



August 4, 2009

**VIA SUBMISSION TO THE ENVIRONMENTAL REGISTRY
UNDER PROJECT NO. 010-6624**

The Hon. Donna Cansfield
Minister of Natural Resources
Government of Ontario
6th Floor, Room 6630, Whitney Block
99 Wellesley Street West
Toronto, Ontario M7A 1W3

Dear Minister Cansfield:

Re: PDAC Response to Bill 191, the *Far North Act, 2009*

On behalf of the Prospectors and Developers Association of Canada (PDAC), I am writing to advise that this letter and the enclosed document entitled “Detailed Responses” constitute together the submission of the PDAC in response to Bill 191, Ontario’s proposed *Far North Act, 2009*. For the reasons presented in the detailed responses and discussed below, we submit that the provincial government should not enact the proposed legislation in its present form.

By way of review, the present submission represents the third occasion on which the PDAC has formally responded to the public consultation process that Premier Dalton McGuinty initiated in the summer of 2008 when he announced the province’s “Far North Initiative” on July 14 of that year.

In our first submission, which we filed with the Environmental Registry on October 10, 2008, we provided extensive comments and recommendations in response to the discussion paper that the Ministry of Northern Development released in August of that year. In that paper, your colleague, the Hon. Michael Gravelle, outlined the basis for the government’s initiative to “modernize” the Ontario *Mining Act*.

The second PDAC submission consisted of the two documents that we filed with the Environmental Registry on July 3, 2009 in which we provided our detailed views on Bill 173, the *Mining Amendment Act, 2009*. In that submission, we likewise recommended that the proposed legislation not be enacted into law in its present form.

All three of the PDAC’s submissions reflect an overarching goal: to reinforce the importance of maintaining a regulatory regime in Ontario that will allow the exploration and mining industry to carry on business in a vigorous, commercially successful, environmentally responsible and socially accountable manner. The outcome we therefore seek is one in which this important sector of our economy will continue to make a significant contribution to the growth and prosperity of the province, especially during these economically uncertain times.

As an organization whose purpose is to protect and promote the interests of the Canadian mineral exploration sector as a whole, the PDAC also offers a uniquely national perspective on the issues

2/...

that the provincial government has brought forward for discussion and debate through the *Mining Act* discussion paper, Bill 173, and now Bill 191. In addition, the association's growing record of contributions to addressing environmental, social and regulatory issues in a number of different jurisdictions, both at home and overseas, positions the PDAC to share a broadly informed point of view on the important questions that the government's initiatives have raised.

Moreover, we are keenly aware that Ontario's legislative proposals have a strong potential to accelerate the debate on the same issues elsewhere in Canada. We have therefore urged the members of the PDAC, wherever they may currently be working, to familiarize themselves with Ontario's initiatives, and to make their views and concerns known to the provincial government, whether individually or through the association.

As outlined below and further discussed in our detailed responses, many of the questions that Bills 173 and 191 have raised in Ontario are particularly relevant to the unique position of Aboriginal peoples in the province, as well as in other regions of the country. While First Nations are very well equipped to articulate their views and concerns, we hope that the PDAC's perspective on Aboriginal relations, something to which we attach great importance, will merit a close and careful assessment by you and your cabinet colleagues when you consider our submissions.

Bill 191 raises a wide variety of issues, some of which are in the realm of public policy, while others are more closely related to the structure, function and anticipated impact of the legislative proposal itself. The detailed responses provided in the enclosed document are, in many cases, focused on the second class of subjects. In turn, this letter is intended to complete our submission by providing a perspective on the broader policy issues that Bill 191 raises.

1. Absence of Balance – Environment and Economy

We submit that implementing Bill 191, in its present form, would present serious impediments to achieving an appropriate balance between environmental, social and cultural goals, on the one hand and ensuring a healthy economy through the responsible development of the natural resources of the Far North, on the other. While we base this conclusion on our own independent analysis, we note that similar concerns were first expressed by the Nishnawbe Aski Nation (NAN) in the letter of Grand Chief Stan Beardy to Premier McGuinty dated April 3, 2009.

In that letter, Grand Chief Beardy points out that the government's proposal to designate 50 per cent or more of the Far North as "protected areas" would permanently preclude "...modern forms of economic development" such as forestry, mining and hydro electricity, and thereby, in NAN's view, cripple the economic future of its communities.

These concerns echo those that we voiced in our October 10, 2008 submission in response to the *Mining Act* discussion paper. At that time, we urged Minister Gravelle and his cabinet colleagues to bear in mind that mineral resource development is likely to remain the only economic activity capable of creating, through employment, training and business development opportunities, the substantial economic benefits that First Nations communities so urgently need to narrow the gap between their standard of living and that of other Canadians.

2. Due Regard for the Broader Public Interest

As outlined above and as discussed in more detail in the attached document, the PDAC continues to make significant progress in forging strong working relationships with Aboriginal organizations, and in encouraging its members to recognize the enormous importance of engaging Aboriginal communities in ways that lead to true partnerships and mutually rewarding, long-term relationships.

At the same time, however, and with full respect for the unique status that First Nations interests, societies, cultures and traditions are rightly accorded in the Far North, we are also mindful of the fact that the lands to which Bill 191 would apply are publicly owned Crown lands that are meant to be managed in the collective best interests of all Ontarians. Against this backdrop, we are troubled by what we see as an apparent failure in Bill 191 to account for the broader public interest.

