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Mines Alerte

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April 10, 2015

Ms. Bonnie Lysyk,
Auditor General for Ontario
20 Dundas Street West, Suite 1530
Toronto, Ontario
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Dear Ms. Lysyk:

Re: Need for a comprehensive "value-for-money," costs-benefits analysis for mining in Ontario

Current mining policies, programs, and regulations pose a threat to public finance and taxpayers in Ontario, with potentially billions of dollars at stake.

The Ontario government recently announced its intention to review its Mineral Development Strategy (March 2015). MiningWatch Canada is very concerned about the current lack of a comprehensive "value for money," cost-benefit analysis for mining in Ontario.

Pitifully low mining royalties, very low corporate taxes, direct and indirect subsidies, give-away prices on electricity, unaccounted social and environmental costs, and hundreds of millions of dollars in mine site clean-up costs are all major concerns.

According to Natural Resources Canada, mining companies generated over $93.3 billion in gross revenue in Ontario over the last 10 years. During the same period, a meagre 1.5% was generated in mining royalties – 10 times less than a tip at a restaurant!

Low mining royalties are unacceptable, particularly considering that companies are digging up collectively owned non-renewable resources, which will no longer be available for future generations.

In an analysis of the actual taxes paid to governments by the industry, Chen and Mintz at the University of Calgary undertook a study of marginal effective tax and royalty rates (METRR) in 2013. The METRR for the provincial share in Ontario was 2%, one of the lowest in Canada – and possibly in the world.

The Drummond Commission on the Reform of Ontario's Public Services and two successive Ontario budget speeches (2012 and 2013) committed to a review of the mining tax. This review is still pending.

The problem of low mining royalties becomes sharper as one of the industry's main economic benefits — employment — is on a steady decline. Twenty years ago, the metal mining industry employed 20,000 workers, but by 2012, in the midst of an ongoing mining boom, the number of jobs had declined 25% to 15,000, reflecting the increasingly automated nature of mining operations.

The Auditor General last reviewed Ontario's Mineral Development Program in 2005. Many of the recommendations made at that time appear to be ignored in the current Mineral Development Strategy.

MiningWatch Canada is particularly concerned that severe environmental costs and liabilities are not accounted for in the ongoing review. Ontario has some of the worst toxic mining sites in North America, which potentially represent billions in clean-up costs. Current financial assurances for active mines are not providing the necessary security that Ontarians will not have pay the bill – not to mention the bill we already have to pay for abandoned mine sites.

The current Mineral Development Strategy does not address either the significant liability that increasingly larger tailings management facilities represent, nor does it address the lessons learned from the recent Mount Polley disaster in British Columbia. The Independent Engineering Panel set up to look at the cause of the Mount Polley disaster made a number of recommendations about the management of tailings facilities, including an end to the kind of water saturated tailings used at most Ontario mines. The Mount Polley disaster has and will cost hundreds of millions in losses and damages, in addition to a huge cost to the environment and downstream communities.

Ontario is the only province or territory in Canada without a mandatory requirement for environmental assessment of large mines. This greatly increases the risk of accidents and unanticipated effects during operations and after closure. There is no comprehensive baseline study upon which to base an effects analysis, and the existing permitting system does not contemplate ecosystem, social, and cultural impacts.

While the 2009 *Mining Act* revisions included recognition of Aboriginal and treaty rights, it does not recognize a requirement for Aboriginal consent to claim staking, mineral exploration, and development. A number of recent court decisions make clear that the Ontario's mining strategy is failing in its fiduciary responsibility to First Nations, and forcing the Province into a costly and unnecessarily conflictual relationship.

We urgently request that the Auditor General's office exercise its "value-for-money" mandate to evaluate the Ontario Mineral Development Strategy. The attached brief sets out our concerns in more detail.

