

Submission to:

A Mineral Resources Act for the Northwest Territories: Unlocking Our Potential Together - Discussion Paper, August 2017

from:

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Thank you for the opportunity to participate in consultations towards the development of a new NWT Mineral Resources Act.

The Canadian Arctic Resources Committee (CARC) is Canada's oldest citizen's organization dedicated to environmental sustainability in the Arctic. We have a long history commenting on environmental assessments in the Canadian North. For decades, we have also been a vocal supporter of caribou conservation for their own sake and for those who rely on them for food. Moreover, over the years, we have been very active in the development of mineral policy.

Below are our responses to some of the questions asked in your Discussion Paper. We realize that these concerns cannot be all fully addressed directly in the new NWT Mineral Resources Act. We believe, therefore, that the new act must be fully integrated and complementary to existing legislation if we are to improve our efforts to minimize the costs of mineral development and maximize both benefits and the protection of the environment in the NWT. The new act needs to work in cooperation with environmental and other relevant legislation including the Lands Act, the Environmental Protection Act, conservation legislation (e.g. Waters Act, Wildlife Act, proposed Protected Areas Act), the Finance Act and federal legislation such as the MVRMA.

Generally, we believe that in integrating the new act with existing legislation, the legal concept known as the "precautionary principle" should be used to compel mining operations to include environmental safeguards in their projects. The concept suggests that regulators and governments be cautious. The new legislation should therefore ensure that environmental protections are a part of all development projects even

when it has not yet been scientifically proven that a project will do environmental harm in order to err on the safe side.

Before reviewing the Discussion Paper, we had the opportunity to review Andrew Bauer's background research paper for ITI "*Northwest Territories Mineral Sector Review and Benchmarking*" and to re-review our own related research papers and other relevant documents. We have included below a list of seven documents produced by CARC in 1998. While some aspects of these studies may be out of date today, much of the research is still highly pertinent and worthy of consideration in the development of the Mineral Resources Act.

Based on our research in the late 1990s on the free entry system in Canada and considering that the Yukon court decision in 2013 in favour of Indigenous people's right to be consulted is not well addressed with the free entry system, CARC believes that while you are working towards the creation of the new legislation, a discussion paper on this subject – the costs, benefits and alternatives to the free entry system – would be a good investment by the GNWT to grapple with this issue and seek useful input on how it can be managed. Such a discussion would lead to clarity in the reasoning adopted in final decisions on the model to be followed in the new NWT mineral management regime.

A prevailing issue across the North, and much of Canada for that matter, is the problem of saturation levels of exploration such as happened with the diamond rush of the 1990's and the pushing of new roads through wilderness areas, both in relation to caribou population health and implications for people and ecosystems. Because of the direct and indirect impacts of such roads on caribou in the NWT, we develop these points further in our detailed comments appended, but wish again to highlight here the need to grapple with this very real issue in a clear, transparent and effective way.

We believe that the GNWT's decision and commitment to pass a new mining law unique to the NWT provides a real opportunity to develop a responsible mineral development regime within which public interest is assured as a priority. Moreover, we believe that mineral development companies will be pleased to work in the NWT because of the high development standards set and the social license that this engenders. Towards this end, there are some big issues to discuss, resolve and improve upon from past performance under the federal regime. It is well worth delving into these, with the perspectives of the public, to seek the best resolution options.

We are aware that besides the new Mineral Resources Act, public engagement and consultation has begun for five Acts from ENR, most of which are relevant to mining regulation, and that many non-government organizations focused on public interest are highly challenged to participate meaningfully in consultations without some resources to support their involvement. On this basis, we urge the GNWT to consider providing

the critical support required to enjoy the benefits of progressive and publicly supported legislation on the management of the peoples' resources.

We thank you for beginning these discussions with this initial consultation and we look forward to participating in the next phase as the work progresses.

The Specific Responses to Discussion Paper Questions

Land access for prospecting and exploration

The Discussion Paper states that:

- Advanced exploration activities such as drilling may have impacts on the land.
- Besides reviewing the process of accessing and exploring lands, the Mineral Resources Act (MRA) could regulate the use or allocation of uniquely significant lands.
- The MRA could also create different sets of regulations for different regions of the NWT, depending on ecological and cultural sensitivity.
- The MRA could allow the GNWT to create transportation corridors by setting aside land which mines need for transportation infrastructure.

Q1: How should land access for mineral exploration be dealt with in the proposed MRA?

CARC is concerned that land access for mineral exploration can have a negative impact on wildlife populations in decline, such as caribou. Mineral exploration should be required to be carried out in a manner that is much more sensitive to environmental concerns and the new legislation should include provisions to ensure this.

