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Kitchenuhmaykoosib Inninuwug

INDEPENDENT SUBMISSION

BY

THE SOVEREIGN KITCHENUHMAYKOOSIB INNINUWUG

ON

MINING IN KITCHENUHMAYKOOSIB INNINUWUG (KI) TERRITORY

October 10th, 2008

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INDEPENDENT SUBMISSION BY THE SOVEREIGN KITCHENUHMAYKOOSIB INNINUWUG (KI) PEOPLES ON MINING IN KITCHENUHMAYKOOSIB INNINUWUG TERRITORY

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I. FUNDAMENTAL PRINCIPLES:

The peoples of Kitchenuhmaykoosib Inninuwug (KI) have controlled their traditional territories since time immemorial and have lived in harmony with nature. We are a sovereign peoples recognized by the fact that the Crown signed a treaty with our peoples. International law sets out clearly that provincial governments cannot sign treaty as a result provinces are not part of negotiations regarding international human and indigenous rights instruments, international trade agreements and multilateral environmental agreements. All negotiations about access to and mining in our traditional territory therefore have to include the federal government as the successor state to the treaty and KI on a nation-to-nation basis. They further have to be based on the recognition of indigenous rights according to international and constitutional minimum standards.

A. KI Indigenous Laws and Traditional Knowledge

The sovereign peoples of KI have lived in and off their territory since time immemorial and hold the most long-term traditional knowledge about our land and resources. The KI are the ultimate authority that plays the key role in decision-making over land use to ensure economically, environmentally and culturally sustainable development. Settler societies and economies have been based upon the exploitation of indigenous lands and resources. It is a colonial approach to enable individuals and corporations to stake claims to indigenous lands and resources. The indigenous laws of KI dictate a different approach, based on collective indigenous rights and responsibilities to lands and resources. The KI has its own laws and philosophies that reflect and reinforce a sacred relationship with the natural earth. It stems from the recognition that all life is part of a circle, including human beings. Because we are within the circle of life as all others in Creation, we must be careful in reaching decisions that affect the circle. Our decision will travel around the circle and impact on future generations to come. We have a responsibility to ensure that future generations can look back at us and say that our decisions today have not caused them harm in the future. It has always been KI's practice that users leave a site the way they found it for future generations to use.

B. Resource Development

Kitchenuhmaykoosib Inninuwug, as a signatory to the Treaty #9, continue in their diplomatic effort to address resource development interests, which are to be carried out in conformance with the KI philosophies and principles including beliefs, values, laws and spiritual life. All resource development decisions and activities must take place on the basis of the recognition of KI sovereignty, in the context of the Royal Proclamation and the spirit and intent of the treaties as understood by KI. KI and the Crown, as the signatories of the treaty, must come together to lawfully establish grounds of diplomatic relations and measures to ensure treaty provisions are intact and in accordance with international law when KI territories are at stake. All resource development initial proposals must be addressed to Kitchenuhmaykoosib Inninuwug, as a sovereign nation and signatory to the Treaty #9, on equal footing with the Crown. KI has the ultimate authority over resource development in KI territory and any development activities are subject to the free prior informed consent of KI. All resource development activities that pose threat or harm will be deemed withdrawn from prospecting, exploration, discovery, staking, lease or sale. Any resource development proposals must satisfy the conditions as set out by the KI laws and protocols not only those set out in federal and provincial legislation and regulations.

I. INTERNATIONAL LAW

On September 13, 2007 the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[1], securing the recognition of the Human Rights of Indigenous Peoples globally. 143 countries voted Yes, 11 Abstained and 4 countries voted No, namely, Canada, Australia, New Zealand and the United States of America, because their economies are built on the non-recognition of the land and resource rights of Indigenous Peoples. Still based on the broad consensus of the world, human and indigenous rights are universal, indivisible and inalienable. Canada and the provinces have to change their policies that violate international human rights and indigenous rights standards, in order to come in line with internationally accepted principles.

The Indigenous Peoples of the Kitchenuhmaykoosib Inninuwug hereby fully adopt the United Nations Declaration on the Rights of Indigenous Peoples and hold out the Articles of the Declaration as the minimum standard regarding the implementation of Indigenous and Human Rights in Canada.

The KI peoples assert, and international law stipulates, that Canada cannot pick and choose what Human Rights Canada will recognize or not recognize. Canada voted against the Declaration on 29th June 2006 at the United Nations Human Rights Council and at the United Nations General Assembly on 13th September 2007 making it the only country in the world to vote twice against UNDRIP, yet its principles have been accepted by the great majority of nation states in the world and many of the principles enshrined in it already form part of international customary law. Only by adopting and implementing the principles and minimum standards set out in UNDRIP can Canada and the province of Ontario engage in fair negotiations with the indigenous peoples of KI and bring its national and provincial policies in line with international law.

A. International Law Principles

Many of principles reiterated in UNDRIP are also part of standing international law. For example, Canada is a party to both the Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2]. The right to self-determination is enshrined in Article 1 of both Covenants. The right to self-determination is the all encompassing right, that enshrines within it all further principles and standards set out in UNDRIP.

The Indigenous Peoples of Kitchenuhmaykoosib Inninuwug stand on the position that we have the right to self-determination as articulated in Article 1 of the ICCPR and ICESCR and Article 3 of UNDRIP[3].

