

# Energy Transition Minerals Ltd

## Overview of Statement of Claim

### *GMAS v Government of Greenland & Government of Denmark*

20 July 2023

#### 1. Introduction

On 19 July 2023, Greenland Minerals A/S (**GM**), a wholly owned subsidiary of Energy Transition Minerals (**ETM**), filed its Statement of Claim in its arbitration against the Government of Greenland (*Naalakkersuisut*) and the Government of the Kingdom of Denmark (together, the **Respondents** or the **two Governments**).

The arbitration concerns the Kvanefjeld technology metals project in southern Greenland (**Kvanefjeld** or the **Project**). In its Statement of Claim, GM asks the Tribunal to confirm that GM had a right to an exploitation licence for Kvanefjeld and that, through their conduct on and since 1 December 2021, the two Governments have breached contractual obligations that they owed GM by denying that GM had or has any rights to Kvanefjeld at all.

Although at this stage GM does not ask the Tribunal to award GM any remedies for breach of contract or other wrongdoing, the Statement of Claim includes a provisional quantification of the losses that GM has sustained, and will sustain, due to the Respondents' breaches. Supported by independent expert evidence, GM provisionally quantifies its damages claim at USD 7.5 billion, plus USD 4 billion in pre-award interest at the rate prescribed under Danish law.

Kvanefjeld has the potential to deliver enormous social and economic benefits to Greenland and Denmark. On the basis of the expert evidence submitted with GM's Statement of Claim, it is estimated that Greenland will receive approximately USD 22.8 billion in taxes, royalties and other benefits if the Kvanefjeld Project is allowed to proceed. In addition, the Project has the potential to deliver jobs, infrastructure, services and lasting opportunities to the local people.

This document is intended as a summary of GM's case for the benefit of stakeholders, including members of the public. For a comprehensive explanation of GM's case, readers are directed to GM's Statement of Claim. In the event of any inconsistency between this summary and the Statement of Claim, the Statement of Claim is authoritative.

#### 2. Key points

The evidence set out in GM's Statement of Claim proves that:

- GM worked in good faith for over a decade, in close cooperation with the Greenlandic and Danish governments. The two governments used GM to promote Greenland to the world as a safe destination for mining investors.
- Like every company that holds an exploration licence based on the Greenlandic Standard Terms, GM had a conditional right to be granted an exploitation licence. GM met the legal conditions to be entitled to an exploitation licence for Kvanefjeld and the Government of Greenland confirmed this in writing in April 2020. From that point, GM's right to an exploitation licence was unconditional. As a matter of Greenlandic and Danish law, the Government of Greenland had no discretion as to whether to issue GM's exploitation licence, the Government only had discretion on the conditions that would be included in the exploitation licence.
- GM established that Kvanefjeld could be safely developed, in accordance with Greenland's own environmental guidelines and international best practice, and without harm to human health. This was accepted by the Respondents' specialist agencies, which were responsible for reviewing GM's Environmental Impact Assessment (EIA), together with the substantial number of reports on which it was based, which were prepared by globally renowned independent experts on environmental and related matters. GM's EIA and the radiological reports prepared by its expert consultants complied with the relevant Greenlandic guidelines for the preparation of EIAs, as well as international standards and best practice with respect to the assessment and mitigation of radiation risk.
- The law that the Government of Greenland introduced in December 2021 (the so-called "*Uranium Act*") was politically motivated, and specifically targeted GM. The explanatory notes to law record that the Government had "*a political wish to stop uranium extraction in Greenland*", and that it was "*not the aim of this Bill to lay down rules on health and safety, the environment, resource utilisation, etc., as these considerations are covered by the Mineral Resources Act*".
- Through this new law, the Government of Greenland tried to carry out an expropriation without calling it expropriation. That is not possible under Danish law. The explanatory notes to the new law say that it does not apply if its application would result in an expropriation. GM had property rights, including a contractual right to an exploitation licence, that would be expropriated if the new law applied. This means the new law does not apply to GM or its exploitation licence application.
- Despite having previously given GM written confirmation that GM had met the requirements to be entitled to an exploitation licence, after passing the new law, the Government and its representatives stated to GM that it had no rights at all.

These points are discussed further below.

