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Balancing Needs Minimizing Conflict

A Proposal for a Mining
Modernization Act, 2008



Balancing Needs/Minimizing Conflict: A Proposal for a *Mining Modernization Act*

October 2008

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Ecojustice, formerly Sierra Legal Defence Fund, is Canada's leading non-profit organization of lawyers and scientists devoted to protecting the environment.

Since 1990, Ecojustice has helped hundreds of groups, coalitions and communities expose law-breakers, hold governments accountable and establish powerful legal precedents in defence of our air, water, wildlife and natural spaces.

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Executive Summary

When Ontario's *Mining Act* was first passed into law in 1873, it was a remarkably different era. A mere six years after confederation, a fledgling Provincial government viewed it as necessary to exploit Ontario's natural bounty in order to settle on the land and exercise control.

In 1906 the *Mining Act* took a turn for the worse. The government of the day gutted key elements that controlled access to lands and established a free-entry model, a mining-friendly system where company rights are paramount.

For the next century, this free-entry system has stoked the fires of controversy, as mining companies clash with the interests of Aboriginal peoples, landowners and the public without due regard to environmental impacts. Today, the archaic *Mining Act* remains the law of the land and mineral rights in the province are still up for grabs with little to no planning as to how mining interests should be created. However, increasingly intense conflicts over the past few years have prompted the current government to agree to reform the *Mining Act*.

Principally at issue is the free-entry system, which allows the rights of mining companies to trump the interests Aboriginal peoples and property owners. Under the act, prospectors can stake claims to the minerals on both public and private lands without notifying or consulting with land owners or with Aboriginal peoples who have rights in the land.

In addition to serious issues with the free-entry system, the financial requirements under the *Mining Act* were relaxed in the mid-1990s, creating a risk that companies can evade their responsibility for cleaning up environmental hazards they have created. As the public is now on the hook for more than half a billion dollars for the clean-up of abandoned mine sites in Ontario, it is high time that more stringent financial requirements be implemented.

Encouragingly, Ontario's Premier has pledged to reform the *Mining Act*. Such reforms are not only intended to alleviate continued land-use conflicts but also to reflect modern-day values associated with how Ontario's public lands are managed.

This report sets out a number of proposed amendments that should be included in a *Mining Modernization Act* if such legislative reforms are to achieve intended results. Eight groups of legislative amendments are proposed in this report and relate to three imperatives:

- Requiring consent of land owners and Aboriginal peoples before any prospecting, exploration or mining activities can occur on their lands;
- Implementing regional land-use planning prior to allowing exploration or mining operations to proceed to ensure environmental, social and development needs are balanced; and
- Ensuring all exploration and mining projects face the scrutiny of environmental assessment to ensure that environmental and socio-economic impacts are minimized.

This report also provides a summary of our comprehensive review of international and domestic mining law, demonstrating that the elements of a proposed *Mining Modernization Act* have been widely implemented elsewhere.

These proposed amendments provide Ontario with a framework for modernizing its archaic legislative regime and present the province with an opportunity more than a century in the making. With a *Mining Modernization Act*, Ontario can demonstrate that it is a world leader in balancing the management of its significant natural wealth with the interests of Aboriginal peoples, landowners, the mining industry and the public.

I. Introduction

Comprehensive land use planning prior to any mining activities – including prospecting and exploration – is an essential precursor to avoiding most conflicts arising from differing land use needs in Ontario. Certainty of designated land use can provide all land users with the security they need for maintaining culture and community, ensuring protection of environmentally sensitive lands, increasing economic opportunities, and improving the investment climate.

Ontario's Premier has recently pledged to reform the Province's dated *Mining Act*, R.S.O. 1990, c. M.14. Such reforms are not only intended to alleviate continued land-use conflicts in the Province but also to reflect modern-day values associated with our public lands. This report sets out a number of proposed amendments in a model *Mining Modernization Act*. It should be noted that this report has been scoped to address specific issues related to reform of the *Mining Act*, and does not address numerous other provincial laws and policies that could be amended to improve the regulatory regime governing mining in Ontario.

In July 2008, Ontario's Premier announced that his government would review and amend the *Mining Act*. The Ontario Ministry of Northern Development and Mines (MNDM) subsequently released *Modernizing Ontario's Mining Act – Finding A Balance Discussion Paper* ("Discussion Paper") to facilitate consultation on *Mining Act* reform and related policy issues. The paper outlined the five policy issues that the government believes need to be addressed in the *Mining Act* review:

1. The mineral tenure system and security of investment, including potential adjustments to the aspects of the system such as free entry
2. Aboriginal rights and interests related to mining development
3. Regulatory processes for exploration activities on Crown land
4. Land use planning in Ontario's Far North
5. Private rights and interests relating to mining development such as mineral rights and surface rights issues.¹

This report responds to the five policy issues raised in the MNDM Discussion Paper and sets out model legislative provisions that could address concerns that have been raised about the current *Mining Act*. This Discussion Paper was released on August 11, 2008 and the public was given a period of 65 days, until October 15, 2008, to comment on the questions raised in the paper. It is important to note that this is not an adequate period of time for many members of the public respond to these issues. In addition, most Aboriginal governments in Ontario feel that they need a great deal more time to consider proposed amendments at the community level. We would encourage the government to consider extending the time period for this consultation process.

Ontario's free entry regime has been in place since 1906, replicating legislation born during the gold rush era in Western Canada.² These laws were created to encourage mining as a means to increase settlement in "frontier lands," and were derived from feudal law developed centuries earlier.

As mentioned in the Ministry of Northern Development and Mines' Discussion Paper:

In Ontario and throughout most of Canada, this system – commonly known as the “free entry” system – sets out the rules for acquiring title to Crown owned minerals. It has four key features:

- The right of prospectors to enter lands containing Crown-owned minerals to undertake mineral exploration
- The right of prospectors to acquire mineral exploration rights by properly staking a claim and having it recorded with the mining recorder
- The exclusive right of the claim holder to carry out further exploration within the area covered by the claim
- The right of the claim holder to obtain a mining lease – the tenure instrument required to undertake mineral production – provided proper procedures and requirements have been complied with.³

Thus, under a free entry system, there are no preconditions for land-use planning, consultation with the public or First Nations, nor any environmental assessment or restoration requirements. Although some of these considerations may be addressed in meeting requirements prior to beginning a mining operation, these do not come into consideration until well after the prospecting and staking activities under the current system.

This system has been highly criticized for its complete lack of consideration of, and inability to consider, respect and accommodate Aboriginal interests, important ecological values, private surface interests and other values associated with lands prior to the commencement of mining activities. For example, the Environmental Commissioner of Ontario (ECO) has stated that Ontario’s “century-old system continues to rely on principles that are no longer reflective of modern planning or resource management.”⁴ According to the ECO, the government’s current “mineral development strategy all but ignores that mining is but one of many possible land uses in northern Ontario.”⁵ The ECO made a number of other strong statements about the current *Mining Act*:

There are strong arguments that reforms to the *Mining Act* and its associated legal mechanisms are needed. The existing regulatory structure treats public land as freely open to mineral exploration. The consideration of other interests, such as the protection of ecological values, is reactionary, and the question of whether mineral development may be inappropriate is not answered upfront. Instead, it is assumed that mineral development is appropriate almost everywhere and that it is the “best” use of Crown land in almost all circumstances.

Ontario’s *Mining Act*, and its presumption of free entry for mineral development, impedes land use planning. Ecological values should not only be identified, but they should also form the foundation of a comprehensive land use planning regime that possesses legal authority. Without legal authority and designation, the identification of ecological values is virtually meaningless....

The ECO also believes that the existing regulatory structure for mining does not adequately assess the cumulative impacts of development. It is evident that the various existing approvals processes are highly compartmentalized.⁶

In his 2006-2007 annual report, the Environmental Commissioner of Ontario specifically recommended that the *Mining Act* be reformed to reflect land use priorities of Ontarians today, including ecological values.⁷ The ECO also noted the recent Ontario Superior Court case of *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, observing that it “seriously questions the existing approach to consultation in the context of mining exploration and development in Ontario...[and] calls for the province to develop and apply appropriate consultation policies or regulations in relation to resource decisions.”⁸

Canada is one of the world’s leading exporters of minerals and mineral products.⁹ Canada’s mineral production in 2006 was estimated at \$33.6 billion, of which 28 percent was from Ontario.¹⁰ According to the Ontario government, exploration spending in Ontario rose from \$120 million in 2002 to \$500 million in 2007, and is expected to be more than \$625 million in 2008.¹¹ As a world leader in mining production and exports, Ontario’s mining industry should also be a world leader in promoting and engaging in sustainable, responsible mining practices. The Ontario government must play a lead role in ensuring that such sustainable, responsible practices are adopted, especially given that Ontario’s mining laws and policies are used as a model for developing nations where Canadian mining companies operate.

Current Structure of Ontario’s *Mining Act*

The regulatory process for mining currently enshrined in the *Mining Act* can be summarized as follows. First, a person must obtain a prospector’s licence, which is available to anyone over the age of 18 at a cost of \$25.50.¹² To gain the exclusive right to explore and develop minerals on land where the Crown holds the mineral rights, a prospector must stake a mining claim. This process is regulated by the *Claim Staking Regulation* under the *Mining Act* and involves demarcating a square or rectangular area up to a maximum of 256 hectares by erecting claim posts and creating claim lines by blazing (i.e. cutting) the trees and underbrush between posts.¹³ After a claim is staked, an application must be made within 31 days to record the mineral claim with the Provincial Recording Office. Providing the applicant complies with the form and payment requirements, the Mining Recorder records the claim and updates provincial maps to mark the claim’s location.¹⁴ The Mining Recorder has little to no discretion under the Act to refuse to record the mining claim. To maintain a staked claim, the claim holder must perform annual assessment work costing \$400 per 16 hectare claim unit and report such work to the Mining Recorder. There are no environmental conditions imposed on this assessment work.

The holder of a staked claim has the exclusive right to explore for minerals and the right to lease the claim after the first year of assessment work has been filed. Even early in the exploration stage, the Minister may provide written permission for bulk samples to be taken to test for mineral content. Early exploration may also include extensive stripping, trenching, and surface disturbance without permits. During advanced exploration, extensive ore samples may be taken for further mineral content testing. There are no fees associated with any of this exploration payable to the Ministry, nor are there any environmental assessment requirements unless a

Federal environmental assessment is triggered. Further, holders of mining claims or leases have the right to sell or transfer the claim to other parties without restriction.¹⁵

The holder of a mining claim does not automatically gain the right to remove minerals for the purpose of sale at the exploration stage but they do have the right to a mining lease. In order to obtain a lease from the Ministry of Northern Development and Mines, a mining company must submit an application (including a proposed closure plan) and associated fee of \$75 and upon payment of the mining rents for the first year (normally \$3 per hectare), the holder of a mining claim is entitled to a lease.¹⁶ Mining leases are obtained for a duration of 21 years and may be renewed for the same period.¹⁷ After a lease is issued, the only means by which a lease can be terminated is for arrears of rent¹⁸ or, when a lease is up for renewal, for failure to produce minerals from the mine continuously for a year¹⁹.

At the end of mineral production, the mine is to be closed as per the closure plan filed with the Ministry, according to guidelines under the *Mining Act*.²⁰ If no further mining is to be performed on the lands, the miner may surrender the lands back to the Crown.²¹

Currently, mining is exempt from Ontario's *Environmental Assessment Act* and a Declaration Order gives MNDM complete discretion as to whether to require an environmental assessment of a proposed mine, which it has not yet chosen to do.

