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## **Submission to the Province of Ontario's review of the Ontario *Mining Act***

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## **Submission to the Province of Ontario's review of the Ontario *Mining Act***

**On behalf of Amnesty International Canada and Canadian Friends Service Committee (Quakers).**

Our organizations welcome the Province of Ontario's decision to reform the Ontario Mining Act.<sup>1</sup> We hope that the rushed and haphazard process by which the public is being consulted about possible changes to the Act does not reflect the willingness of the province to carry out the necessary and long overdue restructuring of mining exploration and how development is approved and monitored. Our submission highlights one aspect of such reform that is of particular concern from the perspective of human rights and social justice: that being, the protection of the rights of Indigenous peoples.

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<sup>1</sup> R.S.O. 1990

## **Mining and threats to the human rights of Indigenous peoples**

1. The Government of Ontario's discussion paper on mining in the province<sup>2</sup> estimates a five-fold expansion of exploration activities over the past five years. It is reasonable to assume that the majority of this activity is on the traditional lands of Indigenous peoples and is subject either to treaties or to aboriginal rights and title.
2. In its current form, and as it is currently administered, the Ontario *Mining Act* contains no provisions to ensure that the distinct rights of Indigenous peoples are promoted, respected, and protected. Prospectors can obtain permission to carry out invasive exploration activity, including felling trees, blasting and drilling, and the construction of temporary roads and shelters, without any regard to how this may impact on the rights of Indigenous peoples. This is despite repeated rulings by the Supreme Court of Canada that governments must in every instance ensure good faith consultation with Indigenous peoples and meaningful accommodation of their concerns *prior* to making any decisions that have the potential to impact on Indigenous rights and interests.
3. It is important to emphasize that the protection of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982* has been characterized by the Supreme Court as an "underlying constitutional principle" and "value".<sup>3</sup> This constitutional obligation

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<sup>2</sup> *Modernizing Ontario's Mining Act: Finding a Balance*. August 2008

<sup>3</sup> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 32 ("respect for minorities" is an underlying constitutional principle); para. 82 (protection of Aboriginal and treaty rights, "whether looked at in their own

is also referred to as a “national commitment”.<sup>4</sup> Moreover, as set out by the Supreme Court, any prima facie infringements of such rights would have to meet certain justification tests consistent with the honour of the Crown.<sup>5</sup> These tests include “whether there has been as little infringement as possible in order to effect the desired result”.<sup>6</sup>

4. Legislation that would privilege the mining industry while ignoring and denying the constitutionally-entrenched rights of Indigenous peoples undermines the very purpose of constitutional protection, and is inconsistent with maintaining the honour of the Crown. Such policies deny Indigenous peoples in Ontario a meaningful role in determining how the resources on their lands may be developed and shared. In accordance with its commitment to implement the recommendations from the Ipperwash Inquiry Report the province should be doing all it can to reverse the injustices of the past and ensure reconciliation. The rights, security and well-being of Indigenous peoples, as distinct peoples, must be ensured for present and future generations.<sup>7</sup>
5. As we have seen in the last year, permitting exploration activities on Indigenous lands without consultation or consent can put the

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right or as part of the larger concern with minorities, reflects an important underlying constitutional value.”); and para. 96 (minorities includes Aboriginal peoples).

It is important to emphasize that the legal and constitutional status of Aboriginal peoples go well beyond minorities. See, e.g., *R. v. Van der Peet*, [1996], 2 S.C.R. 507, para. 30, where Aboriginal peoples are distinguished from “all other minority groups in Canadian society” and have a “special legal, and now constitutional, status.”

<sup>4</sup> *R. v. Marshall* (No. 2), [1999] 3 S.C.R. 533, para. 45.

<sup>5</sup> See, generally, *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075.

<sup>6</sup> *Id.*, at p. 1119. Similarly, see *Tsilhqot'in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (BC Supreme Ct.), para. 1113.

<sup>7</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 7, para. 2: “Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples ...”

province in conflict with Indigenous leaders who have a sincere intent to protect their peoples' rights and interests. Such conflicts are incompatible with the imperative of reconciliation of Indigenous and non-Indigenous peoples.

