Alternatives North

January 9, 2013

Michelle Tittley
Clerk
Standing Committee on Aboriginal Affairs and Northern Development
House of Commons
6th Floor, 131 Queen Street
Ottawa ON
K1A 0A6

Re: Submission on Bill C-47 (Northwest Territories Surface Rights Board Act)

Dear Ms. Tittley:

Please accept this letter as our submission on the *Northwest Territories Surface Rights Board Act* which is now before the Standing Committee on Aboriginal Affairs and Northern Development (AANO) as part of its consideration of Bill C-47.

We understand that the Committee may be travelling to Yellowknife to obtain further views on the bill and we would be pleased to present our observations directly to the Committee should the opportunity arise.

To be clear, there were never any public opportunities for comment on the drafting of this bill and Alternatives North was not invited to participate in the drafting process. Our comments are based on our members' extensive experience with northern resource management, a review of previous meetings of the Standing Committee on Bill C-47 and a review of land claims agreements. We do not have access to legal counsel and are not in a position to offer alternative language. We raise our concerns in the spirit of democratic participation and in an effort to ensure both sustainable development and a co-management approach to northern resource management.

Background Information on Alternatives North

Alternatives North was established 20 years ago and functions as a social justice coalition and non-profit society, based in Yellowknife and operating in the Northwest Territories. Within our ranks are representatives of churches, labour unions, environmental organizations, women and family advocates, seniors and anti-poverty groups. Alternatives North is an active volunteer organization with a well established history of constructively engaging with other stakeholders and government agencies on various issues of concern. We have a proven track record of securing resources for research and bringing people together to work towards practical solutions.

P.O. Box 444, Yellowknife, NT X1A 2N3
Tel. (867) 920-2765 Fax (867) 873-4295
e-mail: info@alternativesnorth.ca web: www.alternativesnorth.ca

Although we have no paid staff or office, we have intervened effectively in environmental assessments such as that for the Mackenzie Gas Project and the Giant Mine. We were also instrumental in advocating for a NWT anti-poverty strategy that is now under development. We have commented on policy related to resources and economic development for the NWT, including recent efforts to streamline or deregulate the integrated resource management system established through northern land claims agreements.

Concerns with the Legislative Process

We are concerned with two legislative aspects of Bill C-47. Firstly, the misleading and incorrect short title of the overall bill, "Northern Jobs and Growth Act", bears no relation to its content. Neither the word "jobs" nor the word "growth" appears anywhere in the actual bill. "Employment" only appears in the bill in relation to employees of the Nunavut Planning Commission. The bill should more properly be called something like "Northern Land Claims Implementation Act".

Secondly, while we strongly support long overdue implementation of various provisions of northern land claims agreements, we do not believe that placing several different implementation provisions in one bill is the proper approach. This makes amendments and meaningful debate difficult at best. We would have much preferred for separate bills for each land claim area to allow better consultation and opportunities for improvement.

Substantive Comments on the Bill

<u>Need for NWT Surface Rights Board?</u>

There is really no need for a NWT Surface Rights Board as there are provisions already in place for the adjudication of surface rights and access in existing laws, regulations and agreements as follows:

- Mining rights as dealt with through the *Northwest Territories and Nunavut Mining Regulations* (see s. 70-72 where a dispute resolution process is already outlined for entry on to occupied lands to prospect and locate mineral claims);
- Oil and gas exploration rights as dealt with under the *Canada Oil and Gas Operations Act* (see s. 5.01(2)(b) where arbitration of any dispute with a surface rights holder is required);
- Mining or oil and gas rights on or access across Aboriginal lands through various land claims agreements (see Gwich'in Land Claims Agreement s. 6.2.1(b)(ii), Sahtu Dene-Metis Land Claims Agreement s. 6.2.1(b)(ii), Tlicho Agreement s. 6.5, Inuvialuit Final Agreement s. 18) where dispute over surface rights and access are to be handled through arbitration panels or processes.

The NWT Surface Rights Board Act will create uncertainty, duplicate and overlap with existing regulations and authorities, cost taxpayers more, impose additional administrative burdens and serve little practical purpose as few if any disputes are likely to be referred to this body. Why "fix" something that is not broken?

Recommendation 1: A NWT Surface Rights Board would duplicate and overlap with existing provisions for surface rights and access disputes resolution. As such, there is no need for this legislation and it should be withdrawn.

Entrenching Free-Entry and Changing the Balance of Power

The NWT Surface Rights Board Act will set up a process for awarding access and compensation for commercial purposes on Aboriginal, Crown and privately owned lands in the NWT. A right of access is established and only terms and conditions can be placed on such access, including compensation. In other words, if this Act is passed as written, access cannot be denied. This will further entrench the free-entry approach to mineral rights disposition in the NWT, an approach that Alternatives North rejects.

Surely we have evolved in our thinking beyond believing that mining and oil and gas development is the highest and best use of land that should supersede all other uses, while other users and uses can be compensated through money alone. The recent decision of the Yukon Court of Appeal (Ross River Dena Council vs. Government of the Yukon) and legislative changes in other jurisdictions, including Ontario, show that free-entry is really an antiquated, unfair and unsustainable rights disposition process. We should not further entrench this system in the NWT.

