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Re: A New Mineral Resources Act for the Northwest Territories

Dear Minister,

As the Government of the Northwest Territories (GNWT) is currently seeking public input for the development of a new Mineral Resources Act (MRA), MiningWatch Canada is hereby submitting key recommendations that would help better protect northern communities and the environment, while also increasing the long-term benefits from the extraction of non-renewable minerals. These recommendations also aim to reduce mining-related conflicts and increase predictability for all of those involved in, or affected by, the sector. We divide our recommendations in three sections:

1. Ensuring a greater share from the extraction of NWT's non-renewable minerals for future generations;
2. Ending the 'free entry' system to reduce conflicts, increase predictability and better protect communities and the environment; and
3. Other measures to increase transparency, accountability, and oversight of the mining sector.

About MiningWatch Canada

MiningWatch Canada is a non-governmental organization (NGO) created in 1999 as a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat, and community interests posed by some irresponsible mineral policies and practices in Canada and around the world. It is supported by twenty-seven Canadian environmental, social justice, Indigenous, and labour organisations, collectively representing tens of thousands of members across Canada.

Our Canada Program focuses in four main areas: (1) policy and regulatory reforms, (2) technical and strategic support to communities, organizations and governments; (3) corporate practices and accountability, including litigation when necessary; and (4) public education and awareness campaigns. In addition to working with communities and organizations directly affected by mining, we also participate to governmental and intergovernmental committees (federal-provincial-industry-NGO), including the Mine Environment Neutral Drainage (MEND)[1] initiative and the National Orphaned and Abandoned Site

[1] http://mend-nedem.org/default/

Initiative (NOAMI).[2] We are also a member of the Mines Minister's Advisory Committees for both Ontario and Quebec, and have actively participated in mining legislative reforms in both of these provinces.

The author of this paper has an B.Sc.H. in Geological Engineering (Queen's University) and over twenty years of diverse experiences in the Canadian mining sector, including about ten years in mineral exploration in northern Quebec and Ontario throughout my various trainings, and about ten years in the not-for-profit sector as an independent consultant for NGOs, communities, government agencies and ethical investment firms. He has been the Canada Program Coordinator for MiningWatch Canada since 2015.

1. Ensuring Long-Term Benefits from NWT's Non-Renewable Minerals

One fundamental challenge that all governments face when regulating the mining sector is how to increase the share of the wealth generated from the extraction of non-renewable minerals for the benefit of current and future generations. The answer to this question will take different forms depending how one defines 'wealth' and how much emphasis is put on current versus future generations. While the current dominant model in Canada is to put more emphasis on short-term benefits, such as jobs creation during the exploration and mining phases, there is a growing movement nationally and internationally to question this short-sighted model and to propose alternative economic and fiscal models with longer-term visions. Key fundamental principles underpinning these alternate models include the notions that:

- mineral resources are non-renewable and once extracted, will not be available for future generations;
- they are site-specific, that is, their deposits can't be moved or displaced;
- their value is tied to world-market fluctuations over which there is little to no control;
- they represent both opportunities and risks for geographically specific communities and regions (e.g. opportunities of wealth generation but risks of dependency, boom-bust cycles, lack of diversification, environmental degradation);
- their extraction today must, therefore, include specific measures to maximize long-term and intergenerational benefits while also minimizing exposure to short- and long-term risks.

With the current review of the MRA, the GNWT has a unique—once in a generation—opportunity to truly set course for a model with long-term visions and goals, while also maintaining and consolidating some of the short-term benefits. As such, we recommend the following main actions forward:

- Maximizing the share of revenues generated by NWT's non-renewable minerals;
- Transferring a significant portion of these revenues into the Heritage Fund for economic diversification and for the benefit of future generations;
- Establishing a comprehensive economic diversification and sustainability plan for the NWT;

1.1 Maximizing the share of revenues generated by NWT's non-renewable minerals. Fiscal revenues to governments from the mining sector typically include (1) royalties paid to compensate for the depletion of public-owned, non-renewable resources (generally value-based or profit-based, or a combination of both, at the provincial/territorial level); (2) corporate income taxes (to both provincial/territorial and federal levels); and (3) personal income taxes from the workforce. Other revenues such as capital taxes, sale taxes, and contributions to workers' benefits and pension plans can also be included, but those are generally much smaller in proportion, often reimbursable (e.g. sales taxes), and unevenly distributed from one mine to another. Overall, the GNWT collects far less fiscal

[2] http://www.abandoned-mines.org/en/

revenues than the national average (2.4 times less) when those revenues are put against the minerals' value extracted (see below). This discrepancy is even more disconcerting given that the mining sector represents about 25% of NWT's GDP and 50% of its exports—by far the highest levels in the country (see below). *As such, a new MRA and associated legislations should review and increase the levels of revenues generated from royalties and/or corporate taxes applicable to mining, at least to the same levels as the national average, and even possibly higher considering the proportion of NWT's GDP and exports directly linked to mining.* This can be done either by increasing these levies ('size of the pie-slice') or by eliminating various tax credits and loopholes that allow for tax avoidance, transfer pricing, and other fiscal schemes that allow for reducing the overall taxable income ('size of the pie').

a. Mining companies extracted over $31.6 billion[3] in minerals value in the NWT over the last 25 years (average of $1.3 billion/year), including $18.0 billion over the last 10 years (average $1.8 billions/year). Yet, when GNWT's fiscal revenues from the mining sector are compared against these production values (which are about the same as the industry's gross revenues),[4] they pale in comparison to the national averages. The averages of fiscal revenues generated from mining and collected by provincial and territorial governments across Canada amount to about 11.4%, including 4.4% in royalties, 3.9% in corporate taxes, 3.0% in personal income taxes.[5] Meanwhile, GNWT collects about 1.8% in mining royalties,[6] 1.3% in corporate income taxes[7] and 1.7% in personal income taxes,[8] for total fiscal revenues of about 4.8%.[9] This is 2.4 times less than the provincial/territorial averages across Canada. The 50% of NWT's royalties deducted as per the conditions of the Devolution Agreement with the federal government explains, in part, this discrepancy. Another important factor is that about half (50%) of the mineworkers are out-of-territory, fly-in-fly-out, workers not contributing to NWT's fiscal revenues. But even if 100% of the mineworkers were residing in the territories and that the GNWT were to keep 100% of the royalties, the total fiscal revenues would amount to 8.3% of the minerals' value, still far behind the national average of 11.4%. Given the above and other issues discussed below, the GNWT should take the MRA review as an opportunity to fill this important fiscal gap.

b. Even when total contributions and expenses from the mining sector into NWT's economy are considered, the NWT still lag behind other mining jurisdictions. As such, the industry claims to have spent 30 to 50% of all of its revenues in the NWT in construction, operation, salaries, contracts, taxes and various other expenses over the last 15-25 years.[10] This means, however,

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[3] NRCAN Annual Mineral Production Statistics http://sead.nrcan.gc.ca/prod-prod/ann-ann-eng.aspx. The '25 Years of Diamonds' report produced in 2016 claims that mines have produced over $50 billions in value in the NWT over the last 25 years (average 2.0 billions/year), but we could not find a reference to sustain this figure (http://www.miningnorth.com/_rsc/site-content/library/publications/MN_Diamond-Insert-Lowres.pdf).

