WOODWARD & COMPANY
LAWYERS LLP

REPLY TO: KATE KEMPTON
Victoria Office
email: kkempton@woodwardandcompany.com

March 23, 2023

Via email and online comments platform

The Honourable George Pirie
Ontario Minister of Mines
Room 5620, 5th Floor
99 Wellesley St. W
Toronto, ON M7A 1W3

Dear Minister Pirie:

Re: Proposed changes to the *Mining Act* regulations associated with Bill 71 – *Building More Mines Act, 2023*

We are counsel for Ginoogaming First Nation. We write to express our serious concerns with the proposed amendments to the *Mining Act*[1] and regulations set out in Bill 71 – *Building More Mines Act, 2023.*

Ontario's proposed amendments to the *Mining Act* take law in Canada backwards, away from the UNDRIP requirements for free prior and informed consent to projects on First Nation homelands that threaten our lands and wellbeing. These amendments would allow mines to commence with very little scrutiny as to their impacts, through a barely-there proponent-driven regulatory regime that facilitates biased self-interested and uninformed decision making.

First Nations would be consulted based on this weak regime. Ontario's engagement with First Nations over exploration and mining should be with the intent of acquiring First Nations' free prior and informed consent, yet how can any decisions be informed when the entire regime is designed to skirt unbiased information and analysis? How can such decisions be "prior" when they are intended to allow mine construction to commence before the key planning tool (closure plans) are done?

[1] RSO 1990, c M.14.

VICTORIA OFFICE:
200 – 1022 GOVERNMENT STREET
VICTORIA, BC V8W 1X7

TEL: 250-383-2356; FAX: 250-380-6560
WEBSITE: www.woodwardandcompany.com

WHITEHORSE OFFICE:
201 - 3059 3RD AVENUE
WHITEHORSE, YT Y1A 1E2

TEL: 867-633-5940
WEBSITE: www.woodwardandcompany.com

The sharing of lands and resources permitted by Treaty 9 was based on the understanding that the Crown would be responsible in its use of those lands. The *Mining Act* amendments proposed in Bill 71 are not sustainable. Such regulatory changes would be reckless and would cause harm to Treaty 9 lands, in direct violation of the Crown's Treaty promises to ensure those traditional territories are cared for and respected.

In 2006 to 2008, as a result of First Nations' advocacy in a number of cases, Ontario was forced to amend the *Mining Act* to one that better respected First Nations' rights. While those amendments only partially addressed First Nations' concerns, they did improve upon the previous free entry system that had allowed unchecked exploration for decades. Today, the changes proposed in Bill 71 would set the *Mining Act* back in time by de-regulating other aspects of the mining industry. Such amendments would be very dangerous and will not go unchallenged.

The proposed changes contained in Bill 71 must be considered in the context of the existing regulatory framework for mining in Ontario. Ontario does not require private sector mining projects to undergo environmental assessments under the provincial *Environmental Assessment Act*[2] (*"EAA"*). Under the federal *Impact Assessment Act*[3], only large mines and those situated in certain precarious environments require impact assessments. As of 2020, only one mine or smelter in the established mining districts of Timmins, Sudbury and Kirkland Lake had ever received an environmental assessment, either federally or provincially.[4]

This huge gap in environmental assessment underscores the need for robust environmental protections and Ministry oversight under the *Mining Act.* The proposed amendments in Bill 71 would significantly weaken the regulatory framework for mining in Ontario. This in turn will weaken the exercise of First Nations' decision making, consent rights, and protections for our lands and values.

1. Weakened Closure Plans

A comprehensive closure plan is a crucial element of responsible mine management. At present, Part VII of the *Mining Act* requires project proponents to submit a detailed closure plan to the Ministry of Mines before advanced exploration or mine production can begin. A closure plan requires consideration of a mine's long-term impacts and the steps and expense necessary to rehabilitate the mine site at the end of its productive life. The closure

[2] RSO 1990, c E. 18.
[3] SC 2019, c 28, s 1.
[4] Mining Watch Canada, Submission on a proposed list of projects which will be subject to the comprehensive environmental assessment requirements in Part II.3 of the Environmental Assessment Act (EAA) and will be designated in a regulation as Part II.3 project, Environmental Registry of Ontario number 019-2377, November 5, 2020 at p. 7:https://miningwatch.ca/sites/default/files/ojams-mwc_submission_on_project_list_for_comprehensive_eas.pdf

plan must describe all measures the proponent will take to rehabilitate the mine site during the life cycle of the mine.