Article 3 – Self-Determination

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Since Canada is a signatory of the ICCPR and the ICESCR, it is bound to recognize and implement the right to self-determination and other rights enshrined in the covenants. Under the

[1] UN Declaration on the Rights of Indigenous Peoples (UNDRIP) UNGA Res. 61/295, 13 September 2007, Annex
[2] UNGA Resolution 2200 A (XXI) Annex
[3] See supra UNDRIP Article 3

Covenants and other international human rights treaties such as the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Canada is subject to periodic reviews of its human rights records. Canada has also been repeatedly questioned about its implementation of the right to self-determination of indigenous peoples and Canada's policies regarding indigenous rights have been repeatedly found in violation of international human rights law. In its 1998 Concluding Observations on Canada's third periodic report, the Committee on Economic, Social and Cultural Rights recommended that[4]: "policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party." Similar recommendations have been made by the Human Rights Committee (1999 & 2005), the Committee on the Elimination of Racial Discrimination (2002), and the Committee on the Rights of the Child (2003).[5]

Following his first official mission to Canada, UN Special Rapporteur Rodolfo Stavenhagen, expressed concern about Canada's policies in regard to land and resources and their failure to recognize Aboriginal and treaty rights. In his concluding observations Mr. Stavenhagen noted:

> 85. Despite the progress already achieved, Aboriginal peoples are justifiably concerned about continuing inequalities in the attainment of economic and social rights, as well as the slow pace of effective recognition of their constitutional Aboriginal and treaty rights, and the concomitant redistribution of lands and resources that will be required to bring about sustainable economies and socio-political development."[6]

The Human Rights Committee in its Concluding Observations following its review of Canada in December 2005, recommended that Canada "re-examine its policy and practices to ensure they do not result in extinguishment of inherent Aboriginal rights."[7]

Canada's policies especially in regard to land and resources rights have been repeatedly found in violation of international human rights law. It is KI's position, that Canada and the provinces have to adopt policies based on the recognition of Aboriginal and Treaty rights, based on principles set out in international law and the minimum standards enshrined in the UN Declaration on the Rights of Indigenous Peoples.

B. Minimum Standards in the UN Declaration on the Rights of Indigenous Peoples

KI is in the process of restructuring their political status to reflect their responsibility to their entire territory and base it on our traditional governance structure. KI are also engaging in freely pursuing economic development by protecting our traditional land-based economies. KI assert that any consultation and accommodation process conducted by the Ontario government must recognize our Human Rights as Indigenous Peoples. Human Rights in Canada must balance the

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[4] *Concluding Observations of the Committee on Economic, Social and Cultural Rights,* UN CESCR, 1998, UN Doc. E/C.12/1Add.31, paragraph 18

[5] *Concluding Observations of the Committee on Economic, Social and Cultural Rights,* UN CESCR, 1998, UN Doc. E/C.12/1Add.31, paragraph 18. *Concluding Observations of the Committee the Elimination of Racial Discrimination,* UN CERD, 2002, A/57/18, paragraphs 330-331. *Concluding Observations of the Committee on the Rights of the Child,* UN CRC, 2003, CRC/C/15/Add.215, paragraph 59.
Concluding Observations of the Human Rights Committee, UN HRC, 2005. CCPR/C/CAN/CO/5, paragraph 8.

[6] Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61st Session, E/CN.4/2005/88/Add. 3 (2004), paragraph 85 [*Mission to Canada*]

[7] *Concluding Observations of the Human Rights Committee,* UN HRC, 2005.
CCPR/C/CAN/CO/5, paragraph 8.

Human Rights of all human beings and not just Canadians and Ontario citizens, but also Indigenous Peoples. Indigenous peoples have been socially and economically marginalized by being denied access to their traditional territories, any fair dealing with indigenous peoples has to be based on the recognition of indigenous rights over their traditional territories.

The Indigenous Peoples of the Kitchenuhmaykoosib Inninuwug hereby fully adopt the United Nations Declaration on the Rights of Indigenous Peoples and hold out the Articles of the Declaration as the minimum standard regarding the implementation of Indigenous and Human Rights in Canada. The following sections make reference to specific minimum standards that KI require be met as the basis for any meaningful engagement between the province of Ontario and the federal government and KI as signatories of our treaty.

In regard to the discussion papers on Modernizing Ontario Mining Act August 2008 and Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities Winter 2007, Kitchenuhmaykoosib Inninuwug take the position that any legislative or administrative reform process has to be based on "free, prior and informed consent" of the affected indigenous peoples. This has been specifically provided for in Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

Article 19 – consultation & FPIC regarding legislative and administrative measures

> 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.

The Ontario Minerals Development Strategy, Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities and the Modernizing Ontario's Mining Act strategies are all designed to economically exploit KI territories. Consultation and accommodation must be based on the free prior informed consent as expressed in Article 32 of UNDRIP.

Article 32 – FPIC regarding developments

> 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.

The sovereign KI peoples point out that Indigenous Peoples forced the Canadian government to adoption of the principle of free prior informed consent of Indigenous Peoples at the Sixth conference of the Parties of the Convention on Biological Diversity (CBD) in 2002 at The Hague. This principle is now enshrined in the CBD Akwé:Kon Guidelines[8] for the conduct of

[8] Secretariat of the Convention on Biological Diversity (2004) Akwé:Kon Guidelines, Montreal

cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.