[4] This is also a comparative indicator methodology that has been used before by the Entrans Policy Research Group for the Mining Association of Canada (MAC) http://mining.ca/sites/default/files/documents/Entrans_PaymentstoGovernments_2013_0.pdf

[5] Fiscal revenues paid to the federal level are about 70% of those. Fiscal revenues are averaged over 10 years, data from MAC 2016 http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf (Figure 6); and production values are from NRCAN Annual Mineral Production Statistics for the same 10 years http://sead.nrcan.gc.ca/prod-prod/ann-ann-eng.aspx .

[6] After deducting 50% for the federal transfers' reductions as per the current terms of the Devolution Agreement for 2014-2016. See http://www.fin.gov.nt.ca/sites/default/files/documents/2016-2017_main_estimates.pdf and http://www.fin.gov.nt.ca/sites/default/files/documents/2017-2018_main_estimates.pdf

[7] Assuming that 50% of corporate income taxes in the NWT are directly link to the mining sector, which is probably an overestimation given that the sector represents about 25% of NWT's GDP. Same references as above.

[8] Assuming that 25% of the NWT's personal income revenues came from the mining sector in 2014-2016, which is probably an overestimation given that the sector represents about 7% of NWT's workforce (see below).

[9] When using NWT's mining royalties data over 10 years, the overall royalty contributions climb to 2.2%, which is still about half of the national average (http://mining.ca/sites/default/files/documents/Entrans_PaymentstoGovernments_2013_0.pdf). But if the GNWT were to keep 100% of the royalties, the territories' royalties would be on par with other provincial/territorial averages—but the federal fiscal contributions would be equally lowered and below national averages.

[10] The 'Measuring Success' report claims that total spending to construct and operate the mines in the NWT reached an average of $0.93 billion/year between 1998 and 2013, of which $0.66 billion/year was spent in the NWT—including $0.3 billion/year for aboriginal businesses and communities (http://www.miningnorth.com/_rsc/site-content/library/publications/Measuring_Success_NWT_Diamond_Mining.pdf). The '25 Years of Diamonds' report claim that mines have spent on average $0.48 billion/year in the NWT (http://www.miningnorth.com/_rsc/site-content/library/publications/MN_Diamond-Insert-Lowres.pdf).

that 50 to 70% of the non-renewable wealth has left the NWT and mainly profited to out-of-territories shareholders and businesses. This model is not sustainable and, as stated by Bauer, compares poorly to other mining jurisdictions in Canada and around the world. [11] And it justifies even more the need for increased fiscal revenues from NWT's non-renewable mineral extraction to keep more benefits in NWT.

1.2 Transferring non-renewable resources' revenues into a fund for the benefit of future generations. In 2012, the GNTW established the NWT Heritage Fund, which purpose is "to save a portion of future resource revenues for the benefit of future generations of NWT residents."[12] Revenues deposited in this fund are to be retained for 20 years, after which up to 5% of the year-end balance can be spent, providing the principal is kept untouched. In principle, a fund of this type can be very effective at transferring value from a non-renewable activity (mineral extraction) to more sustainable forms (e.g. a permanent capitalized fund able to support various socioeconomic and sustainable projects). However, to be effective, a fund of this type must (1) be funded consistently and substantively (at least 2-3% of the gross value produced, or more); (2) have the principal capital accumulate for some time before interest generated can start being used (typically 20-25 years, or more); (3) have a clear mandate, clear goals and objectives, and detailed criteria about how the funds can or cannot be used; and (4) be transparent and have strong oversight and accountability mechanism, with competent managers. *As assessed by Bauer, the NWT Heritage Fund, as currently set-up, meets none of these criteria, except for the second.[13] The review of the MRA should also include a review of the legislation that governs the NWT Heritage Fund so that it fully meets the four criteria stated above*. This type of fund exists in multiple jurisdictions (Norway as a prime example for the oil & gas sector) and, increasingly, at local and regional levels as part of the IBAs and collaborative agreements that are concluded with Indigenous and other local governments.[14]

a. Over the last three years (2014-2016), only 0.3% of the produced mineral value in the NWT were saved and injected in the Heritage Fund ($12.6 vs $4,975 millions produced). This is clearly insufficient and, at this rate, will never lead to any effective and meaningful transfer of value to future generations. In fact, at this rate, it does not even cover the cost of the interests paid yearly by the GNWT on its various debts ($29.4 millions for 2014, 2015, 2016).[15] If more appropriate levels of resource revenues were channelled into the fund, in could become a powerful tool to diversify NWT's economy and increase benefits for future generations. For instance, if 2.5% of the mineral value generated in NWT over the last 25 years (1992-2016) had been saved into a sovereign fund, at 5 to 7% interest rates,[16] the GNWT could today count on a $1.3 to 1.6 billion fund to help diversify its economy (or $65 to 80 million per year, using 5% of the fund, to support various other socioeconomic and sustainable projects).

1.3 Establishing a robust and comprehensive economic diversification and sustainability plan for the NWT. With 25% of GNWT's GDP and 50% of its exports directly linked to the mining sector, the NWT's economy can be classified as "resource-dependent" according to the International Monetary Fund (IMF) criteria.[17] As such, the NWT's economy and people are more vulnerable to risks of

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[11] Bauer 2017, p.4 and p.27 https://responsibleminingnwt.ca/responsible-mining-for-the-northwest-territories/2017/11/06/andrew-bauers-report-northwest-territories-mineral-sector-review-and-benchmarking/
[12] http://www.fin.gov.nt.ca/fr/about-us/office-deputy-minister/heritage-fund
[13] Bauer 2017, p.33
[14] See Bauer 2017, p.33, for examples (e.g. Alaska, Alberta, Chile, Montana, New Mexico, North Dakota, Norway, Texas and Wyoming—also Quebec). See also Ciaran O'Faircheallaigh's publications for fund of this type set-up in IBAs and other similar agreements https://www.griffith.edu.au/business-government/griffith-business-school/departments/school-government-international-relations/staff/professor-ciaran-ofaircheallaigh, https://experts.griffith.edu.au/academic/ciaran.ofaircheallaigh
[15] http://www.fin.gov.nt.ca/sites/default/files/documents/2016-2017_main_estimates.pdf and http://www.fin.gov.nt.ca/sites/default/files/documents/2017-2018_main_estimates.pdf
[16] Relatively modest when compared to most securities index performances (more in 8-12% range).
[17] IMF 2012 https://www.imf.org/external/np/pp/eng/2012/082412.pdf: "Using average data for 2006–10, at least 20 percent of their total exports were natural resources or they derived at least 20 percent of their revenue from natural resources." Also in Hailu and Kipgen, 2015 https://eiti.org/sites/default/files/documents/theextractivesdependenceindexnovember2015.pdf: "…the McKinsey Global Institute, in 2014, classified resource driven countries as those that met any one of the following three criteria: a) resource exports