6. Our organizations have worked with Indigenous peoples across Canada and around the world that are facing the impacts of mining activities on their lands. We have seen that by their very nature, mining activities can pose a profound threat to the integrity and well-being of societies and communities whose identity, way of life, and health and livelihood are inseparable from the land itself.
7. We recognize that some Indigenous peoples welcome mining activities on their land, confident that the environmental and social impacts can be mitigated and that the economic opportunities brought by mining will benefit their communities. We also know that other Indigenous peoples reject mining, or particular forms of mining, as incompatible with their relationship to the land.
8. Indigenous peoples in Ontario have for far too long been denied a meaningful voice in decisions affecting the lands and resources on which they depend. Decisions made in the interest of other sectors of society have led to the dramatic erosion of Indigenous peoples' land and resource base in Ontario, leading in many instances to profound poverty and ill-health within affected communities. Justice demands urgent measures to restore to Indigenous peoples secure access to, and control over, the lands and resources sufficient to maintain or rebuild healthy and prosperous communities. Part of the solution, required by Canada's existing laws and commitments,

is for Indigenous peoples to have the opportunity to participate meaningfully in land use planning decisions that may impact on the enjoyment and protection of their rights, including decisions on whether or not mineral development will be permitted and under what conditions. This will mean that there are circumstances where mining development must be put on hold to give Indigenous peoples' the time to prepare to participate meaningfully in such planning, as well as other instances where mining should never be permitted.

### **The human rights of Indigenous peoples in domestic and international law**

9. In the landmark 1997 *Delgamuukw* decision<sup>8</sup>, the Supreme Court of Canada found that the Crown's duty to deal "honourably" with the Indigenous peoples over whose lands and lives it has assumed jurisdiction necessarily requires "the involvement of aboriginal peoples in decisions taken with respect to their lands." The court concluded that in every instance where the Crown contemplates actions that could possibly affect the rights and interests of Indigenous peoples, there is a "minimum acceptable standard" of consultation "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."
10. Subsequent court decisions have further defined this minimum duty of consultation and accommodation as requiring the government to:

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<sup>8</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

- Inform itself in advance of any relevant Indigenous interests and how they might be affected.
- Openly share this information with the affected peoples.
- Demonstrate willingness to make changes to the planned actions based on the views expressed by Indigenous peoples.
- Undertake this process in a manner appropriate to the cultures and needs of Indigenous peoples.<sup>9</sup>

11. It is important to note that the duty of consultation and accommodation in Canadian law applies to all instances in which the government contemplates action with any potential to affect the rights and interests of Indigenous peoples. The duty is not limited to those situations where Indigenous peoples' land rights have already been established through negotiation and litigation and where there is no dispute over these rights. The *Haida* decision stated:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.<sup>10</sup>

12. It is also important to note that consultation and accommodation is explicitly a minimum standard which federal and provincial governments are required to meet. The *Delgamuukw* decision

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<sup>9</sup> See for example, *Halfway River First Nation v. British Columbia (Minister of Forests)* [1999] B.C.J. No. 1880.

<sup>10</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at 27.

clearly stated that situations requiring only the minimum duty of meaningful consultation and accommodation are “rare” and that “in most cases” the duty of the Crown “will be significantly deeper.” In fact, in the *Delgamuukw* decision, the Supreme Court found that on very serious issues the legal duty of the Crown “may even require the full consent of an aboriginal nation.”

13. In our view, governments in Canada should be working collaboratively with Indigenous peoples to build a greater understanding of how to interpret and apply the rights of consultation and accommodation, including understanding when consent must be obtained. Aboriginal and treaty rights are pre-existing rights having a source independent of the common law and the Canadian constitution. Therefore, a full discussion and consideration would have to include Indigenous perspectives and legal systems as to their meaning and application.

Case law such as *Van Der Peet* and *Delgamuukw* provides clear direction in that regard:

“Courts must take into account the perspective of Aboriginal peoples themselves.