Sincerely yours,

Ugo Lapointe
Canada Program Coordinator,
MiningWatch Canada

cc. Premier of Ontario
Minister of Northern Development and Mines
Minister of Environment and Climate Change
Environmental Commissioner of Ontario

Value for Money?

Why the Auditor General Needs to Review the Ontario Mineral Development Strategy

MiningWatch Canada, April 10, 2015

We urgently request that the Auditor General's office exercise its "value-for-money" mandate to evaluate the effects of the Ontario Mineral Development Strategy.

It is the Auditor General's responsibility to do this. "The Auditor is...required to assess whether government and broader public-sector activities operate with due regard for economy and efficiency, and whether procedures to measure and report on the effectiveness of programs and organizations exist and function properly. This is known as the "value-for-money mandate."

The last time the Auditor General reviewed the OMNDM Mines and Minerals Program was in 2005. Many serious concerns were identified, and they have been largely ignored. "*The objective of [the] audit was to assess whether the Ministry had adequate procedures in place to:*

- manage mineral resources to ensure that the mining sector is healthy, competitive, **and sustainable**;
- ensure compliance with related legislation and ministry policies; and
- measure and report on the program's effectiveness in encouraging the development and use of the province's mineral resources **while minimizing the impacts of mining activities on public health and the environment and limiting the cost to the taxpayer, by ensuring that the Industry rehabilitates mining sites.**" (emphasis ours)

The 2005 Report on the OMNDM Minerals program from the Auditor General found: "The existing performance measures are mainly economic and do not reflect all aspects of the Ministry's goals and responsibilities. For instance, there are no performance measures for the long-term-sustainability goal or for minimizing the impacts of mining activities on public health and safety and the environment." The Auditor General also expressed serious concerns about financial assurance provisions at operating mines, and about the Ministry's relationship with First Nations.

The new strategy documents reflect the same problems.

From the documents available to the public, it appears that the proposed Mineral Development Strategy:

1. Continues to avoid a transparent "value for money" analysis of the impacts on the province of having the second lowest marginal effective tax and royalty rate (2%) in the country;
2. Continues to rely on an economic impacts model with no debit column (the input-output model) that externalizes all risks, as well as environmental, cultural, and social costs, and continues to have no way of understanding the impacts of mineral development on ecosystem functions nor of the depletion of our mineral resources on future generations;
3. Risks leaving the province as an unsecured creditor to deal with closure of some of the worst toxic sites in North America (in Sudbury, Timmins, Red Lake, and Kirkland Lake); and
4. Continues to force the province into conflict with First Nations over mineral development, creating uncertainty in the industry and continuing impoverishment in remote communities.

The OMNDM 2015 Mineral Development Strategy "Questions for Consideration" offered to the public are all narrowly focused on industry benefit. Contrary to recommendations in the Auditor General's 2005 report, there is no opportunity to discuss impacts on the environment or communities, the risks of perpetual storage of ever-growing amounts of toxic waste, or the consequences of single-minded dependency on an extractive industry built on depletion of a non-renewable resource.

The Ontario Mineral Development Strategy presents an enormous financial, environmental and social risk to the people of Ontario, and the Auditor General needs to act.

Our detailed concerns and recommendations for expanding the Mineral Development Strategy review are set out below.

1. The Mineral Development Strategy continues to avoid a transparent "value for money" analysis of the impacts on the province of having the second lowest marginal effective tax and royalty rate (2%) in the country.

1.1 The Drummond commission[1] and two successive Ontario budget speeches (2012 and 2013) committed to a review of the mining tax. In an analysis of the actual taxes paid to governments by the industry, Duanjie Chen and Jack Mintz at the University of Calgary[2] undertook a study of marginal effective tax and royalty rates (METRR) in 2013, with an update the same year to incorporate changes to the federal system (specifically the 2020 proposed end to the federal 100% depreciation allowance for Class 41a). **The METRR for the provincial share in Ontario was 2%, the second lowest in the country.** The industry continues to use "contributions to government" figures that include taxes paid by employees and contributions to EI, CPP etc.[3], although these amounts might well be contributed by the same employees if they worked elsewhere, and the figures should be net of this possibility. The Mineral Development Strategy review should look at the full impact of mining tax holidays and remote mine allowances, as well as available deductions and incentives in corporate tax calculations.