downfall in commodity prices, premature closing of mines and of the overall mining economy. As pointed out by Bauer: *"The territory remains dependent on federal transfers and is exposed to commodity price-driven boom-bust cycles."*[18] To put this dependency in perspective: the mining's contribution NWT's GDP (about 25% in 2016) was by far the highest in the country in 2016, with Yukon (15%), Newfoundland (8.8%) and Saskatchewan (7.7%) following, and the main mining provinces (Ontario, BC and Quebec) being much closer to the national average at 2.0%.[19] Yet, despite representing a large proportion of its GDP and exports, the mining sector only represents about 7% of the workforce.[20] This is about the same as most other NWT's economic sectors. Bauer states: *"economic multipliers for mining in the NWT are lower than for most other industries or sectors,"* both in terms of jobs creation and labour income per dollar of output.[21] This is not surprising given that that mining is capital intensive and that about half (50%) of mining jobs in the NWT are non-resident, fly-in/fly-out jobs, without much direct or long-term contribution to the territories' economy.[22] A dependency to non-renewable resources can also generate a phenomenon called the 'Dutch Disease,' described as *"a situation where government and the resource sector attracts the best professional talent, capital and government interest, preventing growth of other sectors."* [23] *Given the above, it is crucial that the GNWT takes this issue seriously and develop a robust and comprehensive economic diversification plan for the NWT, using tools like a sovereign fund, described in the previous section.*

a. Bauer insists that a useful diversification plan, or strategy, should be asking in priority "*how the industry can support the NWT economy and livelihoods of residents"* and *"how it can be leveraged for economic diversification.*"[24] A good diversification strategy should also have *"clear targets over the medium- to long-term, is fully costed, is institutionally linked to the annual budget process, and has buy-in from a critical mass of residents,"* all of which to help *"keeping the government on track."*

b. While the NWT government appears to increasingly recognize the importance of economic diversification for NWT's future, still too little has been done to date. According to Bauer's assessment, the GNWT has only produced "vague economic growth and diversification plans," the most recent of which is the NWT Economic Opportunities Strategy a few years ago. While wide-ranging, this strategy, still falls short from being "*a comprehensive development strategy,*" nor are its action plans "*costed with clear prioritization, clear timelines… or [with a clear] monitoring mechanism.*"[25] The current NWT Mineral Development Strategy[26] also falls short of setting meaningful and effective orientations to leverage mineral revenues for the benefit of future generations. Bauer describes the Mineral Strategy more as a "*blueprint for improving the business environment for mining companies… rather than generate broader improvements in NWT residents' welfare."*[27] The shortcomings of the current Mineral Strategy may reflect the drafting process, "*which was led by ITI and the NWT Chamber of Mines rather than a broader set of government ministries and non-governmental organizations."*[28]

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greater than 20% of total exports in 2011; b) resource revenues more than 20% of government revenue on average from 2006 to 2010; and c) resource rents greater than 10% of GDP in 2011."

[18] p.4

[19] http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ15-eng.htm

[20] 1,600 workers, http://www.statsnwt.ca/labour-income/labour-force-activity/2016%20Annual%20LFA.pdf, and http://www.statsnwt.ca/index.html

[21] p.43, using NWT Bureau of Statistics http://www.statsnwt.ca/economy/multipliers/: 2 to 3 times less than construction, manufacturing; 4 to 5 times less than transpiration, trade, retails, IT and culture industries; 8 to 20 times less than agriculture, fishing, hunting, trapping, forestry.

[22] http://www.miningnorth.com/wp-content/uploads/2013/06/NWT-diamond-mining-benefits-to-2011.pdf

[23] P.43

[24] Ibid.

[25] Bauer 2017, p.44

[26] MDS 2013 http://www.iti.gov.nt.ca/sites/www.iti.gov.nt.ca/files/nwt_mineral_development_strategy.pdf

[27] p.11

[28] p.11

1.4 Other measures to increase the share and benefits from NWT's non-renewable resources. Beside the measures identified above, there are a number of other actions the GNWT could take to increase the return to the public and future generations from NWT's non-renewable resources. These include:

a. *Conducting a full cost/benefit analysis of the mining sector* in the NWT, including environmental, social and health costs, as well as assessing the effectiveness of the various fiscal and incentive programs for the mining sector to attain sustainability and economic diversification in the NWT, *versus* other sectors that could or should potentially be supported in priority;

b. *Eliminating the big public expenses that almost exclusively favour the mining sector* over other economic sectors and that further exacerbate the mineral dependency cycle;

c. *Increasing fees and revenues from mining claim registration and renewing*. The NWT currently applies some of the lowest—if not the lowest—fees for claim registration ($0.25/ha) and renewal ($5-10) in Canada, that is: about 6 to 12 times lower than BC ($1.75/ha), Ontario ($1.88/ha) and Quebec ($1.50-3.00/ha) for claim registration; and up to 2.0 to 3.6 times lower than BC ($5-20/ha), Ontario ($25/ha) and Quebec ($1.25-$36.00/ha) for claim renewals.[29] While these fees appear insignificant, they can cumulate to millions of dollars. For instance, the NWT currently has about 1 million hectares of claims in good standing, and had up to 5 million hectares in recent years, and close to 20 million hectares during the diamond rush in the mid-1990s.[30]

d. *Make SEAs with GNWT and IBAs with local governments mandatory to mine approval*. If properly structured and implemented, SEAs and IBAs can help increase long benefits from mining, while also minimising impacts. They can be useful in setting legally-binding terms and conditions that go beyond existing regulations and policies, including for mandatory local content procurement clauses, local employments, revenue sharing, environmental monitoring, social measures, etc. SEAs and IBAs may also be useful to address the *scale* and *pace* of proposed mines.[31] (see below recommendation 2.4.d for more discussion on SEAs and IBAs).

e. *Enforce the polluter-pay principle during the entire mining cycle*, from prospecting, to mining, to closure and perpetual care. Long-term management and perpetual care of toxic mine waste is one of the major—if not the main—public liability associated with mining (see section 3 below for more details). Also, as many off-the-grid, northern mines are often entirely dependent on fossil fuel for generating power, heat and electricity, and given Canada's national and international commitments to fight climate change, the GNWT should also account for costs carbon emissions as part of the permitting of new and existing mine proposals (about 10-30$/t CO_2eq).

[29] http://mern.gouv.qc.ca/mines/titres/titres-exploration-tarification.jsp, http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1639 https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/mineral-titles/mineral-placer-titles/fees-mineral-placer-titles
[30] http://www.enr.gov.nt.ca/en/state-environment/74-trends-development-activities-requiring-permit-nwt
[31] e.g. Voisey's Bay's IBAs with the Labrador Inuit led to a reduced pace of production, in part to increase the longevity of mine life and increase the associated benefits, including more time for training opportunities

2. Ending 'Free Entry' to Reduce Conflicts and Better Protect Communities and the Environment

The 'free entry' system is a relic of the 19th century gold rushes[32] which is today fundamentally at odds—if not squarely violating—contemporary social and environmental laws and values, including the rights of other users of the lands; the rights of communities to have a say on how the land may be developed; the social, economic, cultural and ecological values that an area may represent beyond its mineral potential; as well as the constitutional and international rights of Indigenous Peoples.