This principle is further reinforced by the Ontario Court of Appeal making very specific reference to consultation in their decision releasing the Chief and Council of KI despite the lower court decision to incarcerate them for six months. The United Nations Declaration on the Rights of Indigenous Peoples Article 32 merely gives international clarification and support to what the Ontario Court of Appeal also ruled. The Ontario government and Ministry of Northern Development and Mining must get in step with the Canadian judicial system and the international community and to recognize the Human Rights of the KI Indigenous Peoples.

The reduction and the elimination of the poverty of Indigenous Peoples in Canada depends upon any development recognizing the minimum principles set out in the United Nations Declaration on the Rights of Indigenous Peoples. That is what the Ontario Court of Appeal referenced as a "complex process of consultation and accommodation". The federal and provincial governments' existing approach to dealing with indigenous concerns is still based on the outdated and rejected concepts of the Colonial Doctrines of Discovery, meaning that they claim mutually exclusive jurisdiction over indigenous territories and resources. They fail to recognize the indigenous right to self-determination, which further enshrines other indigenous rights set out in the UN Declaration on the Rights of Indigenous Peoples, namely:

Article 20 – indigenous political, economic and social systems

> 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.
> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Indigenous political, economic and social systems are deeply connected to our territory. The KI peoples still control their territory, rely on it for their subsistence and are determined to restructure their own political, economic and social systems on the basis of it.

Article 25 – indigenous land and resource rights

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26 – indigenous land and resource rights

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

The KI peoples maintain a strong connection to their territory which has never been severed and which remains the basis for their subsistence and future development. The federal and provincial governments fail to recognize the land and resource rights of indigenous peoples and their land tenure systems. The KI peoples still maintain their land tenure systems and require full recognition of their land and resource rights by the governments as the basis for any discussions about mining developments in KI territory.

Article 27 – process for recognition of indigenous peoples laws

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

The KI have strong laws in regard to the use, access to and protection of their territories, these laws have to form the basis of any land and resource use decisions in KI territory. These principles include principles such as respect for the circle of life and protection of their land and resources for future generations.

Article 28 – redress and fair and equitable compensation for lands and resources

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

To date KI have not received any redress or remuneration for the resources removed from their traditional territories and the benefits drawn from KI territories. These monies are owing to KI. Apart from having to give consent to any access to their territory, KI has to receive fair and equitable resources for any benefit drawn from their territories and resources. Government policies that refuse to recognize indigenous land and resource rights and therefore exempt corporations to have to pay the indigenous peoples constitute a subsidy and further violate international trade law. Discretionary government payments not based on the true value of the resources just constitute a further subsidy, not fair and equitable remuneration, since they are unilaterally determined by governments based on their discretion and budget and not on the recognition of indigenous rights.

Article 29 – right to protection of the environment

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States

shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Protection of KI territory for future generations was the main motivation for the KI leadership to take a stand against mining in their traditional territory, the KI Chief and Council even gave up their personal freedom to protect KI territory. KI's right to protection of their environment has to be taken into account and has to be a key concern in considering any mining development.

Article 31 – traditional knowledge

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The KI people, elders, land users and youth, hold the longest-term knowledge regarding KI territories. This traditional knowledge is key to ensuring the economically, socially and environmentally sustainable development of KI territory.

Article 37 – treaty rights

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

The KI are a sovereign peoples and signatories to a treaty with the Crown. The treaty has to be implemented on the basis of the spirit and intent of the treaty as understood by KI and on the basis of KI self-determination. The failure of the federal and provincial governments to fully implement KI treaty rights and inherent rights over KI territories violates our treaty and human rights and constitutes a subsidy to settlers and corporations, including mining ventures.

Any developments in KI territory have to be based on the recognition of KI Treaty and Aboriginal rights and the minimum standards as enshrined in the UN Declaration on the Rights of Indigenous Peoples and in other UN legal instruments that Canada is signatory.

II. CURRENT FEDERAL + PROVINCIAL POLICIES VIOLATE KI RIGHTS

A. Constitutional Breach

Canada is the only country in the world to vote twice against the UN Declaration on the Rights of Indigenous Peoples at the UN Human Rights Council in 2006 and at UN General Assembly in 2007. Canada voted against the Declaration because Canada and the provinces' current policies violate indigenous rights. The governments fail to recognize the indigenous right to self-determination, with their self-government policy and other policies aiming at maintaining mutually exclusive federal and provincial jurisdiction without having to recognize Indigenous Peoples Human Rights, especially over Indigenous territories and resources. These policies do not only violate international human rights and trade law; they also violate the Canadian constitution and Canadian court decisions, calling for the recognition of Aboriginal and Treaty rights.