Q3: The *Mining Regulations* list prohibited lands. Should the process and list be reviewed for the MRA?

Q4: Should lands with high potential for mineral presence or transportation be regulated differently than other areas? For example, to designate special mining zones or transportation corridors?

The proposed legislation should provide the mechanisms for identifying and continuing to ensure the protection of prohibited lands; i.e. areas off limits to mining. Protected lands must include important caribou habitat, especially land that has been used as calving grounds. Furthermore, the legislation should require that all mining exploration drilling activities stop during the times of the year when caribou are using their traditional habitats for breeding, calving, insect relief, and other important activities. These restrictions should also apply to all transportation corridors to and from exploration sites.

The negative impact of roads on caribou populations is well documented. With the emergence of alternative options like hybrid air ships there are now options other than roads for the transportation of mining materials. The new legislation should allow for these alternatives to be fully explored as a possible replacement to roads.

Finally, the legislation must include provisions for the public to have some say over proposed development near areas where mineral development is prohibited.

Q5: Should the MRA allow for high-potential land to be regulated differently than other under-explored lands in the NWT?

If anything, high-potential mining lands could lead to more concentrated mining activities and should be more strictly regulated than other lands in the NWT.

Opportunities for online map staking

The Discussion Paper states that online map staking could help prospectors avoid working, often alone, in remote and harsh environments during the claim staking process and that the natural environment could also benefit from reduced intrusion, and the avoidance of unnecessary carbon dioxide emissions.

CARC agrees. Online map staking would reduce costs to mining companies, and as Andrew Bauer points out, increase the opportunity for revenue generation to government. This possibility should be fully explored and developed.

Acquiring and maintaining mineral tenures

Q5: Should prospectors be required to report on all their planned work yearly?

Wildlife and their habitat in the Northwest Territories are more threatened than ever before. Everyone involved in mining development, even at the prospecting stage, must provide the government with advance information on their activities including how they will minimize impacts on threatened wildlife populations and their habitats. The GNWT must be assured that exploration activities will not have a negative effect on threatened wildlife populations and their habitat.

Transparency, public accountability, and ministerial authority

The Discussion Paper states that, to be effective, the MRA framework should advance the environmental, social, and cultural fabric of the NWT.

Q1: What information needs to be made public to enhance transparency?

It is important for organizations like CARC, who represent public interest in the protection, conservation and development of lands in the NWT, to be made aware as far in advance as possible of mining operations being considered and that we have an opportunity to comment on those developments before the proponent has spent too much money on pursuing the development. The public must be able to make informed decisions before advanced exploration activities and mining operation development takes place and to have some influence over the rate of development. Moreover, the legislation should be well integrated with legislation that includes provisions that trigger comprehensive environmental impact assessments and public consultations within these processes prior to development. CARC also asks that the new legislation allow the GNWT to work with communities to identify the appropriate scale and pace of mining development.

The 2015 NWT Environmental Audit found that, since the last Audit in 2010, the environmental regulatory system in the NWT has continued to improve. It suggested that the integrated system of land and water management is generally effective in protecting the environment. That being said, the Auditor concluded that some foundational challenges continue to affect the ability of the system to fully function. It was recommended that actions include the completion of land use plans, which we agree with to, among other things, protect caribou and other threatened wildlife populations. It was also recommended that there be increased funding for organizations like CARC, indigenous organizations and other interested parties to participate in the system.

Organizations whose mandate is to ensure the conservation of wildlife, as you must be aware, are always seriously underfunded. This is not a reflection of the importance of the work that they do on behalf of wildlife and the concerns of those individuals and organizations that support them. The critical role of civil society, and the responsibility of government to support public interest groups, is often under-recognized. Participatory funding should be made available by governments to enable public interest groups to participate in these processes in meaningful ways.

Q4: Should the Minister have the power to withdraw lands from staking and re-open lands to staking, and under what circumstances?

The new legislation should allow the government to withdraw lands from staking if there are environmental, social or cultural concerns in a particular area.

Inspections, monitoring and auditing

Q5: What improvements could be made to the ways the GNWT inspects, monitors and audits resource activities and regulatory compliance?

We believe that monitoring should include the regular collection of data by the GNWT to ensure that mining operations are meeting all the Territories' legally required environmental protection measures. It is the responsibility of government to know what standards are needed to ensure ecosystem integrity and to enforce their implementation.

We recommend that the GNWT set up a schedule of frequent and unscheduled inspections of mines to ensure that they are meeting environmental regulations during their lifetime. Too often, variances are tolerated without the necessary enforcement and follow-through with the courts is required for the system of inspections and reporting to be effective.