The Government of the Northwest Territories has not only a unique occasion to reform this archaic system, but also a responsibility to do so, to align and harmonize the new MRA with the principles that sustain other territorial and federal laws that regulate the use of land, water and environmental matters, such as the Mackenzie Valley Resource Management Act, the Fisheries Act, the Northwest Territories Lands Act, and the Waters Act. The GNWT also has a legal obligation to align the new MRA to respect the inherent, constitutional and international rights of Indigenous Peoples.

In this regard, the GNWT is the first government in Canada to undertake a comprehensive review its mining legislation since (1) the Supreme Court of Canada confirmed in 2013 the *Ross River Dena v Yukon Government* decision regarding the problems of free entry systems,[33] (2) the government of Canada committed to implement the recommendations from the Truth and Reconciliation Commission in 2015;[34] and (3) the government Canada announced fully supporting the implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2016,[35] and more recently committed to bring forward a new legislation in this regard.[36]

As such, the GNWT can be the first government in Canada to develop a mining a legislation to be fully in compliance with the constitutional obligations to inform, consult and accommodate Indigenous Peoples at all stages of the mining cycle, from claim staking to mining, as recognized in the Ross River decision.[37] It can also advance a new mining legislation that is fully in compliance with Canada's commitments to respect the inherent and international rights of Indigenous Peoples, including the rights to self-determination and to free, prior, and informed consent (FPIC), as recognized in UNDRIP.[38] In the context of NWT, these rights also need to be interpreted as complementing those recognized or asserted in the Comprehensive Land Claim Agreements and the associated Land Use Planning processes. Taking the right steps now would also bring the GNTW closer to fulfil Canada's commitment to implement the *Calls To Action* from the Truth and Reconciliation Commission.

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[32] And even going back to medieval European mining regions, see 2014 "The Legacy of the Free Mining System in Canada" by Ugo Lapointe https://fernwoodpublishing.ca/book/resources-empire-and-labour and 2010 L'héritage du principe de free mining au Québec et au Canada https://www.erudit.org/fr/revues/rag/2010-v40-n3-rag0118/1009353ar/. See also 1998 "Aboriginal Title and Free Entry Mining Regimes in Northern Canada" by Nigel Bankes and Cheryl Sharvit http://epub.sub.uni-hamburg.de/epub/volltexte/2010/5122/pdf/NMPWorkingPaper2BankesandSharvit.pdf, and 1999 Reforming the Mining Law of the Northwest Territories by Barry Barton http://carc.org/wp-content/uploads/2017/10/NMPWorkingPaper3BartonPaper.pdf.

[33] http://www.yukoncourts.ca/judgements/appeals/2007/2012_ykca_14_rrdc_v_yukon.pdf, https://www.firstpeopleslaw.com/database/files/library/FPL_Comment_Ross_River(1).pdf. See also 2017 "Free Entry, Aboriginal Rights and the Discussion Paper on a New Northwest Territories Mineral Resources Act" by Law Professor Jean Paul Lacasse submitted to GNWT as part of this consultation. On unceded territory, one should also consider the Tsilhqot'in decision in 2014 regarding title rights to lands and resources (https://www.amnesty.ca/legal-brief/tsilhqot%E2%80%99-nation-v-british-columbia)

[34] http://www.trc.ca

[35] https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958

[36] https://ipolitics.ca/2017/11/20/liberals-will-back-u-n-indigenous-rights-bill/, http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037

[37] In the 1997 Delgamuukw and 2004 Haida Nation decisions, the Supreme Court of Canada added that, on "very serious issues", the full consent of the Aboriginal nation would be required (http://www.amnesty.ca/sites/amnesty/files/fpic_factsheet_nov_2013.pdf). The 2014 Tsilhqot'in decision confirmed title rights to lands and resources.

[38] UN Declaration on the Rights of Indigenous Peoples http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For more discussions on what FPIC means, see hwww.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf (2013), http://www.amnesty.ca/sites/amnesty/files/fpic_factsheet_nov_2013.pdf (2013), http://www.fao.org/3/a-i6190e.pdf (2016: p.15-16) and recent proceedings from https://www.amnesty.ca/sites/amnesty/files/20NovSymposiumUNDeclarationWebinar.pdf (2017).

Again, we believe that these are not only unique opportunities for the GNTW to show the way for responsible mining in Canada, but also constitute moral and legal obligations that cannot be denied or avoided. Taking the right approach now would set a path to avoid or reduce mining-related conflicts, while also increasing certainty for the industry and all parties involved in or affected by the mining sector. It would also ensure greater protection of other land values that are also fundamental to northerners and the unique social, ecological and economical fabric of the NWT. Failing that, however, would likely set the NWT in a direction of increased social and environmental mining-related conflicts, less certainty, greater financial risks, and exposing the GNTW and the public purse to potentially costly litigations forward.

There are concrete actions the GNWT could take to bring the new legislation in the right direction, including:

- Prioritizing land use planning and the designation of 'no go zones;'
- Requiring prior information and consultation before registering new claims;
- Reviewing the thresholds defining the impacts of exploration works and require prior consultation for 'notices and plans,' 'permits' and 'remediation securities;'
- Subjecting the granting of a mining lease to (1) the prior completion of an economic feasibility study, (2) the completion of a successful environmental assessment review and (3) the signing of mandatory SEAs and IBAs;
- Allowing for the revocation of mining titles for reasons of public interest or alternative land uses.

2.1 Prioritizing land use planning and the designation of 'no go zones.' This can be done through the Land Use Planning processes, the Comprehensive Land Claim processes, or in the shorter term, more directly in consultation with the affected Indigenous communities, municipalities and other key land users by temporarily subtracting sensitive areas or tracks of lands from any new claim staking, until the final land use plans are completed.

a. These approaches are already being implemented in the NWT to varying degrees, but could be accelerated with more funding to the affected communities and organizations so that they can more effectively identify the potential sensitive areas that should be excluded from mining—at least temporally and until a final land use decision is made.

b. The new MRA should also include provisions to fast-track temporary designations of 'no go zones.' The Quebec Mining Act, for example, allow for such fast-track process that, overnight and under ministerial order, can suspend temporarily large swaths of lands from claim staking for 6 months, which can be renewed for unlimited 6-months terms, until a final land use determination is made. Existing mining claims within these areas are grand-fathered but can be imposed a time limitation (e.g. 4 to 6 years), after which time mining companies must abandoned the claims if they have not found 'mineral resources' as defined by the CMI Standards and the Canadian Securities.[39] Stricter social and environmental conditions can also be imposed for any exploration work on these claims.

c. The new Quebec Mining Act also automatically excludes urban areas from mining and, since 2016, allow for municipalities to designate 'no go zones' on other municipal lands, with buffer zones that can extend up to 1km.[40] Existing claims within these areas are also grand-fathered—this is a limitation—but the owners have the obligation to carry work on them and cannot substitute for payment in-lieu. Also, as seen above, the fee schedule for required exploration work are much higher—although still too low—in Quebec than they are in NWT. Once the claims are abandoned, the area is integrated in the 'no go zone.' If the claim owner

[39] http://web.cim.org/standards/menupage.cfm?sections=177&menu=178
[40] https://www.mamot.gouv.qc.ca/amenagement-du-territoire/orientations-gouvernementales/activite-miniere/

finally applies for a lease for mining, it must first go through a comprehensive environmental assessment process with an independent panel.

d. In Ontario, the Far North Act also allows for communities to designate 'no go zones,'[41] although it is facing multiple challenges and limitations in its implementation.

e. Following the Ross River decision, the Yukon government also temporarily designated large swaths of lands off-limit to mining, until agreements can be reached with affected First Nations.