The most notable omission is apparent in paragraph 6.4, which identifies sustainable economic development in the Far North as one of the key goals of land use planning. For the reasons outlined above, we would have thought that this provision would have spoken to enabling "...sustainable economic development that benefits First Nations **and other residents of Ontario**" (emphasis added).

We note that analogous statutory regimes elsewhere in Canada strike a better balance between protecting the interests of local residents and those of other citizens. For example, when addressing land use planning in certain regions of the Northwest Territories, the federal *Mackenzie Valley Resource Management Act* states, as one of its guiding principles, that the purpose of such planning is to "...protect and promote the social, cultural and economic well-being of residents and communities in the settlement area, **having regard to the interests of all Canadians**" (emphasis added). As Bill 191 does not adopt a similar approach, we recommend that the appropriate revisions be given serious consideration.

Similarly, we acknowledge the need to ensure a full and meaningful role for First Nations in land use planning as contemplated by paragraph 6.1 of Bill 191. However, as pointed out in the enclosed document, other important stakeholders who can play a significant and useful role in the development of effective and balanced land use plans are precluded from direct involvement until the very final stage of the process. We question whether this approach truly serves the public interest.

Section 3 of Bill 191, the "interpretation" provision, raises related concerns. We are fully mindful of the constitutional protection that section 35 of the *Constitution Act* affords to existing Aboriginal and treaty rights. However, because the constitution is the supreme law of Canada and therefore prevails over other enactments, we are uncertain of the need to invoke it in this manner.

From a more pragmatic perspective, we would also ask whether section 3 of Bill 191 will facilitate the reconciliation of Aboriginal interests with those of Canadian society as a whole. It should be remembered that reconciliation is the ultimate purpose of section 35 of the *Constitution Act* according to the Supreme Court of Canada. We see a risk that, instead of promoting that goal, section 3 could be used as a platform to launch unproductive, damaging and divisive litigation that pits Aboriginal and non-Aboriginal interests against each other.

3. Inadequate Time for Proper Consultation and Reflection

As mentioned earlier, the PDAC has made it a priority to make the fullest possible contribution to the government-led initiatives that commenced with the August 2008 discussion paper and have culminated with the introduction of Bill 173 and Bill 191 in the provincial legislature. The association has dedicated significant resources in support of its initiatives.

Despite these efforts, we remain concerned with the pace at which the process has continued, and question whether the government has provided adequate opportunity for meaningful consultation with all key stakeholders. We also question whether sufficient allowance has been made for a reflective and thoughtful assessment of the short and long-term potential consequences of the proposed enactments, each of which may have far reaching implications or unexpected consequences that may not be immediately apparent.

The questionable approach taken to the timing for this initiative became apparent at a very early stage, as evidenced by the need to extend, on two separate occasions, the original deadline that the government set for filing responses to the August 2008 discussion paper. Regrettably, this experience does not appear to have promoted a more measured and well planned approach, as shown by the inability of the Standing Committee on General Government to accommodate all of the interveners who have requested the opportunity to appear at the one-day hearing into both Bill 173 and Bill 191 that is scheduled for Thursday, August 6, in Toronto. The lack of any committee hearings in the Far North, particularly any scheduled for the Aboriginal communities most likely to experience the long-term effects of the two bills, is also of concern.

Undertaking a detailed, comprehensive and systematic analysis of Bill 173 and Bill 191 requires a substantial effort supported by the appropriate resources and expertise. In addition, even though certain aspects of the two proposals are interrelated, we suggest that each of them is sufficiently complex and far-reaching in its implications to have warranted separate hearings by an appropriate committee of the provincial legislature, in addition to the joint hearings on the two bills that are about to begin.

Considering the sweeping nature of the changes proposed under these proposals, especially those that implicate existing Aboriginal and treaty rights, we submit that the provincial government has not allowed sufficient time for all potentially affected sectors of society to properly evaluate the proposed legislation and make a positive contribution to its development.

Against this background, it is not surprising that the Aboriginal community has been particularly vocal in its objections to the present scheduling. This is clearly illustrated by the recent resolution of the Chiefs of the Nishnawbe Aski Nation calling upon the government to entirely abandon Bill 191 in its present form, and challenging the legality of the consultation process that the government has thus far undertaken.

In conclusion, we submit that in its present form, Bill 191 presents a serious risk to the future of responsible mineral resource exploration and development in Ontario's Far North, and therefore compromises the significant economic benefits that would otherwise be available to Ontarians and their communities. However, it is the Far North, and especially its Aboriginal residents, who are most likely to experience the adverse impacts and negative consequences of the proposed regime.

We fear that these impacts will only serve to perpetuate the cycle of poverty and deprivation that continues to prevail in many First Nations communities.

We therefore urge you, Premier McGuinty, and your cabinet colleagues to carefully consider, when you determine the future of Bill 191, the individual and cumulative impacts that could potentially result from:

- removing 50 per cent or more of the Far North land base from exploration;
- excluding the exploration and mining sector from significant stages of the land use planning process;
- compromising or eliminating the value of existing mineral tenure through land use planning decisions;
- rendering it very difficult, if not impossible, for exploration companies to raise the funds necessary to continue mineral initiatives in the Far North;
- prohibiting new mining operations for a significant period of time or in some cases, indefinitely;
- depriving Far North communities, notably Aboriginal communities, as well as other Ontarians, of the significant employment, training and business-related benefits that responsible development of the region's mineral potential could achieve;
- barring by statute any right to recover compensation for losses suffered as a result of implementation of the Bill 191 regime, at least by Canadian companies;
- implementing a statute that incorporates an unbalanced approach to the environment and the economy, and fails to properly account for the broader public interest; and
- in the interim, continuing to follow a schedule that provides insufficient opportunity for full and meaningful consultation, assessment and reflection on what can reasonably be seen as some of the most significant and far reaching changes to Ontario's statutory framework for decades to come.