Section 35 of the Canadian constitution recognizes Aboriginal and Treaty Rights, federal and provincial policies that fail to recognize those rights, therefore violate the constitution. The result is a constitutional breach, where the executive branch violates the rules set out by the legislative and judicial branch. Section 35 is a further minimum standard that secures constitutional protection for indigenous rights. It does not create indigenous rights, but rather recognizes them as inherent rights that flow from indigenous laws. Section 35 could be easily implemented by the governments ascribing to the minimum standards enshrined in the UN Declaration on the Rights of Indigenous Peoples. Canadian Courts have often based their decisions on Section 35 and thereby added substance to the section, they have been very clear in their call on the executive branch to implement Section 35 and recognize indigenous rights rather than continuing to violate them. The courts and the United Nations are pressuring the federal and provincial governments to recognize Aboriginal and Treaty Rights and consult and accommodate Indigenous Peoples. The Ontario Court of Appeal rejected the way the government of Ontario dealt with the indigenous peoples of KI, and indicates a new direction has to be found in how to get the consultation process on track and take into account KI rights. In regard to resource extraction, the Ontario Court of Appeal has made it clear that the Ontario Mining Act "free entry" system impacts or undermines unresolved Aboriginal and Treaty Rights.

B. Kitchenuhmaykoosib Inninuwug and the Ontario Court of Appeal

The Chief and Council of Kitchenuhmaykoosib Inninuwug First Nation were sentenced to six months incarceration and that they were placed in jail on March 17, 2008 and remained until released on May 28, 2008. The Chief and Council and the peoples of KI paid for our right to make this presentation based on the Chief and Council sacrificing their personal freedom so our voices could be heard. The Ontario Court of Appeal did not elaborate fully on the KI case but said our Appeal decision is covered under the principles applied in the Frontenac Ventures Corp. v. Ardoch Algonquin First Nation:

> [6] There is no good reason to expand on the endorsement. The principles that would have been applied to this appeal are set out in the reasons in the companion appeal in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*. There is no point in applying these principles to this appeal at this juncture. Indeed, it would be unwise to do so because the court heard no argument about the circumstances giving rise to the contempt findings made against the appellants[9].

[9] Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2008 ONCA 533

The Ontario Court of Appeal found that the reasons why the Chief and Council took the position they did was because mining exploration might have an adverse impact on the Aboriginal and Treaty Rights affirmed in s. 35 of the Constitution Act 1982.

> [43] In my view, the stage at which the comprehensive and nuanced description of the rule of law expressed in *Henco* must be considered is when a court is requested by a private party to grant an injunction and where doing so might have an adverse impact on asserted aboriginal and treaty rights affirmed in s. 35 of the *Constitution Act, 1982*. Such cases demand a careful and sensitive balancing of many important interests in assessing whether to grant the requested injunction and on what terms. [10]

Furthermore, the Court of Appeal found that this demanded a careful and sensitive balancing of many important interests. This finding places a very heavy burden on the province to come up with a "careful and sensitive" consultation process. A careful and sensitive consultation process should not be restrictive. In fact the government of Ontario needs to take into account environmental, health and land use planning issues since these were motivating factors that caused the KI Chief and Council to be incarcerated. The Ontario Court of Appeal elaborated that diverging interests need to be balanced through consultation, negotiation, accommodation, and ultimately reconciliation of Aboriginal and Treaty Rights, even when there are conflicting interests. It is also up to Indigenous Peoples to determine if these processes are balanced and KI should not be forced to accept limitations based on Ministerial competences and powers determined by the government of Ontario.

> [45] And how are these interests to be effectively balanced? The answer has been clear for almost 20 years in the jurisprudence of the Supreme Court of Canada – consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights and other important, but at times, conflicting interests: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; and *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 S.C.R. 388. The honour of the Crown requires that it act as a committed participant in the undoubtedly complex process of consultation and reconciliation: *Haida Nation*, *Taku River* and *Mikisew Cree*. [11]

The Ontario Court of Appeal states that this is a "complex process of consultation and reconciliation" and it is up to the honour of the Crown to be a committed participant, rather than having Indigenous Peoples fend for themselves against the onslaught of mining corporations.
The Ontario Court of Appeal also stated that the reason many Indigenous Peoples come before the Court is because of the "estrangement of aboriginal peoples from the Canadian justice system" and the "impact of years of dislocation" and specifically in this case the "nature and content of Ontario's Mining Act" especially in terms of the "free entry" system.

> [61] The second background factor that played a part in bringing the appellants before the courts is the nature and content of Ontario's *Mining Act*. It is a remarkably sweeping law. It establishes a "free entry" system whereby all Crown lands, including those subject to aboriginal land claims, are open for prospecting and staking, without any consultation or permitting required. Anyone with a prospector's licence may stake claims and prospect for minerals on any Crown land. Once a claim has been staked, in

[10] Frontenac Ventures Corporation v. Ardoch Algonquin First Nation (Frontenac v. AAFN) , 2008 ONCA 534
[11] Supra AAFN, para 45

> accordance with the Act, the Mining Recorder must record the claim. There is nothing in the *Mining Act* about considering aboriginal land claims or interests.[12]

Furthermore, it was highlighted that "there is nothing in the Mining Act about considering aboriginal land claims or interests". This is a very significant statement to be made by the Ontario Court of Appeal because the Court clearly recognizes the limitations of the Ministry of Northern Development and Mines to address competing Aboriginal and Treaty property ownership vis-à-vis prospector claims because the Mining Act does not recognize Aboriginal and Treaty Rights. Consultation and accommodation cannot really be mutually satisfactory unless the proprietary aspect of Aboriginal and Treaty Rights are recognized.

