NORTHWEST TERRITORY MÉTIS NATION

PRESENTATION TO THE STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND ENVIRONMENT REGARDING:

BILL 34 - *MINERAL RESOURCES ACT*

BILL 36 – *AN ACT TO AMEND THE PETROLEUM RESOURCES ACT*

BILL 37 – *AN ACT TO AMEND THE OIL AND GAS OPERATIONS ACT*

SPEAKING NOTES OF

SHANNON CUMMING, LEGAL COUNSEL

YELLOWKNIFE, NT, MAY 8, 2019

Introductory Remarks

- Good evening, Committee members and guests. My name is Shannon Cumming. I am legal counsel for the Northwest Territory Métis Nation ("NWT Métis Nation") on the legislative initiatives.
- I have been asked to convey the regrets from President Garry Bailey, who is unable to attend this evening as he is engaged in Main Table negotiations in Hay River.
- I would like to thank the Committee for hearing our concerns with the three Bills.
- Since we have a lot of presenters here this evening, our presentation will focus on some of the broader concerns with the proposed Bills.
- We will provide further written submissions on the Bills within the timelines provided by the Committee.

Devolution Commitments

- In our presentation to Committee on April 24 in Hay River, we discussed the linkage of this legislative development process to GNWT commitments made during Devolution Agreement negotiations.
    - The NWT Métis Nation consented to Devolution in good faith, with the expectation that the GNWT would change the way it does business with indigenous governments when developing policy and legislation on land and resource management.
    - As a condition of Devolution, the NWT Métis Nation entered into the *Northwest Territories Intergovernmental Agreement on Lands and Resources Management* (2013) (the "IGA").
    - The IGA provides for the NWT Métis Nation to participate in the Intergovernmental Council ("IGC").
    - The purpose of the IGC is to formalize government to government relationships and provide a meaningful role for Indigenous governments in a cooperative and coordinated management system for lands, resources and rights in respect of waters in the Northwest Territories.
    - The Duties of the IGC include co-developing legislation:

    5.1 The duties of the Council are to:

    (a) review the land and resource management systems of each Party;

    (b) review and develop any proposed changes to the systems described in subsection (a), including:

    (i) any associated legislative, policy or organizational changes that are necessary to further the purpose and objectives listed in section 2.1; …

- The IGC reflects the promise that NWT Devolution would foster government-to-government relationships and co-development of legislation on land and resource management.
- It is important that GNWT honour these commitments throughout the legislative development process.

Intergovernmental Council Process – Establishment of the Technical Working Group

- NWT Métis Nation technical representatives participated in the GNWT Technical Working Group process to develop the Bills.

- Those Bills remain subject to review by the political leadership of the NWT Métis Nation to ensure the Acts do not adversely affect or infringe our Aboriginal rights.

General Comments

- We believe the proposed legislation strikes a balance between fostering responsible non-renewable resource development while:
    1. protecting the environment and
    2. recognizing, respecting and accommodating indigenous rights.
- The NWT Métis Nation supports the environmentally-responsible development of non-renewable resources in our traditional territory and throughout the NWT.
- Métis played a key role in the development of the economy in Canada through the Fur Trade.
- We understand the importance of non-renewable resource development in the economy of the communities. Métis people were denied their rightful share of the benefits from the now-closed Pine Point mine, but our community residents continue to live with the long-term environmental legacy.
- We look to the GNWT to ensure that proper securities are in place to address mine closure and ongoing monitoring.
- The NWTMN supports the efforts of ITI to create an *MRA* which would provide for some critical improvements to the existing mineral exploration regime, including:
    - early notification of mineral exploration activities;
    - benefits to indigenous governments through impact and benefit agreements; and
    - recognition and affirmation existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate. An impact and benefit agreement forms part of the duty of accommodation, contemplated by the IGA and offers the ability of an affected Indigenous group to provide its *free, prior and informed consent* as required by Article 32(2) of the *United Nations Declaration on the Rights of Indigenous Peoples.*

Position on Legislation

Mineral Resources Act* – ("*MRA")

- While the NWT Métis Nation does not oppose the Bills' introduction into the Legislative Assembly, we have the following concerns:
    1. Subsection 52(1) provides for an "agreement for benefits" instead of the term "Impact and Benefits Agreement (IBA)", which is a common provision in

existing land claim agreements. All major mining projects in the Northwest Territories have a requirement for the negotiation of IBAs as a condition of obtaining the required licences and approvals for the mine. You will note Nunavut requires a concluded IBA before a project proceeds. We suggest IBAs should be the preferred language to use, instead of the vague term "agreement for benefits". We are very concerned that the conditions for the requirement of an IBA are punted to the regulations. Ideally the MRA would contain more prescription for the process and substance of IBA requirements. We are also concerned that this subsection provides too-much discretion with the Minister based upon the words, "that the Minister considers appropriate in the circumstances". The Minister has an obligation to act honourably and in good faith in respect to any accommodation of Aboriginal rights through an IBA.