Ontario's Leadership Role in Exploration and Mining

Planning is already well underway for the March 2010 PDAC convention in Toronto. The PDAC event, which is held annually, is the largest gathering of its kind in the world and a major economic contributor to the city. In March of this year, the convention attracted more than 18,000 delegates from 120 countries.

While the PDAC convention is clearly important to Toronto and to the province, it is only one part of an impressive array of attributes that gives Ontario its pre-eminent place on the international mining scene. While not uniquely centered on this province, many of the technical, geological, financial, legal and related enterprises that make Canada a world leader in mineral exploration and mining have chosen Ontario for their head offices. It is in the interests of all Ontarians that the province maintain its enviable position as a focus of global mineral exploration and mine development.

We hope that you will keep these circumstances in mind when considering the many submissions that you will have received on Bill 191 and Bill 173, and come back to the citizenry with significantly revised proposals that focus on the issues of greatest concern, including those raised by First Nations.

In doing so, we urge you to strive for new approaches enriched by creative and innovative thinking that will lead to fair, balanced and enduring solutions. In our experience, these kinds of goals will only be achieved through a process that proceeds in an orderly, disciplined and balanced way, has the benefit of the appropriate resources and expertise, and is allowed to take place over an adequate period of time. However, despite the daunting challenges that these objectives may encompass, we firmly believe that, by working together, a better outcome is within our collective grasp.

With these goals in mind, let me emphasize that PDAC's executive officers and key members of the association would welcome the opportunity to discuss in further detail our comments, concerns and recommendations with you, your fellow Ministers, your respective officials or other Members of the Provincial Parliament, at your respective convenience.

On behalf of the more than 7,000 members of the PDAC, I wish to thank the Ontario government once again for the opportunity to contribute to these important developments. We trust that, when read individually and together, the association's three submissions will assist you in continuing this very important work.

Yours truly,

A handwritten signature in black ink, appearing to read "Jon Baird". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Jon Baird
President

Encl. (1)

Copy

Mr. Chris Hodgson
President
Ontario Mining Association

Mr. Garry Clark
Executive Director
Ontario Prospectors Association

PROSPECTORS & DEVELOPERS ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DES PROSPECTEURS ET ENTREPRENEURS

**DETAILED RESPONSES TO ONTARIO BILL 191,
*THE FAR NORTH ACT, 2009***

Toronto, Ontario

August 4, 2009

TABLE OF CONTENTS

	Page No.
1. THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA: AN INTRODUCTION	1
2. BACKGROUND TO THIS SUBMISSION	1
3. ADDRESSING ABORIGINAL INTERESTS	2
4. RECONCILING PROTECTED AREAS AND MINERAL EXPLORATION AND DEVELOPMENT	4
5. ESTABLISHING A BALANCED APPROACH TO LAND USE PLANNING	6
6. IMPEDING EXPLORATION AND PROHIBITING NEW MINING OPERATIONS	7
7. EXTINGUISHING RIGHTS OF RECOVERY	9
8. CORRECTING AMBIGUITY AND UNCERTAINTY	10
9. CONCLUSIONS AND KEY RECOMMENDATIONS	11

1. THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA: AN INTRODUCTION

- 1.1 The Prospectors and Developers Association of Canada (PDAC) is a national association that exists to protect and promote the interests of the Canadian mineral exploration sector and to ensure a robust mining industry in Canada. The association encourages the highest standards of technical, environmental, safety and social practices throughout Canada and internationally.
- 1.2 While the PDAC regularly contributes to legislative and policy initiatives of importance to mineral exploration and mine development in Canada, it also pays close attention to regulatory developments that affect Canadian exploration and mining companies working in other countries. The PDAC also works in close collaboration with the organizations that represent the interests of the mineral exploration and mining sector in each of Canada's provinces and territories, including the Ontario Prospectors Association and the Ontario Mining Association, while ensuring that it brings a national perspective to the regulatory and policy issues that the PDAC addresses,
- 1.3 The PDAC is widely recognized for its leadership role in promoting sound environmental practices, both in Canada and abroad, especially since 2003, when the association launched its flagship *e3 environmental excellence in exploration* initiative. While initially designed as a program to promote environmental excellence, e3 has been progressively expanded to encompass community engagement and social responsibility as well as environmental matters.
- 1.4 In March 2009, the PDAC released the initial phase of the successor initiative, *e3 Plus: A Framework for Responsible Exploration*. Under this program, the designation "e3" now stands for excellence in three areas: social responsibility, environmental stewardship, and health and safety. Each of these elements is supported by the specific principles and guidance that the program provides in three separate toolkits. The 'plus' emphasizes the extensive enhancements that the PDAC has made since launching the original version of the program.
- 1.5 Available online at no charge, e3 and e3 plus have attracted more than 3000 registered users in some 40 countries. The success of these programs reflects favourably on the Canadian mineral sector, and bears witness to the PDAC's unparalleled leadership in promoting, on a global basis, environmentally and socially responsible mineral exploration practices that likewise conform to high standards of health and safety.