III. ONTARIO'S MINING ACT AND POLICIES

In regard to resource extraction, the Ontario Court of Appeal has made it clear that the Ontario Mining Act "free entry" system impacts or undermines unresolved Aboriginal and Treaty Rights. Furthermore, the United Nations in its Declaration on the Rights of Indigenous Peoples states that "consultation and accommodation" is "free, prior and informed consent (FPIC)" before adopting and implementing legislation and administrative measures that may affect Indigenous Peoples. The Ontario Mining Act currently does not take Aboriginal and Treaty Rights into account. It is not sufficient to simply focus on the Ontario Mining Act to fully take into a count all aspects of the Aboriginal and Treaty Rights of the Peoples of Kitchenuhmaykoosib Inninuwug.

The proposed Mining Act Consultation Process is insufficient and too narrow in its consideration of Aboriginal and Treaty Rights and does not address, amongst other matters, environmental standards, health and land use planning. These are the instrumental reasons why the KI Chief and Council opposed Platinex mining exploration and went to jail over it. The Ontario Mining Act cannot be modernized without addressing the very constitutional dilemma that caused the Chief and Council to go to jail. Unless the Ontario government broadens the scope of consultation on the Mining Act to include matters that directly impact on Aboriginal and Treaty Rights it will never result in mutually satisfactory solutions. Any "mutually satisfactory solution" has to be based on the minimum standards set out in the UNDRIP, including FPIC.

A. Ontario's Mining Act

The Mining Act attempts to put the Minister of Northern Development and Mines, exclusively or 100% in control of all mining activity in the province of Ontario. The Minister claims 100% exclusive jurisdiction over mining including in KI territory. This provision coupled with the fact that Aboriginal and Treaty Rights are not recognized in the Mining Act totally violates KI human and economic rights as Indigenous Peoples.

> **4.** (1) All public lands for mining purposes and for the purposes of the mineral industry and all regulations made with respect to mines or minerals or mining or mining lands or mining rights or the mineral industry shall be administered by the Minister.[13]

[12] Supra Frontenac v. AAFN para 61
[13] Ontario Mining Act, R.S.O. 1990, Chapter M. 14

The Indigenous Peoples of KI request recognition of the proprietary aspect of their Aboriginal and Treaty Rights as the basis for establishing their economic security for their future. KI understands that the above provision of the Ontario Mining Act claiming that the province of Ontario has exclusive or 100% ownership over KI territories and resources is subject to Aboriginal and Treaty Rights. The Ontario Court of Appeal told the Ontario government to consult Indigenous Peoples and accommodate Aboriginal and Treaty Rights. The KI will not accept the limitations set out by the Ministry of Northern Development and Mines since they violate our human and indigenous rights.

B. Ontario's Mineral Development Strategy:

The Ontario government is going through very ambitious plans of promoting mining in Ontario, as a basis of job and revenue creation while actively opposing and undermining any efforts to seek recognition of Aboriginal and Treaty Rights. Taking advantage of the poverty on Indian Reserves and in Aboriginal communities governments often try to use consultation funding to buy silence, so that Indigenous Peoples do not oppose destructive mining developments in their territories. These monies do not constitute fair and equitable remuneration for Indigenous Peoples, but rather such discretionary payments can be classified as a subsidy that potentially violates international trade law since it is a government payment to secure corporate access to indigenous resources. The monies usually put on the table are nothing in comparison to the huge amounts corporations and governments make off our lands and resources.
Only fair and equitable remuneration of indigenous peoples will overcome the current subsidization of corporations who benefit from indigenous lands. The following list shows some of the revenue mining raises in Ontario on a yearly basis without benefitting Indigenous Peoples:

Almost $1 billion in wages and salaries, mostly in Northern Ontario

- $1 billion in goods and services, with almost 80 per cent of that spent in Ontario
- $100 million in federal taxes
- $115 million in provincial taxes
- $40 million in municipal taxes[14]

Mining is gaining importance as an economic driving force and Indigenous Peoples are the first to suffer the negative effects of mining. Indigenous human rights are undermined and not recognized and indigenous territories and ecological biodiversity are seriously impacted and often even destroyed by mining. The province uses the positive impact mining has on the mainstream economy to justify continued mining developments without considering the adverse impact mining has on Indigenous Peoples. This is part of the balancing act identified by the Courts, when it comes to interim relief, like injunctions. During injunction hearings the corporations and governments will list jobs, money and wealth generated by mining to ask courts to remove and in some cases jail Indigenous Peoples who oppose mining developments. KI is starting to document the ongoing loss of land-use and the value of their indigenous economies due to mining and the devastating effects mining has on the environment. The impacts of mining activities on indigenous peoples, rights, economies and territories have to be taken into account.

Ontario's Mineral Development Strategy is designed to limit consultation to procedural rather than substantive matters like environmental concerns and Aboriginal and Treaty Rights related

[14] Ontario's Mineral Development Strategy (Mineral Development Strategy), page 2, Queen's Printer, 2006

matters, so as to create a better investment climate for mining corporations and the Ontario government.

- Public perception has lagged behind the reality of this innovative and modern industry. A negative perception of mining and misconceptions about the industry could foster unwarranted public concerns and make it more difficult for Ontario to attract much-needed investment in new projects and expansions.[15]

C. Modernizing Ontario's Mining Act

The position paper entitled: Modernizing Ontario's Mining Act very bluntly states that the Mining Act has a narrow focus of encouraging prospecting, staking and exploration, rather than addressing any impact these activities may have on public health and safety and the environment, they try to downplay them.