Recommendation 2: If the Act is not withdrawn, it should be amended to grant the Surface Rights Board the power to deny access if appropriate.

It appears that the right of access for commercial purposes even applies in built-up areas like Yellowknife where someone could stake mineral claims on private property and then get access and destroy homes and private businesses in the process (see s. 2, non-designated land definition and s. 69). The Gwich'in and Sahtu land use plans do not apply to lands within municipal boundaries. This Act, if not withdrawn, should not apply within municipal boundaries and should allow municipalities to avoid disputes by prohibiting mineral rights acquisition within their boundaries .

Recommendation 3: The Act should not apply within municipal boundaries and municipalities should have the ability to prohibit mineral rights acquisition within their boundaries.

We acknowledge that a surface rights adjudication process is consistent with what was contemplated in the NWT comprehensive land claims agreements. However, a surface rights process can only be appropriate once the integrated resource management system required through land claims agreements is actually fully implemented. Full implementation of an integrated resource management system would include: legally binding land use plans, fully resourced co-management boards with timely appointments, sound environmental assessment, land and water regulation, effective state of the environment reporting, and audits that resulted in improvements in to the environment and communities. In the absence of a fully functioning and

balanced integrated resource management system, a surface rights process as contemplated in this bill would create an unjust power imbalance between proponents and impacted communities.

Much work remains to be done for full implementation of the integrated resource management system in the NWT in a timely and fair fashion, including additional financial resources. The two NWT Environmental Audits conducted pursuant to the *Mackenzie Valley Resource Management Act* provide the most helpful and relevant guides as to how all of this can be accomplished, yet the federal government has not responded to these reports from 2005 and 2010.

Given that there have been no surface rights disputes that have been arbitrated under the Gwich'in, Sahtu or Tlicho land claims agreements, and the lack of such cases across the North, we wonder whether there is any urgent need for such legislation.

Recommendation 4: Before devoting any further resources to the implementation of a Surface Rights Board, the federal government must fully implement the provisions of the *Mackenzie Valley Resource Management Act* and respond in a meaningful manner to the 2005 and 2010 NWT Environmental Audits.

Types of Surface Access and Financial Security

Although the bill does not spell out what type of access may be contemplated through access orders issued by the NWT Surface Rights Board, we are very concerned that this may be interpreted in a way that always leads to surface access by means of roads (see s. 50(3) "a suitable route" and s. 69 where access order on non-designated lands must cover transportation of minerals). Once road access is provided, it is difficult if not impossible to prevent other users from similar access and this often results in permanent damage to wildlife and/or habitat, or unanticipated consequences. We recognize that air access may in some cases be more costly, but this may be a necessary trade-off to protect and preserve the rights of land users and surface rights owners.

Recommendation 5: It is very important that access be interpreted broadly to include air-only access through the use of helicopters, fixed wing aircraft or lighter-than-air craft.

Recommendation 6: The bill should explicitly allow the Board to deny access if it is deemed too damaging, or to restrict access to air-only during certain time periods.

The Board is not allowed to ask for or require financial security to ensure compliance with its orders (see s. 56(2) and s. 71(2)). This is likely to present an enforcement problem, especially with regard to reclamation requirements that the Board may require (see s. 56(1)(a)(vi) and s. 71(1)(a)(vi)). This shortcoming should be rectified.

Recommendation 7: The Board should be given the power to require financial security to ensure compliance with Board orders and to shift the burden of proof and risks on to a private developer rather than surface rights holders and the public.

Surface Rights Board Not Consistent with Co-Management Model

Throughout most of the northern land claims agreements, there is an exchange of rights: Aboriginal title and rights are exchanged for defined rights of participation in resource management and decisions, and in some cases, self-government authority. Where boards or authorities are established, a co-management model is usually adopted where public governments (most often federal and territorial governments) nominate and/or appoint half of the members, and the other half are nominated, and in some cases actually appointed by, Aboriginal governments. This is certainly the case for the Mackenzie Valley Environmental Impact Review Board, the Mackenzie Valley Land and Water Board, the Gwich'in Land Use Planning Board, the Sahtu Land Use Planning Board and the regional land and water boards.

The spirit and intent of the land claims agreements would seem to suggest that the co-management model should be applied to a NWT Surface Rights Board. Prior to this legislation being adopted, any disputes under the Gwich'in and Sahtu land claims agreements, including those related to surface rights on Aboriginal owned lands, were referred to arbitration panels that were also established pursuant to the co-management model (see Gwich'in Land Claims Agreement s. 6.2.1(b)(ii) and Sahtu Dene-Metis Land Claims Agreement s. 6.2.1(b)(ii)). Surely the provisions of the land claims agreements set the floor for what we might accomplish, rather than the ceiling.

We acknowledge that there are residency requirements for some regional panels of the proposed surface rights board (s. 13) and that officials from Aboriginal Affairs and Northern Development Canada have stated that the Minister may contemplate nominations from Aboriginal governments or through a public process (see testimony of Camille Vezina at AANO Standing Committee Meeting #52 December 3, 2012), but this is not the same as a co-management model.