2. BACKGROUND TO THIS SUBMISSION

- 2.1 The PDAC has taken an active role in the public consultation process that was initiated by the July 14, 2008 announcement of Ontario's "Far North Initiative", and was subsequently advanced in August of that year through the release of the Ministry of Northern Development and Mines discussion paper that outlined the government's intention to "modernize" the provincial *Mining Act*.
- 2.2 The PDAC's first contribution to this process consisted of the detailed brief dated October 10, 2008 that the association submitted in response to the August 2008 discussion paper. This document can be viewed on the Lands and Regulations page of the PDAC's website at: <http://www.pdac.ca/pdac/advocacy/land-use/081010-pdac-submission-ont-mining-act-review.pdf>.

- 2.3 The second contribution was the submission to the Environmental Registry that the PDAC filed in response to Bill 173, *An Act to Amend the Mining Act*, on July 3, 2009. This document can likewise be viewed on the Lands and Regulations page of the website at: <http://www.pdac.ca/pdac/advocacy/land-use/090703-pdac-submission-bill-173.pdf> .
- 2.4 The third submission consists of the detailed responses to Bill 191 set out below, together with the accompanying letter addressed to the Hon. Donna Cansfield, Minister of Natural Resources. While this submission reflects a number of the general themes that are evident in the two previous submissions, it also provides the opportunity for the PDAC to reiterate certain the principles that the association believes should underpin the public policy and statutory regimes that government authorities establish in order to administer the exploration and development of Crown-owned mineral resources in a manner that promotes the broader public interest.
- 2.5 In commenting on the regulatory regime that would come into force if Bill 191 were enacted into law, this document and the accompanying letter also highlight a number of the wider negative consequences that the PDAC foresees the proposed legislation may have for Ontario's reputation as a jurisdiction that has historically welcomed responsible development of mineral resources on a fair, balanced and commercially viable basis. It therefore emphasizes the adverse economic impacts that these consequences may have, including the loss of the wide range of employment, training and business development opportunities that mineral exploration and mining operations are capable of delivering.

3. ADDRESSING ABORIGINAL INTERESTS

- 3.1 The PDAC actively promotes greater participation by Aboriginal peoples in the mineral industry, as well as greater understanding and co-operation between Aboriginal communities and mineral exploration and mining companies. Through its own initiatives and by its contributions to the efforts of others, the PDAC has held steadfast to the belief that the responsible development of Canada's mineral wealth must provide full and fair opportunity for First Nations peoples, along with other Canadians, to enjoy the benefits that all phases of the exploration and mining cycle can provide.
- 3.2 We are especially proud of the efforts that the association and its member companies continue to make in this regard, including those that reflect the commitments made under the historic Memorandum of Understanding that the PDAC signed with the Assembly of First Nations in March 2008. All of these advancements affirm the association's long-held position that true partnerships between First Nations and the mineral resource industry that fairly benefit all parties constitute the path to just, equitable and enduring relationships.
- 3.3 On initial reading, Bill 191 appears to acknowledge the importance of respecting the Aboriginal and treaty rights that section 35 of the *Constitution Act, 1982* recognizes and affirms. In addition, the mechanisms for land use planning that the legislative proposal outlines incorporate a number of opportunities for First Nations to assume an active role.
- 3.4 However, when examined more closely, many of the applicable provisions are general in nature, and lack the substance that is necessary to properly define the roles and responsibilities that First Nations would be afforded under the overall regime. For example, in some instances the Minister retains the power to make important decisions, apparently without the need to first undertake meaningful consultation with the responsible Aboriginal representatives.

- 3.5 Pertinent examples of these kinds of deficiencies include paragraph 6.1, which contemplates a “significant role” for First Nations in land use planning, and subsection 6(3), which provides opportunities for the “involvement” of First Nations in the preparation of the Far North land use strategy. In each case, there is no clear indication as to how these terms will be interpreted and applied in actual practice.
- 3.6 This trend continues in subsection 8(1), where the Minister of Natural Resources is directed to “work with” First Nations who indicate their interest in preparing terms of reference to designate a planning area. The words “work with” would likely be susceptible to a wide variety of interpretations. Moreover, to our knowledge, “work with” is a phrase that is seldom, if ever, used in other Canadian statutes dealing with environmental issues, the management of natural resources, or other regulatory matters.
- 3.7 Some of the responsibilities granted to First Nations under other provisions of the draft legislation appear to be more conclusively defined. An example is the requirement for the approval of the council of the relevant First Nation in order to implement terms of reference to designate a land use planning area. Nonetheless, this approach is not maintained throughout all phases of the overall process in a way that confirms that First Nations are meant to play a truly meaningful role throughout each of the key phases of the proposed regime.
- 3.8 As a result, Bill 191 describes the role that First Nations would assume in the Far North land use planning process in a way that seems both tentative and uncertain. In addition, the legislative proposal reserves a significant degree of discretion to the Minister of Natural Resources in certain key aspects. Subsection 16(2), which authorizes the Minister to establish one or more bodies to advise on the development, implementation and co-ordination of land use planning in the Far North, is a notable example. Here, the Minister alone has the power, to decide “...what role First Nations should play in the *establishment* of the body and the *extent to which First Nations should participate* in the work of the body” (italics added).
- 3.9 Given provisions of this kind, it is not surprising that First Nations leaders in the Far North have, in their own words, “condemned” Bill 191, and called upon the government to withdraw it.
- 3.10 Like other remote areas of Canada where Aboriginal residents constitute the majority of the resident population, land use planning in Ontario’s Far North calls for a clear and unambiguous apportionment of decision-making powers for land use planning between government authorities and First Nations. A meticulous and detailed approach to drafting is therefore necessary in order to clearly define a regulatory regime that will ensure a full, fair and workable allocation of responsibilities for each of the key parties. We submit that Bill 191 has failed to achieve these standards and is therefore defective in this critically important area.
- 3.11 While amendments to Bill 191 could conceivably correct some of its more apparent deficiencies, we question whether the proposed legislation, as presently structured, can ever be sufficiently robust in order to meet the challenges and complexities that will inevitably arise in the land use planning process in Ontario’s Far North. By way of review, while section 16 of the legislative proposal contemplates the establishment of one or more advisory bodies for land use planning purposes, it provides essentially no indication of the powers, duties and composition that such bodies would have.