1.2 The Mineral Development Strategy review should also address the government's direct contributions to research and development and training for the mining industry[4]: the cost of geosciences data collection, grants to industry associations (Ontario Prospectors Association, Ontario Mining Association, etc.), support to mining programs in universities and colleges (NORCAT, OMICC, Centre for Excellence in Mining Innovation, MITAC, Rehabilitation and Applied Research Corporation, etc.)

1.3 There are other government contributions to infrastructure costs at advanced exploration sites and operating mines, including: Ring of Fire development costs, costs of bailouts and compensation such as Platinex[5], legal costs, road building and maintenance, reduced hydro rates (for example, the Northern Industrial Electricity Rate program recently renewed in 2012 for $360 million over 3 years), and limited water taking fees (the AG office found that the 2007 Water Taking Charges Program the charge of $3.71 for every million litres of water taken by high consumption industrial users. Mining was included in Phase 2 of the program. The program was estimated to recover less than 40% of the direct costs of water quality management programs).

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[1] Drummond Commission, Commission on the Reform of Ontario's Public Services. Chapter 11. 2012. http://www.fin.gov.on.ca/en/reformcommission/

[2] Chen, Duanjie, and Jack Mintz. "Repairing Canada's Mining-Tax System to Be Less Distorting and Complex." *SPP Research Paper* 6-18 (2013a). and Chen, Duanjie, and Jack Mintz. "Marginal Effective Tax and Royalty Rates (METRRS) for the Mining Industry After 2013 Budget Changes are Fully Implemented." *SPP Research Paper* 6-18 (2013b).

[3] Dungan, Peter and Steve Murphy. Policy and Economic Analysis Program, Rotman School of Management, University of Toronto. Mining: Dynamic and Dependable for Ontario's Future, December 2012 and An Au-thentic Opportunity: The Economic Impacts of a New Gold Mine in Ontario, December 2014. Submitted to the Ontario Mining Association.

[4] See Ontario's Mineral Development Strategy, Progress Report March 2015, page 5

[5] Peerla, David. No Means No The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty. N.p.: Cognitariat, 2012.

1.4 An analysis of the financial risk to taxpayers of mine abandonment or of a catastrophic tailings dam failure like Mount Polley (see #3 below).

2. The Mineral Development strategy continues to rely on an economic impacts model with no debit column (the input-output model) that externalizes all risks, as well as environmental, cultural, and social costs, and continues to have no way of understanding the impacts of mineral development on ecosystem functions nor of the depletion of our mineral resources on future generations.

2.1 The use of GDP and the Input-Output model[6] to measure the economic contribution of mining is useless. Neither have a debit column, and as a result, all the lost opportunity costs, environmental damage and health costs only appear as credits on the ledgers. This error has been repeated in the much-touted Rotman reports[7] commissioned by the Ontario Mining Association.

2.2 In the 2005 OMNDM review, the Auditor General spoke forcefully on this point:

...to assess its performance, the Ministry reported only two measures: Ontario's global and national ranking for mineral-sector attractiveness, and Ontario's share of Canadian exploration investment (as a percentage of total Canadian exploration expenditures)... However, we noted that the measures were essentially the same as those reported in the past, either publicly or internally. The existing performance measures are mainly economic and do not reflect all aspects of the Ministry's goals and responsibilities. For instance, there are no performance measures for the long-term-sustainability goal or for minimizing the impacts of mining activities on public health and safety and the environment. With respect to sustainability, the World Commission on Environment and Development defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." To meet this objective, planning for the development of a mine must consider how to maintain the quality of the environment, human well-being, and economic security. With respect to environmental protection, we noted that another Canadian jurisdiction requires its mining program to track and report on the achievement of a high standard of environmental protection for its mine sites. If the Ministry were to report in this manner in these areas, it would be better able to determine if mining operations are maintaining the integrity of ecosystem functions, as well as determine the physical, chemical, and biological stress imposed by mining operations on the environment.