While such permissive laws served to foster settlement at the turn of the century, they are a poor gauge of how the public presently values land and its attributes. Today, many equally important land uses exist in addition to mining, including: the exercise of Aboriginal and treaty rights; recreation and tourism; and basic ecological services such as water and air purification, species habitat, carbon sequestration, etc. By giving pre-eminence to mining interests under the *Mining Act*, the government is currently limited in its ability to make informed choices about land use in the Province. Further, mining practices from a century ago when the *Mining Act* was originally enacted differed dramatically from the large-scale industrial operations that are used today, as does the scientific knowledge of ecosystem services provided by public lands. In addition, as mentioned above, the current regulatory system for mining does not require an assessment of the environmental impacts of mining. At no stage of the mining process is an environmental assessment required for the work performed on public lands – exploration, development, mining or closure – because mining activities are exempted from the *Environmental Assessment Act*, and MNDM has chosen not to subject mining projects to environmental assessment.

The absence of environmental assessment, permitting and reporting also means that there are currently few opportunities for public engagement in the mining process. The only public consultation available under the *Mining Act* is completely at the discretion of the Ministry of Northern Development and Mines. For example, under section 140 of the Act, the Ministry may require a mining company to provide public notice of an advanced exploration project.

The *Environmental Bill of Rights* requires that public notice be provided on the Environmental Registry of specific instruments that may be issued under the *Mining Act* and certain mining-related permits under other pieces of legislation such as permits to take water and sewage works approvals under the *Ontario Water Resources Act* and affords the public with the ability to

provide comment on such proposals.²² These processes however, are far too late for public input to have any meaningful impact on strategic decisions regarding public land use or mine permitting.

Informed by a comprehensive review of the legislation governing mining in countries such as Australia, New Zealand, England, Scotland, the United States, Germany and the Philippines and in other Canadian Provinces and Territories, this report recommends an alternative regulatory framework to Ontario's current free entry system. Ontario currently has a significant opportunity to take the necessary steps to bring our outdated legislation in line with other jurisdictions where mining is similarly a major contributor to the economy.

Summary of Principles Needed in Amended Mining Act

1. Land use planning mechanisms that put a pause on mining activities while land use planning takes place;
2. Environmental assessment at each stage of the mining cycle;
3. Protection for Aboriginal rights, including rights to consultation, accommodation, and free prior and informed consent
4. Increased regulatory oversight of mining activities and operations;
5. Increased rights for surface rights only landowners;
6. Increased transparency of mining operations, including public notice, consultation and reporting;
7. Financial securities for 100% of clean-up and reclamation costs; and
8. A self-funded regulatory scheme.

This report is structured around these eight principles. Each principle is discussed below in the context of: the current Ontario mining regulatory regime; how these principles have been applied in other jurisdictions; and legislative amendments that are proposed to enshrine the principles in Ontario law.

II. Proposed Legislative Amendments

In order to provide context for the proposed legislative amendments outlined below, we believe it is necessary to, at the very least, set out some preambulatory clauses and delineate a purpose for an amended *Mining Act*. We propose the following preambulatory clauses and purpose section:

Proposed amendments

Recognizing that planning in advance of mining is a sound way to ensure that conflicts that may arise from differing land use needs may be minimized;

Recognizing that a conflict-free investment climate is essential for attracting investment in Ontario;

Recognizing that lands in Ontario are often subject to Aboriginal and Treaty rights and that the Crown has a legal obligation to honour and uphold such rights;

Recognizing that mining processes can have significant adverse environmental impacts;

Recognizing that surface rights owners and occupiers ought to have their rights and interests respected when mining activities are proposed on their land;

Recognizing that the people of Ontario have a right to a protected natural environment; and

Recognizing that mining contributes significantly to the economy of Ontario;

The Province of Ontario enacts the *Mining Modernization Act*.

1. The purpose of this Act is to ensure that:

- (a) mining is undertaken in a socially, environmentally and economically sustainable and responsible manner;
 - (b) mining is undertaken in a manner consistent with the legal obligations of the Crown to Aboriginal peoples;
 - (c) mining is undertaken in an accountable manner that reduces conflict between potentially competing interests and provides an appropriate climate for investment in and development of the mining sector; and
 - (d) the impacts of mining on public health and safety and the environment are minimized through land use planning before mining and that mining lands are rehabilitated.
-

1. Land use planning prior to mining

The free entry system has been widely criticized as an obstacle to meaningful land use planning decisions in Ontario.²³ Land use planning in advance of staking, exploration and mining activity will reduce the potential for conflict between those with competing interests as to how lands should be used, and will thereby decrease uncertainty over proposed mining projects and provide stability to the mining industry.

The Minister of Northern Development and Mines is already empowered under section 35 of the *Mining Act* to withdraw Crown lands from mining and this provision could be used effectively to allow for land use planning to be conducted through the withdrawal of lands from mining while land use planning moves forward. It is notable that the Ministry did use its discretion in s. 35 as part of the Ontario government's 1999 Living Legacy Land Use Strategy. While MNDM did issue withdrawal of staking orders as part of the strategy, MNDM also sent a memo to claims holders stating that areas that had been designated as having "Provincially Significant Mineral Potential" would be reopened to exploration and staking under regulations to be developed for these areas.²⁴

It is our view that legislative direction is needed to ensure that land use planning processes precede mining activities rather than leaving the withdrawal of Crown lands for land use planning at the complete discretion of the Ministry. A statutory prohibition on prospecting, exploration or mining in areas subject to active land use planning initiated by the Ontario government, a municipal government or an Aboriginal people is recommended.

Ontario's Lands for Life process was a land designation exercise conducted on a regional basis throughout the Area of the Undertaking. The process was intended to address the issue of withdrawing land from potential mineral development and setting it aside for conservation purposes. At the outset of the process, lands that had already been staked were not "on the table," and if a mining claim conflicted with Lands for Life designated lands the area became a "forest reserve," which did not exclude the possibility of mines. In the event that a mining claim were to be advanced, it would be taken out of the reserve.²⁵ Under the Lands for Life process, the government recommended the creation of 378 new protected areas on Crown lands in Ontario in 1999. However, it was later revealed that mining claims had been staked on 66 of the proposed provincial parks and conservation reserves either before the protected areas were proposed, or after they had been proposed but before MNR had made the request that MNDM remove the areas from eligibility for mining.²⁶ It should also be noted that a sub-regional planning phase was supposed to follow in order to provide detail on the broad brush land use plans developed through the Lands for Life process. This sub-regional process has not taken place, yet the Lands for Life planning process has concluded.

Some provincial jurisdictions have used additional mechanisms to halt claim staking while considering the implementation of a new mining regime. For example, New Brunswick has introduced a moratorium to suspend all mineral claims staking activity in the province until a new map-staking system is implemented.²⁷

Other jurisdictions surveyed have implemented a system to identify areas off-limits to mining through land use planning. In the United Kingdom, a minerals policy statement sets out national

planning policies for minerals planning, to provide advice and guidance to planning authorities and the minerals industry. It contains a broad range of national land use policies for minerals planning that include avoiding adverse environmental impacts and protecting heritage and countryside.²⁸

Quebec's Ministry of Natural Resources, Forests and Parks prepares public land use plans that recognize lands where resource extraction is excluded, permitted or is a priority.²⁹ In the Northwest Territories, land use planning has been effected under the Northwest Territories Protected Areas Strategy,³⁰ and is conducted by Aboriginal land use boards established under the *Mackenzie Valley Resource Management Act*.³¹

Example from Another Jurisdiction: Land Use Planning in the Northwest Territories

The 1999 Northwest Territories Protected Areas Strategy is intended to protect special natural and cultural areas and core representative areas within each ecoregion throughout the Northwest Territories.³² The Strategy specifies that mining, and other resource based development, will not be permitted in core representative areas.³³

Under the *Mackenzie Valley Resource Management Act*, public boards engage in additional land use planning in the Mackenzie Valley. Pursuant to Dene and Métis land claims agreements, Aboriginal peoples are entitled to nominate half of the members of a board. Public boards are responsible for regulating all uses of land and water in the Mackenzie Valley and preparing regional land use plans to guide development.³⁴

Land use planning has not deterred mining companies from investing in the Northwest Territories, where economic growth relies heavily on mining. For example, diamond mining currently represents approximately half of the Gross Domestic Product of the territory.³⁵

Therefore, in order to avoid the claim staking rush experienced during the Lands for Life process, transitional provisions will be needed that stipulate that no new claims or assessment work will be recorded until land use planning is completed. We propose this for land use planning in the Near North and Far North but not in Southern Ontario given that municipalities continually revise their Official Plans.

With respect to Southern Ontario, it is important to note that there have been calls by some municipalities for re-unification of sub-surface and surface rights to address concerns about free entry. In June 2007, the Association of Municipalities of Ontario passed a resolution petitioning the Premier and the Minister of Northern Development and Mines to reunite surface and mining rights when requested by the owner of surface-rights only properties, or municipalities, to resolve issues relating to mining activities that have resulted in property damage, environmental degradation, unmapped mining hazards, disturbing residents' enjoyment of the land or risking public health and safety.³⁶

We propose the following Part be included in the *Mining Modernization Act*:

Proposed amendments _____

Part II.2 Land Use Planning

Definitions

“Area of the Undertaking” is that area of Ontario where forest management activities are conducted as of the date of enactment of this legislation.

“Southern Ontario” is that area of Ontario located south of the French River.

“Near North” is that area of Ontario north of the French River and south of the northern limit of the Area of the Undertaking.

“Far North” is that area of Ontario north of the Area of the Undertaking.

Southern Ontario

[Section](1) The Minister of Natural Resources or the Minister of Municipal Affairs and Housing may conduct a land use planning process in Southern Ontario to determine those areas where mining may be permitted.

[Section](1) The council of a municipality or a planning board in Southern Ontario may establish, within an official plan, those areas where mining may be permitted.

(2) Council of a municipality shall notify the Minister of any areas to be withdrawn from further staking pursuant to a finalized official plan.

(3) After having received notification from a municipal council of lands to be withdrawn from further staking, the Minister shall withdraw the lands from further staking within twenty-four hours.

[Section] The council of a municipality in Southern Ontario may pass by-laws setting land use controls within areas established in an official plan as open to mining.

[Section] Where an area of Southern Ontario is not currently subject to municipal organization, the land use planning provisions relating to the Near North will apply.

Near North

[Section] Prospecting, exploration and new mining are prohibited in areas of the Near North where land use planning is active until,

- (a) Land use planning is complete, or
- (b) After 5 years has elapsed since the planning process commenced,

unless the government initiating the land use planning process explicitly states that the process will require more than 5 years for completion at the commencement of the process.

[Section] Land use planning includes a land use planning process conducted by:

- (a) The Minister of Natural Resources;
- (b) The Minister of Municipal Affairs and Housing;
- (c) An Aboriginal government; or
- (d) A municipal government.

[Section](1) The Minister of Natural Resources or Minister of Municipal Affairs and Housing shall notify the Minister of Northern Development and Mines of a land use planning process thirty days before it begins.

(2) An Aboriginal or municipal government that initiates a land use planning process must notify the Minister of Northern Development and Mines in writing of the geographical area subject to land use planning in order for the prohibition on prospecting, exploration and new mining to be operative.

(3) After having received notification of a land use planning process, the Minister shall withdraw the lands subject to land use planning from further staking within twenty-four hours.

Assessment work

[Section] Mining claims registered by the Mining Recorder prior to a land use planning process being posted and filed shall not have any assessment work recorded while a land use planning process is underway.