2. Subsection 52(3) allows the Minister to determine, where "exceptional circumstances exist", to waive the requirement for a benefits agreement with an Indigenous Government. This potentially creates a similar situation as exists with the *Protected Areas Act*, where Executive Council can move forward on a project with just one Indigenous Government, irrespective of outstanding or unresolved issues of other Indigenous Governments. The honour of the GNWT always requires the GNWT to take steps to accommodate the Aboriginal rights of affected Indigenous governments to mitigate any potential adverse effects of a project. The duty of accommodation cannot be legislated out.
3. Section 54 provides for a dispute resolution body to resolve disputes under Part 5, in accordance with regulations to be developed. We question the efficacy of offloading Ministerial decision-making powers to a dispute resolution body whose representatives may be lacking in cultural competency on Métis history, use and occupancy of its territory.
4. The NWTMN supports the principle in Subsection 22(2) whereby the Minister may designate lands as a restricted area where interests in minerals may not be issued for up to one year, with a two-year extension. However, such designation must not be used as a tool to block critical economic development initiatives which require corridors for transportation or transmission of power. The NWTMN continues to be interested in examining options for economic development, including mineral exploration and expanding the Taltson Hydro project. We are concerned that such designation may negate the economic viability of such projects

Early Notice Provision

- The NWT Métis Nation notes with approval the early notice provision in subsection 28(5) of the Bill wherein the Minister is required to notify an indigenous government where the Mining Recorder has received an application to record a claim.

Truth and Reconciliation Commission Recommendations should be in MRA

- In 2015, the Truth and Reconciliation Commission released 94 "Calls to Action" to deal with the history of residential schools. Those recommendations included calls to action for governments and industry.
- Recommendation 57 called on public governments to take specific actions.

> Professional Development and
> Training for Public Servants
>
> 57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

- Recommendation 92 called upon business entities to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework

> Business and Reconciliation
> 92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:
>
> i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
>
> ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
>
> iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations

> Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

- We recommend that these principles be incorporated into the MRA, PRA and OGOA to guide the public service and industry.

Recommended Changes to the MRA

The NWTMN recommends the following:

Subsection 52(1); delete the words, “that the Minister considers appropriate in the circumstances”.

Subsection 52(3) be deleted in its entirety:

~~(3) If the Minister is of the opinion that exceptional circumstances exist, the Minister may, on the recommendation of the Executive Council, waive the requirement for any agreement under subsection (1).~~

Comments on PRA and OGOA

- Given the limited opportunities to discuss the PRA and OGOA, our comments are very limited at this stage. The NWTMN may provide further commentary to the Standing Committee via written submissions.

Redline Version would have helped in reviewing the Bills

- Because both the PRA and OGOA Bills are Acts to amend the existing legislation, the draft Bills only propose the amendments, which must be read with the existing Acts. It is difficult to read it as a seamless piece of legislation. A redline version would have helped our review.

PRA

Term of Significant Discovery Licence (SDL)

- The NWTMN has no concerns with the 15-year term of the SDL in the proposed amendments to subsections 32(3); however, the renewal of the SDL in subsection (4) appears to be open-ended. We do not necessarily object to that provision, but would appreciate an explanation why the open-ended extension to the SDL is the preferred option.

Hydraulic Fracturing Fluid

- There is significant public concern around hydraulic fracturing in the Northwest Territories. The NWTMN has concerns with the provision of information on hydraulic

fracturing fluids. The definition, as drafted, does not appear to include a measure of the volume of fluid from the output side. The definition in the *PRA* sets out at (k) "the total volume of water injected with the ingredients", but does not include the volume of water recovered from the well. Sahtu Secretariat Incorporated (SSI) suggested a definition on that basis, and we support SSI's suggested amendment.

Financial Responsibility (Securities)

- The NWTMN has been following the issue of securities for abandoned mine sites in mineral resource legislation. We have similar concerns regarding financial security for abandoned wells. The Bill should ensure that sufficient financial security is provided by companies doing work on lands in the Northwest Territories.
- The one-year period for financial responsibility seems inadequate. The history of abandoned mines in the Northwest Territories provides a cautionary tale where companies have walked away from their projects, having provided little or no security, and the public has had to pay for the remediation and cleanup of these abandoned sites.
- We are also concerned with the effects of climate change on abandoned wells, and there could be significant downstream costs as a result of changes to the environment on which abandoned wells are located.
- Given the short time for review and complexity of the proposed PRA and OGOA, we will provide further commentary to the Standing Committee in our written submissions.