In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right. In *Sparrow*, *supra* Dickson C.J. and La Forest J. held at p.1112 [S.C.R.; p. 182 C.N.L.R.] that it is “crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake”. It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35 (1) is the reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of



Crown sovereignty. Courts adjudicating Aboriginal rights claims must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada.

...True reconciliation will, equally, place weight on each."<sup>11</sup>

"... the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "true reconciliation will, equally, place weight on each". I also held that the Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an Aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands, which are the subject of a claim for Aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use."<sup>12</sup>

This is a significant statement, often overlooked or not applied by Crown policy and law, with respect to the task of dealing with First Nations assertions of their rights and jurisdiction.

14. Another critical source for this interpretation of the rights of Indigenous peoples is existing international and universal human rights standards relating to Indigenous peoples.
15. International human rights bodies have long recognized the right of Indigenous peoples to directly participate in decisions affecting their

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<sup>11</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

<sup>12</sup> *Delgamuukw op cit.*

lands, territories and resources. A critical international norm in this respect is the right of Indigenous peoples to freely grant or withhold consent for any development on their lands and territories. The right of free, prior and informed consent is a specific application of the right of self-determination recognized in domestic and international law. It is also a mechanism to protect the distinct rights of marginalized and vulnerable peoples whose interests, values and perspectives are poorly understood and rarely considered in government decision making.

16. The United Nations Treaty Body charged with oversight and interpretation of the *International Convention on the Elimination of all Forms of Racial Discrimination* – a legally binding treaty to which Canada is party – has called on states to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.<sup>13</sup>
  
17. The *United Nations Declaration on the Rights of Indigenous Peoples*, adopted as a universal human rights standard by the UN General Assembly on September 13, 2007, includes the following provisions:

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as

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<sup>13</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXIII concerning Indigenous Peoples, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).

to maintain and develop their own indigenous decision-making institutions.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20 (1): Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

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.

Article 32 (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.

Article 32 (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.

18. These human rights declarations and recommendations provide authoritative guidance for the interpretation of state obligations, including those established in national and provincial laws. Former

Chief Justice Dickson observed that international human rights instruments were part of the context in which the Canadian *Charter of Rights and Freedoms* was drafted and adopted, and should be viewed as "...a relevant and persuasive source..." for Charter interpretation. Moreover, the Supreme Court has found that "...the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents".<sup>14</sup> Barbara Hall, the Chief Commissioner of the Ontario Human Rights Commission, has characterized the *UN Declaration on the Rights of Indigenous Peoples* as helping "clarify Canada's existing obligations under domestic and international law."<sup>15</sup>

### **Bring minerals exploration in line with requirements of human rights and justice**

19. The current formulation and functioning of the Ontario *Mining Act* is indisputably in conflict with the province's legal duties to Indigenous peoples. There is no consultation or accommodation possible when Indigenous peoples find out after the fact that the province has already given permission for a prospector to fell trees, drill holes or build roads in a territory that is subject to an unresolved dispute, on land that is used by Indigenous peoples to maintain their traditions or other interests, or near lakes and rivers upstream from an Indigenous community. Nor can consultation be considered meaningful when there is no disclosure of information critical to the interests of the affected communities such as an independent

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<sup>14</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 348-350.

<sup>15</sup> Barbara Hall. "UN vote needs Canada's support." *The Toronto Star*, September 13, 2007.

assessment of possible environmental and social impacts of these activities.

20. The report of the Ipperwash Inquiry called on the government of Ontario to collaborate with Indigenous peoples to establish laws, regulations and policies that formalize the Crown's duty of consultation and accommodation and to ensure that all other laws, policies and regulations are brought in line with this responsibility. Our organizations have welcomed the government's commitment to fully implement the recommendations of the Inquiry. We consider reform of the Ontario *Mining Act* to be an area of critical priority for fulfilling this commitment to bring Ontario's laws, policies and practices into line with its legal responsibilities to Indigenous peoples.
21. At the same time, our organizations recognize that Indigenous peoples' rights cannot be adequately protected in respect to the permitting and oversight of mining without broader reforms in the relationship between the province and Indigenous peoples.
22. Numerous long-standing unresolved land disputes mean that many Indigenous peoples in Ontario do not have secure access to, and control over, the lands and resources necessary to guarantee respect for their rights and a decent standard of living to their communities. Many are also coping with urgent social, economic, and environmental pressures such as severe housing shortages and a lack of access to safe drinking water. Some First Nations have taken the position that there can be no meaningful engagement in a process of consultation and accommodation around resource development proposals until these pressing concerns have been