[Section](1) The Minister of Natural Resources or Aboriginal government that has provided notification of a land use planning process to the Minister, shall notify the Minister of the finalization of a land use plan, including:

- (a) Lands that have been identified as ecologically sensitive, culturally important or otherwise significant, and thereby off-limits to mining activities;
- (b) Other lands that are to be designated as off-limits to mining activities and the reasons for such designation; and
- (c) Lands in which mining activities may be permitted, and the conditions under which mining activities may be permitted.

Cancellation of claims

(2) A mining claim on lands designated as off-limits to mining as part of a finalized land-use plan may be cancelled by the Minister.

Compensation

[Section] (1) A mining claim holder is not entitled to any compensation or damages for any losses incurred while a land use planning process is underway.

(2) A mining claim holder may be compensated for the assessment work performed on a claim before the land use planning process was commenced if the claim is cancelled by the Minister but will not be entitled to any other form of compensation, claim or monetary remedy flowing from the cancellation of the claim.

(3) The compensation mentioned in subsection (2) shall be paid from the Consolidated Revenue Fund.

Far North

No prospecting, exploration or mining

[Section] Prospecting, exploration and new mining are prohibited in areas of the Far North where land use planning is active until,

- (a) Land use planning is complete, or
 - (b) After 5 years has elapsed since the planning process commenced,
- unless the government initiating the land use planning process explicitly states that the process will require more than 5 years for completion at the commencement of the process

[Section] Land use planning includes a land use planning process conducted by:

- (a) The Minister of Natural Resources;
- (b) The Minister of Municipal Affairs and Housing;
- (c) An Aboriginal government; or
- (d) A municipal government.

[Section](1) The Minister of Natural Resources shall notify the Minister of Northern Development and Mines of the commencement of a land use planning process once it begins.

(2) An Aboriginal or municipal government that initiates a land use planning process must notify the Minister of Northern Development and Mines in writing of the geographical area subject to land use planning in order for the prohibition on prospecting, exploration and new mining to be operative.

(3) After having received notification of a land use planning process, the Minister shall withdraw the lands subject to land use planning from further staking within twenty-four hours.

Assessment work

[Section] Mining claims registered by the Mining Recorder prior to a land use planning process being posted and filed shall not have any assessment work recorded while a land use planning process is underway.

[Section](1) The Minister of Natural Resources, Minister of Municipal Affairs and Housing, Aboriginal or municipal government that has provided notification of a land use

planning process to the Minister, shall notify the Minister of the finalization of a land use plan, including:

- (a) Lands that have been identified as ecologically sensitive, culturally important or otherwise significant, and thereby off-limits to mining activities;
- (b) Other lands that are to be designated as off-limits to mining activities and the reasons for such designation; and
- (c) Lands in which mining activities may be permitted, and the conditions under which mining activities may be permitted.

Cancellation of claims

(2) A mining claim on lands designated as off-limits to mining as part of a finalized land-use plan may be cancelled by the Minister.

Compensation

[Section] (1) A mining claim holder is not entitled to any compensation or damages for any losses incurred while a land use planning process is underway.

(2) A mining claim holder may be compensated for the assessment work performed on a claim before the land use planning process was commenced if the claim is cancelled by the Minister but will not be entitled to any other form of compensation, claim or monetary remedy flowing from the cancellation of the claim.

(3) The compensation mentioned in subsection (2) shall be paid from the Consolidated Revenue Fund.

An alternative to the above proposed amendments would be to simply define Aboriginal peoples, municipalities and the Ministers of Natural Resources and Municipal Affairs and Housing as “competent authorities” under the *Mining Act* in order to afford them the authority under section 27 to withdraw lands from prospecting.

2. Environmental assessment at each stage of mining cycle

Although environmental assessment in Ontario is far from perfect, minimum standards under existing legislation are not even met given that a Declaration Order in various forms has been in place since 1981 exempting mining from environmental assessment in Ontario. Although MNDM has been made responsible under the Declaration Order³⁷ to develop environmental assessment requirements for mining, we have little confidence that progress is being made to put a comprehensive environmental assessment system in place for mining processes.

Even at the early stages of mining, environmental impacts are of concern. Prospecting can result in disturbance to wildlife and the establishment of camps in remote areas. Staking can entail the blazing of claim lines and aerial reconnaissance work, while initial exploration work allows for the construction of new roads. These activities can disturb migrating wildlife and contribute to habitat fragmentation and open up previously undisturbed areas to human access. Early

exploration can involve stripping areas of all vegetation and soil, using heavy machinery to dig trenches and pits, and the drilling of bore-holes which can negatively impact surface and ground water. Acid mine drainage and metal leaching, as well as siltation and sedimentation from exploration and mining, can adversely affect adjacent water bodies. The development and production of minerals as part of advanced exploration and mining involve even more intrusive activities, which result in even more disruptive environmental impacts.

Rarely are low-impact best practices or guidelines imposed on mining companies because the government has no discretion to refuse to record a mining claim or issue a mining lease, or to attach conditions to these activities where appropriate.³⁸ For example, the use of “mixing zones” substitutes the dilution of toxics from mine sites for zero discharge practices that could be adopted. Pollutants released to tailings and waste rock disposals are of serious concern for investors, creditors and insurers, and governments as they may result in undisclosed liabilities. Inadequate reclamation bonding and closure planning has resulted in over ten thousand abandoned mines in Canada. According to the Ministry of Northern Development and Mines, there are currently more than 5,700 known abandoned mine sites located within Ontario of which approximately 4,000 sites have the potential to be hazardous to public health and safety and to the environment.³⁹ The cumulative impact of historic and abandoned exploration sites and associated hazards is unknown but the Ministry currently projects that it will cost about \$500 million to properly rehabilitate all of Ontario’s abandoned mine sites.⁴⁰

There are currently no mechanisms in place to allow consideration of the impacts of mining on areas such as the headwaters of rivers that flow through provincial parks, conservation reserves or other sensitive areas. Even a mine located outside of a park may be close enough to adversely affect a sensitive ecosystem. It is important that the potential for such environmental impacts be assessed, and that mining claim boundaries be redrawn to ensure that mining is not permitted in sensitive areas. This would be consistent with the priority of maintaining the ecological integrity of parks and conservation reserves enshrined in Ontario’s *Provincial Parks and Conservation Reserves Act, 2006*.⁴¹

Not only does the current regime prevent the government from imposing environmental protective and mitigation measures, the public is often forced to absorb the clean up costs of mining operations that have been abandoned or improperly restored. Every jurisdiction surveyed in our jurisdictional research requires some form of environmental assessment for mining, and most also require environmental assessment as a pre-condition to any exploration work undertaken.

British Columbia⁴² and Quebec⁴³ both require environmental assessment of mines. However, we highly recommend assessments to begin much earlier in the mining cycle with low-level assessments at the prospecting stages with progressively more rigorous assessments as impacts become more significant. Both the Northwest Territories and the Yukon have recognized the value in environmental assessment earlier in the mining cycle and require assessments at the exploration stage. In addition, First Nations have enhanced rights in the environmental assessments in the territorial processes. Recent environmental assessments of a number of proposed Canadian mines have made use of a “contribution to sustainability” test to assess the projects. Sustainability tests have been applied in the assessment of proposed mines in the cases

of Kemess North, British Columbia; Whites Point, Nova Scotia; and Voisey's Bay, Labrador, and resulted in projects being denied or continuing with substantial conditions to promote sustainability.⁴⁴

We also recommend that when a project reaches the mining stage, that participant funding be provided to interested stakeholders to ensure members of the public are given the opportunity to participate in a meaningful way in the environmental assessment process. The federal environmental assessment process provides for such funding.⁴⁵

Example from Another Jurisdiction: Environmental Assessment of Kemess North Project in British Columbia

In the case of BC's proposed Kemess North Project, an open-pit, copper/gold expansion of an existing mine, the Federal-Provincial joint environmental assessment review panel applied a sustainably-based evaluation framework in its decision. This framework considered "environmental stewardship, economic benefits and costs, social and cultural benefits and costs, fair distribution of benefits and costs, and present versus future generations."⁴⁶

Based on these sustainability criteria, the Kemess North Joint Review Panel recommended the project not be approved because it would not likely bring lasting benefits. This conclusion was based largely on the long-term impacts of wastes from the mine on the environment generally and on Aboriginal peoples in the area.⁴⁷ As a result of the Panel's decision, the Federal government decided that project was likely to cause significant adverse environmental effects that could not be justified.⁴⁸

Not only do we recommend that the most recent version of the Declaration Order exempting mining from environmental assessment in Ontario not be renewed in 2009, we also propose that specific environmental assessment requirements be adopted in the *Mining Modernization Act*:

Proposed amendments _____

[Section] (1) An application for a prospecting permit shall include an environmental assessment report which includes the following:

(a) a description of the environment of the area subject to the permit, including but not limited to:

- (i) a recent map of the area and surrounding lands;
- (ii) a description of the water bodies in and around the area subject to the proposed permit, including lakes, rivers, streams, wetland, ponds and groundwater;
- (iii) a description of the applicant's plan of access to the area; and
- (iv) a description of any Aboriginal cultural values or historic resources associated with the lands.

- (b) the possible impacts of prospecting work on the features mentioned in subsection (a); and
- (c) measures the applicant intends to take to minimize such impacts.

(2) An application for an exploration permit shall include an environmental assessment report which includes the following information:

- (a) a description of all work and activities to be undertaken;
- (b) a description of the environment of the area subject to the permit, including but not limited to:
 - (i) a recent map of the area and surrounding lands;
 - (ii) a description of the water bodies in and around the area subject to the proposed permit, including lakes, rivers, streams, wetland, ponds and groundwater;
 - (iii) an inventory of natural, social and cultural values;
 - (iv) a description of the applicant's plan of access to the area; and
 - (v) a description of any Aboriginal cultural values or historic resources associated with the exploration site.
- (c) the possible impacts of exploration work on the features mentioned in subsection (b);
- (d) measures the applicant intends to take to minimize such impacts;
- (e) an assessment of the potential for impacts on the ecological integrity of a provincial park or conservation reserve; and
- (f) a rehabilitation plan for any disturbances to vegetation, soils or bedrock including methods and timeline for closing bore holes, filling trenches and other remediation.

(3) An applicant seeking a permit for advanced exploration shall complete an environmental assessment under Part II of the *Environmental Assessment Act* that includes consideration of:

- (a) closure and reclamation;
- (b) potential impacts on natural, social, cultural and historic values associated with the exploration site;
- (c) the potential for impacts on the ecological integrity of a provincial park or conservation reserve;
- (d) management of water treatment; and
- (e) long-term management of any wastes.

(4) An applicant seeking a permit for mining shall complete an environmental assessment under Part II of the *Environmental Assessment Act* that includes consideration of:

- (a) closure and reclamation;
- (b) potential impacts on natural, social, cultural and historic values associated with the site;
- (c) the potential for impacts on the ecological integrity of a provincial park or conservation reserve;
- (d) management of water treatment; and
- (e) long-term management of any wastes.

(5) An environmental assessment completed under this section must be approved by the Minister of the Environment before the Minister of Northern Development and Mines may approve a permit.

(6) The Minister of the Environment may refer an environmental assessment to the Environmental Review Tribunal for a decision.

[Section] (1) The Minister shall establish a participant funding program to facilitate the participation of the public in environmental assessments of mines.

(2) Through a process of public consultation, the Minister shall establish rules and procedures for the participant funding program related to the determination of eligibility for funding and the amount of the funding.

