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Comité consultatif de l'environnement Kativik
Kativik Environmental Advisory Committee

Kuujjuaq, August 22, 2011

Mr. Pierre Paradis, Chair
Committee on Agriculture, Fisheries, Energy and Natural Resources
Commission Secretariat
Pamphile LeMay Building
1035, rue des Parlementaires, 3rd Floor
Quebec, Quebec G1A 1A3

Subject: **Bill nº 14 entitled "An Act respecting the development of mineral in keeping with the principles of sustainable development"**

Dear Sir,

The Kativik Environmental Advisory Committee (KEAC) was created pursuant to Section 23 of the *James Bay and Northern Quebec Agreement* (JBNQA). The KEAC is a consultative body to responsible governments on matters related to environmental and social protection in Nunavik. As such, it is the preferential and official forum for the governments of Canada and Québec, the Kativik Regional Government (KRG) and the Northern village corporations.

The KEAC has reviewed Bill nº 14 entitled "An Act respecting the development of mineral resources in keeping with the principles of sustainable development" and wishes to inform you of its comments and concerns in this matter.

General comments

Bill nº 14 contains several of the provisions from Bill nº 79 of 2009, while making a number of improvements. The KEAC notes that the new bill takes into account some of the comments contained in its letter of April 26, 2010, particularly with respect to the inclusion of the objective and principles of sustainable development.

The KEAC will, again, avail itself of a review of the Quebec mining law to remind everyone that particular rules apply to mineral exploration and mining activities in the Nunavik territory pursuant to the JBNQA. Moreover, the current *Mining Act* "applies subject to the *Act respecting the land regime in the James Bay and New Québec Territories* (chapter R-13.1), the *Act approving the Agreement concerning James Bay and Northern Québec Agreement* (chapter C-67) and the *Act approving the Northeastern Québec Agreement* (chapter C-67.1)"[1] and Bill nº 14 does not modify this provision. In addition, the JBNQA is guaranteed and protected by section 35 of the C*onstitution Act* of 1982.

The proposed modifications to the *Mining Act* are intended to apply uniformly throughout Quebec, which includes Nunavik. According to the KEAC, the bill does not adequately reflect the particular legal features applicable north of the 55th parallel, and should be amended to clarify the rules and improve the legal security of the Inuit living in this region. For example, the Ontario Mining Act distinguishes between certain mechanisms applicable to the "north" which are different from the "south".[2] Following the announcement of *Plan Nord* and taking into consideration the scope of the mining developments foreseen in the region, it would be most relevant to clarify the specific rules of law prevailing in the Nunavik territory.

The committee also wishes to reiterate some of its previous recommendations concerning mining activities in Nunavik.

In September, 2009, the KEAC submitted to the Ministry of Natural Resources and Wildlife (MRNF) several recommendations regarding Quebec's *Mineral Strategy*.[3] In particular, its recommendations were to strengthen the good practices of mining companies operating in the north, to withdraw mining activities near the boundaries of protected areas, to curtail the proliferation of mining company road, sea and airport infrastructure and to involve local institutions in natural resources development projects in the region.

In 2007, the KEAC submitted to provincial authorities a *Position Paper concerning Current and Future Transportation Infrastructure Development in Nunavik*[4] following concerns raised by the Kativik Regional Government (KRG). For the KEAC, all mining as well as roads needed for mineral exploration and operations are clearly subject to the environmental and social impact assessment and review procedure contemplated in Section 23 of the JBNQA. These activities are considered development or a development project under the JBNQA and are automatically subject to the assessment process. The Agreement provides an exception only for "air and ground reconnaissance, surveying,

[1] *Mining Act*, R.S.Q., c. M-13.1, Sect. 341
[2] *Mining Act*, R.S.O., c. M-14, Sect. 35
[3] Recommendations of the Kativik Environmental Advisory Committee concerning Quebec's Mineral Strategy, addressed to Mrs. Nathalie Normandeau, Minister of Natural Resources and Wildlife, September 6, 2009.
[4] KEAC, *Position Paper concerning Current and Future Transportation Infrastructure Development in Nunavik,* October 2007.

mapping and core sampling by drilling" (JBNQA, Section 23, Schedule 1). No exception is contemplated for the construction of possible access roads for mineral exploration or mining activities north of the 55th parallel.

