TABLED DOCUMENT NO. 13 – 13(7) TABLED ON MAR 23 1999

THE WESTERN NWT ABORIGINAL SUMMIT

March 22, 1999

The Honourable Jane Stewart, P.C., M.P.
Minister of Indian Affairs and Northern Development
Ottawa, Canada
K1A OH4

Dear Madam Minister:

Re: NWT Constitutional Crisis Arising From Electoral Boundaries Court Decision

You have doubtless been advised of the decision of the Northwest Territories Supreme Court in *"Friends of Democracy" et al v the Commissioner of the Northwest Territories.* The Court ruled three western NWT ridings constitutionally invalid based on the size of their population, which in each case is more than 25 per cent greater than the average for all western NWT ridings. The declaration of invalidity was suspended by Order of the Court, only until April 1, 1999, in order to permit legislators to make changes to the boundaries to meet the criteria established by the judge.

I am writing on behalf of the Aboriginal/First Nations Intervenors, and on behalf of the Western NWT Aboriginal Summit, which supports the Intervenors, to express serious concern that this court decision will result in a constitutional crisis in the post-division Northwest Territories, or in our Treaty and Aboriginal rights being trampled, in legislators' haste to meet a Court-imposed deadline. Madam Minister, you are responsible for the Northwest Territories Act and for existing and contemplated negotiations with the Aboriginal peoples of the western NWT concerning Treaties, lands, resources and governance. We believe you have a duty to act in this matter.

Under the Northwest Territories Act, s. 9 (2), as recently amended, the minimum number of seats in the "Council of the Northwest Territories" (the self-styled NWT Legislative Assembly) is 14. The term of the ten members from what will become the new territory of Nunavut ends April 1, leaving 14 members in the western territory legislature. If the NWT Legislative Assembly fails to comply with the Court decision by April 1, and three western seats are declared invalid, the total number of seats will fall below the minimum required in the NWT Act. It is questionable whether the remaining 11 MLAs legally constitute, or could act as, a territorial council, let alone a Legislative Assembly.

#201 5204 50th Ave., Box 2611, Yellowknife, NT, X1A 2P9
Telephone 867-873-5487 Facsimile 867-873-6718

Complicating the issue is the fact that the NWT Act s. 9. (3) sets a term limit: "Every Council shall continue for four years from the date of the return of the writs for the general election and no longer..." This Assembly was elected on October 16,1995. An election in the west had been planned for October 4, 1999. The "Friends of Democracy" argued that the writ of election must, in any event, be issued by December 1, 1999.

Further, under the NWT's Elections Act s. 207 (1) (b), no amendment to the provisions respecting electoral boundaries of the Legislative Assembly and Executive Council Act, applies in an election for which the writ is issued within 180 days after the commencement of the amendment, unless it has been gazetted before the issue of the writ. In other words, it appears that legislation amending the boundaries to comply with the judgment must be gazetted by a date on or around June 1, 1999, to permit an election at the latest possible date under the NWT Act.

The April 1 deadline is difficult to meet, for the reasons outlined in the attached letter from David Hamilton, Clerk of the NWT Legislative Assembly to Earl Johnson, Q.C., the GNWT's legal counsel on this case. In essence, because of the nature of the Court ruling, making the changes is a complex and contentious matter. It should not be done in haste.. Nevertheless, counsel for the "Friends of Democracy" told the GNWT today by letter, attached, that the "Friends" will not agree to request, by motion, that the judge's order of suspension be clarified and that the deadline for action be extended. We do not yet know whether the GNWT itself will now move for a variance. This must be done soon, if at all.

The Western Caucus of MLAs has recommended to the Executive Council ("Cabinet") that the GNWT not appeal from Justice de Weerdt's decision. They are offering moral and financial support to us, as Intervenors, to appeal. However, as Intervenors, we have no automatic right of appeal, but must apply to the Court for leave. In the letter to Premier Antoine copied to you and to the Western Caucus on Thursday, March 18, 1999, we strongly urged the GNWT Cabinet to appeal, as the respondent, and as an agent of the Crown with a fiduciary duty to protect our Aboriginal and Treaty rights.

