continue to act as a singular deterrent to mineral exploration in the NWT, and therefore future mine development, for as long as it goes on.

In our view, it would be preferable to address this issue by incorporating the appropriate amendments in the MVRMA itself, notably by including the requirement for a more rigorous analysis of "public concern" at the preliminary screening stage before a project is referred to environmental assessment on that basis alone.

Nonetheless, if amending the MVRMA is deemed not possible, and amending related regulations, for example, the Exclusion List Regulations or the Preliminary Screening Requirement Regulations could offer an alternative, we would be eager to contribute to the development of the appropriate amendments.

7.2 Proportionality and Balance

In our past industry submissions to AANDC, the exploration and mining sector has recommended that the MVRMA be amended so as to ensure an incremental approach to environmental assessments. We maintain that the scope and intensity of the scrutiny applied to a development proposal should be proportionate to the magnitude, nature and duration of the development and any adverse environmental or socio-economic impacts that the project is reasonably expected to have.

We have also recommended that, similar to a provision incorporated in the recently established *Nunavut Planning and Project Assessment Act*[11], the MVRMA should expressly acknowledge the need to balance environmental and economic priorities, in keeping with the principles of sustainable development.

To address these two issues, the Chamber of Mines wishes to again propose amending section 114 of the MVRMA, which enumerates the purposes of the statute, by modifying paragraph 114(b) and by inserting a new paragraph 114(d), as shown below:

[11] Preamble to the *Nunavut Planning and Project Assessment Act*, S.C. 2013, c. 14, s. 2

> **114.(*b*) to ensure that, before actions are taken in connection with proposed developments, their impacts on the environment are carefully considered, taking into account the nature, duration and intensity of those impacts;**
>
> **114.*(d)* to enable responsible economic development of the natural resources of the Mackenzie Valley for the benefit of its residents and that of other Canadians.**

We therefore urge the Standing Committee to incorporate these changes in Bill C-15.

7.3 Requirements for Aboriginal Consultation and Accommodation

The long-standing lack of clarity and certainty around fulfillment of the duty to consult with Aboriginal peoples and accommodate their Aboriginal and treaty rights, notably the role of the proponent in undertaking the "procedural aspects" of consultation that the Crown is entitled to delegate, has been a long-standing issue of grave concern to the exploration and mining sector[12]. The outcome of consultation-related litigation pertaining to an early-stage exploration initiative has only deepened the concern felt within the exploration and mining community in this regard.

The provision authorizing regulations to address this critical issue that has been included in the proposed amendments to the MVRMA is therefore an encouraging development. We also wish to acknowledge the commitment of AANDC to recognize the industry as an important contributor to the development of these regulations, and the department`s commitment to reach out to industry early in the regulation development process to seek our input and involvement.

While these commitments are encouraging, considerable time may be required before the proposed regulations come into effect, given the complexity inherent in developing regulations that will win broad acceptance with the Aboriginal community and on the part of key stakeholders.

We therefore recommend that, in the interim, consideration be given to utilizing the expanded Ministerial authority to issue policy directions in order to resolve, if only partially, the prevailing degree of uncertainty. Particular attention should be given to clarifying standards for the delegation of "procedural aspects" of consultation to proponents, and to confirming that the obligation to accommodate any Aboriginal interests or treaty rights that the development proposal may potentially infringe remains the responsibility of the Crown.

7.4 Cost Recovery Regulations

The high cost of doing business in the NWT already acts as a deterrent to exploration investment and puts the NWT at a disadvantage when competing for hard-won exploration dollars with lower-cost regions, including those in the provinces. As a result,

[12] Note 5, pages 17-19 and pages 29-30.

the amendments proposed in Bill C-15 to offload the costs of environmental assessment and permitting and licensing processes onto proponents raise concerns on the part of explorers and developers.

The federal government has assured us that the exploration and mining sector will be afforded the opportunity to comment on the proposed regulations commencing with the earliest stages of their development. Nonetheless, these regulations, both before and after they come into effect, are likely to represent yet another negative factor that discourages exploration spending in the NWT.

It is therefore recommended that only costs that are peculiar to the application or development in question will be made recoverable, and that the proposed regulations will not require repayment of expenditures usually incurred by public authorities in the conduct of their normal activities.

We have been advised that provision for cost recovery was included in the amendments in order to make the MVRMA consistent with other federal legislation, notably the *Canadian Environmental Assessment Act, 2012*[13]. However, it is important to recognize the important differences between northern Canada and other regions of the country, especially in respect of the cost of doing business.

We therefore submit that careful consideration should be given to all of the anticipated consequences of the proposed regulations before they are brought into effect. It would be unfortunate if the extensive community and business benefits generated by responsible mineral resource development, not to mention the taxes and royalties enjoyed by government, were to be lost because of an overly zealous desire to collect "up front" costs under the proposed regulations at the outset of the exploration and development process.

[13] *Canadian Environmental Assessment Act, 2012* , S.C.2012, c. 19, s. 52.

Backgrounder – NWT & Nunavut Chamber of Mines

Established in 1967, the NWT & Nunavut Chamber of Mines serves as the voice of the exploration and mining sector in both territories. Its goals are to promote mineral exploration, mine development and mining activities to northern residents, to all Canadians and to the world at large.

Throughout its history, but especially over the past two decades, the Chamber of Mines has actively participated in addressing legislation and policy developments of importance to the minerals industry, including those related to land access, security of mineral tenure, land use planning, environmental and socio-economic assessment and regulatory approvals. Its membership currently includes nearly 200 corporate entities as well as almost 50 prospectors, entrepreneurs and other individuals who endorse the Chamber of Mines' goals.

The Chamber of Mines undertakes its work from its principal office in Yellowknife, and from a satellite office that was established in Iqaluit in 2011.