RECOMMENDATION:

The Ministry should develop more comprehensive indicators for measuring and reporting on the Mines and Minerals Program's effectiveness in ensuring that Ontario's mining sector is healthy, competitive, and sustainable and in minimizing the impacts of mining activities on public health and safety and the environment."

2.3 This recommendation has been ignored. There continue to be no performance indicators to measure environmental and social impacts of mining and the externalized costs of the activity (including depletion of the resource itself)[8]. This deliberate omission is particularly serious in

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[6] Ontario's Mineral Development Strategy, Progress Report March 2015.
[7] Dungan, Peter and Steve Murphy. Policy and Economic Analysis Program, Rotman School of Management, University of Toronto. Mining: Dynamic and Dependable for Ontario's Future, December 2012 and An Au-thentic Opportunity: The Economic Impacts of a New Gold Mine in Ontario, December 2014. Submitted to the Ontario Mining Association. Both are prime examples of the use of the Input-output model and what it externalizes.
[8] Ontario's Mineral Development Strategy, Progress Report March 2015.

terms of planned new developments like the Ring of Fire. A case study of the impacts of the Victor Mine on Attawapiskat would be a salutary exercise for all concerned.

2.4 The lack of mandatory environmental assessment (EA) for major mines in Ontario means that there is usually no comprehensive baseline study upon which to base an analysis of environmental effects. The permitting system for mines in Ontario is piecemeal, and not compensated for by the gutted federal *Canadian Environmental Assessment Act (2012)*. The Class EA that was introduced in 2011 only considers activities undertaken by the province, but does not consider the granting of mining claims and leases to be one of those activities requiring an EA. Ontario is the only province or territory in Canada that does not require an EA for large mines.[9]

3. The Mineral Development Strategy risks leaving the province as an unsecured creditor to deal with the closure of some of the worst toxic sites in North America (in Sudbury, Timmins, Red Lake, and Kirkland Lake).

3.1 The Financial Assurance program under Part VII of the Mining Act (Reg. 240/00 sections 16-18) enables companies with a B credit rating to self-assure for half of the estimated life-of-mine; companies with an A rating can self-assure for the entire life-of-mine. However, most companies incorporate subsidiaries to run their mines whose only asset is the mine itself; a bankruptcy of the subsidiary leaves the province holding the bag for reclamation. The taxpayers' only protection is a line on the company balance sheet.

3.2 A Freedom of Information request filed by MiningWatch in 2006 revealed that both Inco and Falconbridge were exempt from posting financial security for their facilities in Sudbury and Timmins. Their combined risk at closure was estimated at over $585 million[10]. This self-assurance provision has undoubtedly been passed on to Xstrata and Vale, and probably now includes Goldcorp and some other mines. These mining "camps" encompass huge tailings impoundments and waste rock dumps. There are plumes of nickel in aquifers under Sudbury that have to be controlled, and a plume of arsenic under Balmerton. If the companies close, what protection will we have for managing these sites in perpetuity?

3.3 In Quebec, since its *Mining Act* reforms, the government has to publically post – for each mine – the form of security, the amount, and the estimated costs of closure. We have no idea of the situation in Ontario. Recently, however, the Timminco mine near Timmins was abandoned to government. The company had only posted $$900,000 in security, but the costs of pumping and treating effluent had been over $320,000 a year.[11]

3.4 In addition, since mining is essentially a waste management industry, tailings management facilities and waste rock dumps in Ontario are constantly expanding, using outdated technology like dams and water covers. Following the Mount Polley disaster in BC, an expert panel of three renowned engineers was set up by the BC government and affected First Nations to look at the causes of the tailings dam failure and make recommendations to prevent a similar situation occurring in the future.[12] The BC government has now said it accepts these recommendations.[13]