Inspections of mining operations are also needed during the exploratory period when persons are seeking out potential mine sites. As noted above, the exploratory phase can also disrupt wildlife populations and create pollution and should be monitored more closely.

We are aware that, since Devolution, the GNWT has created new positions to ensure that there are adequate numbers of qualified personnel to carry out inspections, monitoring and the auditing of resource activities and regulatory compliance but we are not aware that the improved performance anticipated has been achieved. Clearly inspection, monitoring and enforcement systems need to respond to different levels of intensity and different stages of mineral development. This should be assured.

Rehabilitation and closure of mining and exploration sites

The Discussion Paper states that:

- Although Giant Mine has contributed to jobs and economic development, it has also left a legacy of contamination that is still being managed and cleaned up at great economic and environmental cost.
- Mine rehabilitation and closure aim to return the mine site as close as possible to its natural ecosystem or repurpose it for another productive use after mining finishes.
- Mining rehabilitation in the NWT currently relies on land use and environmental laws instead of mining laws, specifically that of the *MVRMA* and the *Waters Act*.
- The *Mining Regulations* do not address rehabilitation of mines at the exploration, development, production, or closure stages.
- While the MRA will not address rehabilitation and closure directly, it can be developed to complement the *MVRMA* and the *Waters Act* and respect communities and the environment. (It is important to note that the Government of Canada controls the *MVRMA*. The GNWT does not have any power to change the *MVRMA* and can only make complementary laws.)

The GNWT's Mineral Development Strategy states that:

-While mineral development contributes substantially to the economic viability of NWT communities, there is a need to ensure that the negative long-term impacts of mining are minimized to protect and maintain the land and its people.

-Some key land use planning processes are the Regional Land Use Plans, which set out what activities are allowed or not in specific areas, and the NWT Protected Area Strategy which helps identify and advance areas of special ecological or cultural significance for consideration as protected areas.

The Strategy recommends that:

-effective mine reclamation planning, execution, inspections and monitoring are adopted

-sound environmental practice is conducted through all phases of exploration and development which is incorporated into mineral development investment decisions

-the impacts of development are adequately mitigated and carefully monitored

Mining generates an enormous amount of waste, including potentially massive amounts of heavy metals such as lead and arsenic and other harmful substances such as sulphuric acid. These pose threats to the environment and the health of human and wildlife populations. They are a contributing factor to the deterioration of local environments and declining wildlife such as caribou populations. Moreover, energy for mining continues to be fossil fuel based, at a time when we need to be moving aggressively towards low-carbon fuels. As such, the Canadian Arctic Resources Committee does not believe that current mining practices satisfy criteria for environmental sustainability.

Regarding caribou populations specifically, recent reports from the Committee on the Status of Wildlife in Canada note increased levels of industrial exploration and development in both barren-ground caribou and Eastern Migratory caribou ranges over the past several decades. The reports further note the existence of new mines and hundreds of prospecting permits, mineral claims and mineral leases on several subpopulation ranges. Some of the proposed new mines are in sensitive caribou habitat areas. New roads to access these developments and to allow locals to travel more freely are a concern. The Beverly and Qamanirjuaq Caribou Management Board have listed development concerns for the subpopulation that they oversee to include mineral exploration, permanent all season roads and winter roads in calving, post-calving and key migration areas. These caribou populations are already being considered for threatened species status by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Any new non-renewable resource development in their key habitat can have a serious detrimental effect on them.

CARC strongly recommends that the new legislation include provisions (either in and of itself or in reference to the other connected legislation noted above) that state that during the life of a mine, and once it is no longer operational, the owner is responsible for all costs associated with the environmental aspects of the operation and its clean-up. This means that the government can go after the personal wealth of company

directors for the responsible mining company, even after bankruptcy is declared, to protect the public from clean-up costs. The provisions should ensure that the mine operators, as a cost of doing business, be responsible for all pollution coming from the operation. Operators must also be made aware of and must consider all the impacts of their operation on threatened and endangered species and their habitat. If the mine operators fail to do so the public and/or their government on their behalf must be allowed to take them to court. Moreover, this provision must include clauses to the effect that these costs are carried over with transfers of ownership.

With regards to mine reclamation and closure, particularly the clean-up of mine tailings, rehabilitation efforts must be done in a way that ensures that the removal of these contaminants are not just being done in such a way as to cause an environmental problem elsewhere. There must be more facilities to properly deal with the wastes generated by mine sites and these should not become polluting operations in and of themselves. Ultimately, a mine should not be permitted to produce a pollutant that cannot be ultimately dealt with in a safe and economic way.