Moreover, in another position paper tabled in 2005[5], the KEAC reiterated a recommendation for the adoption of regulatory standards to govern the use of heavy equipment on the tundra, especially by mining companies.

Note also that the *Partnership Agreement on Economic and Community Development in Nunavik,* signed April 9, 2002 by the Premier of Québec, KRG and Makivik Corporation, reiterates in its section 2.3 that "as contemplated in Schedule 1 of Section 23 of the JBNQA, mining development on the Nunavik territory will be subject to the applicable environmental and social protection regimes." This reaffirms existing law on this matter and, given the Quebec government's recent announcement of *Plan Nord*, it seems important to us to always keep it in mind.

The particular legal considerations applicable to the Nunavik territory drew the attention of KEAC members in its review of Bill nº 14. The specific comments concerning sections 2, 3, 4, 32, 51, 67, 76, 80, 90, 91 and 94 of the Bill show that these provisions do not sufficiently take into account the specificities of Nunavik and the objective of developing the mineral resources of that territory in keeping with the principles of sustainable development.

Finally, the KEAC believes that the Government of Quebec should seize the opportunity of the present legislative review to look at the various exemptions to the right of access to information contained in the *Mining Act*. The right to information is recognized by the *Charter of Human Rights and Freedoms* [6] and access to information is one of the legal principles contained in the *Sustainable Development Act* [7]. In KEAC view, a mining law with a title explicitly referring to this development model should aim to set the example in this regard.

Specific comments

***Article 2* – Preamble and whereas clauses**

Headed with a new title, the "*Act respecting the development of mineral resources in keeping with the principles of sustainable development*" is now introduced by a preamble of seven whereas clauses. However, the KEAC notes that nowhere in these whereas is reference made to the *Sustainable Development Act* and its 16 guiding principles. Even if said Act already applies to the entire public administration, an explicit reference to it in the preamble would be a source of consistency and clarity regarding the legislative intent

[5] KEAC, *Position Paper concerning the Quebec Sustainable Development Plan*, February 2005, p. 11. On line : http://www.keac-ccek.ca/documents/memoires-avis/avis-developpement-durable_en.pdf
[6] R.S.Q., c. C-12, Sect. 44
[7] R.S.Q., c. D-8.1.1, Sect. 6 f)

to ensure the development of mineral resources “in keeping with the principles of sustainable development.”

The KEAC notes the unfortunate wording of whereas 3 and 4. The reference to the “importance to promote a mining culture in Québec by raising public awareness” in the third paragraph should be reviewed to avoid any implicit reference to the "free mining" culture prevailing in the 19th century and at the origin of mining law in Quebec. According to the KEAC, this whereas should refer to the mining culture desired for the future by taking up the words in the title of the law: "to promote a mining culture in keeping with the principles of sustainable development in Québec ...."

Furthermore, the fourth whereas states that “it is essential to promote the optimal use of mineral resources in order to maximize wealth.” This statement fits poorly with the objective of sustainable development which requires not only reconciling the economic aspects of mineral resources development, but also its social and environmental dimensions. The *Sustainable Development Act* retains the principle of "economic efficiency" to implement sustainable development in Québec, which it defines as follows "the economy of Quebec and its regions must be effective, geared toward innovation and economic prosperity that is conducive to social progress and respectful of the environment.” Since it is appropriate to be consistent in regard to sustainable development, the KEAC recommends to replace the words "optimal" and "to maximize wealth" by the words "sustainable" and "an economic prosperity that is conducive to social progress and respectful of the environment."Thus reworded, the fourth whereas appears more consistent with the intergenerational equity approach in the development of mineral resources.

