NORTHWEST TERRITORY MÉTIS NATION

May 3, 2019

Mr. Corey Vanthuyne, MLA
Chair, Standing Committee on Economic Development and Environment
Legislative Assembly of the Northwest Territories
Box 1320
4570-48th Street
Yellowknife, NT X1A 2L9

Dear Chair Vanthuyne:

Re: Northwest Territory Métis Nation – Further Written Submissions on Bill 38, 39 and 44 – *Protected Areas Act*, *Environmental Rights Act* and *Forest Act*

Further to our appearance at the SCEDE meeting in Hay River on April 24th, we wish to thank the Committee for hearing our concerns with Bills 38, 39 and 44 – the *Protected Areas Act, Environmental Rights Act* and *Forest Act,* respectively. We are providing the following written submissions in addition to the speaking notes filed with Committee on April 24th.

***Protected Areas Act* – ("*PAA*")**

While the NWT Métis Nation does not oppose the introduction of the *PAA* into the Legislative Assembly, we expressed the following concerns:

1. section 15(1)(b) enables the GNWT to establish a Protected Area with just one Indigenous Government, irrespective of outstanding and unresolved issues of other Indigenous Governments;
2. the *PAA* must be expressly subject to the carrying on of traditional renewable resource harvesting activities by Indigenous persons and not provide more onerous identification requirements than the *Wildlife Act*; and
3. the *PAA* must include an express provision to enable future corridors for transmission lines and roads for future development.

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1. Establishment Must Involve All Affected Indigenous Governments: There is No place for "Irreconcilable Differences" in the PAA

Section 15(1)(b) of the *PAA* allows GNWT to proceed with the establishment of a Protected Area with the support of only one Indigenous Government under section 14 through an Establishment Agreement on the premise that there are "irreconcilable differences" with other Indigenous Governments. The term "irreconcilable differences" is utilized in divorce proceedings for a "no-fault" divorce, and this proposed wording would enable to the GNWT to dispense with its honourable duties. We want to be clear that the Honour of Crown requires the Crown to make good faith efforts to meaningfully address the concerns of all affected Indigenous Governments and to collaborate with Indigenous Governments, which is an ongoing condition of Devolution. The GNWT is duty bound to exhaust every effort to resolve differences with each affected Indigenous Government. Accordingly, the honourable conduct of the GNWT to act faithfully towards all Indigenous Governments can never give rise to irreconcilable differences. The NWT Métis Nation is very concerned that GNWT will use the *PAA* to frustrate existing and future negotiations between GNWT and Indigenous Governments. Proceeding unilaterally with an establishment agreement with just one Indigenous Government while other Indigenous Governments are actively seeking accommodation measures is inconsistent with the honour of the Crown and will complicate future management of the territorial protected area. Proceeding with the establishment with a PAA without the broad support of affected Indigenous Governments is also inconsistent with the requirement for the "free, prior and informed consent" of an Indigenous Government mandated by the *United Nations Declaration on the Rights of Indigenous Peoples*.

We call upon Committee to propose the changes we have requested to address our concern that the Minister may disregard NWT Métis Nation land, resource and governance rights in an area under active negotiation, and proceed with the establishment of a territorial protected area without NWT Métis Nation involvement or consent.

This concern applies not only to the proposed East Arm Protected Area, but also to other potential protected areas in the NWT. If subsection 15(1)(b) is not amended, it may create a situation where a sponsoring Indigenous community may use the establishment agreement process to undermine the Aboriginal and Treaty rights of other groups in a candidate protected area. This would be an unfortunate and unfair outcome of the *PAA*.

The *PAA* cannot be used as a "wedge" to drive regional and community Indigenous governments apart. The GNWT must give serious consideration to the potential effect of such a clause on the relationships among and between public and indigenous governments.

These provisions are not reflective of the government to government relationship we have. You will note the *Wildlife Act* provides flexibility for the negotiation of agreements with Indigenous Governments:

> **12.** The Minister may enter into agreements with governments, persons, bodies or organizations with respect to the Minister's responsibilities under subsections 11(1) and (2).

Amendments Required

- We recommend that Subsection 14(4) be amended to ensure the GNWT complies with its honourable obligations to all affected Indigenous Governments to read as follows:

> (4) The Minister shall make best efforts to enter into an establishment agreement, on the recommendation of the Executive Council, with one or more Indigenous governments and organizations~~, but a protected area may be established under section 17 if~~
>
> ~~(a) there is agreement with at least one of the applicable Indigenous governments and organizations, unless paragraph 15(1)(b) applies; and~~
>
> ~~(b) the Government of the Northwest Territories has discharged its duty to consult.~~

- We further recommend that subsection 15(1)(b) – the provision on irreconcilable differences – be removed <u>in its entirety</u> as this subsection does not uphold the Honour of the GNWT to meaningfully address differences.