An appeal by either the respondent or Intervenors would have to be accompanied by a request for a stay, if the appeal is to be meaningful and not merely an academic exercise. A stay may or may not be granted. If a stay is granted, it may or may not affect the actions of MLAs to change the existing electoral boundaries. An appeal can be heard, at the earliest, in mid-April. The original proceeding was expedited owing to the impending election. The haste with which it took place prejudiced our ability to develop and present evidence and argument. It appears that an appeal, too, would be an expedited proceeding.

There is something systemically unfair in a system that places so much more importance on an individual's right to an effective vote, where the largest riding contains only 7,105 people, than on the collective right of Aboriginal/First Nations peoples to govern themselves, and indeed, to survive as peoples. If the MLAs do not change the boundaries to comply with the judgment in advance of an appeal decision, and the appeal is lost, they could be faced with trying to make changes under an even more onerous deadline.

The underlying problem is that NWT legislators are being compelled, both by the courts and by federal and territorial legislation, to act "with a gun to their heads." As a result, while there are a range of possible changes that would meet the criteria set out in Mr. Justice de Weerdt's decision, from one additional seat to five, only the most extreme response appears is under serious consideration. This involves three additional seats for Yellowknife, and one each for Hay River and Inuvik, the next two largest centres in the western NWT. This will bring the total to 19 seats, 7 of which will be Yellowknife seats, and 11 of which will be "urban" ridings. About 10 seats are likely to have a majority of non-Aboriginal people. Whether or not the MLA for such a riding is an Aboriginal person, the interests he or she represents in the house will largely be non-Aboriginal.

Because the principle of representation by population has been recognized in this Court decision as having the same primacy in the western NWT as in the rest of Canada, our situation will only get worse in the future. Non-Aboriginal in-migrants are attracted mainly to the larger centres in the NWT. As NWT Minister Stephen Kakfwi said in a Globe and Mail news article on March 8, 1999, "We face the prospect of Aboriginals becoming a minority in their own homeland," and, we would add, a distinct minority in the Assembly.

The prospect of a constitutionally invalid NWT legislature does not alarm us. We have always considered the NWT Legislative Assembly to be, at best, an institution in transition to arrangements that will better reflect the rights and interests of Aboriginal/First Nations peoples and their governments. It is our frank view that rule by the Commissioner of the NWT under instructions given by the Minister, with a view to re-establishing a legislative body after due consultation and with the consent of the Aboriginal peoples of the west, is more likely to preserve and protect our Aboriginal and Treaty rights and title than rule by a "Legislative Assembly" dominated by the larger centres, and by non-Aboriginal interests.

What makes this situation especially disturbing is that the NWT is the only jurisdiction in the country, to the best of our knowledge, where a quasi-provincial government controls virtually all programs and services to Aboriginal/First Nations people. These include services to which we are entitled under our Treaties or by virtue of our Aboriginal rights, and programs and legislation which concern matters that, in the words of the federal Inherent Right policy, are "integral to [our] distinct Aboriginal culture," such as adoption and child welfare, Aboriginal language and cultural programs, education, health, social services, law enforcement, land, wildlife and resources management, management of public works and infrastructure, housing and the like.

The GNWT it therefore an agent of the Crown with a delegated fiduciary duty towards us, although the transfer of responsibility took place without our consent. No distinction is made between funds for services to Aboriginal people, and funds for services to other residents; the money all goes into the "pot."

Our people have tolerated this anomaly, first, because we believed that new governing arrangements would soon be in place that would allow us to control these programs, and secondly, because there was a majority of MLAs who represented ridings with a majority of Aboriginal voters. Now it appears that even this minimal degree of Aboriginal control will be diluted, as more MLAs representing mainly non-Aboriginal interests are added to the house.