2.2 Requiring prior information and consultation before registering new claims. As the GNWT is moving towards an online claim staking process, it should consider integrating in the new MRA a provision that allows for a period of information and consultation of the affected Indigenous and non-Indigenous communities, *in-between the moment the proponent applies for an online claim and the moment the Ministry formally registers the claim*. This information and consultation period could be 45 to 90 days, or more, and allow for Minister to reject the claim application, or to formally register it with specific conditions in response to the comments received during the consultation period, or for any other public interest reasons,[42] at the discretion of the Minister. A provision should also be included to allow the Minister to prolong the consultation period if needed. If a mining claim application is rejected by the Minister, the land where it is located should be integrated as part of a 'no go zone.'[43] Such provisions would allow to meet the Crown's constitutional obligations to information and consultation prior to allocating mining rights on lands with existing or asserted Indigenous rights—a minimum constitutional legal standard, as identified in the Ross River decision. Such provisions could also have the potential to meet the inherent and international rights of Indigenous Peoples, as defined in UNDRIP. But they would also allow non-Indigenous communities and the public to have a say about potential risks and issues of allowing a mining claim to be staked in certain area, or conditions that should be implemented in any early exploration work forward.

a. There are no known jurisdictions in Canada where such provisions are currently being implemented prior to formally registering a claim (similar provisions exist, however, prior to exploration work—see below). But following the Ross River decision, we expect that more jurisdictions will implement such required changes as they proceed with reforming their mining legislations, and/or as more legal cases are brought to the Courts by the affected Indigenous Peoples. Again, the GNWT is the first significant mining jurisdiction in Canada to proceed with a comprehensive mining legislation reform since the Supreme Court of Canada upheld the Ross River decision in 2013 and since Canada committed to fully implement UNDRIP in 2016 and 2017. As such, the GNWT has a unique opportunity to show the way and implement this type of provisions now and avoid having to do it later, or to risk facing costly litigations. Both Bauer (2017) and law Professor Lacasse (2017) also advocate for this type of provisions in the new MRA.

b. Also, in order to simplify the mining legislation and to respect the constitutional obligations to inform and consult affected Indigenous communities prior to registering a mining claim, we would recommend eliminating *prospection permits* from the new MRA. Most mining jurisdictions that reformed their mining legislations in the last 10 years have eliminated this type of permit because (1) they tended to 'freeze,' 'monopolize' or 'lock' large areas at the detriment of other mineral explorers or other potential land users; (2) they added a layer of unnecessary complexity to the mining tenure system; and (3) they became more obsolete with

[41] "30 No mining claim shall be staked or recorded on any land… g) that is located in the Far North, if a community based land use plan has designated the lands for a use inconsistent with mineral exploration and development." (Mining Act Ontario, s.30, https://www.ontario.ca/laws/statute/90m14#BK30)
[42] For example, if the claim applicant has a history of legal violations in the NWT or elsewhere in Canada.
[43] Unless the reason of rejection relates to a bad track-record and law violations on the part of the claim applicant.

the integration of online claim staking systems. If the GNTW intends to keep the prospecting permits, then it would also have to build-in new provisions in the MRA similar to those as described above, at the very least to be complying with the constitutional obligations of information and consultation of affected Indigenous communities prior to formally registering prospecting permits.

c. Another option of mineral tenure that would move away from the traditional claim (online) staking would be to implement a 'bidding system,' whereby the GNTW would be opening lands (after consulting with Indigenous Peoples, the public and other affected communities) for companies or prospector to 'bid' to acquire the mining rights. Advantages of this system would be: (1) to select where and when the GNTW wants to open lands for mineral exploration; (2) being able to set social, environmental and fiscal conditions attached to the mining rights; and (3) potentially getting a higher return per hectare of mineral rights granted. One disadvantage, however, include to favour larger companies with more resources to bid with, over smaller ones or prospectors. Also, we believe these three categories of advantages can also be met with the modification to the MRA we are proposing in this submission.

2.3 Reviewing the thresholds to subdivide the exploration phase into 'preliminary,' 'intermediate,' and 'advanced' works, and set requirements for prior information, consultation and accommodation at each level, including 'notices and plans,' 'permits' and 'securities' for clean-up. The presumption perpetuated by some in the mining sector that exploration works 'have no impacts' is simply false. Any type of exploration work will generate impacts (e.g. noise, land marks, tree cutting, water intake or crossings, camp waste, drill cuttings, etc.). Those impacts are all the greater as you move-up the exploration latter from preliminary exploration (typically involving no machinery and no flight surveys), to intermediate exploration (e.g. drilling, trenching, flight surveys, line cutting, trail making, etc.), to advance exploration work (e.g. same as 'intermediate,' but more intense). These impacts also tend to be higher in socially, culturally or ecologically sensitive areas (e.g. Indigenous cultural sites, caribou calving grounds, rare plant or animal species, etc.), as well as in northern contexts, where ecosystems can be more fragile and less resilient (e.g. lower biodiversity level, lower rates of revegetation, etc.). Environments already under stress should also be a factor to consider (e.g. ecosystems already affected by human degradation, climate change, etc.). Zones with higher mineral potential or subjected to exploration 'rushes,' with sudden and lasting influxes of companies concentrated in one sector, can also exacerbate impacts. Some mining jurisdictions, like BC, Ontario and the Yukon, have stricter (more protective) exploration thresholds that should serve as a starting point for a new MRA in the NWT (see details below).

a. Like the three levels of exploration works applied in Ontario, a new MRA should review the current thresholds to also subdivide exploration works in three categories (preliminary, intermediate and advanced) and set requirements for information, consultation and accommodation of Indigenous and non-Indigenous communities before each level. These requirements could include 'notices' and 'exploration plans' submitted 45 to 60 days prior to undertaking preliminary exploration work, and 60 to 90 days in the case of intermediate to advanced exploration works. Intermediate and advanced exploration works should require more detailed 'exploration plans,' as well as prior 'permits' and 'reclamation securities.' These two higher levels should also require or allow for the Minister to trigger an environmental and social impact assessment if the affected communities request it, or if a third party organization has legitimate social, cultural, ecological or economic justifications to require it. A 45 to 90 days consultation period would be built into these processes and allow for the Minister to reject all or part of the proposed exploration works, or to require specific conditions, in response to the comments received during the consultation period.[44] Provisions

