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May 15th, 2019

Standing Committee on Economic Development and Environment
Government of the Northwest Territories
Yellowknife NT X1A 2L9

To the Standing Committee:

Re: GNWT Legislative Initiatives—Tłı̨chǫ Government Intervention to SCEDE on Bill 34, the *Mineral Resources Act*

1. Overview

Please accept this as Tłı̨chǫ Government's written submission in support of our presentation to the Standing Committee on Economic Development and Environment (the "Committee"). This submission provides the comments and perspective of Tłı̨chǫ Government on the draft *Mineral Resources Act* ("MRA") that is before the Committee as Bill 34.

Tłı̨chǫ Government supports Bill 34 in its current form, subject to the comments set out in this submission. In general, the process that the Department of Industry, Tourism, and Investment ("ITI") undertook for the development of the MRA was positive, effective, and resulted in draft legislation that largely reflects the priorities and concerns of Tłı̨chǫ Government. Tłı̨chǫ Government recognizes and acknowledges the collaborative and consensual approach taken by its partners in the Government of the Northwest Territories ("GNWT") and in other Indigenous Government Organizations ("IGOs") in developing the draft MRA.

Bill 34 is the result of a long collaborative process involving GNWT, Tłı̨chǫ Government, and other IGOs. It is the product of significant compromises on all sides. In Tłı̨chǫ Government's view, the strength of Bill 34 is not simply the result, but rather the process that allowed the various stakeholders to forge a common path forward from disparate interests.

Tłı̨chǫ Government wishes at this stage of legislative development to focus its submissions on the key principles and processes that are essential for the success of resource co-management in the North now and in the future. This submission addresses the broader context of the MRA, the collaborative process through which Bill 34 was drafted, and the importance of continuing and improving that collaborative process through the implementation of the MRA and the development of substantive regulations. Tłı̨chǫ Government looks forward to further addressing the technical details of the MRA and its implementation in future discussions.

2. The Tłı̨chǫ Agreement

The Tłı̨chǫ are one of the Indigenous peoples of the NWT. The Tłı̨chǫ Agreement, brought into force in 2005, confirms Tłı̨chǫ title to over 39,000 square kilometres of land. Tłı̨chǫ Government has primary legislative jurisdiction over Tłı̨chǫ lands. Tłı̨chǫ citizens also exercise Aboriginal rights, including harvesting rights, throughout the larger traditional territory of Mǫwhì Gogha Dè Nı̨ı̨tłèè, which spans Tłı̨chǫ lands, Crown lands, and the traditional and settlement lands of other IGOs.

A system for the co-management of natural resources is an integral part of the Tłı̨chǫ Agreement and maintaining and developing that system is essential to reconcile the overlapping interests and legal jurisdiction of Tłı̨chǫ Government, other IGOs, and public government. Protection of the environment while promoting and facilitating responsible development and use of resources is a mutual and overriding concern. Any new legislation for the management of renewable and non-renewable resources in the NWT must work harmoniously with the Tłı̨chǫ Agreement and respect the co-management regime established pursuant to the Tłı̨chǫ Agreement.

3. Devolution

Devolution provided a historic opportunity for public and Indigenous governments to work in partnership to create modern, made-in-the-North legislation to govern the co-management of natural resources. It was an opportunity to co-draft and co-develop legislation for the consideration of the Committee, and the Legislative Assembly as a whole, that is reflective of the concerns and priorities of all Northerners, Indigenous and non-Indigenous alike. In particular, it provided an opportunity to update and modernize the resource management legislation in the NWT, in order to fully reflect and respect the modern land claim agreements—including the Tłı̨chǫ Agreement—and the co-management regimes that have been established pursuant to those land claim agreements.