### 3. Background to dispute

GM holds its rights to Kvanefjeld under an exploration licence that was transferred to GM in 2007 with the approval of the two Governments (**Exploration Licence**). As GM explains in its Statement of Claim, the Exploration Licence has the character of a contract. Section 1401 of the Exploration Licence provides as follows:

*"If the licensee has found and delineated commercially viable deposits which the licensee intends to exploit and provided the terms of this licence have been complied with, the licensee is entitled to be granted an exploitation licence under articles 7 and 15 subsection 2 of the Mineral Resources Act. The exploitation licence will be granted as indicated in sections 1402 [to] 1408".*

The two Governments drafted this provision, which (as they described it) provides for an "automatic" right to an exploitation licence, as part of a decades-long campaign to make Greenland more attractive as a destination for foreign mining investment. The same right is granted to the proponents of mining projects in Greenland in Section 29(2) of the Greenlandic *Mineral Resources Act (MRA)*.

As a result of GM's work on the Project between 2007 and 2021, it has been established that Kvanefjeld is one of the world's largest deposits of rare earth elements (**REEs**). The ore body at Kvanefjeld is rich in neodymium, praseodymium, terbium, and dysprosium (elements that are essential for the global energy transition). The ore body also contains commercial quantities of zinc and fluorspar and a small amount of uranium (approximately 0.036%). The existence of uranium in the ore body at Kvanefjeld has been known to the two Governments since the 1950s.

GM worked in close collaboration with the Greenlandic and Danish authorities for over a decade, and, by 22 April 2020, GM had received formal written confirmation from the Government of Greenland that it had satisfied the conditions under Section 29(2) of the MRA to be entitled to an exploitation licence over the mineral deposit (16 oxides and one metal) that it had delineated at Kvanefjeld.

GM was in the final stages of the process for approval of its EIA for the Project when a snap election took place in Greenland. A new government, led by the Inuit Ataqatigiit (**IA**) Party, came to power in Greenland in April 2021. Having campaigned on the basis that it would stop the Kvanefjeld Project, the IA-led Government of Greenland promptly proposed a new law to achieve this purpose.

On 1 December 2021, the Greenland Parliament (*Inartsisartut*) enacted a new law (**Act No. 20**) banning prospecting, exploration and exploitation minerals of containing uranium at a concentration above 100 parts per million (**ppm**). The ore body at Kvanefjeld exceeds this ppm limit. However, Act No. 20 expressly states that it does not apply to existing licences (Section 5) and the explanatory notes that accompanied the law say that Act No. 20 does not apply if its

application would amount to an intrusion on property rights (expropriation) under Section 73 of the Constitution of Denmark.

In two subsequent meetings with the Government of Greenland (in December 2021 and February 2022), GM sought clarification on whether Act No. 20 applies to its Exploration Licence and its exploitation licence application, given that, if Act No. 20 did apply, it would force the surrender of GM's property rights. At these meetings, the Government of Greenland advised GM that Act No. 20 does apply and that, in the opinion of the Government of Greenland, GM has no rights or legitimate expectations regarding Kvanefjeld at all.

On 22 March 2022, GM commenced arbitration against the Respondents, in accordance with Section 20 of its Exploration Licence, which expressly provides for disputes arising under the licence to be settled by arbitration in Copenhagen.

A tribunal of three arbitrators was then appointed: Professor Torsten Iversen, an eminent Danish law professor (who is the President of the Tribunal), Dr Veijo Heiskanen, a well-known international arbitrator of Finnish nationality (appointed by GM), and Mr Poul Søggaard, a former President of the Danish Supreme Court (appointed by the Respondents).

Subsequently, the Greenland Government unilaterally stopped the licensing process and gave notice of its intention to issue a decision on GM's exploitation licence application of 2019. GM applied to the Tribunal for interim measures to maintain the status quo and prevent the Respondents from aggravating the dispute, but the Tribunal declined to do so (for reasons unrelated to the strength of GM's case).

In December 2022, GM submitted an amended exploitation licence application, in which GM requested (without prejudice to its original application of 2019) an exploitation licence for REEs, fluorspar and zinc only, proposing to treat uranium safely as a residual impurity for tailings (**Amended Application**).

On 1 June 2023, the Greenland Government issued a final decision, rejecting GM's exploitation licence application of 2019, based on Act No. 20.

#### **4. GM's Statement of Claim**

GM's Statement of Claim is a comprehensive document, prepared by a team of specialist arbitration practitioners from leading international law firm Clifford Chance and leading Danish law firm Plesner. It is supported by over 1,900 pieces of evidence, six witness statements and six independent expert reports (referred to in the Appendix below).

##### **(a) Detailed Factual Background**

The Statement of Claim begins with a detailed factual background. It was necessary for GM to include a detailed factual background covering the entire 14-year history of its investment in Greenland because the two Governments have stated that GM not only had no right to receive, but also had no legitimate expectation that it would receive, an exploitation licence.