***Section 3* – Duty to consult**

Section 3 states that the *Act respecting the development of mineral resources in keeping with the principles of sustainable development “*must be construed in a manner consistent with the obligation to consult Native communities. The Minister must consult Native communities specifically, depending on the circumstances.” The KEAC welcomes the codification of the duty to consult Aboriginal people based on Section 35 of the *Constitution Act*, 1982. However, the KEAC would like to stress that the rights of the Inuit of Nunavik protected by the JBNQA extend beyond the simple right to be consulted. In this regard, we prefer the wording adopted by Ontario in the 2009 reform of its *Mining Act*, which made the province the first to explicitly recognized aboriginal and treaty rights of Aboriginal people in its mining legislation. Therefore, the KEAC recommends amending Section 3 of the bill, to read as follow:

> 2.1. “This Act shall be construed consistently with existing Aboriginal and treaty rights of the aboriginal peoples, including the duty to consult.”

***Section 4* – Surface ownership and Category 1 lands**

The KEAC is concerned about the scope of the new section 5, which raises questions about its application to the Nunavik territory and more particularly to JBNQA Category I lands and Inuit landholding corporations. It is important to keep in mind that said corporations received their title to Category I lands from the State,[8] for purposes other than mining, upon the signing of the JBNQA, while Québec retained ownership of mineral rights and subsurface rights.[9] Does section 4 of the Bill applies to the Nunavik territory despite the current provision of section 341 which states that the *Mining Act* "applies subject to" the JBNQA? On the opposite, does section 4 of the Bill mean that Inuit landholding corporations, as owners of the soil, become owners of surface minerals on Category I lands? The latter interpretation has the effect of changing the terms of the JBNQA and should therefore be approved by the signatories of the JBNQA to take effect

In general, we are disappointed that Bill nº 14 does not take into account the particular land regime established by JBNQA in Nunavik territory. We believe that adjustments should be made to the bill in order to distinguish the rights applicable on category I, II and III lands.

Section 32 – Notice of registration and mining claims

Section 32, amending section 65 of the *Mining Act*, creates new obligations for a mining claim holder. He is now required, within 60 days following the registration of a claim, to notify the owner of surface rights. In addition, when the claim is located on the territory of a municipality, the claim holder "must also inform the municipality of the work to be performed, at least 90 days before the work begins." The KEAC welcomes these changes to mining law that are supportive of greater public participation, a cardinal principle of sustainable development.

However, the application of section 32 in Nunavik territory needs to be clarified. In this regard, the KEAC wishes to point out that Kativik Regional Government (KRG) is a "municipality" within the meaning of the *Act respecting Northern Villages and the Kativik Regional Government*[10] "in respect of any part of the Territory that is an unorganized territory". Said Act defines the territory as follows:

> v) «Territory" means all the territory of Québec located north of the fifty-fifth parallel, excluding the Category IA and IB lands intended for the Cree community of Great Whale River and designated as such under the Act respecting the land regime in the James Bay and New Québec territories (chapter R-13.1) or, meantime, under the Act respecting Cree, Inuit and Naskapi Native persons (chapter A-33.1))[11].

[8] JBNQA, Section 7, subsection 7.1.3.
[9] *Id*., subsection. 7.1.7.
[10] R.S.Q., Chapter V-6.1, Sect. 244
[11] *Id.*, sect. 2 (v).

According to that interpretation, the KEAC understands that north of the 55th parallel, a claim holder will now have the obligation to give notice of future work to either the "Northern Village Municipality" where the claim is located or to KRG for the rest of the territory.

However, beyond access to information, the KEAC notes that there is no obligation to hold public consultations or to obtain the consent of the municipality when the exploration work has a significant impact on the environment and the population[12]. In KEAC view, Bill nº 14 should be improved on the issue of public consultations.

***Section 51* – Application for a mining lease, mining and public consultation**

Section 51 of the bill amends section 101 of the *Mining Act* by imposing to the claim holder applying for a mining lease the obligation to hold public consultations according to terms to be determined by regulation at a later date. The minister shall decide on the adequacy of the consultations and may impose in the mining lease conditions to avoid conflicts with other uses of the territory or to take into consideration comments received during the public consultations. The amendments also states that the holder of the mining right must establish a monitoring committee to ensure compliance with the commitments made following the observations made during the public consultations. The KEAC welcomes these changes that enhance the principle of public participation in mining law and its development in accordance with sustainable development.