[44] Or for any other public interest reasons at the discretion of the Minister. For example, if the mining title holder is no longer financially solvent or have violated other NWT's and Canadian's laws

should also be included to allow the Minister prolong the consultation period if needed or to bump-up a 'notice / exploration plan' requirement to a 'permit' requirement.[45]

b. The new MRA should not, however, substitute or compromise the integrity of existing social and environmental assessment processes and securities as currently required by the Mackenzie Valley Land Use Regulations (MVLUR), the Comprehensive Land Claim Agreements, or any other NWT's legislation. Any new provisions in the MRA should be structured to work in addition to, and be complementary with these existing EA and security requirements.

c. Exploration thresholds currently under the Mackenzie Valley Land Use Regulations[46] appear to be too permissive when compared to other jurisdictions. We also note that many thresholds are missing, such as for aerial surveys that can have major impacts on wildlife. We recommend that the thresholds applied in other jurisdictions be reviewed and that the strictest (more protective) thresholds be applied, particularly when considering the fragile, northern ecosystems that compose the NWT and the rapid ecological changes seen in recent years and decades (e.g. increased access infrastructures and human presence, climate change, rapid decline of certain species like the caribou, etc.). As stated above, we note, for examples, that BC[47], Ontario[48] and the Yukon[49] implement some thresholds that are more protective. If stricter standards can be identified in industry initiatives like the PDAC Responsible Exploration E3+[50] and the Initiative for Responsible Mining Assurance (IRMA)[51], they should also be integrated into a new MRA.

2.4 Making the granting of a mining lease conditional to (1) the completion of an economic feasibility study, (2) the completion of a successful environmental assessment review and (3) the signing of mandatory SEAs and IBAs.[52] In a pure, or orthodox free entry system, there are typically little to no conditions required prior to granting a mining lease to the exploration title holder, other than locating the title sought, demonstrating the presence of resources (but usually not its economic viability) and paying a small fee (hundreds to a few thousands of dollars). Mining leases are typically valid for 10 to 21 years in Canada, and renewable. They allow for the extraction and the selling of resources. Again, such lean conditions date back to the 19th century's mining reality, which tended to be quite small in scale and have nothing to do with today's industrial mining operations, nor the contemporary social and environmental values that are now incorporated into our legislations—let alone the constitutional rights of, and obligations towards the affected Indigenous Peoples. Legislators are slowly moving away from this anachronistic model which expose governments, the public and the environment to too much risks versus too little benefits, and increasingly tie the granting of mining leases with the environmental assessment and permitting processes.

a. One prime example is Quebec, which since 2013, is now requiring the successful completion of an environmental assessment and the granting of an environmental certificate as a pre-condition to granting a mining lease under the Mining Act.[53] The proposed closure plan and

[45] This is also a provision applied in Ontario.
[46] http://laws-lois.justice.gc.ca/PDF/SOR-98-429.pdf
[47] See Fair Mining Collaborative Memo 2017 attached and http://www.fairmining.ca/code/mineral-prospecting-and-exploration-2/regulating-exploration-activities/, http://www.fairmining.ca/code/mineral-prospecting-and-exploration-2/regulating-prospecting-activities/, http://www.fairmining.ca/code/mineral-prospecting-and-exploration-2/exploration-camps/
[48] https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act/mining-act-modernization/exploration-plans and https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act/mining-act-modernization/exploration-permits
[49] http://www.emr.gov.yk.ca/mining/quartz_mlu_threshold_table.html
[50] http://www.pdac.ca/priorities/responsible-exploration/e3-plus, see in particular the two toolkits on Environmental Stewardship and Social Responsibility: http://www.pdac.ca/priorities/responsible-exploration/e3-plus/toolkits/environmental-stewardship and http://www.pdac.ca/priorities/responsible-exploration/e3-plus/toolkits/social-responsibility
[51] http://www.responsiblemining.net/irma-standard/irma-standard-draft-v2.0/
[52] The signing of mandatory SEAs and IBAs has been addressed above.
[53] S.101, Quebec Mining Act, http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/M-13.1

financial securities for site remediation must also be approved as part of the environmental review and permitting. Quebec also requires the completion of an economic feasibility study prior to triggering the environmental review[54] and, therefore, also before the granting of a mining lease. The economic feasibility study must be compliant with the Canadian securities standard NI43-101, which is the main standard for Canadian mining companies operating here and abroad.[55] But Quebec now also requires that this feasibility study, or a parallel 'scoping and market study,' *assesses* the potential for downstream value-added processing in the province, as a condition for granting or renewing a mining lease.[56] The proponent must also demonstrate that it mined resources for at least 2 consecutive years in the last 10 years to be able to renew a mining lease. Despite these stricter conditions, industry members constantly rank Quebec in the top 5 or 10 mining jurisdictions in world, not because projects are easily approved (they are not[57]), but because of the clarity and predictability of its regulatory and assessment processes.[58]

b. Requiring a fully-costed technical feasibility study prior to triggering an environmental assessment can help achieve two main purposes from the regulator perspective: (1) it avoids costly environmental assessment and public consultation processes for projects that are not viable or still poorly defined, and (2) it clarifies the technical and financial characteristics and risks that define a specific project, which should also be coherently reflected and reported into the environmental impact review process. It helps the public and the regulators to have a more complete picture of the project, its risks and its potential impacts. Under Canadian securities' laws, proponents must report to their shareholders various risks associated with their projects. Private projects (not subject to the public securities laws) should also be required by the governments where they operate to submit complete feasibility study as part of the review process leading to the granting or renewal of permits and mining leases.

c. A robust economic feasibility study is one that, typically: (1) uses conservative (prudent) technical and financial assumptions, including, in particular, commodity prices for the duration of the mine, exchange rates, metal recovery rates and technologies, discounting rates, and the level of confidence in resources evaluation (should be mostly in the 'reserves' or 'indicated resources' categories[59]); (2) achieves a good level of financial performance based on these assumptions, using three main indicators: (i) internal rate of return (IRR) of 15-20% before taxes; (ii) a significant net present value (NPV), using 5-8% discounting rates, that usually amounts in the hundreds of millions (sometimes less for the very small mines, or in the billions for very large mines; a rule of thumb is an NPV of about 1/3, or more, of the initial investments or capital expenditures before taxes), and (iii) a pay-back period of 3-4 years; (3) does not omit to account for major costs that can amount in the tens to hundreds of millions and that could significantly affect the IRR or the NPV, such as some of the main operating expenses, the clean-up costs and securities, and revenue sharing with local governments; (4) includes a thorough analysis of several 'worst case scenarios,' such as a dam breach and spill (in the hundreds of millions, or more, when factoring damages, share price fallout, interruption and delays, etc.); (5) demonstrates good financial resiliency when performing a 'sensitivity analysis' with fluctuating commodity prices (or recovery rates of metals), exchange rates, operating costs, and capital costs (e.g. can sustain 15-20% variations, or more, before breaking even—zero IRR or NPV).