The obligation of ongoing collaboration in the development of resource management legislation was expressly recognized in the Intergovernmental Agreement on Lands and Resources Management (the "Intergovernmental Agreement" or "IGA"), which provides for "cooperative and coordinated Management of Lands and Resources, recognizing the rights,

titles, jurisdiction and authority of each Party."[1] The IGA provides for the collaborative development of resource management legislation through the joint Intergovernmental Council ("IGC"). The duties of the IGC include to "review and develop… legislative, policy or organizational changes… including the development of any new resource management legislation."[2]

4. The MRA

As discussed below, Bill 34 was developed in part pursuant to and in accordance with the IGA and GNWT's treaty obligations. This has ensured that the legislation, if passed, will be able to fill an important role in resource co-management while respecting and advancing the spirit and intent of the Tłı̨chǫ Agreement.

The responsible development of mineral resources is essential for the prosperity of the North, but causes significant environmental, social, and cultural impacts. These impacts must be conscientiously mitigated. The Tłı̨chǫ Agreement addresses specific impacts on Tłı̨chǫ citizens in detail,[3] and the MRA covers much of the same ground. Tłı̨chǫ Government has a significant interest in ensuring that the legislation is done right.

In Tłı̨chǫ Government's view, Bill 34 respects GNWT's treaty commitments and strengthens the overall co-management of mineral resources in the North. Section 28(5) deals with notice to Indigenous governments and organizations when an application is made to stake a claim.

Tłı̨chǫ Government wishes to specifically highlight the importance of Part 5, which will help ensure that benefits from mineral resource development go to the people and communities of the NWT. Part 5 is a critical piece of the negotiated package represented by the MRA as a whole.

The key provisions of Part 5 include sections 50-52, dealing with Benefits Agreements. These provisions provide essential regulatory clarity for both proponents and Indigenous governments, including Tłı̨chǫ Government, to ensure that development proceeds in accordance with Aboriginal and Treaty rights.

The Committee has already heard submissions recommending changes to Part 5. Such changes would affect—after the fact and without the benefit of context—the delicate and complex compromises that were negotiated while developing Bill 34. Any amendment that

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1 Intergovernmental Agreement on Lands and Resources Management, s 2.1 [IGA].

2 IGA, *supra*, s 5.1.

3 See chapters 18-23 of the Tłı̨chǫ Agreement, particularly chapter 23, "Subsurface Resources."

would alter the substance of Part 5 would not just be minor or technical in nature. It could also easily snowball into further and broader revisions.

Section 52 is an important example of the balance that is necessary to earn the support of all stakeholders. Subsection 52(1) requires proponents to negotiate benefit agreements with affected IGOs. This codifies industry best practices that leading resource development companies already follow all over the world, including currently in the NWT. As both a practical issue and a matter of law, companies that are unwilling or unable to work with Indigenous communities should not be trusted to develop resources in this country and especially in the North. Benefit agreement requirements are ultimately beneficial for all parties and are part of being a world class jurisdiction.

At the same time, subsection 52(3) reflects the balance necessary to respond to competing interests by providing a limited exception to the benefit agreement requirement. Although presumptively necessary, the Minister may waive the requirement in "exceptional circumstances," subject to administrative law, natural justice, and potentially the honour of the Crown. The Minister also requires the recommendation of the entire Cabinet to take that step. This was a flexible and proportionate compromise that Tłı̨chǫ Government and other IGOs helped to develop and expressly supported during the development of Bill 34.

To be clear, Tłı̨chǫ Government would reconsider and potentially withdraw its support for the entire Bill if there were substantive changes made to Part 5.

5. The Legislative Development Process

Tłı̨chǫ Government, along with other IGOs, has been actively involved in developing Bill 34 through a Technical Working Group ("TWG"). The TWG was convened pursuant to the IGA as collaborative, cooperative, government-to-government body under the auspices of the IGC.

The TWG provided a forum in which Bill 34 could be jointly discussed and considered by representatives of both ITI and participating IGOs, including Tłı̨chǫ Government. ITI also provided draft copies of Bill 34 through the engagement and consultation process, consistent with the commitments of the IGA and Tłı̨chǫ Agreement, prior to their introduction in the Legislative Assembly.