3. Requirement for Aboriginal Peoples' Free, Prior and Informed Consent

The Supreme Court of Canada has held that when governments make any decisions that may have an impact on an established or asserted Aboriginal right or interest that the Crown must, at a minimum, carry out meaningful consultation with all Aboriginal peoples who may be impacted in order to identify and accommodate their interests. Furthermore, the Supreme Court has found that where the strength of the right and the potential threat to that right warrants, the duty to accommodate may require the consent of the affected peoples.⁴⁹ In applying these principles, courts in Ontario⁵⁰ have held that Ontario's implementation of the current *Mining Act* has been inadequate to meet the Crown's duty to Aboriginal peoples in Ontario and that consultation must start at the very beginning of the mining cycle when prospecting begins.

Under a free entry mining regime, the government is incapable of fulfilling its constitutional duty to consult First Nations with regard to mining activities that may impact First Nations' rights. Because there is no requirement to inform government of such activities, the government is often unaware of prospecting activities and mining claims before they are recorded. As such, the government is unable to engage in any kind of process with Aboriginal peoples at an early stage of the mining cycle. As the duty of consultation and accommodation cannot be delegated to a third party such as a prospector,⁵¹ it is incumbent on government to enact amendments to the *Mining Act* requiring prospectors and miners to notify government as early as possible of their intended mining activities.

In 2007, the ECO recommended amending the "*Mining Act* to include specific criteria that reflect MNDM's constitutional duty to consult with First Nations when granting mining claims and leases that may impact their rights."⁵² The ECO also explained the added benefit that "appropriate consultation policies or regulations in relation to resource decisions...would not only ensure that proper consultation occurs, but would also alleviate the uncertainty that developers face in satisfying themselves that the government has fulfilled its constitutional duty to consult First Nations when granting mining rights."⁵³

In recognition of similar deficiencies in their laws, Australian, New Zealand and the Philippines governments have incorporated legislative provisions in mining legislation to recognize Indigenous peoples' rights at a higher level than mining interests.

In New Zealand, consideration of Maori rights and interests is necessary at the prospecting, advanced exploration and mining stages. Under New Zealand's *Crown Minerals Act*, permits for prospecting, exploration or mining may not be granted unless the Minister has had regard to the principles of the Treaty of Waitangi.⁵⁴ For mining activities other than those with minimum impacts, the owners of Maori land also have an absolute veto right on all mining activities on their land.⁵⁵

In Queensland, Australia,⁵⁶ a party interested in pursuing "low impact" prospecting activities must consult with each Aborigines with title to the specific the area before entry and Aborigines have veto rights under legislation to control mining in their territory.

In Canada, Quebec's environmental assessment regime for mining provides for Cree and Inuit representatives on environmental assessment Boards when they are struck to examine mines and further, provides for specific environmental assessment processes when development is proposed on Cree or Inuit traditional territory.⁵⁷ In the Northwest Territories, the *Mackenzie Valley Resource Management Act*⁵⁸ provides for land use planning, environmental assessment, land and water regulation, cumulative impacts monitoring and environmental audit to fulfill commitments in the Dene and Métis land claims agreements.⁵⁹

We highly recommend that Ontario adopt similar processes and further, that Ontario honour the emerging international law requirement recognizing Aboriginal peoples' free, prior and informed consent as a precondition to allowing development that will impact their interests at each stage of mining. The Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in September 2007 and endorsed by the Canadian Parliament on April 8, 2008, provides:

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In January 2005, under the auspices of the UN Permanent Forum on Indigenous Issues, and previous to the adoption of the above-noted Declaration, an inter-agency workshop of UN bodies met to examine policies and practices related to free, prior, informed consent. Free, prior and informed consent was described during the workshop as:

For consent to be “free,” it must be given without coercion, duress, fraud, bribery, or any threat or external manipulation.

For consent to be “prior,” it must be given before any significant planning for the proposed activity has been completed, and before each decision-making stage in the proposed activity’s planning and implementation at which additional relevant information is available or revised plans are proposed.

For consent to be “informed,” it must be given only after the affected indigenous people is provided with all relevant information related to proposed activities in appropriate languages and formats, including information regarding indigenous rights under domestic and international law, the likely and possible consequences of the proposed activities, and alternatives to the proposed activities. All information must be provided free from external manipulation and with sufficient time for review and decision-making in accordance with the laws and customs of the affected indigenous people.⁶⁰

We recommend that a requirement for free, prior and informed consent be enshrined within the amended *Mining Act*.

Example from Another Jurisdiction: Aboriginal Consent in New Zealand

Under New Zealand’s *Crown Minerals Act 1991*, the government must have regard to the principles of the Treaty of Waitangi in making decisions under the Act.⁶¹ As a result, permit applications for prospecting, exploration or mining permits are referred to First Nations groups (iwi) for comments, which are taken into consideration as the applications are processed.⁶² On the request of an iwi, a minerals program may provide that defined areas of land of particular importance to the iwi shall not be included in any permit.⁶³

Before entering onto Maori land for minimum impact activities, a permit holder must ensure that reasonable efforts have been made to consult with the owners of the land, and at least 20 days’ notice must be given to the local iwi authority.⁶⁴ Where Maori land is regarded as culturally sensitive, access even for minimum impact activities may only be obtained if the Maori landowners give their consent.⁶⁵ With respect to activities other than those that have minimum impacts, the owners of Maori land have an absolute veto right on all mining activities on their land.⁶⁶

New Zealand continues to sustain a strong mining industry. The value of production from mining grew by more than 45% between 1999 and 2004 due to strong economic conditions and growth in mineral exports.⁶⁷

Overall therefore, in addition to the sections above related to land use planning initiated by Aboriginal peoples, we recommend the following:

Proposed amendments _____

[Section](1) Prospecting, exploration or mining shall not occur on the traditional territory of an Aboriginal people absent the free, prior and informed consent of such Aboriginal people.

(2) Consent referred to in subsection (1) must be obtained in writing by the Minister and must be provided by those authorized by the Aboriginal people to enter into an agreement with the Minister.

(3) Any Aboriginal peoples whose consent is sought by the Minister shall be given:
(a) Technical assistance necessary to review information provided by the Minister in relation to proposed prospecting, exploration or mining work; and
(b) Sufficient time to review such information.

4. Increased Regulatory Oversight

Permitting Generally

Through permitting we propose that requirements be imposed to ensure that there are environmental, Aboriginal and other public interest screens prior to any mining interests being created. However, the proposed regime would continue to allow for priority of prospecting interests, in that the first prospector to stake a claim would have priority over other prospectors as long as the pre-conditions to staking have been met.

Under the *Mining Act*, government has very little power to prevent any prospecting, exploration or mining work or to impose conditions and monitor such activity as it is undertaken. Industry's view is that a mining lease is essentially guaranteed to mineral claim holders if they perform the required amount of work. This position is largely supported by current legislation.

To enable improved government control and monitoring of mining activities, a permitting and monitoring/reporting system should be implemented as has been done in various forms by many other jurisdictions such as New Zealand,⁶⁸ Queensland⁶⁹ and Victoria⁷⁰ Australia, Germany,⁷¹ Alberta,⁷² Newfoundland and Labrador⁷³ and Nova Scotia.⁷⁴ Many of these jurisdictions⁷⁵ have adopted map staking as a substitute to prospecting and have no requirements for permitting at this stage of mining but do require permits at the exploration and mining stages.

We propose permit requirements for each stage of mining activity: prospecting, exploration, advanced exploration and mining. A prospecting permit would be issued to allow for

prospecting within a defined region for a specified period of time. A person in possession of a prospecting permit then would be entitled to stake a mining claim for a specified area as under the current *Mining Act*. Once a mining claim has been staked, the holder of the claim would have security of tenure against other potential miners, but further permits would be required to secure the right to continue with exploration, advanced exploration and mining activity.

Key features of the proposed permitting regime include consent to the permit by affected Aboriginal peoples, as well as more stringent application requirements than currently exist, including: submission of proposed work plans; proof of financial security and payment of security deposit (addressed under principle 7 below); proof of adequate training and technical capability (including completion of a ministry-approved training course for prospectors); conditions for agreement of Aboriginal peoples, environmental assessments and reporting.

An amended *Mining Act* should also include Ministerial discretion to: refuse the permit application at each stage of mining activity; revoke permits if conditions of permits are not satisfied; issue penalties for infractions; and cancel mining claims for a variety of reasons that meet the intent of an amended *Mining Act* in addition to the general reasons currently stipulated in section 26 of the current Act.⁷⁶

Although this permitting process would be a pre-condition to staking of claims, priority of interest amongst prospectors would be maintained through the Minister disallowing other claims from being sought for the same geographical location until the permitting process has been concluded.

Example from Another Jurisdiction: Permitting in Queensland, Australia

Queensland, Australia's *Mineral Resources Act* sets out a progressive permitting regime that covers all activities beginning with prospecting through staking a claim, exploration and mining.

The Act requires that a permit be obtained in order to prospect for minerals.⁷⁷ The holder of a prospecting permit may then apply for a mining claim on land subject to that prospecting permit.⁷⁸ Once a mining claim has been secured, the holder of that claim must apply for further permits to enable exploration and mining.⁷⁹

Permitting of Uranium Exploration

Significant public outcry has resulted from the surge of uranium exploration in Ontario. Although the federal government has ultimate authority over the rules governing actual uranium mines, the Province has authority to regulate uranium exploration activities. Despite the unique nature of uranium exploration and the environmental and health impacts associated with such activity, the rules governing uranium exploration in Ontario fail to reflect the need for unique rules.

There is no uranium mining permitted in British Columbia. The BC government does not support the exploration and development of uranium in British Columbia and has established a “no registration reserve” regulation under the *Mineral Tenure Act* for uranium and thorium to ensure that any future claims do not include the rights to uranium.⁸⁰ New Brunswick recently announced a moratorium on uranium exploration and extraction in designated watersheds and well fields, as well as in villages, towns and cities.⁸¹

We recommend that the *Mining Act* include a prohibition on uranium mining, until the Ontario government has studied the health and safety implications and established appropriate rules for this specific sector of exploration and mining activity. The study of health and safety implications should include environmental considerations and consider the option of a long term prohibition.

Even where an exploration or mining project seeks non-radioactive minerals, as many ore bodies in Ontario contain radioactive elements, radioactive waste can be released into the environment from such activities. As a result, environmental assessment conducted as a pre-condition to an exploration or mining permit being issued ought to include an assessment of measures aimed at minimizing releases of radioactive material into the environment.

Example from Another Jurisdiction: Environmental Assessment of Uranium Exploration Projects in Northwest Territories

Of four recently proposed uranium exploration projects in the Northwest Territories, three were rejected by the MacKenzie Valley Environmental Impact Review Board for reasons of sustainability. The rejections were due to cultural heritage protection reasons; the Board found that Aboriginal people with interests in the areas have a connection that goes beyond the use of the physical landscape. The approved project was subject to the company implementing mitigation measures necessary to avoid impacts on caribou and other heritage resources.⁸²

As a result, we propose the following legislative amendments regarding permitting:

Proposed amendments _____

- [Section](1)** A person shall obtain separate permits for prospecting, exploration, advanced exploration and mining work from the Minister.
- (2)** Permits are subject to the free, prior, informed consent of Aboriginal peoples who may be impacted by the activities to be carried out under the permit.
- (3)** A person who engages in prospecting, exploration, advanced exploration and mining work without the appropriate permit, issued under this Act, is guilty of an offence.

- (4) A person convicted of an offence under this section is liable,
- (a) to a fine of not more than \$2,000,000, in the case of a corporation, or
 - (b) to a fine of not more than \$500,000 or to imprisonment for a term of not more than one year, or to both.