Even this drastic shift in the balance of power in the legislature would not alarm us, if Treaty, lands, resources and governance agreements had been concluded and implemented with all the Aboriginal peoples of the western NWT. The fact is that negotiations are still in progress, at various stages, from near-completion to pre-framework agreement, in all regions of this territory. In part at the behest of the federal government, the GNWT is at most of our tables. The Court decision, and its implementation, will have a serious impact on these ongoing negotiations, particularly with respect to governance.

Some of us have already experienced roadblocks in these negotiations, with respect to jurisdiction. How likely is it that a legislature with more ridings comprised of a majority of non-Aboriginal voters will direct the Executive Council to be more liberal? And for our part, how likely is it that a "critical mass" of Aboriginal peoples and governments in the western NWT will be willing to allow the GNWT to take on the authority for the administration and control of oil, gas and minerals, let alone ownership, if the GNWT is controlled by non-Aboriginal interests?

The choice of implementing our Aboriginal/First Nations governance rights, in part, through the public government of the territory was still on the table until this Court decision. We planned to return to the constitutional table as governance negotiations in the regions progressed. It now appears that the territorial option has been unilaterally removed. The Court decision appears to set severe limits on what can be done to protect Aboriginal rights in the western NWT through the constitutional process, for example through guaranteed representation of Aboriginal governments.

We are shocked that MLAs appear to be so ready to abandon nearly 20 years of negotiations with the Aboriginal peoples of the western NWT to develop a constitution and form of government that will balance individual rights, such as the right to vote, enshrined in section 3 of the Canadian Charter of Rights and Freedoms, with the collective Aboriginal and Treaty rights enshrined in s. 35 of the Constitution Act, 1982 and protected by s. 25 of the Charter.

We are willing to negotiate temporary measures to minimize the impact of the Court decision, to provide interim protection for Aboriginal rights, or both, with the MLAs and the GNWT, pending the outcome of a possible appeal, and the conclusion of Aboriginal/First Nations Treaty, lands, resources and governance arrangements. However, we, like the MLAs, need more time to fully consider all the options, consult our people on them and come to a reasonable degree of consensus among ourselves.

We believe you will agree that nothing should be allowed to transpire that would frustrate the ability of the Crown to honour its commitments towards Aboriginal peoples, to negotiate in good faith with Aboriginal/First Nations governments and to honour its treaty commitments. You can assist us in this regard by immediately announcing that you are:

- **publicly supporting negotiations on a "political solution" between the Legislative Assembly/GNWT and the Aboriginal governments of the western NWT.**
- **causing amendments to the NWT Act to be drafted that will once again permit an appointed Council of the NWT, in case of need.**
- **causing amendments to be drafted that will decrease the lower limit of seats on the Council of the NWT, to ten or 11.**
- **causing amendments to be drafted that remove the term limit for the Council of the NWT or, in the alternative, increase the term to five years, as is common elsewhere in Canada.** MLAs in the past have not been willing to suggest such measures themselves, for fear of adverse public reaction.
- **expediting the passage of this legislation through the House on an emergency basis.**
- **joining and supporting an appeal to the Court of Appeal on the basis of s.25 and s.35 of the Constitution Act, 1982.**

These measures, taken together, will give both the Assembly and the Aboriginal Summit the time needed to reflect on what can and should be done, and to set up a negotiating table, without an atmosphere of panic. You, Madam Minister, will be seen to be acting positively to protect the rights and interests of the Aboriginal peoples of the NWT, in line with the trust obligations your office lays upon you, but also to be acting fairly towards the other residents of the north. With the greatest of respect, for you to say in this instance that northerners must solve their own problems, is to overlook the very real difficulties and constraints that federal legislation is causing us. What we are asking is that you agree to do everything you can to ensure that these constraints are removed so that we in the North may indeed solve our own problems in our own way and in respect for the constitutional rights of all peoples of the western NWT.

Given the severe time constraints, the fact that Notice of Motion for First Reading of Bills on the bill to add five seats was scheduled in the Assembly for today, and the very real possibility that MLAs may feel constrained to enact the legislation by March 31, we ask that you reply to our request no later than Monday, March 29, 1999. We are willing to discuss this matter with you by telephone at your convenience.

Yours sincerely

Bill Erasmus, Co-chair