However, the KEAC wants to stress that this new public consultation regime cannot replace the duty to consult Native communities, nor the environmental and social impact assessment and review regime contemplated in Section 23 of the JBNQA[13], which grants "a special status and involvement for the Native people and the other local inhabitants of the region over and above that provided for in procedures involving the general public." [14] The assessment and public participation regime established by Section 23 can only be modified through an amendment to the JBNQA.

Therefore, the KEAC recommends that Inuit communities be consulted in the development of future mining regulations setting the rules applicable in Nunavik territory regarding public consultations and the creation of monitoring committees (in reference to new sections 101 and 140.1 introduced in Bill nº 14).

With regard to the scope of the consultation, the KEAC is surprised that the only document submitted to public consultation is the rehabilitation and restoration plan proposed by a mining lease applicant. If it makes sense to publish such plan prior to the granting of a mining lease, it seems just as logical to allow the public to learn about the impacts of the operation of the project itself, that is the nature and the scope of mining activities.

[12] We are referring to intermediate and advanced exploration projects as defined by Écojustice in the document, *Pour que le Québec ait meilleure mine*, Ottawa, 2009, p. 18-19.
[13] *Québec (P.G.) v Moses* [2010] 1 S.C.R. 557.
[14] JBNQA, subsection 23.2.2.

In terms of access to information, the KEAC recommends to the National Assembly to amend Bill nº 14 to repeal the override provisions of the *Act respecting access to documents held by public bodies and the Protection of personal information* contained in the current *mining Act*[15]. Thus, it seems inappropriate to keep from public scrutiny annual report stating "the nature and cost of the rehabilitation and restoration work performed or to be performed"[16] once the lease is granted. In KEAC view, the obligation to make available to the public information about mining operation works should prevail throughout the existence of the mining lease and the bill should be amended accordingly. The repeal of the override provisions regarding access to information will also facilitate the work of the monitoring committee and the fulfilment of commitments made during public consultations.

Section 67- Access to environmental information

Still in relation to the exemptions granted to the mining industry in terms of access to information, the KEAC questions the scope of the amendment to section 226 of the *Mining Act.* In case of suspension of work "for six months or more", the mining rights holder who performs underground exploration and the operator must now submit the "plans of the underground works, surface mines, ground facilities and tailings dumps existing on the date of cessation of the work" to the Minister of Sustainable Development, Environment and Parks.

This amendment to the *Mining Act* is desirable, as it will make the information regarding tailings impoundment areas available to the public. Indeed, according to section 118.4 of the Environmental Quality Act (EQA):

> Every person has the right to obtain from the Ministry of Sustainable Development, Environment and Parks copy of any available information concerning the quantity, quality or concentration of contaminants emitted, issued, discharged or deposited by a source of contamination or concerning the presence of a contaminant in the environment.
>
> This section applies subject to the restrictions to the right of access provided in section 28 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

The "tailings impoundment areas" being contaminants under the EQA, section 118.4 of said Act obliges the Minister to provide to anyone who requests it a copy of any available information in his possession regarding the presence of contaminants in the environment, which is the case of certain information contained in documents submitted under section 226 of the *Mining Act*.

[15] R.S.Q., c. M-13.1, sect. 215 and 228.
[16] *Id*., sect. 221, para. 3.

The override provision to the *Act respecting access to documents held by public bodies and the Protection of personal information* contained in section 228 of the *Mining Act* may be causing unnecessary debates regarding public participation that can be resolved through Bill nº 14 by repealing the mining law override provisions regarding access to information.

According to the KEAC, as the right to information and the right to a healthful environment are recognized by the *Charter of Rights and Freedoms*, it is important to make this information available, especially in view to "develop mineral resources in keeping with the principles of sustainable development."

In KEAC view, there is no reason why Bill nº 14 should maintain the current section 228 of the *Mining Act*, while it announces plans to make the mining industry more respectful of sustainable development principles. Even bearing in mind that some exceptions may be necessary, particularly in terms of financial data, extending the secret to all environmental information and those affecting human health is inadequate. To clarify and simplify the situation, the override provision of section 228 should be reviewed to ensure public access to information.