Prospecting Permit

[Section](1) An application for a prospecting permit shall include:

- (a) A map of the permit area;
- (b) A statement of the technical qualifications and financial resources of the applicant;
- (c) A certificate showing that the applicant has successfully completed a ministry-approved training course for prospectors.
- (d) If the application is on behalf of two or more persons, an explanation of each person's share of the permit that each person will hold;
- (e) A summary of known geology, potential mineralization, and exploration and mining history of the permit area; and
- (f) A statement of any other factors the applicant considers relevant to support the application.

(2) The Minister shall not accept an application for a prospecting permit for a specific geographical location if a permit application for that location is already before the Minister for consideration.

(3) Before issuing a prospecting permit to an applicant, the Minister shall:

- (a) consider the applicant's financial and technical ability to carry out the proposed work program;
- (b) ensure the proposed area falls within a zone designated for mining in an applicable land use plan;
- (c) ensure the application is complete and the information contained is accurate;
- (d) ensure the permit contains requirements for restoration activities; and
- (e) ensure that any Aboriginal people that may be impacted by activities carried out under the permit have provided their free, prior and informed consent to such activity.

(4) The Minister has discretion to attach whatever terms and conditions are necessary to the permit to ensure prospecting activities are consistent with the purposes of the Act.

(5) A prospecting permit shall expire after 2 years.

(6) A person who submits incomplete or inaccurate information as part of the application for a prospecting permit is guilty of an offence punishable by no more than \$10,000.

Mining Claim

[Section] (1) The holder of a prospecting permit may stake out a mining claim on any land under that permit, subject to the other provisions of this Act.

(2) The holder of a mining claim may not transfer his or her interest in the claim to another party without the approval of the Minister. Prior to approving the transfer of a mining claim, the Minister must ensure that notice of the proposed transfer and an opportunity to comment is provided to:

- (a) Any Aboriginal people who have provided their consent to the project;
- (b) Any landowners who have provided their consent to the project; and
- (c) The public.

(3) The Minister has the discretion to cancel a mining claim at any time if the holder of the claim is not in compliance with the provisions of this Act and with any permits or regulations under this Act, or with any other legislation or regulations, and shall provide the holder of the cancelled claim with reasons for the decision.

Exploration Permit

[Section](1) An application for exploration or advanced exploration work shall include:

- (a) A map of the permit area;
- (b) A statement of the technical qualifications and financial resources of the applicant;
- (c) A statement of the applicant's track record of restoration of other exploration projects in Ontario and other jurisdictions.
- (d) If the application is on behalf of two or more persons, an explanation of each person's interest in the permit (including the percentage of the share of the permit that each person will hold);
- (e) A summary of the geology, potential mineralization, and exploration and mining history of the permit area.
- (f) A detailed plan of the proposed work program that:
 - (i) states its objectives;
 - (ii) identifies the technical rationale, milestones, and deliverables of the program;
 - (iii) identifies any ongoing work commitment options;
 - (iv) for each stage of the program,
 - a. states the estimated duration and expenditure for the stage;
 - b. the type of equipment to be used;
 - c. outlines plans for restoration; and
 - d. states the estimated expenditure for the duration of the permit; and
 - (v) A statement of any other factors the applicant considers relevant to support the application.⁸³
- (g) Proof that the applicant holds a mining claim on the proposed permit area.

(2) Before issuing an exploration or advanced exploration permit to an applicant, the Minister shall:

- (a) consider the applicant's financial and technical ability to carry out the proposed work program;
- (b) ensure the proposed area falls within a zone designated for mining in an applicable land use plan;
- (c) ensure the application is complete and the information contained is accurate;
- (d) consider the applicant's record of compliance with previous permit requirements;

- (e) ensure the permit includes a closure plan and requirements for reclamation bonding reviewed and approved by the Minister of the Environment;
- (f) consider the applicant's track record of restoration of other exploration projects in Ontario and other jurisdictions; and
- (g) ensure that any Aboriginal people that may be impacted by activities carried out under the permit have provided their free, prior and informed consent to such activity.

(3) The Minister has discretion to attach whatever terms and conditions are necessary to the permit to ensure permitted exploration activities are consistent with the purposes of the Act.

(4) If an environmental assessment has shown the potential for impacts on the ecological integrity of a provincial park or conservation reserve, the Minister may require that mining claim boundaries under the permit be redrawn to ensure that mining is not permitted in sensitive areas.

(5) An exploration or advanced exploration permit shall expire after 3 years.

(6) A person who submits incomplete or inaccurate information as part of the application for an exploration or advanced exploration permit is guilty of an offence punishable up to a maximum of \$50,000.

Mining Permit

[Section](1) An application for a mining permit shall include:

- (a) A map of the permit area;
- (b) A statement of the technical qualifications and financial resources of the applicant;
- (c) A statement of the applicant's track record of mine closure and restoration in Ontario and other jurisdictions.
- (d) If the application is on behalf of two or more persons, an explanation of each person's interest in the permit (including the percentage of the share of the permit that each person will hold);
- (e) A summary of the geology, mineralization, and exploration and mining history of the permit area.
- (f) A statement of the proposed work program that:
 - (i) states its objectives;
 - (ii) identifies the technical rationale, milestones, and deliverables of the program;
 - (iii) identifies any ongoing work commitment options;
 - (iv) for each stage of the program, states the estimated expenditure for the stage;
 - (v) states the estimated expenditure for the proposed duration of the permit.
- (g) A statement of any other factors the applicant considers relevant to support the application.⁸⁴
- (h) Proof that the applicant holds a mining claim on the proposed permit area.

(2) Before issuing a mining permit to an applicant, the Minister shall:

- (a) consider the applicant's financial and technical ability to carry out the proposed work program;
- (b) ensure the proposed area falls within a zone designated for mining in an applicable land use plan;
- (c) ensure the application is complete and the information contained is accurate;
- (d) consider the applicant's record of compliance with previous permit requirements;
- (e) ensure the permit includes a closure plan and requirements for reclamation bonding reviewed and approved by the Minister of the Environment;
- (f) consider the applicant's track record for mine closure and restoration in Ontario and other jurisdictions; and
- (g) ensure that any Aboriginal people that may be impacted by activities carried out under the permit have provided their free, prior and informed consent to such activity.

(3) The Minister has discretion to attach whatever terms and conditions are necessary to the permit to ensure permitted mining activities are consistent with the purpose of the Act.

(4) If an environmental assessment has shown the potential for impacts on the ecological integrity of a provincial park or conservation reserve, the Minister may require that mining claim boundaries under the permit be redrawn to ensure that mining is not permitted in sensitive areas.

(5) A mining permit shall expire after 10 years.

(6) A person who submits incomplete or inaccurate information as part of the application for a mining permit is guilty of an offence punishable up to a maximum of \$100,000 or six months imprisonment.

[Section] If the Minister decides not to issue a prospecting, exploration, advanced exploration or mining permit, the Minister shall give the applicant reasons for the decision.

[Section](1) The Minister may renew a prospecting, exploration, advanced exploration or mining permit up to the full time period already provided for.

(2) The Minister's decision whether or not to renew a permit will be informed by whether the holder of the permit has:

- (a) observed and performed all the covenants and conditions applying to the permit and required to be observed and performed by the holder; and
- (b) complied with this Act in relation to the permit;
- (c) the activities proposed to be carried out during the renewed term are appropriate and acceptable;
- (d) the financial and technical resources available to the holder to carry out the proposed activities during the renewed term are appropriate;
- (e) the public interest will not be adversely affected by the renewal.

[Section](1) A permit holder must report to the Minister, not later than 30 days after the annual anniversary of the commencement of a permit, the following information where applicable:

- (a) geological investigations, studies, or reviews;
- (b) reviews of existing data;
- (c) geochemical surveys including acid based accounting and metal leach testing;
- (d) geophysical surveys;
- (e) programs of bulk sampling including the amount of ore taken and processed and results;
- (f) drilling and shaft sinking;
- (g) expenditures on the work performed;
- (h) the amount of ore processed and taken to market;
- (i) progress on the implementation of environmental mitigation requirements or activities identified during an environmental assessment;
- (j) any other progress on the permit requirements stipulated by the Minister as part of the permit approval; and
- (k) any accidents or breaches of applicable regulation.

(2) Based on analysis by Ministry staff of the information submitted under subsection (1), the Minister may decide to amend or cancel the permit.

(3) The Minister may order a permit holder to repair any damage arising from non-compliance with terms of a permit or otherwise arising from the activities carried out by a permit holder.

(4) The Minister may repair any damage arising from non-compliance with terms of a permit or otherwise arising from the activities carried out by a permit holder and recover the costs of repair from the permit holder.

(5) The Minister shall publish the annual report submitted by the permit holder and any order issued by the Minister under subsection (2), and make it available to the public on the MNDM's website.

[Section] (1) The Minister may amend or cancel a permit at any time.

(2) If a permit is cancelled pursuant to subsection (1), the Minister shall provide reasons to the permit holder for the cancellation.

(3) A permit holder may not appeal a decision to cancel a permit.

(4) The permit holder shall be responsible for restoring all damages and hazards resulting from its activities under the cancelled permit.

Uranium Exploration

Definition:

“Uranium” includes thorium

[Section] (1) No one shall prospect, explore or mine for uranium in Ontario.

A proposal for fees and security funding associated with the above permits is discussed below.

5. Increased Rights for Surface Rights Only Landowners

In Ontario, property interests are divided into surface and subsurface rights for about 1.37% of the land mass in Southern Ontario and 0.4% of the land area in the Near North. In these cases, landowners hold title to the surface of the land and the subsurface rights are vested in the Crown or in some cases owned by the landowner or someone else. Currently, any person with a prospector’s licence can stake a mining claim on private property where the Crown owns the subsurface rights. This staking can occur without prior notification to the landowner and without their consent. Once a mining claim has been staked, a claim holder must only give one day’s notice of the intention to perform assessment work to a surface rights owner.⁸⁵

The lack of a legislative requirement to notify private landowners of staking on private property has already been recognized as a problem that needs to be addressed. Due to numerous disputes between mining companies and landowners, a Surface Rights/Mining Rights Working Group was established under the auspices of the Minister’s Mining Act Advisory Committee by the MNDM to develop recommendations to alleviate conflict. In a 2002 report to the Minister, the Working Group recommended amending the *Mining Act* to require prospectors to 1) provide notice of staking to surface right holders by registered mail within 90 days of recording the staking; failure to do so could result in cancellation of the claim; and 2) provide 30 days notice prior to the commencement of any ground exploration; material changes to exploration plan would require a new 30 day notice period. The Committee, which is heavily weighted with industry representatives, voted to reject both of these recommendations.

Under the *Mining Act*, mining claim holders are required to compensate landowners for loss of property for mining development, or for damages sustained to the surface rights due to prospecting, staking out, assessment work or other operations.⁸⁶ This requirement should be maintained but augmented with additional measures to provide clear indicators that compensation can be claimed for losses other than material damages. Further, conflict should be alleviated by providing surface rights owners with the ability to veto activities at the earliest possible stage of the mining process, and providing both surface rights owners and users with improved notification and rights of comment on permits sought by mining companies.⁸⁷ Enshrined within such a system would be mechanisms to encourage prospectors and property owners to reach agreement on how mining exploration can occur on their lands. A timeframe for landowners to consult and gain legal advice on access agreements and compensation should be reasonable.