4. RECONCILING PROTECTED AREAS AND MINERAL EXPLORATION AND DEVELOPMENT

- 4.1 Section 6 of Bill 191 gives effect to the principal goal set out in the provincial government's announcement of July 14, 2008 on the future of the Far North. The legislative proposal confirms that one of the four key objectives of land use planning is the establishment of an "interconnected network of protected areas" constituting at least 225,000 square kilometres that will therefore amount to not less than 50 per cent of the surface area of the Far North region.
- 4.2 Several provisions of the bill provide further detail in relation to the establishment, management and modification of protected areas. Those of immediate interest include subsection 8(8), which requires that every "community based land use plan" designate one or more areas in the applicable planning area as a protected area, and paragraph 13(2)(1), which prohibits anyone from conducting "Prospecting, mining claim staking or mineral exploration" within the boundaries of a protected area.
- 4.3 The PDAC submits that the current legislative proposal, which would ultimately isolate at least 50 per cent of the land base from mineral exploration, constitutes a "blunt instrument" that fails to recognize the following:
- (a) that the exploration process has a diminishing chance of success in proportion to the severity of the geographic limitations that are imposed on it, given that economic mineral deposits occur only very rarely, and are extremely difficult to discover;
 - (b) when diligently conducted in compliance with regulatory requirements and in conformity with sound management practices, that mineral exploration programs should have little, if any, adverse impact on the surrounding aquatic and terrestrial ecosystems and the living organisms that depend on them for their welfare; and
 - (c) that both entrepreneurs and local communities, including First Nations, can reap significant short and long-term benefits through exploration initiatives that are carried out in a collaborative atmosphere founded on mutual respect, understanding, good will and a willingness to learn from each other.
- 4.4 Two additional factors should also be kept in mind:
- (a) first, the scientific techniques and field practices that enable mineral exploration are in a state of constant evolution and advancement. As a result, an economically attractive deposit that, despite diligent efforts, escapes detection today could conceivably come to light at some point in the future as a result of new geological methods or better insight; and
 - (b) second, the history of mineral resource development in Canada is rich with episodes that illustrate the serendipitous nature of the exploration process. By way of example, one nationally significant deposit that was developed over the past 30 years (and has now been reclaimed) was first noted by geologists searching for oil and gas. In another well-known case, a prospector searching for diamonds unexpectedly discovered a globally significant nickel deposit that is now being prepared for production.

These factors make it imperative to keep the greatest possible land base available for exploration, while concurrently striving to meet other important societal goals, including those that espouse the preservation of natural landscapes to the extent required to satisfy long-term conservation and environmental objectives.

- 4.5 We acknowledge that, unlike the exploration phase, the construction, operation and reclamation of a mining operation has an obvious and unavoidable impact on the land where it takes place. However, it is estimated that, when taken collectively, all of the production-stage mining operations established in Ontario have occupied approximately 250 square kilometres in total, representing only 0.03 per cent of the surface area of the province.
- 4.6 Put differently, the total surface area that is necessarily allocated to allow a mine to undertake production may be very limited in proportion to the economic, social and other benefits that such an enterprise can generate. In addition, it should be remembered that although a typical mining operation may run for 20 to 25 years, from a long-term planning perspective it represents only a temporary use of the land. Moreover, once the production phase is over, modern reclamation practices assure the rehabilitation of the lands used for mining to a state that will support viable, productive and desirable ecosystems.
- 4.7 The PDAC notes, with regret, that the legislation does not adopt, for land use planning purposes, the more refined approach to the regulation of mineral exploration that the association recommended in its October 10, 2008 submission. In that document, we urged the government to recognize the distinctive “footprint” associated with each of the major kinds of natural resource development, specifically mineral exploration and mining, forestry activities, and hydro-electric projects. At that time, we proposed that each major class of undertaking should be given separate consideration in the Far North planning process. This approach to land use planning would take into account the valued components of the landscape that could potentially be affected by exploration and mining, identify the specific measures required to mitigate any adverse impacts, and maximize economic and social benefits from exploration and mining, while concurrently protecting environmental, social and cultural values.
- 4.8 The PDAC also submits that the approach evidenced in Bill 191 fails to properly account for the fact that conservation of the environment is not uniquely dependent on the establishment of protected areas. We maintain that conservation objectives can, in fact, be achieved by a diversified range of management options. Moreover, when tailored to the features of the land use planning area in question, these alternatives may deliver a more balanced outcome by responding to the need for socially beneficial forms of resource development while still ensuring effective protection of the environment. By imposing a “blanket” 50 per cent objective, Bill 191 forecloses objective discussion of other potential alternatives for land use planning that could potentially achieve an overall better outcome.
- 4.9 Against this backdrop, we continue to believe that the long-term interests of Ontario will not be well served by imposing a statutory regime that removes a large portion of the landscape from mineral exploration forever. Instead, we recommend that the province implement an adaptive and flexible approach that, subject to sound principles of environmental management, will enable exploration to continue throughout the land use planning process concurrent with the assessment of the ecological and conservation values that the Far North region embodies.
- 4.10 While private sector exploration programs can be expected to generate a significant on-going stream of information, we recommend that these initiatives be complemented by government-

led campaigns designed to assess the mineral potential and geological characteristics of the under-explored Far North region, supported by long-term adequate funding.