Bill 71 would greatly weaken the closure planning process. If implemented, the proposed changes would allow mining projects to proceed with incomplete closure plans and before comprehensive baseline studies are complete. This short-sighted approach will undermine the very purpose of closure planning, which is to ensure that long-term rehabilitation measures are built into a mining project's design before active production begins.

We are particularly concerned about the following proposed changes to the closure planning process:

a) Conditional Filing Order

Bill 71 proposes to amend the *Mining Act* to allow the Minister to issue a "conditional filing order", on request from a proponent, which allows the deferral of certain required elements of a closure plan. The "conditional filing order" would specify a deadline for the proponent to provide the deferred elements of the closure plan, and may include other terms and conditions as determined by the Minister.

We strongly object to the "conditional filing order" process proposed in Bill 71. Project proponents should not be given the opportunity to defer any aspects of a closure plan. Essential rehabilitation measures may become impossible to implement at a late stage if they were not contemplated as part of a forward-looking closure plan from the beginning. Certain monitoring and remediation activities may not be feasible at the end of a mine's productive life if such activities were not specifically planned for during the mine's construction and operation phases. For instance, the location and nature of waste placement will dictate which remediation options are viable; site rehabilitation options that are not considered at the outset may be impossible to "add on" at a late stage.[5]

While we object in principle to closure plan deferral, at minimum, the Ministry must obtain the consent of all potentially impacted First Nations before any aspects of a closure plan can be deferred.

[5] Mining Watch Canada, "More, Worse Mining: Ontario's Proposed Building More Mines Act", March 7, 2023: https://miningwatch.ca/blog/2023/3/7/more-worse-mining-ontarios-proposed-building-more-mines-act

b) Qualified Persons and Certifications

At present, various aspects of a closure plan must be certified by qualified professionals, such as engineers, while other certifications are provided by the proponent. Bill 71 proposes to create a framework where the Ministry would rely on closure plan certification by "qualified persons", instead of the Ministry conducting its own technical review.[6]

The proposed amendments would also permit "qualified persons" to certify "alternative rehabilitation approaches" and confirm that such alternative approaches meet or exceed the objectives of the Mine Rehabilitation Code where they do not strictly conform with the Code requirements.

The proposed changes purport to "create a fully proponent-driven system which relies on the technical expertise of qualified persons and industry professionals, and correspondingly removes the need for government technical reviews."[7] In practice, this means that mining companies' own staff would be permitted to certify their closure plans. This creates a clear conflict of interest in the mining oversight process. We are concerned that the proposed lack of external review by the province will greatly undermine the effectiveness of closure plans.

Further, the proposed changes are a clear step backward from the Auditor General's recommendations in recent years. The Auditor General's 2015 Annual Report on the province's mines and minerals program found that the Ministry's in-house mineral exploration and development consultants had a conflicting role, as they both oversaw mine closure plans and promoted mineral development by helping proponents through the regulatory process. In response to the 2015 Audit, the Ministry hired a professional engineer as a Closure Plan Co-ordinator who worked directly with consultants to review all closure plans and to ensure that appropriate technical reviews were completed by technical specialists for high-risk components of the closure plans.[8] The proposed changes in Bill 71 would return Ontario to a system where the individuals overseeing closure plans serve in conflicting roles, though the conflict would be even more troubling this time as proponents could be certifying their own closure plans.

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[6] Ministry of Mines, Proposed regulatory changes to closure plan rehabilitation requirements for advanced exploration and mine production and adding an additional class of facilities to the list of such classes that are exclude from the definition of "mine", March 9, 2023, ERO number 019-6750 at p. 4.

[7] Ministry of Mines, Proposed regulatory changes to closure plan rehabilitation requirements for advanced exploration and mine production and adding an additional class of facilities to the list of such classes that are exclude from the definition of "mine", March 9, 2023, ERO number 019-6750 at p. 3.

[8] Office of the Auditor General of Ontario, 2017 Annual Report (Volume 2 of 2), Mines and Minerals Program: Follow-Up Report at p. 152: https://www.auditor.on.ca/en/content/annualreports/arreports/en17/v2_111en17.pdf

c) Delayed Delivery of Baseline Studies

Mining project proponents must currently prepare technical baseline studies before submitting closure plans. Baseline studies can involve data-gathering over multiple years. The proposed amendments in Bill 71 include a change to allow advanced exploration and mine production to begin before a complete baseline study is available. Instead, the Ministry proposes to allow advanced exploration and production after only one year of groundwater and surface water testing and sampling is complete, with the full characterization to follow within two years of the exploration or mine production. In essence, this is a proposal to rely on incomplete data to inform closure plans for mining projects. We strongly object to this proposed change.