Notification and Veto Rights

Notification and veto rights for surface rights owners are contained in New Zealand, Queensland, Victoria⁸⁸ and German legislation. For example, section 49 of New Zealand's *Crown Minerals Act* provides that no person may enter on land to perform minimum impact exploration work without the written consent of the surface rights owner or occupier of the land, or the provision of 10 days notice to the owner or occupier.⁸⁹

In both New Zealand and Queensland, Australia, legislation requires that landowners be advised of the granting of a prospecting permit several days before prospecting is permitted to commence.⁹⁰ The German *Federal Mining Act* requires the consent of the owner to undertake any prospecting or exploration activities on the land. The German law permits an appeal of a landowner's refusal to consent, although it may be overruled by Ministerial order if mining exploration is deemed to be in the national interest.⁹¹

Ontario's lack of notice or consent requirement falls behind other Canadian jurisdictions also. In British Columbia, a free miner cannot enter onto land with mechanical equipment unless the surface right holder is first notified. Alberta's regulatory scheme goes one step further, requiring mining companies to obtain the consent of surface rights owners. Section 12 of Alberta's *Surface Rights Act* requires the consent of surface rights owners to undertake any prospecting or exploration activities.⁹² Newfoundland's *Mineral Act* requires the consent of the owner to undertake any prospecting or exploration activities on private land, unless the Minister makes an order dispensing with that requirement.⁹³

Our research found that Quebec's *Mining Act* requires the consent of surface rights owners before exploration can take place on their property.⁹⁴ Similarly, in the Northwest Territories and Nunavut, consent of the surface rights owner is required before staking may occur on private lands.⁹⁵ Under both Quebec legislation and the *Northwest Territories and Nunavut Mining Regulations*, negotiation of an agreement as between a surface rights owner and prospector is encouraged and arbitration available if agreement cannot be reached.⁹⁶

Compensation

Other jurisdictions require more stringent measures of compensating surface rights holders throughout mining processes than Ontario currently does. In Scotland's Isle of Man, the *Minerals Act* provides that, where damage is caused by searching for or working of mines and minerals, or by exercising a right of entry or use of land conferred under the Act, the person suffering the damage shall be entitled to recover compensation for the damage from the person causing the damage. Guidelines for assessing the amount of compensation are set out in the Act.⁹⁷

Under the New Zealand *Crown Minerals Act*, access arrangements must be made to prospect, explore or mine on or in land even though a permit has been issued. Notice of a request for a grant of a right of access arrangement must include the compensation and safeguards against any likely adverse effects proposed. An access arrangement may further provide details on the

compensation to be paid to any owner or occupier of the land as a consequence of the permit holder prospecting, exploring or mining the land.⁹⁸

Example from Another Jurisdiction: Surface Owner Rights in Newfoundland and Labrador

Newfoundland and Labrador's *Mineral Act* includes strong provisions requiring that consent to be obtained from surface owners and occupiers. No one may search, prospect or explore for minerals in or upon land unless the consent of the owner or lessee of that land is obtained.⁹⁹

However where an owner or lessee refuses to give the required consent or is unable to be found to give consent, the minister has the discretion to make an order dispensing with the need for that consent. This order will allow a mining company to enter the land in order to search, prospect or explore for minerals as though the consent had been obtained.¹⁰⁰

Newfoundland and Labrador's mining industry has begun to dominate its economy in recent years, with both production and exploration booming. Expenditures for exploration reached a ten-year high point of \$98 million in 2006 and were projected to increase to \$116 million in 2007.¹⁰¹

We therefore recommend the *Mining Modernization Act* incorporate the following sections:

Proposed amendments _____

[Section](1) A person intending to perform prospecting, exploration or mining work shall notify the surface rights owner and any occupier 60 days prior to the intended date of entry on the land to perform such work.

(2) The notification referred to in subsection (1) must be made in writing and include the following information:

- (a) The geographical locations where the miner intends to perform prospecting, exploration or mining work;
- (b) The specific work the miner intends to perform, along with projected timelines for such work;
- (c) The expected environmental impacts of the work; and
- (d) How the impacts will be remediated.

(3) Notification of any changes in the information provided to a landowner or occupier under subsection (2) shall be provided to the land owner or occupier forthwith.

[Section] (1) Consent of an owner or occupier must be obtained through a written access agreement.

- (2) An access agreement must make provision for details of access, including the following:
- (a) The periods during which the person intending to perform prospecting, exploration or mining work will be permitted access to the land;
 - (b) The parts of the land on or in which the person intending to perform prospecting, exploration or mining work may carry out the work, and the means by which the person may gain access to those parts of the land;
 - (c) The kinds of prospecting, exploration or mining operations that may be carried out on or in the land;
 - (d) The conditions to be observed by the person intending to perform prospecting, exploration or mining work in carrying out the work;
 - (e) The things which the person intending to perform prospecting, exploration or mining work needs to do in order to protect the environment while having access to the land and prospecting, exploring or mining on or in the land;
 - (f) The compensation to be paid to any owner and/or occupier of the land as a consequence of the person carrying out prospecting, exploration or mining work on or in the land;
 - (g) The manner of resolving any dispute arising in connection with the arrangement;
 - (h) The manner of varying the agreement; and
 - (i) Such other matters as the parties to the arrangement may agree to include in the arrangement.
- (3) If an owner or occupier declines to conclude an access agreement for the proposed prospecting, exploration or mining work shall not proceed.
- (4) A person provided with the agreement of an owner or occupier of land to perform prospecting, exploration or mining work shall notify the Minister.
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6. Increased Transparency of Mining Operations

Legislation from other jurisdictions requires that governments provide the public with information on proposed prospecting, exploration and mining activities, and with yearly reports on such activities once undertaken.¹⁰² Further, the public is given the opportunity to provide input after being provided with such information and before permission to commence the proposed activity is granted.

A number of legal instruments under the *Mining Act* are currently classified by regulation under the *Environmental Bill of Rights* and are required to be posted as proposals on the Environmental Registry. This process provides notice to the public and an opportunity to provide input that must be considered by the government before it makes a final decision in relation to these instruments.¹⁰³ There are currently 30 legal instruments classified as Class I under the EBR,¹⁰⁴ including the following: a proposal to award surface rights where they are necessary to the carrying on of mining operations;¹⁰⁵ a proposal to lease surface rights;¹⁰⁶ a proposal to grant

permission to cut and use trees;¹⁰⁷ a proposal to acknowledge receipt of, or to approve, a closure plan;¹⁰⁸ and a proposal to enter lands to rehabilitate a mine hazard.¹⁰⁹

Mine operations may be required to obtain specific permits issued under other pieces of environmental protection legislation, such as permits to take water and sewage works approvals under the *Ontario Water Resources Act*. As these types of permits are also classified under the EBR, the public will receive notice and an opportunity to comment in relation to them as well. Because environmental assessment is entirely lacking for mining in Ontario at the moment, it is only at this stage where a proponent seeks permits under other environmental statutes that the public becomes aware of some of the environmental impacts of a mine project. These processes take place far too late in the mining process for the public to provide any meaningful input on how a mine is located, planned, undertaken and remediated and how public lands and resources are utilized. Greater public scrutiny and transparency is required earlier in the mining process and throughout it.

In order to ensure transparency and accountability, permits for prospecting, exploration and mining work should be listed as Class II proposals for instruments under the *Environmental Bill of Rights* and subject to public comment.

The amended *Mining Act* should require that permit holders submit annual reports to the Minister on the prospecting, exploration and mining activities they have undertaken. As recommended in proposed legislative provisions above, these reports should subsequently be made available to the public through publication by MNDM on its website. We propose that MNDM be required to post reports within 30 days of receipt.

In order to ensure that proposed environmental assessments, and proposed prospecting, exploration and mining permits, are posted for notice and comment on the Environmental Registry they must be classified as instruments by regulation under the EBR. We therefore recommend the *Mining Modernization Act* incorporate the following sections:

Proposed amendments _____

[Section](1) Sections 19 to 26 of the *Environmental Bill of Rights, 1993*, and the other provisions of that Act that apply to proposals for instruments, apply to prospecting, exploration and mining permits submitted for approval under this Act.

Legislative Review

We also propose that the amended Act be reviewed periodically to ensure that legislation remains consistent with values of Ontarians as they shift and evolve.

Proposed amendments _____

Legislated Review of Mining Act

[Section](1) The Minister shall cause a review of this Act to be undertaken within 5 years after this section comes into force and every 5 years thereafter.

(2) The Minister shall,

(a) inform the public when a review under this section is undertaken;

(b) prepare a written report respecting the review and make that report available to the public;

(c) provide an opportunity for the public to provide input into the review through the Registry established under the Environmental Bill of Rights, public meetings and other means as appropriate;

(d) ensure that all public comments received as part of the public participation process are considered when decisions related to the review of the Act are made; and

(e) provide an explanation of the effect, if any, of public comments on decisions related to the review of the Act.

7. Financial Security for Clean-up and Reclamation

We have already proposed above that applicants be required, as part of applying for permits, to post financial security, both to carry out the proposed work plan and to remediate the environmental impacts of their operations. However, the type of financial proof that will be sufficient and the requirement for security deposits for reclamation work should also be set out in legislation.

In 1996, as part of the Harris flotilla of red-tape reduction measures, the *Mining Act* was amended to establish a self-certification regime for mine closure and rehabilitation plans, and the related regulation – *Mine Development and Closure*, O. Reg. 240/00 – was made in 1999 allowing for self-certification based on a company's credit rating.¹¹⁰ The Act now allows for the following forms of financial assurance:

1. Cash;
2. A letter of credit from a bank;
3. A bond of a licensed insurer;
4. A mining reclamation trust;
5. Compliance with a corporate financial test; or
6. Any other form of security or any other guarantee or protection, including a pledge of assets, a sinking fund or royalties per tonne, that is acceptable to the Director.

To meet the corporate financial test, a mining company need only satisfy specified credit rating criteria, which we consider a very low threshold to meet. It is our recommendation that form of financial assurance be amended to delete the corporate financial test as an option.

The acceptance of a credit rating as a form of financial assurance has been criticized by the Environmental Commissioner of Ontario because it provides less assurance than realizable financial securities:

If the government does not require adequate financial assurance, there is a danger that there will not be sufficient funds available when mine rehabilitation and remediation is necessary, and that Ontario taxpayers will be required to pay for this. This has happened before. There are many abandoned mines in Ontario that must be rehabilitated at public expense.¹¹¹

In his 2000-2001 report the Environmental Commissioner of Ontario suggested that there should be financial assurance provisions that continue to ensure that proponents are able to fund any remediation and rehabilitation that is eventually required.¹¹²

Ontario's Auditor General, in his 2005 annual report, expressed strong concerns about the current system of financial assurance in the province:

Companies whose bonds are rated Triple B or higher meet the financial test established in the Mining Act and do not have to provide financial assurance. We were informed by the Ministry that Ontario is the only province in Canada that accepts the corporate financial test form of assurance, which constitutes the major portion of total financial assurance provided. This form of financial assurance essentially amounts to self-assurance.

A consultant hired by the Ministry in 1996 to review self-assurance found that the risks associated with granting such a privilege to a mining company are considerable because the Ministry is effectively assuming the status of an unsecured creditor. Any failure of these mining companies could mean a significant liability for the province. Also, it could be difficult to obtain another form of financial assurance once a company is experiencing financial difficulty and can no longer meet the financial test. We noted that one mining company with a Triple-B rating, which was required to provide financial assurance for over \$94 million, had been placed on a credit watch by one of the credit rating services since September 2004. Its status had not changed at the completion of our audit. The Ministry was monitoring the company's credit rating to ensure that it continued to meet the financial test.

Experience in other jurisdictions has shown that mining companies that have gone bankrupt continued to meet the financial test right up to the time they filed for bankruptcy protection. Because significant mine-rehabilitation costs are being borne by governments after companies that offered self-assurance have gone bankrupt, some jurisdictions have eliminated the use of self-assurance. For example, the Bureau of Land Management in the United States has not accepted any new corporate self-assurance since 2001.¹¹³

The various jurisdictions surveyed for this report have ensured adequate financial assurance by requiring applicants to supply government with income tax returns or audited financial statements for several consecutive years, and to supply proof of sufficient bank deposits, credit lines, bank guarantees or other similar negotiable instruments to meet the financial demands of the proposed work program and needed remediation.