The TWGs worked to develop the draft Bills over the course of more than a year. It was challenging at times, but Tłı̨chǫ Government, other IGOs, and ITI all made significant concessions to co-develop draft Bills that could meet our various interests and reflect the stated purposes of the IGA. Tłı̨chǫ Government believes that, overall, the process undertaken by the TWG was a good one. Although our governments can and must improve the process together in the future, this collaborative, consensual, government-to-government approach to the co-development of legislation is a profound step towards reconciliation. It is a model that demonstrates to all Northerners—and all Canadians—the

genuine commitment to a reconciled and respectful model of governance that is being developed in the Northwest Territories.

TWG members shared the goal of developing legislation that was respectful of Aboriginal and Treaty rights—particularly modern land claims and self-government agreements, like the Tłı̨chǫ Agreement—and as well respectful of the unique intergovernmental realities that exist in the Northwest Territories. TWG members also shared the goal of developing a modernized, made-in-the-North suite of statutes that will ensure environmental protection of our lands and resources while also ensuring that our territory is attractive to industry and will be able to provide prosperity to all residents, both Indigenous and non-Indigenous, for generations to come.

Tłı̨chǫ Government commends the ITI representatives who participated in the TWG and worked collaboratively with their IGO partners. Their hard work in crafting creative solutions and compromises has resulted in draft Bills that we could all be proud of and support.

6. Future Processes

There is only one specific amendment to Bill 34 that Tłı̨chǫ Government encourages the Committee to consider.

Despite the Treaty commitments set out above and the collaborative process observed in developing Bill 34, it does not currently mandate consultation and co-drafting with respect to the development of regulations, policy materials, and future amendments once the MRA become law. In Tłı̨chǫ Government's view, clear legislative provisions to this effect are required to prevent uncertainty, confusion, delay, or injustice as the MRA regime develops and evolves in the future.

This is particularly significant because many of the key aspects of the MRA—including essential components respecting IBA requirements, access to land, and notification of staking—have been left to be developed in regulations after the MRA becomes law. These are critical and substantive pieces of the legislative framework, which require IGO engagement to the same degree as the enabling statute itself.

The federal *Mackenzie Valley Resource Management Act* ("MVRMA"), which also addresses mineral resource co-management, is a useful model to consider. The MVRMA states that the "federal Minister shall consult the first nations, the Tlicho Government and the Déline Got'ine Government with respect to the amendment of this Act."[4] It also sets out in several places that the Governor in Council may make relevant regulations only "following

[4] *Mackenzie Valley Resource Management Act*, SC 1998, c 25, s 8(1) [MVRMA].

consultation by the federal Minister" with Tłı̨chǫ Government and other IGOs.[5] Similar and express provisions in territorial legislation would both reflect the successful collaborative processes that have, to date, yielded positive results while respecting the Treaty relationships.

7. Conclusion

Bill 34 is a crucial step in the devolution of jurisdiction over lands and resources in the Northwest Territories. It presents an opportunity to create truly made-in-the-North legislation that reflects the unique circumstances of our territory and the unique intergovernmental relationships that exist here. It is the product of shared vision, collaboration, and significant compromise. Tłı̨chǫ Government has worked closely with GNWT through the TWG and IGC processes as Bill 34 was being developed for the Legislative Assembly.

Under these circumstances, Tłı̨chǫ Government supports both the legislative development process that was followed and the Bills that were produced. We look forward to working with our co-management partners to further improve both the process and our co-management legislation in the future.

Tłı̨chǫ Government thanks the Committee and hopes that these submissions assist as it discharges its important responsibility to review Bill 34 and propose amendments where required.

In Tłı̨chǫ unity,

Grand Chief George Mackenzie
Tłı̨chǫ Government

Cc. Hon. Bob McLeod, Premier of the Northwest Territories
Hon. Wally Schumann, Minister of Industry, Tourism and Investment
Shaleen Woodward, Deputy Secretary, Indigenous and Intergovernmental Affairs, GNWT
Gary Bohnet, Principal Secretary, Executive and Indigenous Affairs, GNWT
Mike Aumond, Secretary to Cabinet, Executive and Indigenous Affairs, GNWT

[5] MVRMA, *supra* at ss 90, 90.3(1), 90.3(2), and 143(1).