> ~~(b) the Executive Council determines that~~
> ~~(i) irreconcilable differences have arisen during negotiation between the Indigenous governments or organizations that the Executive Council identified should be parties to an establishment agreement under section 14,~~

2. Recognition of Traditional Harvesting Activities

Our next concern with the draft PAA is the provisions in respect of Aboriginal rights. We are deeply concerned that the PAA does not sufficiently protect Indigenous Métis harvesting activities in a protected area.

Section 3 of the PAA contains a general statement about the Act being interpreted in a manner consistent with s. 35 of the *Constitution Act, 1982*:

> 3. This Act is to be interpreted in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult.

Despite this interpretation clause, it has been the experience of the NWT Métis Nation that GNWT exercises a lot of discretion regarding GNWT's interpretation of its own obligations. GNWT's property tax assessment of traditional use cabins under the territorial *Property Assessment and Taxation Act* has created a situation of GNWT infringing the ancillary rights of our members to build and use cabins.

Section 3 of the *Property Taxation and Assessment Act* provides a similar clause as section 3 of the PAA: "Nothing in this Act shall be interpreted so as to affect aboriginal rights." Despite this clause, GNWT has been assessing some of our cabins for taxation and has increased lease fees. Property taxation on cabins and lease fees constitute an infringement of our Aboriginal rights, due to the effect it has in terms of conflicting with our recognized Aboriginal rights. Indigenous Métis Members have a right to build, use and occupy cabins incidental to traditional harvesting purposes throughout the NWT Métis Nation traditional territory, without paying an $840 lease fee and without being subject to property taxation. This issue has been raised during land claim negotiations, during meetings with Cabinet ministers, and senior GNWT officials. Despite these efforts of the NWT Métis Nation, the *Property Assessment and Taxation Act* has not been amended to exempt from taxation traditional use cabins used by Indigenous Métis Members. The NWT Métis Nation will continue to advocate for the recognition of traditional use cabins free from taxation and lease fees.

Accordingly, the *PAA* must provide an express provision about the exercise of traditional harvesting activities. The *PAA* must contain a companion clause to that found in the *Canada National Parks Act*[1], which provides:

> 40. The application of this Act to a park reserve is subject to the carrying on of traditional renewable resource harvesting activities by aboriginal persons.

Everything being equal, the PAA must meet the minimum threshold of the *Canada National Parks Act*.

If, as we fear, the *PAA* passes without a change to the section dealing with Establishment Agreements, the NWT Métis Nation will be left in a situation where co-management bodies or ENR officers may make their own determination on whether Indigenous Métis have Aboriginal rights to harvest in a protected area.

[1] S.C. 2000, c. 32

This is fundamentally unfair to NWT Métis Nation: we worked tirelessly to have Indigenous Métis rights reinstated in Wood Buffalo National Park, and we will not stand by while the GNWT or its co-management partners take steps to shut out the Métis from carrying on activities in the area to be taken up for a protected area.

Indigenous Métis harvesters have a long and painful experience with being excluded from areas such as Wood Buffalo National Park. We look to the GNWT to ensure that Métis rights to harvest are not infringed by territorial legislation.

Section 27(3)(a) of the *PAA* provides wording that requires evidence of aboriginal rights with an identification card that exceeds wording in the comparable *Wildlife Act* section:

> (3) A person claiming to exercise an Aboriginal or treaty right in a protected area shall
> (a) carry proper identification that **provides <u>evidence</u> that the person has an Aboriginal or treaty right**;

This section provides a more onerous requirement by requiring "evidence" of rights, which is not contained in section 18(a) of the *Wildlife Act*:

> **18.** …, a person claiming to exercise an Aboriginal or treaty right to harvest wildlife in an area of the Northwest Territories shall,
> **(a) while harvesting game or other prescribed wildlife, carry proper identification to harvest in the area;**

Effectively, the PAA would undermine the exercise of the Aboriginal rights of Indigenous Métis as an ENR Officer can request an Indigenous Métis provide "evidence" of their right. This is an untenable situation which could result in an Indigenous Métis being charged while harvesting in a protected area.

Amendment Absolutely Required

Clause 27(7) must be deleted as the *Wildlife Act* deals with identification requirements when harvesting. This provision is not consistent with section 18 of the *Wildlife Act*:

> ~~27(3) A person claiming to exercise an Aboriginal or treaty right in a protected area shall~~
> ~~(a) carry proper identification that provides evidence that the person has an Aboriginal or treaty right; and~~
> ~~(b) on request by an officer, show proper identification to exercise the Aboriginal or treaty right.~~

If this amendment is not provided we will oppose the establishment of any protected area.