We propose that amendments be made to require the Minister collect a security deposit corresponding to 100% of the reclamation costs when a permit is issued to ensure that the funding is in place for adequate closure and rehabilitation should a permit holder walk away from a project. There are examples of this type of requirement in a number of jurisdictions surveyed, including Alberta,¹¹⁴ Newfoundland and Labrador,¹¹⁵ Queensland¹¹⁶ and Victoria.¹¹⁷ Alberta, for example, allows the Minister to require a security deposit, before or after an exploration approval is granted, in an amount sufficient to restore or repair the damage to the land or the renewable natural resource on the land specified in the approval.¹¹⁸

As mentioned above, there are hundreds of abandoned mines in Ontario for which clean-up and restoration has not occurred or has been inadequate. If the law is not changed, there is a significant risk that the public will have to pay to clean up additional abandoned mines. Requiring mining companies to pay a security deposit before permits are granted will help ensure that any costs associated with restoration and remediation of future mining activities are borne by companies rather than the public. If a mining company fails to adequately clean up a site, government can use deposited funds to pay for remaining reclamation work. This “polluter pays” approach creates an incentive for mining companies to engage in practices that minimize the environmental impact of the mining activities in an effort towards cost reduction and ensures that the public does not bear the cost of reclamation.

The requirement for permit applicants to provide financial information and to post financial security for reclamation would enable the Minister to make a more informed decision about whether the issuance of a permit would be in the public interest.

As noted above, the 1996 changes to the *Mining Act* introduced a scheme of self-certified mine closure plans. Mining companies are required to file their self-certified closure plan with MNDM, and a qualified professional, such as a professional engineer, must approve certain elements of the plan. MNDM may require a mining company to re-file a plan that does not adequately address all of the prescribed requirements for a certified closure plan.¹¹⁹ However, prior to these amendments, closure plans were “extensively reviewed by staff at MNDM and the Ministries of Labour, Natural Resources and Environment before they were approved.”¹²⁰

Newfoundland and Labrador’s Mineral Exploration Standards Regulations (made under the *Labrador Inuit Land Claims Agreement Act*) require that both the Government of Newfoundland and Labrador and the Nunatsiavut Government approve a Work Plan providing details of any proposed Exploration Program. Such a Work Plan must include a Reclamation and Closure Plan that contains, if appropriate, a plan for progressive reclamation of the site.¹²¹ This requirement is similar to Ontario’s closure plan approval requirement that was in the *Mining Act* prior to the 1996 amendments. The reintroduction of a requirement that closure plans be reviewed and approved by government staff would enhance the quality of the closure plans and better ensure the ultimate success of rehabilitation measures.

To correct the deficiencies in the current system, we propose not only that the corporate financial test be removed as an option for financial assurance, but also that the following sections be included in the *Mining Modernization Act*.

Proposed amendments ---

[Section] A statement of the financial resources for the purpose of a permit application shall include the following:

- (a) For an individual, a copy of income tax returns for the preceding 2 years and proof of bank deposit or credit line in the amount established under Regulation by the Minister.
- (b) For a corporation, partnership or other association for the preceding 2 years,
 - (i) audited financial statements that include income statements, balance sheets and statements of cash flow, for both the legal entity that would own and operate the mine in Ontario and the legal entity by legal entity basis (the whole corporate group);
 - (ii) income tax returns; and
 - (iii) where applicable, annual reports, credit lines, bank guarantees or similar negotiable instruments in the amount established under Regulation by the Minister.

[Section](1) A prospecting, exploration or mining permit shall not be granted until the applicant for the permit deposits a security with the Minister for compliance with the conditions of the permit to remediate environmental impacts that may be caused by any person while acting under the authority of the permit.

(2) The Minister shall fix the amount of security required as part of a permit approval at an amount not less than that required to remediate environmental impacts that may be caused by any person while acting under the authority of the permit.

(3) Information regarding the amount of security required as part of a permit approval shall be made available to the public.

(4) An owner, occupier or user of any land to which a permit applies may apply in writing to the Minister at any time to request an increase in the security deposit if they estimate that the amount is insufficient to complete reclamation work.

(5) The Minister may, at any time (whether before or after the expiry or cancellation of a prospecting, exploration or mining permit) increase the amount of security required as part of the permit.

(6) The Minister may, at any time (whether before or after the expiry or cancellation of a prospecting, exploration or mining permit) use all or part of the security deposited for the permit to rectify actual damage caused by any person acting under the authority of the permit.

[Section] A permit holder shall not act in accordance with a permit until it has provided the security fixed by the Minister under the permit.

8. Self-Funded Regulatory Scheme

We are of the view that the Ontario mining regulatory regime ought to largely be self-funded as in many other jurisdictions similar to Ontario. In New Zealand for instance, there are application and annual fees associated with prospecting, exploration and mining permits.

We propose replacing the minimum annual work requirement under Ontario's current *Mining Act* with the annual fee system similar to that of New Zealand's. Ontario's current annual work requirement has been criticised as a "make work" requirement that encourages claim holders to disrupt the land for no purpose other than to maintain their claim. A shift from such a system would allow claim holders to maintain their claim without having to perform yearly assessment work.

Similar to New Zealand, we propose the following as part of a fee schedule:

Permit application fees:

1. Prospecting permit = \$500
2. Exploration permit = \$1,600
3. Advanced exploration permit = \$2,300
4. Mining permit = \$3,200

Annual Fees:

1. Prospecting permit = \$3.50 per sq. km. or part of a sq km or \$500, whichever is greater.
2. Exploration permit = \$3.50 per sq. km. or part of a sq km or \$500, whichever is greater.
3. Advanced exploration permit =
 - a. Initial term - \$3.50 per hectare or part of a hectare or \$500, whichever is greater;
 - b. Extension of permit - \$8.50 per hectare or part of a hectare or \$500, whichever is greater.
4. Mining permit = \$8.50 per hectare or part of a hectare or \$1000, whichever is greater.

Endnotes

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- ¹ Ontario Ministry of Northern Development and Mines, *Modernizing Ontario's Mining Act – Finding A Balance Discussion Paper*, August 2008 at 11, available online at: <http://www.mndm.gov.on.ca/mndm/miningact/pdf/discussion_paper_e.pdf> ["MNDM Discussion Paper 2008"].
- ² See the discussion in Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at page 149: "The free entry system was adopted by Ontario, the example of British Columbia being mentioned both in 1864 and 1906" and in Karen Campbell, *Undermining our Future: How Mining's Privileged Access to Land Harms the Environment and People* (West Coast Environmental Law: January 2004) at page 4, available online at: <<http://www.wcel.org/wcelpub/2004/14094.pdf>> ["WestCoast, Mining's Privileged Access"].
- ³ MNDM Discussion Paper 2008.
- ⁴ *Reconciling our Priorities: Environmental Commissioner of Ontario Annual Report for 2006-2007* at page 67, available online at: <http://www.eco.on.ca/english/newsrel/2007/Annual_report-0607-FINAL-EN.pdf> ["ECO 2006-2007 Annual Report"].
- ⁵ ECO 2006-2007 Annual Report at page 65.
- ⁶ ECO 2006-2007 Annual Report at pages 65-67.
- ⁷ ECO 2006-2007 Annual Report at page 71.
- ⁸ ECO 2006-2007 Annual Report at page 68.
- ⁹ *Statistics on Natural Resources: Natural Resource Sectors and Canada's Gross Domestic Product (GDP) in 2006*, Natural Resources Canada, available online at: <<http://www.nrcan-rncan.gc.ca/stat/index-eng.php#fig1>>
- ¹⁰ *Important Facts on Canada's Natural Resources (as of October 2007)*, Natural Resources Canada, 2008 at page 9, available online at: <<http://www.nrcan-rncan.gc.ca/stat/docs/important-eng.pdf>>. It is notable that according to NRCAN statistics environment-related expenditures by mineral exploration companies (which include costs incurred for characterization, permitting, protection, monitoring and restoration), have been consistently decreasing. For example, environment-related spending dropped by 41 percent between 1998 and 1999 (from \$31.7 to \$18.5 million) and by another 58 percent in 2000 (down to \$8 million). Thus between 1997 and 2000, there was an 83 percent decline in environmental spending by exploration companies in Canada for environmental protection related work.
- ¹¹ MNDM Discussion Paper 2008 at 2.
- ¹² *Mining Act*, s. 19.
- ¹³ Claim Staking, O. Reg. 7/96, s. 2(1)(b).
- ¹⁴ *Mining Act*, s. 44(1).
- ¹⁵ *Mining Act*, ss.28 and 59
- ¹⁶ *Mining Act*, s. 81(1).
- ¹⁷ *Mining Act*, ss. 81(3) and (6).
- ¹⁸ *Mining Act*, s. 81(10)
- ¹⁹ *Mining Act*, s. 81(8)
- ²⁰ *Mining Act*, s. 143
- ²¹ *Mining Act*, s.183
- ²² *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28.
- ²³ The ECO recommended in his 2006-2007 Annual Report at page 67 that lands whose ecological values may merit protection "should be withdrawn from eligibility for prospecting and staking by MNDM:"

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- ²⁴ Canadian Environmental Law Association, *The 1999 Ontario Forest Accord*, Publication No. 373, May 1999 at page 30, available online at: http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/373land_life.pdf.
- ²⁵ WestCoast, *Mining's Privileged Access* at page 21.
- ²⁶ ECO 2006-2007 Annual Report at page 66.
- ²⁷ New Brunswick news release, *Province amends uranium exploration and mining regulations*, July 4, 2008, available online at: http://www.gnb.ca/0078/minerals/PDF/Uranium_exploration_mining_reg-e.pdf.
- ²⁸ UK Communities and Local Government, Minerals Policy Statement 1: Planning and Minerals, November 13, 2006, available online at: <http://www.communities.gov.uk/publications/planningandbuilding/mineralspolicystatement5>.
- ²⁹ For example, Quebec has designated certain areas in the Province as restricted zones where mining may only occur under strict environmental protection conditions. For further information see: <http://www.mrnf.gouv.qc.ca/english/mines/rights/rights-reserves.jsp>.
- ³⁰ NWT Protected Areas Strategy Advisory Committee, *Northwest Territories Protected Areas Strategy*, February 15, 1999.
- ³¹ *Mackenzie Valley Resource Management Act*, S.C.1998, c. 25, M-0.2.
- ³² NWT Protected Areas Strategy Advisory Committee, *Northwest Territories Protected Areas Strategy*, February 15, 1999, at page 8.
- ³³ NWT Protected Areas Strategy Advisory Committee, *Northwest Territories Protected Areas Strategy*, February 15, 1999, at page 10.
- ³⁴ Northwatch and MiningWatch Canada, *The Boreal Below: Mining Issues and Activities in Canada's Boreal Forest*, May 2008 at 142-143. Available online at: http://www.miningwatch.ca/updir/Boreal_Below_2008_web.pdf (Northwatch and MiningWatch, *The Boreal Below*’].
- ³⁵ Northwatch and MiningWatch, *The Boreal Below* at 142.
- ³⁶ AMO Resolution – Mining Act, June 24, 2007.
- ³⁷ The Declaration Order is available on the Ontario Ministry of the Environment’s website at: http://www.ene.gov.on.ca/envision/env_reg/ea/english/EAs/mndm3_3.htm
- ³⁸ *Mining Act*, section 46 and 81 respectively.
- ³⁹ Ministry of Northern Development and Mines web site, Abandoned Mines/Mine Hazards. Online at: http://www.mndm.gov.on.ca/mines/mg/abanmin/default_e.asp [“MNDM, Abandoned Mines/Mine Hazards”].
- ⁴⁰ MNDM, Abandoned Mines/Mine Hazards.
- ⁴¹ S.O. 2006, c. 12, s. 3, 1.
- ⁴² *B.C. Reg. 370/2002* sets out the thresholds for environmental assessment of mining projects under the *Environmental Assessment Act*, SBC 2002, c.43
- ⁴³ Quebec’s *Regulation Respecting Environmental Impact Assessment and Review*, R.Q. c. Q-2, r.9 sets out the threshold for environmental assessment of mines in Quebec.
- ⁴⁴ Alberta Fonseca and Robert Gibson, “Application Denied,” *Alternatives* (2008) 34:4 10 [Fonseca and Gibson, “Application Denied”].
- ⁴⁵ *Canadian Environmental Assessment Act*, S.C.1992, c.37, s. 58(1.1).
- ⁴⁶ Fonseca and Gibson, “Application Denied” at page 11.
- ⁴⁷ Fonseca and Gibson, “Application Denied” at page 11.
- ⁴⁸ Canadian Environmental Assessment Registry web site, Kemess North Gold-Copper Mine Decision, July 7, 2008, available on-line at: http://www.ceaa-acee.gc.ca/050/viewer_e.cfm?cear_id=3394.