The matters covered in this detailed factual background include:

- The circumstances in which GM came to Greenland in 2007 and the two Governments' knowledge at that time that uranium was present in the Kvanefjeld ore body.
- The specific contractual arrangements that were agreed between GM and the Government of Greenland to progress exploration at Kvanefjeld while the so-called "*zero tolerance policy*" (**ZTP**) on uranium still existed in Greenland.
- How, in October 2013, the Government of Greenland abolished the ZTP specifically for GM, and specifically to enable the development of Kvanefjeld, after GM indicated that it would be unable to continue investing in the Project unless the uncertainty created by the ZTP was removed.
- The steps that the two Governments took after the ZTP was abolished to create a legal and regulatory framework for the exploitation and export of uranium from Kvanefjeld, in close consultation with GM.
- How, in the pursuit of their own economic interests, the two Governments used GM to promote Greenland as a safe and stable place for international mining investment, and the good faith efforts that GM made to assist the two Governments in this regard.
- The steps that GM took to meet the conditions to be entitled to an exploitation licence under Section 1401 of its Exploration Licence and Section 29(2) of the MRA, which led to the Government of Greenland formally confirming that GM had satisfied these conditions on 22 April 2020.
- The EIA process, through which GM demonstrated, and the Respondents' authorities and the Greenland Government accepted, that Kvanefjeld could be safely developed in accordance with Greenlandic guidelines and international best practice, without mining activities causing a material increase to the radiation exposure of people living in the vicinity of the mine.
- The political changes that led to the enactment of Act No. 20 and the events that followed, including the meetings of December 2021 and February 2022 (where the Government of Greenland stated that it would not perform its contractual obligation to grant GM an exploitation licence).
- The aggressive actions that the Greenland Government has taken since the dispute was submitted to arbitration.

This detailed factual background is supported by witness statements of five past and present GM employees and officers, and one of GM's independent scientific advisors (referred to in the Appendix below).

The environmental aspects are addressed in the independent expert report of William Goodfellow of Exponent, an environmental expert, who confirms that GM's EIA complied with all Greenlandic and international standards and best practice.

**(b) Legal Claims section**

This factual background is followed by a legal section, in which GM sets out the legal basis for its claims against the Respondents.

GM's main claims are:

- A claim for an order that the Respondents shall acknowledge that GM had a right to an exploitation licence as at 1 December 2021 (Claim 1).
- A claim for an order that the Respondents shall acknowledge that Act No. 20 is not applicable to GM's Exploration Licence or exploitation licence application (Claim 2).
- A claim for an order that the Respondents shall acknowledge that they have jointly, or the Greenland Government has individually, breached GM's rights and legitimate expectations (Claim 3).

The question of GM's entitlement to remedies (including damages) is addressed in Claim 4. GM proposes that Claim 4 be addressed in a subsequent phase of the arbitration, if necessary. The logic of this is that, if Claim 1, Claim 2 and/or Claim 3 are upheld by the Tribunal, an amicable resolution of the dispute may be achieved between GM and the Respondents.

In support of GM's claims, the legal claims section covers a range of issues, including:

- The origins of the legal framework for mining in Greenland, which has been designed (drawing on the systems of other countries, such as Norway) to provide flexibility to the Government to agree specific terms with mining investors and encourage investment by making the right to an exploitation licence "*automatic*".
- The legal status and nature of GM's Exploration Licence, which as a concession in the Greenlandic tradition, creates simultaneous obligations for the Government under contract law and administrative law.
- The nature and operation of Section 1401 of the Exploration Licence (and its related provision in the MRA, Section 29 (2), under which GM has an entitlement to an exploitation licence if it meets the stated conditions.
- Whether the addendum to the Exploration Licence that GM and the Greenland Government agreed in late 2011 (concerning uranium and the Government's right to reject an exploitation licence for uranium) is valid and enforceable under Danish law – much of the Respondents' case is based on this addendum, which they say gives the

Government of unlimited discretion to reject GM's application for any reason or even no reason at all.

- Whether GM's rights under Section 1401 of the Exploration Licence and Section 29(2) of the MRA are property rights protected by Section 73 of the Danish Constitution.
- How the Respondents breached contractual and other obligations that they owed GM, including the Danish law duties of good faith and loyalty, by stating that they will not perform under Section 1401 of the Exploration Licence and stating that GM has no rights or legitimate expectations.

GM's legal arguments are supported by the expert evidence of two eminent Danish scholars:

- Professor Bent Ole Gram Mortensen, an expert in Danish and Greenlandic mining law, whose opinion is that GM had, by 1 December 2021, acquired an unconditional right to an exploitation licence for Kvanefjeld; and
- Professor Michael Hansen Jensen, a Danish expropriation law expert, whose opinion is that GM had (and has) property rights that are protected by Section 73 of the Danish Constitution and would therefore be expropriated if Act No. 20 were to be applied.