- 4.11 The PDAC therefore advocates a measured and disciplined approach that would be implemented on the basis outlined above, before any final or irreversible designation of protected areas is made. From our perspective, this approach would form the basis for an objective, impartial and scientifically sound assessment of all of the natural values, economic and otherwise, that may exist in candidate areas. It would thereby promote sound and informed decision-making resulting in the maximum environmental, social and economic benefits for Aboriginal communities, other Far North residents and the province as a whole.
- 4.12 In summary, we fully respect the need to ensure the long-term integrity of the ecosystems that make Ontario's Far North one of the truly exceptional regions of the province, the country and even the planet. Nonetheless, we urge the provincial government to carefully reconsider the extent to which modern exploration and mining initiatives, when properly regulated and carefully conducted, can co-exist with the measures implemented to achieve conservation and environmental goals.
- 4.13 Consistent with the PDAC's October 10, 2008 submission in response to the *Mining Act* discussion paper released in August of that year, we therefore recommend that the government carefully reassess whether designating 50 per cent or more of the Far North as protected areas, thereby prohibiting responsible development of mineral resources, represents sound public decision-making capable of giving full effect to the ultimate goal of ensuring sustainable development, or is likely to achieve the maximum range of benefits for Aboriginal communities, other Far North residents, and Ontarians generally, in economic, social and environmental terms.
- 4.14 We elaborate on the reasoning that supports this recommendation in Section 9 of this document and likewise in the covering letter to Minister Cansfield.

5. ESTABLISHING A BALANCED APPROACH TO LAND USE PLANNING

- 5.1 The approach to land use planning set out in Bill 191 highlights issues and concerns for the mineral industry that the PDAC submits must be resolved, irrespective of the total amount of land that may ultimately be designated as protected areas.
- 5.2 In part, these concerns relate to the inherent complexity of the land use planning as exemplified by the on-going evolution of comparable processes in other parts of Canada in which the exploration and mining sector has gained experience.
- 5.3 With these considerations in mind, the PDAC anticipates that land use plans in Ontario's Far North that successfully reconcile competing environmental, social, cultural and economic goals can only be developed through a process that has been very carefully constructed. In particular, the process must be capable of responding effectively to the challenges that will inevitably arise when striving to achieve a consensus among a varied range of parties who will likely come to the table with very different perspectives and goals.
- 5.4 With these considerations in mind, we would have thought that all significant stakeholders, including the natural resource extractive industries, would be afforded the opportunity to participate at a meaningful level during each major stage of the land use planning process. However, the draft legislation does not appear to adopt such a model.

- 5.5 There is no apparent opportunity for broad stakeholder involvement in the development of the “Far North land use strategy” contemplated by subsection 7(1). The land use strategy is a key element of the overall regime, given that the Minister and the First Nations must take this strategy into account when preparing a draft “community based land use plan” in accordance with Section 8. However, under subsection 7(3), key stakeholders, such as the exploration and mining industry, are excluded from the development of this strategy.
- 5.6 Subsections 8(1) and 8(2) take a similar approach to the development of the terms of reference to guide “...the designation of an area of the Far North as a planning area and the preparation of a land use plan.” The legislation fails to provide any opportunity for other key stakeholders, such as the exploration and mining industry, to contribute to the development of the terms of reference. Likewise, industrial interests have no apparent entitlement to review and comment on the terms of reference before the Minister posts a final copy on the Internet pursuant to subsection 8(5).
- 5.7 We recognize that subsection 8(7) obliges the Minister to make a draft land use plan publicly available and to ensure that the public is afforded the opportunity to comment on the draft plan within the time period that the Minister specifies. However, under this approach, comments can only be made at a late stage of the process. Moreover, the draft legislation makes no distinction between the roles to be played by those may have a general or non-specific interest, and parties whose opportunities, interests or rights may be directly affected by the land use plan.
- 5.8 In addition, once a draft land use plan reaches the “public comment” stage, there is a strong possibility that the parties who participated directly in developing the plan before public disclosure will assert that its fundamental structure and key objectives have been conclusively determined, and are therefore not amenable to significant change. Where that is the case, and the plan adversely impacts the interests of other stakeholders such as the exploration and mining industry, experience in other jurisdictions has shown that conflict, controversy and delay are inevitable.
- 5.9 We therefore urge the government to review the overall regime for the development of land use plans in the Far North in order to ensure that all significant stakeholders will be afforded a meaningful role at each major step of the process. Without these safeguards, the land use planning process is at risk of generating outcomes that unduly favour one set of interests over another, thereby creating disenchantment, engendering cynicism and accentuating the divisions between different sectors of the population. Developments of this kind are unlikely to promote the broader goal of building a society that takes an inclusive and open approach to decisions that have important consequences for all.