> "The purpose of the Mining Act, which applies throughout Ontario, is "to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario."[16]

This statement from the outset clearly minimizes any serious substantive input Indigenous Peoples could have on prospecting, staking and exploration and more importantly keeping mining out of KI territory. The current position paper leaves no room for recognition and substantive consultation and accommodation of Aboriginal and Treaty Rights. The powers in the Mining Act are narrowly focused on encouraging mining.

The position paper on Modernizing Ontario's Mining Act spells out the extent of these limitations.

> Despite its name, the Mining Act has limited application in the day-to-day activities of operating mines. Generally, it focuses on activities that occur before and after mineral production. These activities include the acquisition and maintenance of mineral rights - claim staking, prospecting, mineral exploration and mine development related to mining land tenure - and the safe, environmentally sustainable closure of mining operations.[17]

Consultation regarding the Mining Act does not have the capacity to address some of the fundamental areas of concern for the Indigenous Peoples regarding the impact mining will have in KI traditional territory. Matters like environment, health, safety and land use planning are outside this consultation under the Mining Act. Therefore it is clear that consultation under the Mining Act is too narrow to properly deal with the complex issues of concern for Indigenous Peoples. The province of Ontario segments and limits consultation to suit its own priorities, namely promoting mining, not Aboriginal and Treaty Rights. Meaningful consultation according to mutually agreed terms must be made much broader and must involve more than just the Ministry of Northern Development and Mines but include other Ministries that have responsibilities that Indigenous Peoples want to address and that have a collateral effect on mining. It has to involve the highest decision makers, all the way up to the Prime Minister and Premier, since they are the only ones who can recognize Aboriginal and Treaty Rights and

[15] Supra Mineral Development Strategy, page 4
[16] Modernizing Ontario's Mining Act, Finding a Balance Discussion Paper (Modernizing Mining Act), August 2008, Ontario Government, page 9
[17] Supra Modernizing Mining Act, page 9

mandate that they be fully taken into account. The Mining Act, for example, does not regulate the following matters, covered by other legislation:

- Environmental standards for air, water or land
- Health and safety standards
- Lands in parks and protected areas
- Uranium mining (regulated by federal government, however early exploration is regulated by province)
- Land use planning.[18]

KI does not agree to exclude these matters and only focus on the limited confines of the Mining Act since it continues to undermine Aboriginal and Treaty Rights. KI will only participate in processes aimed at the full recognition of Aboriginal and Treaty Rights.

IV. SPECIFIC ELEMENTS OF ONTARIO'S MINING REVIEW

The following comments shall not be construed as KI consenting to dealing with the review of the mining regime within the narrow confines of the Ontario's Mining Act; rather it points to the limitations established or scope created in the questions set out by the Ontario government.

1. Mineral Tenure System and security of investment

Potential adjustments to the mineral tenure system, including free entry, to assure investment security while taking into account other interests, including Aboriginal community concerns and private landowners' issues[19]

The problem with this question is it does not consider that Aboriginal and Treaty Rights as proprietary interests in and to the land. This does not only violate indigenous and human rights as enshrined in the UN Declaration on the Rights of Indigenous Peoples, but also international trade law. The Indigenous Network on Economies and Trade (INET) made several successful submissions to the World Trade Organization (WTO) and the Bi-panel of the North American Free Trade Agreement (NAFTA) on the Canada United States Softwood Lumber Dispute. INET addressed the position that Canada's policy of not recognizing Treaty Rights and Aboriginal Title was a cash subsidy to the Canadian forest industry. Indigenous Peoples from Northern Ontario participated in preparing those submissions and KI proprietary interests were therefore brought to the forefront. The WTO and NAFTA accepted all these submissions, despite Joint Opposition before NAFTA by Canada, Ontario and industry. Therefore under international trade law Canada's policy of not recognizing Aboriginal and Treaty Rights does not eliminate the fact that these interests do have proprietary characteristics under international trade law. As a result KI opposes the "free entry" system and requests that any access be subject to the proprietary rights of Indigenous Peoples of the Kitchenuhmaykoosib Inninuwug. INET also made a submission to the US Department of Commerce when they were considering the way Canada and the provinces were trying to restructure their tenure systems to meet international trade law requirements. Under international trade law, the non-recognition of indigenous land rights and rights to natural resources constitutes a subsidy and in turn even discretionary payments by the government to pretend that they are engaging in revenue-sharing with Indigenous Peoples can

[18] Supra Modernizing Mining Act, page 9
[19] Supra Modernizing Mining Act, page 11

constitute a further subsidy unless they are based on the recognition of indigenous rights and fair remuneration of indigenous proprietary interests.