***Section 76* – Financial guarantees and rehabilitation**

The KEAC welcomes the changes made by the bill to the guarantee required to cover the anticipated restoration costs. However, we believe that the three years period granted to the operator after the cessation of its operations to undertake rehabilitation and restoration work is too long and should be reduced. Again, the fragility and the peculiarities of the Nunavik territory call for a "continuum" between the end of the commercial operation and the beginning of rehabilitation and restoration work. Nunavik has seen too many "orphan sites", and shorter delays to undertake rehabilitation and restoration work should help to reduce this phenomenon.

The KEAC also believes that the restoration of mining sites must include all aspects of mining activities, without distinction between exploration and operation phases, and without excluding camps, buildings, roads, landing strips, treatment facilities and other equipment. As for the payment of financial guarantees required by law, follow-ups should be performed and enforcement measures must be initiated against offenders in terms of criminal prosecution and suspension of rights granted on mineral resources.

In this regard, the KEAC notes that the fine corresponding to 10% of the total amount of the financial guarantee imposed to a person who fails to comply with the three years delay to undertake rehabilitation and restoration work is insufficient (section 94 of the bill). This amount is hardly an incentive to undertake this work quickly. The KEAC recommends raising the amount of the fine and reducing the delay to undertake the work to one year.

***Section 80* – Mining rights holders' power to expropriate**

The KEAC notes that the bill maintains the power to expropriate granted to the holder of mining rights and the owner of mineral substances. This extraordinary power gives them a considerable advantage in negotiations with the landowner. According to the KEAC, it is necessary to review the power to expropriate granted to private interests to limit it strictly to what is necessary (a minimal impairment) and further protect the land owner' rights in the expropriation process. We believe that the third paragraph of the new section 235 should also exclude the possibility to expropriate Aboriginal burial sites as it is the case for Roman Catholic cemeteries.

***Section 90* – Lands reserved to the State or withdrawn from mining activities**

Section 90 modifies the powers of the minister set out in section 304, by allowing him, among other thing, to:

> […] reserve to the State or withdraw from staking, map designation, mining exploration or mining operations any land containing mineral substances that are part of the domain of the State to avoid conflicts with other uses of the territory, taking into account, among other things, regional land use planning;

The regional land use planning is a major concern for the communities of Nunavik. In this regard, the KEAC believes it is important to recall the existence of the *Master Plan for Land Use in the Kativik Regio*n, a formal KRG by-law adopted in 1998. The Master Plan sets out the broad orientations and land uses north of the 55th parallel. It has been approved by the Ministry of Municipal Affairs, Regions and Land Occupancy. The KEAC recommends to the Minister of Natural Resources and Wildlife to be guided by the Master Plan and it regional planning in the exercise of his new discretionary power.

The KEAC also wishes to remind about consultations conducted by KRG and Makivik regarding the opportunity to create a Regional Land and Natural Resources Commission responsible, among other things, to develop and conduct a broad public consultation on a Regional plan for integrated land and natural resource development. With the recent announcement of *Plan Nord*, such tools are crucial if the minister wants to take into account regional land use planning in Nunavik.

Overall, the Nunavik planning tools are different from those prevailing in southern Quebec. They are unfortunately not sufficiently taken into account by the various public and private stakeholders. For example, the MRNF *Regional Plan for Public Land Development* has never been completed for the region, and the Transportation Plan from the Ministry of Transport of Quebec for the Nord-du-Québec region is not very explicit on the issue of road development in the Nunavik region. In its *Position Paper concerning Current and Future Transportation Infrastructure Development in Nunavik* (2007), the KEAC recommended to the government to better manage the development of transportation infrastructure related to the development of the mining industry and to

enforce regional land use planning (sections 242 to 248 of the *Mining Act* relating to mining roads are not covered by the bill.)

The KEAC believes that more attention should be given to protection, planning and land use planning instruments already in place in Nunavik to avoid conflicts of uses. The law should provide clear rules so that the territory can be managed in a fair and balanced manner, taking into account the rights of the Native population and regional land use planning tools. Restrictions on mining priority (exploration and mining) must be recognized and implemented to ensure the sustainable development of the territory.