Ongoing Consultation

- We are pleased that ITI has committed to continue to work with indigenous governments as the Bills are finalized and preparatory work on the Regulations is about to commence.
- The NWTMN is hopeful that it will be properly resourced for this work. We look forward to working in collaboration with you and your officials as these processes move forward.

Process Concerns

Timing of s. 35 Consultation Letters

- The timing of the s. 35 consultation letters is problematic. The s. 35 consultation letter was sent on December 17, 2018, with a deadline for response of January 18, 2019.
    - This was when NWT Métis Nation operations were closing for the holiday season.
- The NWT Métis Nation was also having to respond to a s. 35 consultation letter from Environment and Natural Resources (ENR) on three other Bills. That letter was sent on December 20.

- We appreciate that ITI was working with inflexible timelines in order to meet the deadlines for GNWT Cabinet review and introducing the legislation into the Legislative Assembly.
- In the future, we would appreciate having more lead time to review legislation which, in our view, demands careful scrutiny and time for thoughtful review before we can respond.

Need for Consistency in Language of Bills

- The NWTMN notes the need for consistency in language among the various Bills. As the ITI Bills were developed and discussed separately, there is a lack of consistency in the general principles language between the *MRA* and the other two Bills – the *PRA* and *OGOA*.

Need for Consistency with the Approach taken for the *Wildlife Act* and *Species at Risk Act*

- GNWT has taken a different approach on the Bills developed through the IGC and TWG process, compared with the process used to develop the *Wildlife Act* and *Species at Risk Act*.
- Both of those Acts were widely acclaimed as examples of co-developing legislation among indigenous and public governments.
- The NWT *Wildlife Act*, for example, sets out [at subsection 2. (1)] a series of principles to be followed when exercising powers and duties under that Act.

> 2. (1) The Government of the Northwest Territories and all persons and bodies exercising powers and performing duties and other functions under this Act shall do so in accordance with the following principles:
>
> a) wildlife is to be conserved for its intrinsic value and for the benefit of present and future generations;
>
> b) the conservation and management of wildlife and habitat is to be carried out on an ecosystem basis, recognizing the interconnection of wildlife with the environment;
>
> c) the conservation and management of wildlife and habitat is to be conducted in an integrated and collaborative manner;
>
> d) traditional Aboriginal values and practices in relation to the harvesting and conservation of wildlife are to be recognized and valued;
>
> e) the best available information, including traditional, scientific and local knowledge, is to be used in the conservation and management of wildlife and habitat;
>
> f) where there are threats of serious or irreparable harm to wildlife or habitat, lack of complete certainty is not to be a reason for postponing reasonable conservation measures.

. . .

3. The principles set out in subsection 2(1) apply to the interpretation and application of this Act.

- For those Acts, GNWT legislative drafters participated in collaborative meetings with GNWT and indigenous government officials. This approach allowed for innovative development of complex legislation that, instead of creating conditions that could potentially infringe Aboriginal rights, provided for a robust set of principles to guide GNWT in interpreting legislation consistent with s. 35 and the principles enunciated in those Acts.
- The NWTMN acknowledges the commendable work of ITI senior officials and their counterparts in ENR in working with participating indigenous governments to develop the suite of legislative initiatives that resulted in the draft Bills being put forward.
- However, it appears that GNWT has stepped back from the co-drafting approach taken to develop the *Wildlife Act* and *Species at Risk Act*. Indigenous government officials were told that the drafting approach now favoured by GNWT no longer takes into account broad preambular language, but this is not an answer to why the approach taken for the *Wildlife Act* and *Species at Risk Act* is no longer in use. Preambular language is very important to provide the background context for legislation, and should reflect the government to government relationship in existence.
- The NWTMN encourages the Committee to reflect on the approach taken in developing the *Wildlife Act* and *Species at Risk Act*, and to discuss this approach with its Cabinet colleagues.
- Going forward, we recommend that the Committee work to design a process that incorporates the co-development and co-drafting approach from those legislative initiatives, which is seen as an exemplar of the collaborative and cooperative approach contemplated in the IGA.

Regulations Development

- The NWTMN shares the view of other participating indigenous governments that ITI must consult with, and involve indigenous governments in developing the Regulations under the various statutes.
- We are pleased that ITI is meeting with indigenous governments to discuss next steps on developing the Regulations. These discussions must include a workplan and budget for the consultations.
- Thank you; I would be pleased to answer any questions you may have.