We believe the language found in the *Canada National Parks Act* is more prescriptive in upholding the rights of Indigenous Métis harvesters in a park. We request that this language be incorporated into the PAA along the lines of:

> A protected area is subject to the carrying on of traditional renewable resource harvesting activities by aboriginal persons.

3. Corridors

Our next concern deals with transportation or transmission corridors. The NWT Métis Nation is of the view that the legislation should make provision for corridors for transportation and power transmission to allow for strategic economic development initiatives such as the Taltson Hydroelectric expansion project.

The NWT Métis Nation views the Taltson Hydro Expansion Project as an opportunity to decrease significantly, the NWT's dependence on greenhouse gas-producing diesel power, and to spur environmentally-responsible economic development in the areas to the east and north of Great Slave Lake.

We note that subsection 14(3)(z.2) deals with "requirements and processes for approving transportation and transportation corridors" in the context of Establishment Agreements. However, we have previously stated our concern with being excluded from Establishment Agreements, so we take "cold comfort" from this provision.

We also note that subsection 36(1) allows the Minister, in the "public interest" to identify land within a Protected Area for transportation or transmission corridors. However, these actions are subject to subsection 36(2), which requires consultation with any management boards established for the Protected Area.

We have serious doubts that a management board would agree to such a proposal. We know from our own experience with the Deze Energy Corporation that any proposed corridors would likely meet strong resistance from the community of Łutselk'e, which has opposed the Deze Energy proposal and has pursued its own community interests for power generation.

If the GNWT were to depend on Section 36 for establishing corridors, it would amount to an offloading of its land management responsibilities to a management authority with a potentially limited membership and a markedly different mandate for managing a protected area. This offloading could place into jeopardy any proposed economic development activities in the entire region not linked to the TDN "conservation economy". The NWT Métis Nation prefers a land management regime that balances the protection of the environment with responsible economic development initiatives.

Environmental Rights Act ("ERA")

The NWT Métis Nation supports the introduction of the *ERA* into the Legislative Assembly. The Bill expands the scope of the existing *ERA* for investigations, prosecutions of offences and bringing actions to protect the environment.

However, the ERA needs to provide a mechanism for an Indigenous Government to make an application to GNWT if the Indigenous Government has grounds to believe that an act or omission has caused or is likely to cause significant harm to the environment.

We are aware that the former *ERA* was employed very infrequently. It is our hope that the modernized *ERA* will ensure that the legislation is utilized as needed, and that the right to a healthy environment is realized.

The NWT Métis Nation would like to be involved in the development of Regulations for the *ERA*.

Proposed Amendment

The NWT Métis Nation proposes the following amendment:

> INVESTIGATIONS
> Application for investigation
>
> **8.** (1) Any adult resident **or Indigenous Government** in the Northwest Territories who believes, on reasonable grounds, that an act or omission has occurred that has caused or is likely to cause significant harm to the environment, may apply to the Minister for an investigation.

Forest Act ("FA")

The NWT Métis Nation has significant concerns with the process and timelines with the *FA* Bill. The NWT Métis Nation only received a draft of the *FA* in December 2018, which did not allow for sufficient time to engage with ENR officials on the policy and legislative aspects of the *FA* Bill. Had we had an opportunity to engage in these government-to-government discussions, the *FA* would have better reflected the interests of the NWT Métis Nation and other Indigenous Governments. We agree with our counterparts from the Sahtu Secretariat Incorporated that the *FA* would benefit from a further review by the Technical Working Group.

It appears that much of the substance of the Bill will need to be taken up in the regulation-making phases, which is not an ideal situation as the regulations are not subject to the same scrutiny as your Committee process. The *FA* needs to include express provision about the economic accommodation of Indigenous rights. For example, the British Columbia *Forest Act* provides for various accommodation measures for Indigenous groups, including: interim measures, revenue sharing of Crown stumpage (e.g. royalties), establishment of a First

Nations Woodland Area (e.g. for management of areas), First Nations Tenure Opportunity Agreement.

Process Issues

Technical Working Group

The work of the Technical Working Group is critical to advancing the legislative and regulatory changes required to achieve the vision of the Devolution Agreement. If we maintain our approach through the regulation-making process, we could achieve the vision that the Devolution Agreement and the *Northwest Territories Intergovernmental Agreement on Lands and Resources Management Act* promised. We see this work as a key aspect of the GNWT's interest in achieving reconciliation. That said, there are opportunities for improvement, which we will comment on briefly below.

