

**Written Submission on Legislative Proposals Relating to the Income Tax Act and  
the Critical Mineral Exploration Tax Credit (CMETC)**

**By: The Prospectors & Developers Association of Canada (PDAC)**



**PROSPECTORS &  
DEVELOPERS  
ASSOCIATION  
OF CANADA**

**ASSOCIATION  
CANADIENNE DES  
PROSPECTEURS ET  
ENTREPRENEURS**



Department of Finance Canada  
Ottawa, Ontario

Sent via email: [Consultation-Legislation@fin.gc.ca](mailto:Consultation-Legislation@fin.gc.ca)

**Re: Budget 2022 Tax Measures and Amendments Related to the Critical Mineral Exploration Tax Credit (CMETC)**

The Prospectors & Developers Association of Canada (PDAC) is the leading voice of the mineral exploration and development community, an industry that supports 719,000 people in direct and indirect employment, and contributes more than \$100 billion to Canada's GDP every year. Representing over 6,000 members around the world, PDAC's work centers on supporting a competitive, responsible, and sustainable mineral sector.

Our mineral exploration and mining industry provides job opportunities to Canadians at salary levels that are twice the national average, and contributes an average of \$2.4 billion a year in taxes and royalties to Canada's coffers. The industry is the largest private-sector industrial employer on a proportional basis of Indigenous Peoples in Canada, and a key partner of Indigenous businesses.

PDAC is keen to respond to draft legislation proposed for Canada's *Income Tax Act* and the Critical Mineral Exploration Tax Credit ("CMETC"). Our commentary focuses specifically on the draft legislation pertaining to the CMETC and intends to:

- 1) Ensure implementation of the CMETC incentive is timely, effective and successful.
- 2) Reduce uncertainty for public issuers and investors that pursue the CMETC in order to increase the overall confidence in the Flow-Through Share ("FTS") regime and realize the intended policy outcomes.

PDAC looks forward to continued collaboration with government to ensure that the CMETC functions in a fair and predictable manner, and results in increased exploration for the minerals that are critical to Canada's transition to a low-carbon economy while providing economic benefits to Canadians from coast to coast to coast. The enclosed Appendix A contains PDAC's comments regarding the CMETC legislative aspects within the implementation act.

We welcome continued engagement with Finance Canada with respect to the CMETC legislation. Please contact Jeff Killeen, PDAC's Director, Policy & Programs ([jkilleen@pdac.ca](mailto:jkilleen@pdac.ca)) if there are questions or clarifications required for the content in this letter.

Sincerely,

*Lisa McDonald*

Executive Director

Prospectors & Developers Association of Canada



## **Appendix A: Commentary on the CMETC Legislation Within the Income Tax Act**

### **1. Interpretation of the Phrase “Acted Reasonably” by CRA**

In the proposed amendments to subsection 127(9) of the Income Tax Act (the “Act”), paragraph (e) of the definition of flow-through critical mineral mining expenditure requires a certification from a qualified engineer or geoscientist who “*acted reasonably, in their professional capacity, in completing the certification*”.

We have concerns regarding the interpretation of the phrase “acted reasonably” by the Canada Revenue Agency (“CRA”) and that CRA will task auditors to determine if a professional geologist or engineer has “acted reasonably”. Our view is the determination of whether a professional engineer or geologist “acted reasonably” is the exclusive prerogative of the professional associations (e.g. Geoscientists Canada, provincial professional geoscientists and engineering associations, etc.), and the current phrasing invites CRA auditors to second-guess the professional and/or ethical conduct of the qualified engineer or geoscientist.

Therefore, PDAC recommends that Finance Canada provide further clarification regarding how the determination of “acted reasonably” will be made before finalizing CMETC legislation.

### **2. The Definition of Qualified Person (“QP”)**

PDAC recommends Finance accept recommendations offered by Geoscientists Canada in responding to this draft legislation. Geoscientists Canada is the professional body that, by law, regulates the requirement criteria for professional geoscientists in Canada, and therefore their recommendations should carry extra weight, in our view.

Two of the recommended changes provided by Geoscientists Canada that pertain to subsection 127(9) of the Act that are of particular importance in our view:

- Amend the part of the sentence “*qualified engineer or geoscientist*”: in paragraph (e) of the definition to flow-through critical mineral mining expenditure, and in the definition of a Qualified Person to add the word “professional” to precede the words ‘engineer’ and ‘geoscientist’.
- Add the phrase: “*and is registered in the jurisdiction of the professional association in which the property is located where an appropriate professional association exists in that jurisdiction.*” to the end of paragraph (d) of the QP definition.

We believe these changes will help to define more clearly and more appropriately, who may act as a QP and provide the requisite authority of such QPs in completing CMETC attestations, which would support a seamless operation of this new incentive.

### **3. Expedite Publication of the Certification Form**

The definition of “*flow-through critical mineral mining expenditure*” in the proposed amendments includes a requirement that no more than 12 months before the time the flow-through share agreement is made “*a qualified engineer or geoscientist certifies in prescribed manner and form that the expense will be incurred pursuant to an exploration plan that primarily targets critical minerals*”.

According to the language of the draft legislation, the proposed amendments related to the CMETC are “*deemed to have come into force on April 7, 2022*”.



In that regard, we are aware that issuers have already conducted offerings in the public marketplace in accordance with Budget 2022's CMETC language to fund exploration for critical minerals in Canada. To date, the prescribed form and any guidance on the certification process is absent and is creating uncertainty for issuers on how to satisfy the certification requirement.

We recommend that Finance Canada and CRA publish the prescribed form in an expedited process and provide transitional measures for any issuance of FTS targeting critical minerals issued prior to publication of the prescribed form and guidance by CRA. In particular, Finance and CRA should provide a transitional measure that enables issuers that entered into FTS agreements after April 7, 2022 and before the release of the form, to complete their certifications retrospectively.

#### **4. Ensure Alignment of CMETC Administration and Guidance with the FTS Regime**

The examples provided on page 75 of the explanatory notes outline scenarios where a public company conducts CMETC financings in 1-year increments after a preliminary assessment of the project is complete. We emphasize that the FTS regime permits companies in certain circumstances to spend funds more than 12 months after the date of issuance. Also noteworthy is that the CMETC qualification is not a "results" test as its eligibility is based on available knowledge and a certification undertaken prior to the FTS issuance. Therefore, findings during the course of an exploration program do not change or negate the qualification of the FTS issuance as being CMETC eligible.

We suggest that Finance modify the example provided to better align with the proposed legislation, and make it clear that:

- i. Eligibility is based only the attestation prior to exploration, and
- ii. Any exploration results produced within the eligible period should only affect the eligibility of subsequent FTS issuances targeting critical minerals (i.e. it should be clear that an attestation provided by the QP as a part of a CMETC issuance requirements should remain valid for the entirety of the related exploration program).

#### **5. Proposed List of Critical Minerals Eligible for the CMETC**

PDAC's view is that there should be an alignment between the [critical minerals list published by Natural Resources Canada \(NRCan\)](#) and the list of critical minerals referenced within the *Act*. The former has 31 minerals but the *Act* specifies only a subset of 15 minerals. As NRCan is the most proficient ministry to determine what minerals are critical for Canada and the Canadian economy, Finance should not include an explicit list mineral species in the *Act*. Rather, Finance should simply refer to NRCan's critical mineral list by Regulation. Such an approach will provide the appropriate flexibility to update the reference list through a regulatory amendment as circumstances change (e.g. shifting technological requirements or industrial demands), which is more expeditious than an amendment to the *Act*.