6. IMPEDING EXPLORATION ACTIVITIES AND PROHIBITING NEW MINING OPERATIONS

- 6.1 The PDAC submits that, in its present form, Bill 191 constitutes a serious impediment to the continuation of mineral exploration in the Far North. This situation is virtually certain to prevail until the “community based land use plans” contemplated by the draft legislation have been developed, and will likely persist beyond that point as well. As discussed below, given the risks that the new regime poses for exploration coupled with the spectre of a virtual “moratorium” on new mining operations, the capital markets will be strongly inclined to simply say “no” to investments in mineral development projects in Ontario’s Far North.

- 6.2 We recognize that the regime proposed under Bill 191 makes certain distinctions between situations where an approved land use plan has been implemented, and those where such a plan is not yet in place. In the second case, paragraph 11(4)(f) authorizes a “development [that] consists solely of prospecting, mining claim staking, mineral exploration or obtaining a mining lease or licence of occupation for mining purposes in accordance with the *Mining Act*.” Nonetheless, once a community based land use plan comes into effect, the ability of the claim lease or licence holder to continue normal exploration activities may be severely compromised, or even eliminated entirely.
- 6.3 The latter would be the outcome if the land use plan designates the area where the mineral interest is located as a “protected area”. Paragraph 13(2)(1) prohibits “Prospecting, mining claim staking or mineral exploration” in any area that is granted this status.
- 6.4 Even where a mineral interest is not encompassed within a protected area, significant uncertainty remains. Subsection 9(1) entitles the Minister, or the First Nations that approved the plan, to propose amendments for the planning area with respect to land use designations, the designation of protected areas in the planning area, or land uses that are permitted in the planning area. While such amendments could result in a variety of changes, the overall scheme conveys the impression that this mechanism will be used to implement more stringent, rather than more permissive, requirements
- 6.5 Subsection 13(3) provides limited relief from the consequences of a land use plan for pre-existing mineral interests. It provides that any mining claim, mining, lease patent or licence of occupation that was validly in existence and in good standing before the land use plan came into effect will not be subject to any limitations that the plan imposes. However, any additional mineral tenure that the interest holder may acquire once the plan becomes effective would not enjoy that exemption, and would therefore be subject to any restrictions that the plan might establish.
- 6.6 In these circumstances, the interest holder could effectively be precluded from staking additional ground adjacent or proximal to the original holdings. It should be remembered that this commonly occurs whenever explorers are attempting to define the full geographic extent of a promising mineral occurrence. This is often necessary in order to acquire sufficient holdings that have the “critical mass” required to justify the effort and expense of proceeding with advanced exploration, undertaking a pre-feasibility study or commissioning a full feasibility study. By restricting the acquisition of additional ground, an approved land use plan could effectively eliminate the value of the claims that were originally staked and thereby foreclose any possibility of proceeding to commercial production in the future.
- 6.7 However, Bill 191 incorporates an even more definitive prohibition against commercial production in the Far North, pending the development and approval of land use plans. Paragraph 11(1)(1) establishes an absolute prohibition on “Opening a mine in the prescribed circumstances” in any area that is not subject to an approved land use plan.
- 6.8 In its own commentaries, the provincial government has indicated that the completion of land use plans throughout the Far North may take up to 15 years. Whether or not that will prove to be the case, the PDAC seriously questions whether exploration companies will be prepared to continue work on existing properties knowing that, at best, the legislation prohibits mining operations and at worst, the approved land use plan may result in restrictions that render mining operations prohibitively expensive or entirely impossible.

- 6.9 Even if management is prepared to contemplate this risk, the capital markets may be much less accommodating, once an exploration company has fulfilled its continuous disclosure obligations and divulged that its Far North mineral prospects are subject to all of the limitations and constraints that Bill 191 would bring into effect. As a result, raising the funds required to continue exploration throughout the inevitable period of uncertainty that would follow the implementation of Bill 191 would be very difficult, if not impossible.
- 6.10 The risk of never being allowed to proceed to production, whether during the time required to develop land use plans or as a result of their implementation, will have a profound influence on decisions made in relation to future development of the mineral potential of the Far North region. Viewed as an apparent reversal of Ontario's present policies, these developments will suggest to the business community that Ontario has become, at least in part, a jurisdiction that is now deliberately intent on creating an environment designed to discourage investment of the high-risk dollars needed to sustain mineral exploration and mining activities.
- 6.11 The PDAC has taken note of paragraph 11(3)(b) of Bill 191, which provides that, pending approval of land use plans, the Lieutenant Governor in Council can issue an order determining that "...the development is in the social and economic interests of Ontario", provided that he or she takes into account the four principal objectives for land use planning established under section 6.
- 6.12 While this mechanism provided in paragraph 11(3)(b) could conceivably allow worthy mining proposals to proceed, experience suggests that governments are very reluctant to invoke provisions of this kind and do so on only the rarest occasions. Moreover, authorizing production under a paragraph 11(3)(b) exemption is likely to be highly contentious and therefore at risk of being challenged through the courts. As a result, this exemption will likely provide little comfort to developers or potential investors.
- 6.13 We conclude that, if proclaimed into force in its existing form, Bill 191 will precipitate an indeterminate period of pervasive uncertainty surrounding the future of mineral exploration and mine development in the Far North. Until land use plans are developed and approved in final form, explorers will have no assurance of any entitlement to proceed with the orderly development of mineral resources that may be discovered in the interim, irrespective of however promising such prospects may be.
- 6.14 In the "worst case scenario", development will be foreclosed forever, if the resources in question happen to fall within a protected area or another area that has been designated for purposes that preclude mining operations.
- 6.15 The PDAC therefore urges the provincial government to carefully evaluate the potential adverse consequences of the present approach, and to consider alternatives for land use planning and related initiatives. We submit that there is a critical need to achieve environmental, social and economic goals in a more balanced, reasoned and fruitful manner that will not deprive the Far North, its Aboriginal communities and its other residents, of important opportunities for economic and social development that are attainable while continuing to protect the environmental and conservation values that this exceptional region holds.