Role of Standing Committee

We appreciated the thoughtful and forthright discussions with Committee members at the SCEDE hearing in Hay River on April 24th. You will recall that Committee members asked some questions about the role of Committee in the legislative development process:

1. **Committee did not see the proposed legislation until just before first reading. How does the NWT Métis Nation see the role of Committee in developing legislation going forward?**

The NWT Métis Nation believes that Committee can play a significant role in ensuring that legislative initiatives have been developed in accordance with the principles enunciated in the *Northwest Territories Intergovernmental Agreement on Lands and Resources Management* (the IGA). The IGA provided [at para. B] that

> … devolution shall be effected in a manner that establishes a framework for a cooperative and coordinated management system for lands, resources and rights in respect of waters in the Northwest Territories I which the Government of the Northwest Territories, Aboriginal Governments and the residents of the Northwest Territories participate. [emphasis added]

The NWT Métis Nation views the Crown as indivisible, and strives to develop collaborative working relationships with the GNWT, whether it be Cabinet, regular MLAs or officials. We see no impediments to Committee getting briefed as the legislative initiatives develop. That is a matter for the Legislative Assembly to address.

We support the principle that all MLAs – not just the Cabinet side – should be kept apprised of work on the legislative initiatives. In addition, we believe the Committee can act as a "check" on unilateral Cabinet decisions to move ahead with legislation that may disregard the concerns of Intergovernmental Council members such as the NWT Métis Nation.

While the GNWT operates on a consensus system, it is also evident that Cabinet can block vote on major items such as legislation. Accordingly, the MLAs on the Committee may have the opportunity to influence Cabinet decisions by recommending changes or, if required, voting against the legislation. You will note there were key changes made to the *Wildlife Act* between the 2nd and 3rd reading as a result the Committee review process that factored in the concerns of Indigenous Governments.

We believe the Committee has demonstrated its considerable skills in assessing, reviewing and making recommendations to legislation. Unfortunately, we also observe that the Committee can lack discipline in voting as a block to maintain critical positions on issues such as legislative initiatives. In the current Assembly, we have seen some MLAs break ranks and vote with Cabinet on key issues, some of which are against the interests of Indigenous Governments. The potential lack of voting discipline can undermine the Committee in its attempts to exert its influence in the legislative development process.

2. **The Departments of Environment and Natural Resources, Industry, Tourism and Investment (ITI), and Lands, respectively, had different approaches for developing the legislative initiatives. What lessons were learned from the different approaches taken by GNWT Departments in bringing legislative initiatives forward?**

We offer some observations in the spirit of improving the process.

With respect to ENR, as we stated in our appearance before Committee we are generally pleased with the collaborative process. We did, however, see a change from the approach taken during the development of the legislation for the *Wildlife Act* and *Species at Risk Act*. In that approach, Department of Justice legislative drafters participated in meetings with the TWG to develop draft legislative text. This did not happen with the current suite of legislative initiatives.

We also believe the volume and complexity of legislation ENR was saddled with created capacity challenges that required some key timelines to be pushed back. We also recognize that decisions may have been made at the political level to advance other Departments' legislation, such as ITI's *Mineral Resources Act*, which may have implicated timelines for ENR legislation. The timelines for introducing the legislation were especially daunting.

The takeaway for the NWTMN is that the more substantial and complex the Bill, the more time and effort should be dedicated to develop the draft legislative text.

With respect to ITI, we believe the combination of effective collaborative work by ITI officials and political support for moving the legislation forward resulted in a successful outcome to the collaborative process, provided ITI addresses certain concerns we will table next week. As was the case with ENR, we appreciated the work of ITI officials to seek creative solutions and reach common ground on resolving key issues for the legislation. We did observe that the oil and gas legislation (*Oil and Gas Operations Act* and *Petroleum Resources Act*) did not

seem to receive the same attention as the *MRA*, but we do not fault officials for the work done on those legislative pieces.

With respect to the Department of Lands, we are disappointed with the approach taken with its legislation. The proposed Act was essentially a “mail drop” exercise, and we have had no meetings with Lands officials to scope out the legislation or engage as a TWG. We cannot comment on the process because, in our view, there has been no process to develop this Act, certainly not as envisaged by the Intergovernmental Agreement . We look forward to meaningful engagement with Lands as the legislation proceeds as GNWT still has a continued duty of consultation with the NWT Métis Nation.

3. **Does the NWT Métis Nation have any reflections on the co-drafting process?**

We commented on this question in our response to question 2 (above). We continue to believe that the co-drafting process is the best approach for cooperative and collaborative management of land and resources as envisioned in the IGA, and we encourage Committee to advocate for this approach going forward.

In closing, we thank you for the opportunity to appear before Committee, and we look forward to recommendations on the legislation consistent with what we have worked so hard to achieve.

Sincerely,
NORTHWEST TERRITORY MÉTIS NATION

Garry Bailey,
President

c.c.: Lloyd Cardinal, President, Fort Resolution Métis Council
Ken Hudson, President, Fort Smith Métis Council
Trevor Beck, President, Hay River Métis Government Council