[54] Ministry of Environment, http://www.bape.gouv.qc.ca/sections/rapports/publications/bape308.pdf, p.102
[55] http://web.cim.org/standards/menupage.cfm?sections=177,181&menu=229
[56] S.101.0.2 and 104, http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/M-13.1
[57] There have been several projects rejected or delayed for insufficient studies, such as the uranium Strateco advanced exploration project in Northern Quebec and the phosphate open pit Arnaud mine in Sept-Îles.
[58] Even according to the all-pro-industry, right-leaning Fraser Institute https://www.fraserinstitute.org/categories/mining
[59] As defined by the CIM / NI43-101 standards, see above.

d. Finally, the mandatory signing of SEAs with the territorial government and of IBAs (or various names such collaboration agreements) with the local/regional communities/governments prior to granting a mining lease would go a long way to meet the constitutional obligations to prior information, consultation and accommodation of the affected Indigenous Peoples, as well as the international rights to self-determination and to free, prior, and informed consent (FPIC) as defined in UNDRIP—although the quality of the process leading to these agreements and the context into which they are imbedded are also crucial elements to their legitimacy, or lack thereof. Transparency, accountability to the affected constituencies, timeline, power and resources imbalances between the negotiating parties, to name a few, are all crucial elements that, if left unaddressed, can significantly undermine the legitimacy and validity of any agreement signed.[60] Other vague terms used to define the result of an IBA include 'social license to operate' and 'social acceptability' — we prefer the concept of free, prior and informed consent (if done properly).[61] IBAs can also be required for non-Indigenous affected municipalities and communities.

2.5 Revoking mining titles for reasons of public interest or alternative land uses. Free entry legislations typically do not include any provision allowing governments to suspend or revoke mining titles for reasons of public interest or for other priority uses of the land, except for very limited uses such as public utility purposes, waterways for power generation, public road access, etc.[62] As such, free entry systems tend to overexpose governments to costly lawsuits or financial settlements if they use unqualified or poorly defined discretionary powers to suspend or revoke mining titles. Examples include:

- In December of 2009, the junior mining company Platinex agreed to surrender its mining claims and to drop its lawsuits against the Ontario government and the First Nation community of Kitchenuhmaykoosib Inninuwug (KI) in return for $5 million in compensation. Ontario has since withdrawn those lands from claim staking and changed its mining legislation to avoid or minimize the risk of similar situations in the future.[63]

- Another case often cited is the Windy Craggy mine in the mid-1990s, which cost British Columbia's government nearly $165 million in loans, subsidies, and other financial assistance for the company Royal Oak to develop another site, including about $30 million in direct compensation. At about the same time, B.C. also paid $4 million in compensation for small placer miners whose rights were expropriated for the establishment of a park.[64]

- More recently, in 2017, the company Copper One accepted a $8 million settlement with Quebec to abandon its claims it could no longer access on the Algonquins of Barrier Lake's ancestral lands.[65]

In some instances, governments use the applicable expropriation laws which can also result in costly settlements. These two approaches (i.e. unqualified discretionary powers and/or the expropriation legislation) tend to put the bulk of risks onto the governments and the public purse, while the mining

[60] For more on IBAs or collaboration agreements, see in particular the work of Ciaran O'Faircheallaigh and Ginger Gibson, including the 2015 IBA Community Toolkit http://gordonfoundation.ca/resource/iba-community-toolkit/ and the multiple references included in this document.
[61] For references on what FPIC means, see above.
[62] E.g. Quebec, Ontario, BC.
[63] See 2014 "The Legacy of the Free Mining System in Canada" by Ugo Lapointe https://fernwoodpublishing.ca/book/resources-empire-and-labour. See also MNDM 2009 https://news.ontario.ca/mndmf/en/2009/12/ontario-resolves-litigation-dispute-over-big-trout-lake-property.html, Globe and Mail 2009 https://www.theglobeandmail.com/news/national/mining-company-surrenders-claim-to-native-land-in-5-million-settlement-opening-ontarios-far-north/article1205845/
[64] See Lapointe 2014. See also: McAllister and Alexandre 1997, "A Stake in the Future: Redefining the Canadian Mineral Industry, Vancouver: UBC Press, and Hunter 1997, "B.C. must pay $3.5-million penalty to mining firm," The Vancouver Sun.
[65] http://affaires.lapresse.ca/dossiers/litiges-economiques/201702/07/01-5067040-copper-one-poursuit-le-gouvernement-du-quebec.php, http://copperone.com/news/news-display/index.php?content_id=156.

title holders face a win-win scenario: they either get to continue to develop the value of their mining titles or receive substantial—and often arbitrarily high—compensations for not being able to exercise their free entry rights. It is not surprising, therefore, that the industry will often fight tooth and nails to keep this system intact. There are, however, alternative approaches that governments can take, including clearly stipulating in law that the *Minister can suspend or revoke a mining title for reasons of public interest or for other land uses, for example as determined into a land use plan or after consultation with the affected communities.* As for the compensations that a mining title holder may, or not, be entitled, there is also a spectrum of options, including: (1) to keep the bulk of the risks and costs on the government's side, but more clearly defining in law what will be, or not, compensated if a title is suspended or revoked (e.g. only the value of the work performed on the mining title to date); (2) to share the risks and costs between the government and the industry by limiting even further in law what the will be compensated (e.g. that statute could specify a percentage, for example 50% of the value of the work performed on the mining title to date); (3) to put the bulk of the risk on the title holder (e.g. no compensation offered, or very little), but by clearly stating the conditions in law so that that the title holder is aware of the risks and integrate them into its work plans and communication to shareholders. These options exist or have been considered, in form or another, by various jurisdictions in Canada.

a. Quebec's Mining Act (2013), for example, allows the Minister to "*order the cessation of the work if necessary in his/her judgment to permit the use of the territory for public utility purposes.*" The Minister first applies a six months suspension of work, after which time, "*if the Minister is of opinion that the cessation of the work must be maintained, he/she shall terminate the claim and pay compensation equal to the amounts spent for all the work performed, on the filing of the reports on that work.*"[66] In a previous mining bill, however, Quebec did contemplate not giving any compensation to mining title holders if a municipality did not consent to exploration work in an area designated as 'urban,' inhabited, or for 'vacationing,' as per its land use planning.[67]

b. An interesting case currently developing is the $190 million Strateco suit against Quebec for refusing to grant the company a permit to start the advanced exploration phase of the Matoush uranium project on the Cree Nations' comprehensive land claim area.[68] In June 2017, Quebec's Court sided with the government, stating that Strateco knew from the outset that the support of the Cree community was one criterion onto which Quebec could base its decision.[69] The Court also stated that risk of not obtaining a permit was also known from the outset and is part of the 'business risk' in the mining sector. All compensations were denied by the Court. The company appealed the decision and the case will be heard in late 2018, or early 2019. It will certainly be interesting to watch for the conclusion of this case. But arguably, if the mining laws had been clearer from the outset, nor Quebec, nor Strateco would be spending millions fighting in Court today.