Professor Mortensen and Professor Hansen Jensen each independently reached the conclusion that the addendum agreed in late 2011 is invalid and unenforceable under Danish law, including because it purports to vary a fundamental term of a statute (the MRA) and it purports to give the Greenland Government the power to act without regard to norms of administrative law.

### (c) Damages section

The legal section is followed by a damages section. Recognising that the situation is still evolving, and that GM proposes that the question of remedies be addressed by the Tribunal in a subsequent phase of the arbitration, GM only presents a provisional quantification of its losses.

GM provisionally quantifies its losses based on three scenarios:

- Scenario 1, in which GM is found to have a right to exploit all elements at Kvanefjeld (including uranium), but only its Amended Application is granted, such that no value is attributed to uranium. In this scenario, the damages due to GM are quantified at USD 292 million.
- Scenario 2, in which GM is found to have a right to exploit all elements at Kvanefjeld (including uranium), but its Amended Application is *not* granted, such that GM suffers a total loss equivalent to the Fair Market Value (**FMV**) of Kvanefjeld. In this scenario, the damages due to GM are quantified at USD 7.5 billion.
- Scenario 3, in which GM is found to have a right to exploit all elements at Kvanefjeld other than uranium, but its Amended Application is *not* granted, such that GM suffers

a total loss equivalent to the FMV of Kvanefjeld minus the value attributed to uranium exploitation. In this scenario, the damages due to GM are quantified at USD 7.2 billion.

In each scenario, pre-award interest is added in accordance with the Danish *Interest Act*.

GM's damages calculations are supported by the expert evidence of Richard Lambert of SLR Consulting, a mining expert, Ryan Castilloux of Adamas, an expert on rare earths pricing, and Chris Milburn of Secretariat, an expert in the quantification of damages.

**(d) Jurisdiction section**

The final section of GM's Statement of Claim is concerned with the jurisdiction of the Tribunal.

This section is necessary because the Respondents have objected to the Tribunal's jurisdiction. The Respondents argue that GM's case against the Government of Greenland must go to the courts and that the Tribunal has no jurisdiction over the Government of Denmark.

The Tribunal has the power to decide challenges to its own jurisdiction under Section 16 of the Danish Arbitration Act.

In the jurisdiction section, GM explains:

- how the dispute falls within the arbitration clause of the Exploration Licence (Section 20) and is capable of settlement by arbitration under Danish law; and
- why the Government of Denmark is bound by the arbitration agreement, such that the Tribunal has jurisdiction over the Government of Denmark as a respondent in the proceeding.

The jurisdiction section includes an extensive discussion on the legal interpretation of the arbitration clause in the Exploration Licence (which the two Governments drafted and are now seeking to avoid).

Regarding the Tribunal's jurisdiction over the Government of Denmark, GM provides the legal and factual reasons why the Danish Government is bound by the arbitration clause contained in the Exploration Licence. The key points include:

- The Danish Government approved the grant of the Exploration Licence (which contains the arbitration clause).
- The Exploration Licence was issued jointly by the two Governments, at a time when mining in Greenland was regulated by Danish legislation.
- The Exploration Licence expressly confers rights upon the Danish Government and Danish Government agencies.
- The Danish Government is an economic beneficiary of the Kvanefjeld Project.



- The Danish Government has at all relevant times been actively involved in the licensing of the Kvanefjeld Project, and establishing a regulatory framework to enable the export of uranium from Kvanefjeld.

These facts engage various Danish legal principles on the basis of which a non-signatory to an arbitration agreement (here, the Government of Denmark) is nevertheless bound by the arbitration agreement.

#### **4. Next steps**

According to the procedural timetable that the Tribunal has set, the Respondents will file their Statement of Defence on 8 January 2024.

In the meantime, GM expects to receive a decision on its Amended Application. As noted above, if the Government of Greenland rejects the Amended Application, this may have an impact on the amount of damages that the Respondents are liable to pay to GM, including because the Respondents' anticipatory breach of GM's right (at least) to an exploitation licence for non-radioactive elements will become an actual breach of contract (and a violation of other obligations under Danish law).

**APPENDIX: Documents filed on 19 July 2023**

1. GM's Statement of Claim;
2. six witness statements; and
3. independent expert reports prepared by:
  - a. a rare earths pricing expert;
  - b. an environmental expert;
  - c. a Danish public and constitutional law expert;
  - d. a Danish mining law expert;
  - e. a mining expert; and
  - f. an expert in the quantification of damages.