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[9] Ibid, page 6.
[10] MiningWatch Canada. Public Taxpayers unprotected from potential costs of cleaning-up $584 million of contaminated sites at Inco and Falconbridge operations. April 13, 2006; included the FOI response setting out the amount of unsecured liabilities.
[11] Diane Saxe. Blog post. http://envirolaw.com/twist-insolvency-environment
[12] Dr. Norbert R. Morgenstern (Chair), CM, AOE, FRSC, FCAE, Ph.D., P.Eng.; Mr. Steven G. Vick, M.Sc., P.E.; and Dr. Dirk Van Zyl, Ph.D., P.E., P.Eng. Report on Mount Polley Tailings Storage Facility Breach, Independent Expert Engineering Investigation and Review Panel, Province of British Columbia, January 30, 2015.

Of real significance is the Panel's recommendation in January 2015 that Best Available Technologies (BAT) must be implemented for tailings impoundment areas, and that the use of saturated tailings and water covers in perpetuity is too risky and unacceptable. Most tailings in Ontario rely on water covers, but there has been thunderous silence from the Ministry on the Panel's recommendations.

4. The Mineral Development Strategy continues to force the province into conflict with First Nations over mineral development, creating uncertainty in the industry and continuing impoverishment in remote communities.

4.1. The price being paid for the ineffective "engagement" strategy undertaken by the province with First Nations is high, both for indigenous peoples and for the rest of us. While OMNDM focuses most of its attention on mining as an economic driver in areas like the Ring of Fire, other opportunities and concerns are ignored. There are numerous economic opportunities for First Nations in import replacement strategies (water, housing, food, energy supply); there are crying needs in their communities for community services, education, and technical services. These opportunities could be addressed by the other programs in OMNDM, like the Northern Ontario Heritage Fund, and by other government programs if the resources were made available.

4.2. The impact-benefit agreements signed by some First Nations with mining companies are inadequate to meet these needs for self-driven development over the long term, based on available evidence. Since most of these agreements are confidential, it is difficult to properly evaluate their effectiveness. Discussions about "revenue sharing" are usually based on a share of the tax collected by governments. If indeed the METRR is only 2%, is the offered revenue sharing only 2% of nothing?

4.3. While the 2009 *Mining Act* revisions included recognition of Aboriginal and treaty rights, OMNDM continues to ignore the right of First Nations to say "no" to claim staking, mineral exploration and development. Although *Mining Act* changes require "consultation" before an exploration permit can be issued, it does not recognize a requirement for Aboriginal consent.

4.4. Many First Nations in other parts of Canada are developing their own mining policies and resource laws based on consent[14]. In Ontario, Kitchenuhmaykoosib Inninuwug has led the way[15]. These actions are based in the *Tsilhqot'in* and *Kaska* decisions (discussed below).

4.5. *Kaska vs. Yukon*[16] clearly established the right of First Nations to withhold their consent BEFORE claims are staked. When the case was appealed to the Supreme Court of Canada, the Court refused to hear it, so it may stand as law in other parts of Canada. The appeals court judge in the Yukon made it clear that governments had discretion to refuse to register a claim, and to refuse to allow those who had staked a claim to go forward with mine exploration and development. Since the government made the law, it could also change it. In Ontario this is