2. Weakened Financial Assurance

At present, closure plans must be accompanied by financial assurance in an amount equal to the estimated costs of the rehabilitation work specified in the closure plan. This financial assurance may be provided in the form of cash, letter of credit, surety bond or other forms permitted by the Act, and is held by the Ministry to ensure that adequate funds are available to rehabilitate a mine site if the proponent is unwilling or unable to do so.[9]

Bill 71 would amend the *Mining Act* to allow Ontario to accept financial assurance in phases, where approved by the Minister, so that proponents could provide financial assurance in stages that correspond with the site construction schedule. In other words, financial assurance would be paid incrementally as mine construction progresses, rather than at the start of the project in an amount that would cover all the rehabilitation measures specified in the closure plan.

The proposal to permit phased financial assurance creates the very real potential that a mine will be operational where the proponent has not provided adequate financial assurance to pay for rehabilitation. The province of Ontario would then be liable for that shortfall in the event of an environmental disaster, or if the proponent suddenly abandons the project or fails to undertake the necessary rehabilitation work.

Allowing phased financial assurance is a reckless proposal, particularly as the province already has a significant shortfall in financial assurance from mining proponents.[10] We

[9] Ministry of Mines, Proposal to make consequential administrative amendments to several regulations under the *Mining Act*, March 9, 2023, ERO number: 019-6749 at p. 2

[10] The Auditor General's 2015 Annual Report on the province's mines and minerals program found that financial assurance retained by the Ministry may not reflect actual costs to close out mines, and that one third of mine-closure plans had not had their financial assurances updated since the early 2000's. In 2015, the Auditor General found that applying a conservative inflation adjustment, the province had a potential $63-million shortfall in financial assurance. The Auditor General also found the Ministry lacked estimates for the total cost of rehabilitating the 4,400 abandoned mine sites in the province in 2015, though rehabilitation costs for the 56 highest-risk contaminated sites

strongly object to amendments that would permit proponents to pay financial assurance in stages.

3. Minister's Decision-Making Role

Bill 71, if enacted, would remove the statutory role of the Director of Mine Rehabilitation and transfer those statutory authorities to the Minister. Among other powers, the Minister would also issue conditional filing orders and provide approval for phased financial assurance.

We are deeply concerned by these proposed changes, which would improperly politicize decision-making about mine regulation, oversight and approvals. The Minister has the discretion to consider broader public interest matters than those set out in the *Mining Act*, which may not always align with the distinct considerations and objectives set out in that legislation. For these reasons, such decisions are better made by Directors of Mine Rehabilitation, who are specialized officers or employees of the Ministry appointed under the current framework.[11] We do not support the greater decision-making role ascribed to the Minister in Bill 71.

Conclusion

Any proposed changes to the *Mining Act* and regulations must directly acknowledge Ontario's obligation to consult with Ginoogaming First Nation and obtain free, prior and informed consent prior to approving any proposed mining projects, closure plans or closure plan amendments on its traditional territory.

Ontario has already slid through (in omnibus bills) many amendments to many statutes that remove regulatory oversight and opportunities for First Nations to be consulted, accommodated and consent (or not) to projects and activities in their homeland territories. You are already placing the lands, waters, climate, wellbeing of Indigenous people and other beings, at serious risk. You are violating First Nations' rights and Indigenous Laws. Ontario now intends to compound these risks and violations by these proposed amendments to the *Mining Act*.

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alone were estimated at $372 million and the potential costs of rehabilitating the remaining sites could range from $163 million to $782 million. Office of the Auditor General of Ontario, 2015 Annual Report, Mines and Minerals Program: https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.11en15.pdf.
In its 2017 follow-up report, the Auditor General found that the Ministry had made little to no progress on its recommendation that the Ministry should require mining companies to regularly update their estimated mine close-out costs and the related financial assurance to reflect changing market conditions and changes to rehabilitation standards. Office of the Auditor General of Ontario, 2017 Annual Report (Volume 2 of 2), Mines and Minerals Program: Follow-Up Report at p. 153:
https://www.auditor.on.ca/en/content/annualreports/arreports/en17/v2_111en17.pdf

[11] *Mining Act*, s. 153(1).

Ginoogaming First Nation will not stand by and allow this to happen.

Yours truly,
WOODWARD & COMPANY LAWYERS LLP

Kate Kempton
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