c. In BC, a mining title can be 'expropriated' under section 11 of the *Park Act* for the purpose of creating a protected area, in which case '*a compensation is payable… in an amount equal to the value of the rights expropriated, to be determined under the regulations.*'[70] The regulation stipulates that the value must be determined '*by estimating the value that would have been paid to the holder of the expropriated mineral title if the title had been sold on the date of*

[66] Section 82, Quebec Mining Act http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/M-13.1
[67] Section 91, Bill 14 : "An Act respecting the development of mineral resources in keeping with the principles of sustainable development"
http://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_46995en&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vIv9rjij7p3xLGTZDmLVSmJLoqe/vG7/YWzz
[68] http://affaires.lapresse.ca/dossiers/litiges-economiques/201701/09/01-5057739-ressources-strateco-poursuit-quebec.php, http://www.stratecoinc.com/data/pdf/Communiques2014/ENGRSC_motion2014-12-11.pdf
[69] https://www.lafrontiere.ca/actualites/economie/2017/6/21/la-cour-superieure-rejette-la-poursuite-de-200-m---de-strateco.html
[70] Section 17.1 of the BC Mineral Tenure Act (1996), http://www.bclaws.ca/civix/document/id/complete/statreg/00_96292_01

expropriation, in an open and unrestricted market between informed and prudent parties acting at arm's length.'[71] The regulation further specifies how the valuation is made, including that it "*must not include consequential damages caused to the expropriated mineral title holder as a result of the expropriation or the expenditures incurred in acquiring or operating an equivalent mineral title elsewhere.*"[72] The Act also specifies that '*no compensation is payable… if the minister believes on reasonable grounds that the claim was acquired or is being held (a) for other than a mining activity, or (b) mainly in the expectation of receiving compensation or other consideration if the area, under the Park Act, is acquired or expropriated.*'[73] The title holder is also entitled, as part of the compensation settlement, to transfer any surplus of exploration credits accumulated to other mining titles it possesses in the province.[74] And if the Minister and the mining title holder do not agree to an amount of compensation, either can '*require the dispute to be settled by a single arbitrator*,' in which case the arbitration decision is binding.

3. Minimizing Public Liability, Strengthening Accountability & Transparency

One of the major challenge facing any government is enforcing and ensuring the compliance of the laws and regulations they have enacted. As the saying goes, 'governments may have the best laws, but if they don't enforce them, or do not have the capacity to do so, these laws are worthless.' It is therefore crucial that governments, when reforming or enacting new laws, also plan to review and improve how these laws are or will be enforced. This can be particularly challenging for small, mineral-dependent jurisdictions, that do not always have the budgetary or expertise capacity they should have, or that are more prone to 'corporate or regulatory capture' due to the dominant nature of the industry in their local economies and its proximity to the regulatory bodies.[75] As such, we recommend governments to pay particularly attention to the following key issues and take appropriate measures to minimize the overall public liability and increase accountability:

- *Enforce the polluter-pay principle during the entire mining cycle*, from prospecting, to mining, to closure and perpetual care. Cost of pollution prevention and mine site clean-up can easily climb in the hundreds of millions, or more. Long-term management and perpetual care of toxic mine waste is one of the major—if not the main—public liability associated with mining.[76] Not only these costs need to be properly accounted for, but the public and the GNWT need to be protected against potential failures, accidents and/or bankruptcies with appropriate levels of financial securities. There is also a need in Canada to review the insurance regime for major mine waste spills and accidents, since it is currently limited to about $25 millions per mine—major spills can easily climb in the $500-1000 millions in cost.[77]

- *Enforce best practices and best standards, particularly for mine waste management and water quality issues*, as well as for mine waste dam construction and operation, and facility operation. Again, this is a major liability for mines. In particular: (1) ban or avoid 'upstream dam

[71] Section 5, Mining Rights Compensation Regulation (2010) http://www.bclaws.ca/civix/document/id/loo99/loo99/19_99
[72] Ibid.
[73] Section 17.1, BC Mineral Tenure Act (1996)
[74] Section 9, Mineral Tenure Act Regulations (2012) http://www.bclaws.ca/civix/document/id/loo94/loo94/529_2004
[75] See examples in Bauer 2017,
[76] For discussions on perpetual care issues, see NOAMI http://www.abandoned-mines.org/en/document/publication/, the Theory and Practice of Perpetual Care of Contaminated Sites (Kuyek 2011): http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Kuyek-theory%20and%20Practice%20final%20(July%202011)-1.pdf, the Giant Mine Perpetual Care Funding Options (Taylor & Kenyon 2012): http://www.reviewboard.ca/upload/project_document/EA0809-001_Giant_Mine_Perpetual_Care_Funding_Options.PDF, and the recent Giant Mine Remediation Project Environmental Agreement (2015) http://alternativesnorth.ca/Portals/0/Documents/Mining%20Oil%20and%20Gas/Giant%20Mine/Giant%20Mine%20Environmental%20Agreement%20(Signed)%20June%202015.pdf.
[77] See Robyn Allan 2016 for a discussion on various financial assurances issues for mines https://miningwatch.ca/sites/default/files/toward_financial_responsibilty.pdf

construction' in favour of 'centre-line' or 'downstream dams,' which are much safer both in the short and long-term; (2) ban or avoid wet closure with large water covers left on top of mine waste in favour of dry closure; (3) do not permit mines or mine designs requiring perpetual active water treatment (this can be very costly, not to mention damaging for the environment); (4) require mine waste dams to be built and operated with a minimum slope of 2:1 or flatter, and a security factor of 1.5 or higher. For more on how to avoid large liabilities of mine waste site failures, see: https://miningwatch.ca/blog/2017/8/11/are-catastrophic-failures-mining-spills-preventable

- *Separate the 'mining promotion' mandate from the 'enforcement and compliance' duties, ideally with separate ministries or with the set-up of a territorial independent monitoring agency*. This is crucial to ensure a culture of compliance and eliminate or reduce the risks of regulatory capture. One big challenges faced by many governments, however, is the difficulty to attract competent and experienced expertise within the enforcement and compliance branch, either because the working conditions are not as attractive as for the private mining sector, or because the ministerial resources available are insufficient, or the ministerial working structures and cultures in some places are simply dysfunctional and/or unattractive for many potential workers. Governments should not minimize these challenges when reforming their mining regime and plan for improvements in these areas as well. A complimentary option would be to also require independent monitoring committees for each mine sites as part of the permitting conditions, well-resourced (about $1 million/year, or more) so that they can hire various experts to conduct the needed work and report the results back to the public and governments.

- *Ensure transparency at all levels*, from information and data available at the exploration phase, to mining, to closure and perpetual care, to mining revenues and royalties, to environmental and social performance, etc. Having one, or few, internet portals with all the relevant data in open-source format can go a long-way to contribute to transparency and ensure public accountability of the mining sector.

- *Consider creating a 'Chief Inspector of Mines' position, which duties would also include ensuring greater transparency and accountability*, with yearly reports on various social, economic and environmental performance/indicators for the mining sector in the NWT. Both BC and Quebec, for instance, now have mechanisms to report on various social, economic, and environmental performance, including royalties paid, securities estimated and given per mine, geological work performed, etc.

Thank you for your consideration,

Sincerely,

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