Under federal responsibility, billions of dollars in costs to clean up exploration and mining operations fell upon the public purse. With the capacity of the Government of Canada, this could be seen as somewhat affordable, but such debt – and it was mostly derived from northern operations – would completely cripple the Government of the Northwest Territories. Clearly a more responsible, clear, and mandatory system and form of financial security is required of mining operations if the public is to be protected and GNWT is to remain financially feasible.

Socio-economic benefits, including impact benefit agreements

The Discussion Paper states that socio-economic benefits should include actions to safeguard the environmental, social, and cultural fabric of the NWT. We at CARC fully support this. Ideally, a standard should be required; clear and transparent reporting of social, environmental, and economic costs and benefits should be mandatory; and SEAs need to be coordinated with Impact Benefit Agreements.

To date, the high expectations of ramped up economic development from new roads has not been realized, while serious issues related to increased access are generally unresolved. How to reduce the negative impacts and costs of mining, while optimizing positive social and economic impacts and benefits, has not been achieved in the Territories. The Giant Mine and Colomac are clear examples of this issue. Newer examples include the fact that most of diamond mine workers come from outside the NWT and pay income taxes outside the NWT, a leakage of more than 500 million per year in wages and tens of millions in income tax even after the 2% personnel tax. We believe that these concerns should be formally addressed through the socio-economic benefit agreement section of the new legislation in a way that defines the model Socio-economic Agreement (SEA) standards to be met, including monitoring and enforcement

requirements. SEAs should provide clear and transparent measuring and reporting requirements on all public costs (social, environmental, cultural, financial) and benefits from the development.

Revenues, including taxes and royalties

Q2: Should the GNWT consider providing incentives to industry? For example, some jurisdictions have given tax deduction for companies that have conducted progressive rehabilitation, developed “newly discovered” deposits, or exceeded socio-economic requirements. What activities could be encouraged or discouraged?

The GNWT’s own research has established that the NWT is one of the most charitable jurisdictions in the world for mining, with a clear record of failing to collect fair economic rent. CARC agrees wholeheartedly with Andrew Bauer’s findings that the NWT is not collecting fair economic rent from the extraction and export of its rich mineral resources for present and future residents. Royalty rates need critical review, the many tax exemptions undermine revenue collection and the dependence of government upon self-reporting by industry for many key parameters are all demonstrable short-comings that need resolution in the new and related legislation.

Moreover, in the current situation royalties are not applied during the mine development phase which often includes extraction of the richest resources but do apply during the phase when there is just extraction without new developments (e.g. opening a new pit, or shifting from open pit to underground mining). We again agree with Bauer who reports that this too has cost the NWT a lot in failed collection of economic rent.

With the examples of Giant Mine and Shear Diamonds as only two of many, the public has also been saddled with costs that have been demonstrated to be far beyond financial benefits to the public. We would therefore recommend that the entire royalty regime and tax collection system be reviewed to ensure appropriate collection of economic rent from these valuable publicly owned resources. Included in this review should be the goal to collect revenues as mines are developed, especially during the richest mining years of a deposit, rather than postponing or allowing complete write-offs and tax exemptions that allow the value of the NWT’s resources to be drained away with benefits accumulating to private interests far removed from the NWT.

After ensuring fair return for the exploitation of our most valuable resources, targeted revenues from mining operations should be sufficient to ensure emergency funds available to mitigate all unintentional or unpredictable costs associated with the negative impacts of their operations on the environment. These would include impacts on the quality of water, air and land and on wildlife species, particularly endangered and threaten animals such as caribou, during the exploration phase, the life of the mine and once it is abandoned and clean-up required. In addition, financial securities in the most

appropriate and secure form should be held for mine site clean-up and their perpetual care and/or for major mining spills, failures and/or accidents. We would suggest however that there should never be a mine permitted that requires perpetual care.

Canadian Artic Resources papers on mining

Mine Reclamation Planning in the Canadian North, Brian Bowman and Doug Baker, 1998

Aboriginal Title and Free Entry Mining Regimes in Northern Canada, Nigel Bankes and Cheryl Sharvit, 1998

Reforming the Mining Law of the Northwest Territories, Barry Barton, 1998

Thinking About Benefits Agreements: An Analytical Framework, Janet Keeping, 1998

A Guide to Community-Based Monitoring for Northern Communities, Brenda Parlee, 1998

The Free Entry Mineral Allocation System in Canada's North: Economics and Alternatives, Malcolm Taggart, 1998

Aboriginal Peoples and Impact and Benefit Agreements: Report of A National Workshop, Kevin O'Reilly and Erin Eacott, 1998