The province of Ontario cannot "assure investment security" under the existing free entry system without first reaching an agreement with the Indigenous Peoples of Kitchenuhmaykoosib Inninuwug based on Aboriginal and Treaty Rights. In fact the non-recognition of Aboriginal and Treaty Rights has been a cash subsidy to the Ontario Mining Industry. Any adjustments to the mineral tenure system must recognize that Aboriginal and Treaty Rights are proprietary interests that need to be fairly remunerated (in relation to the revenues drawn from the land and not just little hand-outs). In addition the KI as owners of the resources hold specific decision making powers over their lands and resources. KI requires the principle of free prior informed consent (FPIC) of Indigenous Peoples to any developments on their land is the minimum standard set out in the UN Declaration on the Rights of Indigenous Peoples be respected. This is really not a veto right, but much more an exercise of KI ownership rights, and the KI being treated as equal partners in decision-making and in accessing the revenues from any mining activities consented to in our traditional territory. This would constitute the necessary modernization of the Mining Act, based on the recognition of Indigenous Peoples Rights as Human Rights under the United Nations Declaration on the Rights of Indigenous Peoples. In order to modernize Ontario's Mining Act, the province and the federal government must keep step with these changes.

2. Aboriginal rights and interests related to mining development
Potential approaches to consultation and accommodation related to the broad range of mineral sector activities as they affect Aboriginal and treaty rights[20]

Contrary to the current position of the government of Ontario, KI insists that any potential new approach to consultation and accommodation needs to include free, prior informed consent and begin with the recognition of Aboriginal and Treaty Rights. The purpose of consultation and accommodation is to come up with an agreement between all holders of underlying proprietary interests. A balance needs to be found that establishes recognition of the Indigenous traditional land use economy and the mining industry. The Indigenous traditional land use economy cannot be sacrificed or ignored. The KI do provide for their families and do protect the ecological biodiversity they depend on and this is what is economically at stake for any Indigenous Peoples who are subject to mining activities. Therefore, a mutually acceptable consultation and accommodation process needs to respect and balance these economic interests. Therefore a more broad consultation and accommodation process needs to be developed or resource conflicts will continue to arise and investments will not be secure if a narrow consultation and accommodation process is maintained.

3. Regulatory processes for exploration activities on Crown Land

Potential approaches to regulating exploration activities, including consultation and accommodation with Aboriginal communities.[21]

[20] Supra Modernizing Mining Act, page 11
[21] Supra Modernizing Mining Act, page 11

The KI and other indigenous peoples need to be included in the regulatory processes in order to ensure that constitutionally protected Aboriginal and Treaty Rights under Section 35 are not undermined by mining activities on the ground. The KI routinely utilize their territory and know firsthand the impact mining activities have on their territory, they have the most long-term knowledge about their land and territory and their traditional knowledge is key to maintaining its biodiversity. The sovereign KI peoples need a means to address any problems that they may run into on the ground. The regulatory process needs to have the capacity to address these issues and ensure that mining activities do not violate our indigenous rights and destroy KI territory, this will lead to long-term economically, socially and environmentally sustainable development.

4. Land use planning in Ontario's Far North

Potential approaches to the requirement that new mines in the Far North would need community land use plans supported by local First Nations[22].

KI needs to be provided the time and resources to conduct both initial and long-term land use and occupation studies of KI communities and traditional territory. They do possess the traditional knowledge that holds the key to protecting the ecological biodiversity of their territory. This knowledge has been recognized by the Convention on Biological Diversity and is the basis for Indigenous Peoples exercising their free, prior and informed consent. Canada was actually forced to agree to the principle of free, prior and informed consent of Indigenous Peoples to any developments that impact their traditional territories at the Sixth Conference of the Parties of the Convention on Biological Diversity Conference of the Parties in 2002 in The Hague. Kitchenuhmaykoosib Inninuwug is in the process of conducting this research which will form the baseline information for any meaningful consultation and substantive accommodation.

Mining plans need to be measured against this traditional knowledge and current use to determine the impact mining will have on the indigenous land-use economies and the impact it will have on the ecological biodiversity of the territory. The baseline will show the sensitivity of each area according to centuries and centuries of traditional knowledge on the capacity of this land to sustain Indigenous Peoples. The Convention on Biological Diversity sets out how critical this kind of knowledge is to sustain the biodiversity human beings depend on. Indigenous Peoples also realize how important this responsibility is when addressing issues like global warming. In fact recognition of the value of these traditional and current land-use plans in regard to recognition of Aboriginal and Treaty Rights is an obvious "check and balance" Canada and Ontario have been ignoring. Traditional land users do have valuable knowledge that can help ensure long-term economically, socially and environmentally sustainable development rather than having modern development blindly destroy lands and resources our future generations may have to depend on.

5. Private rights and interests relating to mining development (mineral rights/surface rights issues) Potential approaches to address mineral rights and surface rights issues.[23]

Indigenous Peoples need to be involved in this level of discussion because provincially created proprietary interests did not extinguish Aboriginal and Treaty Rights. The Ontario Court of

[22] Supra Modernizing Mining Act, page 11
[23] Supra Modernizing Mining Act, page 11

Appeal and other courts have clearly set this out in their decisions. Furthermore, Aboriginal and Treaty Rights need to be recognized within the modern day economies and taken into account through full consultation and accommodation. The sovereign KI peoples will consider all proposals on a case-by-case basis and determine what decision preserves their Aboriginal and Treaty Rights.