- adequately addressed. Temporary moratoria have been used in Canada to provide Indigenous communities the opportunity to prepare to participate meaningfully in decision making processes. The province of Ontario should respect the moratoria declared by Indigenous communities and temporarily remove those lands from consideration for mineral development.
23. Our organizations welcomed the Government of Ontario's July 14, 2008 announcement of a comprehensive land use planning process for the Northern Boreal Forest in which First Nations will have "much greater say on the future of their communities and traditional lands." Such land use planning processes can provide an opportunity to consider Indigenous peoples' own needs, values, ideas and plans when determining which lands should be open to mining exploration – and under what conditions – and what land should be withdrawn from staking. We note that the province has committed that before new mines can be opened or new forest licenses are granted in the Far North, community land use plans must be prepared "in agreement with First Nations." We continue to call on the province to commit to engage Indigenous peoples in a rights-based, land use planning approach throughout the province as one appropriate means to ensure that Indigenous peoples' rights are respected and upheld before decisions are made to permit mineral exploration or development.
24. The Ipperwash Inquiry called on the province to establish an adequately funded land and treaty commission to "independently and impartially assist the governments of Ontario, Canada and First Nations to negotiate settlements of land claims." The

recommendation has been supported by Indigenous peoples' organizations in Ontario, such as the Chiefs of Ontario. Our organizations believe that a more timely and fair process for the resolution of outstanding disputes is essential to establishing conditions in which the province's duties toward Indigenous peoples can be met in the process of permitting and oversight of mines. We urge the government to work in collaboration with Indigenous peoples organizations to develop a specific timetable for establishing a land and treaty commission.

25. Our organizations also believe that while land and treaty disputes remain unresolved, the province must work with Indigenous peoples to establish effective interim protections to ensure that rights that may be affirmed through the land claim negotiation process are not violated or eroded in the meantime. Such measures may include withdrawing sensitive lands from staking or implementing moratoria on specific forms of mineral exploration and development that have a high potential for harm to Indigenous peoples' and their rights.
26. Our organizations believe that the *Mining Act* itself needs to incorporate clear, mandatory requirements to protect the constitutionally-entrenched rights of Indigenous peoples. These protections should include requirements that exploration activities be carried out only *after* meaningful consultation with all potentially affected Indigenous communities and that no exploration or other mining activities be carried out without the free, prior and informed consent of the affected rights holders.

27. Finally, as part of the commitment to meaningful consultation and good faith accommodation, the *Mining Act* should require a full and independent environmental assessment before any permits for mining operations are issued. Such assessment must incorporate First Nation participation as well as funding to facilitate such participation.

## **Recommendations**

28. Our organizations call on the Government of Ontario to work in collaboration with Indigenous peoples to implement the following recommendations:
  - Respect the moratoria declared by Indigenous communities and temporarily remove those lands from consideration for mineral development.
  - Implement a rights-based, land use planning approach throughout the province that will provide a meaningful opportunity for Indigenous peoples to set their own priorities for the use and development of their traditional lands and territories.
  - Include Indigenous peoples in the development and drafting of revisions to the Mining Act to ensure that their interests are properly reflected.
  - Establish interim protections for lands subject to land claim negotiations or other disputes including withdrawing sensitive lands from staking or implementing moratoria on specific forms of



mineral exploration and development that have a high potential for harm to Indigenous peoples' and their rights.

- Amend the *Mining Act* to incorporate clear, mandatory protections for the constitutionally-entrenched rights of Indigenous peoples including requirements that exploration activities be carried out only *after* meaningful consultation with all potentially affected Indigenous communities and that no exploration be carried out without the free, prior and informed consent of the affected rights holders.
- Amend the *Mining Act* to require a full and independent environmental assessment with the full participation of all affected Indigenous peoples before any permits for mining operations are issued.