7. EXTINGUISHING RIGHTS OF RECOVERY

- 7.1 As presently written, Bill 191 provides that anyone whose interests are adversely affected by something done in good faith in accordance with the proposed legislation, including the implementation of a community based land use plan or the amendment of such a plan, will

have no recourse through the courts or any other avenue of recovery for loss or damage that may result.

- 7.2 The provisions that have this effect are found Section 17 of the draft legislation. They specify that there is neither a cause of action nor any right of recovery for an aggrieved individual who suffers such loss or damage. Consequently, no costs, compensation or damages are owing or payable in these circumstances. Bill 191 would also establish a statutory bar to any judicial proceeding intended to seek recovery.
- 7.3 In the context of mineral exploration, these provisions are clearly intended to deprive any holder of a mineral interest who suffers loss or damage as a result of anything done pursuant to the proposed enactment of the right to claim compensation or seek any other remedy. In practice, this means that anyone who incurs the risk of carrying on exploration activities in the absence of a land use plan, whose interests are adversely affected by the implementation of such a plan, or who is adversely affected by amendments to a land use plan, will bear all of the adverse consequences.
- 7.4 The PDAC submits that the immediate and long-term consequences of the approach taken in Section 17 of Bill 191 should be carefully reconsidered. We recommend that, with due regard for the broader public interest, the provincial government should assess the potential for these aspects of Bill 191 to erode confidence in Ontario as a jurisdiction that respects the security and value of private sector investment.
- 7.5 While constructive expropriation or “regulatory taking” of mineral interests would be damaging enough, the broader adverse impact on Ontario’s reputation could be more difficult to predict. Ironically, Canadian companies may be particularly disadvantaged in this regard, given that United States and Mexico-based entities could be expected to challenge these provisions pursuant to the *North American Free Trade Agreement*. If that were the case, Canadian investors would be entitled to feel all the more aggrieved.

8. CORRECTING AMBIGUITY AND UNCERTAINTY

- 8.1 Like the approach it has taken in relation to Bill 173, under Bill 191 the provincial government has evidently elected to defer the development of important elements of the overall statutory regime until the missing components are “prescribed” by regulations whose provisions are not yet publicly disclosed.
- 8.2 Noteworthy examples include the prohibition against opening a mine in the “prescribed circumstances” in the absence of a land use plan (subsection 11(1)), and the “prescribed criteria” under which lands will be afforded “provisional protection”, and therefore withdrawn from staking (section 12). In neither case does the draft legislation or any other information indicate the scope or nature of the requirements that may ultimately apply in these and other circumstances that future regulations will address. These provisions, and others like them, mean that important elements of the overall regime will be implemented through the regulatory process and therefore not subject to the scrutiny and debate that are applied to bills brought before the provincial legislature.
- 8.3 It is also puzzling that Bill 191 fails to include definitions for certain key terms. An example is the term “development” which plays an important role in the overall regime, but is nowhere defined. Likewise, the term “exploration”, as used in subsection 11(4), is not defined. This omission may be especially significant, given that subsection 11(4) allows prospecting, mining claim staking, mineral exploration and related activities to proceed, despite the absence of an approved land use plan. Although the meaning of “exploration” may be

thought to be free of controversy, experience elsewhere has shown that this is not always the case. For example, disputes can arise when distinguishing the activities that constitute “exploration” from those that constitute “development” at the advanced exploration stage, particularly where the program in question involves the collection or processing of a large bulk sample.

- 8.4 These issues indicate the need to re-examine the overall regime to ensure that it strikes an appropriate balance between the key provisions that should be incorporated in the statute itself to provide the required level of clarity, certainty and completeness, and those of a less critical nature that can properly be deferred until the regulation-making stage. When drafting both kinds of enactment, care must be taken to ensure that all of the operative terms, irrespective of how commonplace they may be, are clearly defined to the extent necessary to give proper effect to the intention of the legislature and to mitigate the risk of ambiguity or uncertainty. Similarly, it is essential for the final wording to reflect the standards of clarity and consistency normally applied to legislation that deals with the management of natural resources, the assessment of environmental impacts or related matters.

9. CONCLUSIONS AND RECOMMENDATIONS

- 9.1 The assessment and evaluation of Bill 191 set out above has convinced the PDAC that, in its present form, the legislative proposal constitutes a serious risk to the future of responsible mineral resource exploration and development in Ontario’s Far North region, and would therefore compromise the significant economic benefits that would otherwise be enjoyed by Ontarians and their communities, particularly those in the Far North.

- 9.2 We therefore recommend that Bill 191, in its present form, not be enacted into law. Instead, we urge the provincial government redouble its efforts to establish and implement a new process designed to develop a regulatory regime for the Far North that will:

- respond appropriately to the legitimate aspirations of First Nations and their communities;
- strike a better balance between environmental conservation and economic development;
- encourage the responsible development of the Far North’s mineral resources by providing a foundation for vigorous, commercially successful, environmentally responsible and socially accountable mineral exploration and mining in the region; and
- bring into force a statutory and regulatory process that successfully reconciles competing societal interests and values in a fair, transparent and enduring manner, and thereby represents a model that Ontarians can recommend to other jurisdictions with a sense of confidence and pride.