The KI reject the proposed consultation process proposed as outlined by the Ministry of Northern Development and Mines in its Discussion Paper. The KI take special issue with the lists of "Proposed Principles for Developing Approaches"[24], specifically Principles 3, 5 and 8, because they do not recognize the full ambit of Aboriginal and Treaty Rights. The full by the ministry are set out in the following:

> Principle 3:Consultation should be conducted with the objective of avoiding adverse impacts on asserted or established Aboriginal and treaty rights. Where avoidance is not possible, consultation will be conducted with the goal of mitigating such impacts.
> Principles 5: Although Aboriginal communities have a right to be consulted in relation to Aboriginal or treaty rights that may be adversely affected by a government action, they generally have no veto over the Crown's decisions.
> Principle 8: The type, scope and content of a "duty to consult" consultation process will depend on such factors as the extent of potential adverse effects, the nature of the activities involved and the strength of the claim to an asserted Aboriginal or treaty right.

With Principle 3 the Ministry clearly foresees that consultation will ultimately result in the mining exploration to proceed and that consultation will merely mitigate the impacts created by the exploration. The sovereign KI peoples do not view this as full consultation because it fails to recognize their right to free prior informed consent, including the possible decision that a development should not proceed. The KI further opposed Principle 5 in which the Ministry does not value Aboriginal and Treaty Rights as a proprietary interest but as a merely procedural rights, foreseeing only that indigenous peoples will be consulted but the exclusive decision-making power remains with the government. The KI assert that they hold the ultimate authority and final decision making power regarding developments in their traditional territories. Principle 8 infers that the Crown can unilaterally determine the strength of the claim of Indigenous Peoples and the impacts on them. KI assert that they have to make this determination and be given the time and resources to do research on their traditional land use and occupancy to establish the extent of potential impacts and violation of Indigenous rights

V. KI PRINCIPLES REGARDING MINING EXPLORATION

The sovereign KI peoples stipulate that a mutually acceptable consultation and accommodation policy in Ontario must be based on the recognition of Aboriginal and Treaty Rights and international minimum standards regarding the Human Rights of Indigenous Peoples.

Canada and Ontario's current economies are based on the Colonial Doctrines of Discover and need to be replaced with a new approach based on the recognition of the Rights of Indigenous Peoples and the minimum standards set out in the United Nations Declaration on the Rights of Indigenous Peoples. It is a Human Rights challenge for Canada and Ontario, but at the same time the only way to ensure economically, socially and environmentally sustainable development for

[24] Toward Developing An Aboriginal Consultation Approach for Mineral Sector Activities, page 7

all future generations. Only recognition of Aboriginal and Treaty Rights will help ensure investment security in Canada and Ontario.

This recognition of indigenous rights can only be secured in high-level political negotiations between the Crown and KI as signatories to the Treaty. It cannot be delegated to the provincial and ministerial level; rather it has to involve the federal government and KI as equal partners. It will require all-encompassing sweeping reforms of federal and provincial laws in regard to land and resource management, environmental protection, health and other related fields. The principles enshrined in the UN Declaration on the Rights of Indigenous Peoples constitute minimum international standards in that regard.

KI has devised the following specific principles regarding mineral exploration:
Investigation of Impacts Before Mineral Exploration:

- Governments, ministries and corporations must recognize KI as the ultimate authority in making decisions regarding access to and KI territories.
- The recognition of indigenous rights must be secured in high-level political negotiations between the Crown and KI as signatories to the treaty. It cannot be delegated to the provincial and ministerial level, rather it has to involve the federal government and KI as equal partners.
- All government policies and laws must be based on recognition of Aboriginal and Treaty Rights and international minimum standards regarding the Human Rights of Indigenous Peoples as enshrined in the UN Declaration on the Rights of Indigenous Peoples.
- KI must give their free prior informed consent to any development on or impacting KI territories.
- KI must receive fair and equitable remuneration for the resources removed from and the profits drawn from their traditional territories.
- All resource development activities are to be carried out in conformance with the KI philosophies, principles and environmental policy including the prevention of pollution to land, air and water, as well as ensuring that natural resources are protected and conserved.
- Prospecting, exploration, discovery, staking, drilling of sampling and or geophysical surveying areas will only be permitted subject to the successful resolution of high-level political negotiations between the Crown and KI as signatories of the treaty regarding the full recognition of Aboriginal and Treaty rights.
- The Crown is required to cover all costs for an independent review by KI of the potential impacts and benefits of proposed mining activities based again on the premise that all outstanding diplomatic issues have been resolved.
- Environmental impact assessment must include health, social, economic, cultural and psychological well-being as well as physical, biological and geochemical environments and how they relate to human and natural environments.
- Baseline information is necessary for an integrated environmental impact assessment and must be conducted before any development takes place. This requires the collection of baseline information on traditional environmental knowledge, wildlife, water quality, fisheries, vegetation, rare/endangered species, sensitive areas, etc.
- All development processes must be carried out in a manner consistent with the traditional practices of KI. KI teachings and indigenous laws must be recognized as the basis for addressing existing and future environmental problems in order to achieve harmony and balance in KI's natural environment.

- Decision-making which affects the health and well-being of KI must involve the community at every step of the process. All decisions must be in complementary to KI values and processes, as well as recognize the cultural and traditional practices of KI.
- In order to assess the severity of any adverse effects of mineral exploration and development, KI will require the Crown first consider Indigenous land use and occupancy according to the baseline data collected by KI according to current best practices research methodologies.