[13] Cecilia Jamasmie. Mount Polley disaster prompts new tailings ponds regulations. March 20, 2015. http://www.mining.com/mount-polley-disaster-prompts-new-tailings-ponds-regulations/?utm_source=digest-en-mining-150322&utm_medium=email&utm_campaign=digest
[14] Ross River Dene, resource law development: http://www.miningprospectslawblog.com/2015/02/04/kaska-nation-announces-plans-to-develop-a-new-resource-law-in-its-traditional-territory-while-yukon-government-extends-staking-prohibition-in-ross-river-area/ and Northern Secwepemc te Qelmucw (NStQ) Leadership Council. Northern Secwepemc te Qelmucw Mining Policy. November 19, 2014. Available at: http://www.fairmining.ca/wp-content/uploads/2014/12/NStQ-Mining-Policy_Nov19.20141.pdf
[15] http://kilands.org/wp-content/uploads/2011/10/Ariss-Cutfeet-D.pdf
[16] http://www.kaskadenacouncil.com/newsarchives/current-news/item/court-of-appeal-agrees-with-kaska-challenge-to-free-entry-mining-system-media-release

extremely important as the government claims it has no discretion to limit the rights of any person who has staked a claim (or purchased one) to go ahead with all other stages of mining. This has enormous implications for First Nations, such as those in the Ring of Fire, for example, who are concerned about the sale of Cliffs Natural Resources' properties to Noront, or for other First Nations who want more control over mining permits.

4.6. The other case of importance is *Tsilhqot'in*,[17] which applies to Aboriginal governments that have not signed a land cessation treaty, like the Algonquins, and to other First Nations for whom the treaty process was clearly fraudulent. There is no indication in the OMNDM document of the significance of these developments. For example, Treaty 9 covers two-thirds of northern Ontario, and is currently being challenged by the Mushkegowuk Council claiming that as the Aboriginal signatories, they were misled about what they were signing.[18] The treaty did not properly assess the value of the lands to be transferred, and First Nations were coerced into signing by the government withholding food. They say that the following clause from Treaty 9 was not in the original document which had been orally agreed to in 1905: "*that such portions of the reserves and lands above indicated may at any time be required for public works, buildings, railways, or roads of whatsoever nature. [They] may be appropriated for that purpose by His Majesty's government of the Dominion of Canada".* In 2011, the diary of Daniel MacMartin, Treaty Commissioner for the Crown who personally signed Treaty 9, was located. The diary contains MacMartin's summary of the day's events, and it contains indications – possibly proof – that Treaty 9 was not signed in good faith, and could, therefore, be overturned.

4.7. The short shrift that has been given to the demands for a full environmental assessment in the Ring of Fire by both the province and the federal government trivializes the concerns of First Nations regarding environmental and social impacts.[19] The *Tsilhqot'in* decision sets the framework for evaluating these impacts throughout a broad territory, and makes the OMNDM approach to areas of "cultural significance" insulting.

5. Conclusions

From the documents available to the public, it appears that the Ontario Mineral Development Strategy:

1. Continues to avoid a transparent "value for money" analysis of the impacts on the province of having the second lowest marginal effective tax and royalty rate (2%) in the country;
2. Continues to rely on an economic impacts model with no debit column (the input-output model) that externalizes all risks, as well as environmental, cultural, and social costs and continues to have no way of understanding the impacts of mineral development on ecosystem functions nor of the depletion of our mineral resources on future generations;
3. Risks leaving the province as an unsecured creditor to deal with closure of some of the worst toxic sites in North America (in Sudbury, Timmins, Red lake and Kirkland Lake); and
4. Continues to force the province into conflict with First Nations over mineral development, creating uncertainty in the industry and continuing impoverishment in remote communities.

It is urgent that the Auditor General's office exercise its "value-for-money" mandate to evaluate the Ontario Mineral Development Strategy.

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[17] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44
[18] Mary Wiens, CBC News Posted: Jun 27, 2014. Tsilhqot'in First Nation ruling means revisiting the James Bay Treaty, says lawyer Aboriginal ruling in B.C. has implications for Ontario
[19] Environmental Commissioner of Ontario. The Big Picture: Regional Strategic Environmental Assessment in the Ring of Fire. n.d. http://www.ecoissues.ca/The_Big_Picture:_Regional_Strategic_Environmental_Assessment_in_the_Ring_of_Fire