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- ⁴⁹ See for example *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [“*Haida Nation*”] at paragraph 24 where the Court stated that “The Court’s seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.”
- ⁵⁰ Supporting the need for consultation is *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841 (Ont.S.C.) where the Court stated that consultation was a legal pre-condition to the mining activities and the subsequent companion decisions of the Ontario Court of Appeal in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 and *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534.
- ⁵¹ In *Haida Nation* at paragraphs 52-56 where the Court indicated that a third party could not carry out the Crown’s duty to consult and accommodate.
- ⁵² ECO 2006-2007 Annual Report at page 68.
- ⁵³ ECO 2006-2007 Annual Report at page 68.
- ⁵⁴ *Crown Minerals Act 1991* No 70 (as at 03 September 2007), Public Act, s. 4.
- ⁵⁵ *Crown Minerals Act 1991* No 70 (as at 03 September 2007), Public Act, s. 80.
- ⁵⁶ Queensland *Mineral Resources Act, 1989* section 25A (prospecting permit requirements); section 25AA (land use agreement conditions); and sections 433-435 (land access consultation and agreement requirements).
- ⁵⁷ Northwatch and MiningWatch, *The Boreal Below* at 96.
- ⁵⁸ *Mackenzie Valley Resource Management Act*, S.C.1998, c. 25, M-0.2.
- ⁵⁹ Northwatch and MiningWatch, *The Boreal Below* at 142-143.
- ⁶⁰ From the contribution of the Indian Law Resource Center to the UN Department of Economic and Social Affairs Workshop on Free, Prior and Informed Consent (New York, 17-19 January 2005), available online at: www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_ILRC.doc (accessed on Sept. 18, 2008)
- ⁶¹ *Crown Minerals Act 1991* No 70 (as at September 3, 2007), Public Act, s. 4.
- ⁶² New Zealand Ministry of Economic Development web site, “How do I apply for a permit?”, available online at: <http://www.crownminerals.govt.nz/cms/minerals/permits/permits-how-do-i-apply-faqs/how-do-i-apply-for-a-permit?searchterm=detail>.
- ⁶³ *Crown Minerals Act 1991* No 70, s. 15(3).
- ⁶⁴ *Crown Minerals Act 1991* No 70, s. 49, 51.
- ⁶⁵ *Crown Minerals Act 1991* No 70, s. 51.
- ⁶⁶ *Crown Minerals Act 1991* No 70, s. 80.
- ⁶⁷ Explore Te Ara: The Encyclopedia of New Zealand web site, Mining and underground resources. Available online at: <http://www.teara.govt.nz/EarthSeaAndSky/MineralResources/MiningAndUndergroundResources/1/en>.
- ⁶⁸ Section 8 of New Zealand’s *Crown Minerals Act* requires mining companies to seek a permit for both prospecting and exploration work.
- ⁶⁹ Queensland’s *Mineral Resources Act, 1989*, Queensland Consolidated Acts, requires permits for prospecting, exploration and mining.
- ⁷⁰ Victoria’s *Mineral Resources (Sustainable Development) Act 1990* requires mining companies to obtain a license at the exploration and mining stage to operate while map staking occurs, alleviating the need for a permit for prospecting.

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- ⁷¹ In Germany, a permit must be obtained at the exploration stage of minerals while a licence is required for the actual extraction of minerals. There is no prospecting permit requirement in Germany as most prospecting is performed by map given that most of German mineral resource potential is already known.
- ⁷² Under Alberta's *Mines and Minerals Act* a mining company must obtain exploration approval based on preliminary plans, licensing to establish title, and permits for equipment use. The work requirements in Regulation 145/2005 under the Act are detailed. Further, the Minister may require a security deposit before or after exploration approval is granted and further, s. 18 of the *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993 stipulates that the security shall be in an amount determined by the director to be sufficient to ensure completion of conservation and reclamation on the specified land.
- ⁷³ Newfoundland and Labrador's *Mineral Act*, R.S.N.L. 1990, c. M-12 requires permits at the exploration and mining stages while map staking has been adopted thereby alleviating the need for permitting at the prospecting stage.
- ⁷⁴ Nova Scotia's *Mineral Resources Act 1990*, c. 18 requires permits for any access by mining companies to privately owned lands and for mining operations. Interestingly, regulations under the Act stipulate that no person is permitted to undertake ground exploration in municipal water supply watershed lands without first obtaining approvals from the Nova Scotia Department of Environment and Labour.
- ⁷⁵ Newfoundland and Labrador, Victoria, Australia and Germany for example.
- ⁷⁶ Section 2 of Newfoundland and Labrador's *Mineral Exploration Standard*, Regulation 39/07 contains many of these requirements.
- ⁷⁷ *Mineral Resources Act, 1989*, Queensland Consolidated Acts, Part 3.
- ⁷⁸ *Mineral Resources Act, 1989*, Queensland Consolidated Acts, Part 4.
- ⁷⁹ *Mineral Resources Act, 1989*, Queensland Consolidated Acts, Parts 5-7.
- ⁸⁰ British Columbia News Release, *Government Confirms Position on Uranium Development*, April 28, 2008, available online at: http://www2.news.gov.bc.ca/news_releases_2005-2009/2008EMPR0029-000624.htm.
- ⁸¹ New Brunswick Media Release, *Province amends uranium exploration and mining regulations*, July 4, 2008, available online at: http://www.gnb.ca/0078/minerals/PDF/Uranium_exploration_mining_reg-e.pdf.
- ⁸² For further information on these proposals see the MacKenzie Valley Environmental Impact Review Board website at: <http://www.mveirb.nt.ca>
- ⁸³ Note that these requirements are taken directly from Regulations under the New Zealand *Crown Minerals Act*.
- ⁸⁴ Note that these requirements are taken directly from Regulations under the New Zealand *Crown Minerals Act*.
- ⁸⁵ *Mining Act*, s.78.
- ⁸⁶ *Mining Act*, s.79(2).
- ⁸⁷ *Mining Act*, R.S.O. 1990, c. M.14, s.79.
- ⁸⁸ In Victoria, under section 55 of the *Mineral Resources (Sustainable Development) Act 1990*, a prospector is granted a "miner's right" to explore lands specifically open to exploration but only on private lands with the consent of the surface owner.
- ⁸⁹ *Crown Minerals Act 1991* No 70, s. 49.
- ⁹⁰ New Zealand, *Crown Minerals Act 1991* No 70 (as at 03 September 2007), Public Act, s. 49; Queensland *Mineral Resources Act, 1989*, s. 19-20.
- ⁹¹ *Federal Mining Act* (Bundesberggesetz) 13 August 1980 (BFBI. I S. 1310) amended December 8, 2006 (BGBl. I S. 2833), § 39, 40.
- ⁹² *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 12.
- ⁹³ *Mineral Act*, R.S.N.L. 1990, c. M-12, ss.12 and 13.

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- ⁹⁴ *Mining Act*, R.S.Q. c. M-13, s. 54. See also s. 124 (b) for the requirement of consent to aggregates extraction as well.
- ⁹⁵ *Northwest Territories and Nunavut Mining Regulations*, SOR 2007-273, s. 11(1)(g)
- ⁹⁶ *Northwest Territories and Nunavut Mining Regulations*, ss. 70-72.
- ⁹⁷ Isle of Man, Scotland *Minerals Act*, 1986, c. 46, s. 19.
- ⁹⁸ *Crown Minerals Act 1991* No 70, ss. 47, 59, 60.
- ⁹⁹ *Mineral Act*, R.S.N.L. 1990, c. M-12, s. 12(2).
- ¹⁰⁰ *Mineral Act*, R.S.N.L. 1990, c. M-12, s. 13
- ¹⁰¹ Northwatch and MiningWatch, *The Boreal Below* at 91.
- ¹⁰² For example, under section 16 of New Zealand's *Crown Minerals Act* the responsible Minister must give the public notice of draft minerals programmes, which are required to accompany an application for a prospecting permit.
- ¹⁰³ *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, Part II; Classification of Proposals for Instruments Regulation, O. Reg. 681/94, Part III.
- ¹⁰⁴ Classification of Proposals for Instruments Regulation, O. Reg. 681/94, Part III.
- ¹⁰⁵ *Mining Act*, s. 39(2).
- ¹⁰⁶ *Mining Act*, s. 84(1).
- ¹⁰⁷ *Mining Act*, s. 92(5).
- ¹⁰⁸ *Mining Act*, ss. 140(4), 141(3), 142.
- ¹⁰⁹ *Mining Act*, s. 147(2).
- ¹¹⁰ *Mining Act*, Part VII; Mine Development and Closure under Part VII of the Act Regulation, O. Reg. 240/00.
- ¹¹¹ *Having Regard*: Environmental Commissioner of Ontario Annual Report for 2000-2001, at page 124, available online at http://www.eco.on.ca/eng/uploads/eng_pdfs/ar2000.pdf ["ECO 2000-2001 Annual Report"].
- ¹¹² ECO 2000-2001 Annual Report at 124.
- ¹¹³ Jim McCarter, *2005 Annual Report of the Office of the Auditor General of Ontario*, at page 196, available online at http://www.auditor.on.ca/en/reports_en/en05/309en05.pdf.
- ¹¹⁴ *Metallic and Industrial Minerals Exploration Regulation*, Alberta Reg. 213/98, ss. 10-14.
- ¹¹⁵ *Mineral Exploration Standards Regulations*, N.L.R. 39/07, s. 12. This regulation was made under the *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1.
- ¹¹⁶ *Mineral Resources Act, 1989*, Queensland Consolidated Acts, ss. 26-27.
- ¹¹⁷ *Mineral Resources (Sustainable Development) Act, 1990*, Victorian Consolidated Legislation, No. 92 of 1990, s. 80.
- ¹¹⁸ *Metallic and Industrial Minerals Exploration Regulation*, Alberta Reg. 213/98, ss. 10-14.
- ¹¹⁹ *Mining Act*, Part VII; Mine Development and Closure under Part VII of the Act Regulation, O. Reg. 240/00.
- ¹²⁰ ECO 2000-2001 Annual Report at 123.
- ¹²¹ *Mineral Exploration Standard Regulations*, N.L.R. 39/07, s. 2.3(o).