***Section 91* – Withdrawal from staking, urbanization perimeter and area dedicated to vacationing**

Section 91 has been an important topic of discussions in southern Quebec, where it is presented as a major improvement to the existing mining regime. However, this provision excludes Nunavik from its application. Indeed, the withdrawal from staking, map designation, mining exploration or mining operation is restricted to land included within an urbanization perimeter as defined in the *Act respecting land use planning and development* (chapter A-19.1) (ALUPD), as well as any area dedicated to vacationing according to a land use planning and development plan adopted under said Act .

Since section 266 of the ALUPD explicitly provides that it does not apply in the territories north of the 55th parallel, it appears to the KEAC that the whole territory of Nunavik is excluded from one of the main improvements contained in Bill nº 14. This situation should be corrected. It illustrates, once again, a lack of awareness of the land use planning mechanisms in force in the northern part of the province.

In KEAC view, the bill must be amended to grant to the northern villages and the Kativik Regional Government the same powers as municipalities in southern Québec and Regional County Municipalities (RCM) when adopting land use planning instruments. In addition, the concept of "vacationing" is a cultural characteristic that does not apply in the same manner in Nunavik than in the rest of the province. In this regard, the bill should be amended to allow the people of Nunavik to withdraw from mining operation certain areas which are the equivalent of "areas dedicated to vacationing" in the south.

Finally, the KEAC notes that if an RCM may ask the Minister to terminate a withdrawal, as provided in the bill, it should also be able to request the Minister to withdraw from staking and other mining activities all or part of its territory to ensure the respect of certain uses that have been prioritized at the regional level. In this regard, the reasons stated in the bill that may be taken into consideration by the Minister to reach a decision are strongly linked to the economic objectives of mining development while neglecting social or environmental motivations. In this spirit, the KEAC recommends to amend subsection 3º of the last paragraph to add the word ″sustainable″ "the incidence of the activity on *sustainable* development needs."

***Section 94* – Penal sanctions**

In term of penal sanctions, we have already highlighted the weakness of the sanction imposed for failure to meet the deadline to undertake rehabilitation and restoration work (section 319.5). In general, the KEAC believes that the penal sanctions contained in the bill are not sufficient to ensure compliance with the obligations therein. Fines and penal sanctions should be harmonized with the scale of sanction found in the *Environment Quality Act.*

KEAC recommends providing that failure to furnish the required guarantees should result in suspension of mining exploration and operations rights, and that the beginning of exploration or mining work is subject to the payment of these guarantees.

Finally, given the legislator objective to develop mineral ressources in keeping with the principle of sustainable development, the bill should grant a right of action to the public to enable it to enforce its right to environment. These provisions should be modeled on sections 19.1 to 19.7 of the *Environment Quality Act*, which enable any natural person to seek an injunction to stop activities undertaken in contravention of permit conditions or the obligations of the law.

Conclusion

The KEAC is a consultative body to responsible governments on matters related to environmental and social protection in Nunavik. The review of the Quebec mining law at the occasion of the tabling of Bill nº 14 enables the KEAC to reminds everyone about the particular rules that applies to mineral exploration and mining activities in Nunavik territory pursuant to the JBNQA.

The KEAC reviewed the bill taking into consideration Nunavik specific characteristics and the objective of developing the mineral resources of that territory in keeping with the principles of sustainable development.

While an improvement over previous Bill nº 79*,* Bill nº 14 must still be improved to meet the legal principles of sustainable development recognized by the *Sustainable development Act,* particularly concerning the right of access to information and public participation.

Several features of the Nunavik territory, its management and its Native population are insufficiently taken into consideration by Quebec mining law and Bill nº 14. This is the case of the withdrawal from staking in urbanization perimeters and areas dedicated to vacationing, one of the main improvements that does not apply to the territory north of the 55th parallel.

Finally, the development of mining infrastructure in a territory such as Nunavik must be carefully planned and must fully respected the regional land use planning mechanisms, taking into consideration the fact that the objective is to develop mineral resources in Nunavik in keeping with the principle of sustainable development.

We remain sincerely yours.

Michael Barrett
President

c.c. Mrs Nathalie Normandeau, Minister of Natural Resources and Wildlife
Mr. Serge Simard, delegate Minister of Natural Resources and Wildlife