We understand that a co-management approach has been adopted for the Yukon surface rights board (see 9(2) of the *Yukon Surface Rights Board Act*).

Recommendation 8: Should this bill proceed, a co-management model should be applied to the NWT Surface Rights Board where Aboriginal governments—either separately or collectively—appoint half the members of a NWT Surface Rights Board.

Fairness Issues

According to the proposed Act a hearing process is to be set up to require the NWT Surface Rights Board to hear only from the party exercising a right of access and the party that owns or occupies the land (see s. 39). There can be no other parties to the process, and thus no room or ability for public interest organizations or other individuals to express views, concerns or provide information or expert opinions that the Board should consider and may even find helpful. This is not the case for the Yukon (see s. 29 of the *Yukon Surface Rights Board Act* where Ministers and other interests can be parties) or even the arbitration panels that currently have jurisdiction over surface access disputes in the Sahtu and Gwich'in settlement areas where other parties can be heard upon agreement of the relevant panel (see Gwich'in Land Claims Agreement s. 6.3.4(b)

and Sahtu Dene-Metis Agreement s. 6.3.4(b)). We believe it is procedurally unfair to restrict access to the NWT surface rights process so narrowly.

> **Recommendation 9: At a minimum, the Board should have the discretion to hear from those other than the parties to the dispute, or simply leave the process open to others to make written representations that the Board will then consider.**

The surface rights regime spelled out in the bill would apply in all areas of the NWT, even if no land rights agreements are in place (see s. 2 definition of non-designated lands and s. 4). Those Aboriginal governments that have no settlements or agreements covering their rights appear to have little or no ability to access the process to set terms and conditions or receive compensation, without proving occupancy. We believe this to be unfair. Of course, we also believe that the federal and territorial governments need to place a higher priority on recognizing and negotiating these outstanding rights in a fair and timely fashion. We also note that the determination of compensation on non-designated lands discriminates against Aboriginal peoples outside of the established settlement areas in that access compensation does not have to consider the effects on wildlife harvesting, cultural attachment, and peculiar or special value of the land (see s. 74(2)). Clearly this is unacceptable and seems likely to be subject to a constitutional challenge at some future point.

> **Recommendation 10: The surface rights regime in the Act should not apply in areas of the NWT where no land rights agreement is in place.**

Thank you for the opportunity to present our concerns with the bill. Should you wish any further information, you may contact us by e-mail (kor@theedge.ca) or by phone (867-920-2765 evenings).

Sincerely,

Kevin O'Reilly
On Behalf of Alternatives North

cc. Chair, Inuvialuit Regional Corporation
President, Gwich'in Tribal Council
Chair, Sahtu Secretariat Inc.
Grand Chief, Dehcho First Nations
Grand Chief, Tlicho Government
Chief, Akaitcho Treaty 8 Tribal Council
President, NWT Metis Nation
President, North Slave Metis Alliance
Grand Chief, Dene Nation
NWT Members of the Legislative Assembly

References

December 3, 2012 AANO Committee Meeting #52 (AANDC Staff make presentations only)
http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5909571&File=0#Int-7829308

December 5, 2012 AANO Committee Meeting #53 (Government of Nunavut appears)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5919360&Language=E&Mode=1&Parl=41&Ses=1

December 10, 2012 AANO Committee Meeting #54 (NTI, Minister and staff appear)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5932238&Language=E&Mode=1&Parl=41&Ses=1

December 12, 2012 AANO Committee Meeting #55 (Yukon Government appears)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5940942&Language=E&Mode=1&Parl=41&Ses=1

Bill C-47 Northern Jobs and Growth Act (Part 2 Northwest Territories Surface Rights Board Act) http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-47/C-47_1/C-47_1.PDF

Canada Oil and Gas Operations Act http://laws-lois.justice.gc.ca/eng/acts/O-7/FullText.html

Gwich'in Land Claims Agreement
http://www.collectionscanada.gc.ca/webarchives/20071125165653/http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic_e.pdf

Inuvialuit Final Agreement
http://www.collectionscanada.gc.ca/webarchives/20071125181720/http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.pdf

Mackenzie Valley Resource Management Act http://laws-lois.justice.gc.ca/PDF/M-0.2.pdf

Northwest Territories and Nunavut Mining Regulations http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._1516.pdf

NWT Environmental Audits http://laws-lois.justice.gc.ca/PDF/M-0.2.pdf

Ontario Mining Act http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m14_e.htm

News Release on Ontario's New Mining Act. December 16, 2009.
http://news.ontario.ca/mndmf/en/2009/12/ontarios-new-mining-act.html

Sahtu Dene-Metis Agreement http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/sahmet_1100100031148_eng.pdf

Tlicho Agreement http://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544

Yukon Court of Appeal. Ross River Dena Council vs. Government of Yukon. December 27, 2012. http://www.yukoncourts.ca/judgements/appeals/2007/2012_ykca_14_rrdc_v_yukon.pdf

Yukon Surface Rights Board Act http://laws-lois.justice.gc.ca/PDF/Y-4.3.pdf