

Northwest & Ethical Investments L.P.

October 15, 2008

The Honorable Michael Gravelle,
Minister of Northern Development and Mines,
Government of Ontario
Room 5630 – 99 Wellesley Street West
Toronto, Ontario, M7A 1W3

Re: **Submission on modernizing Ontario's Mining Act**

Dear Minister Gravelle,

Northwest & Ethical Investments L.P. would like to commend the Province of Ontario for taking steps to modernize its Mining Act and for seeking stakeholder input in this process. We believe that incorporating a permit-based tenure system and the principle of Free, Prior and Informed Consent into the Mining Act would increase investment certainty and reduce risk, to the benefit of investors, mining companies and other stakeholders.

With \$4.7 billion in assets under management, **Northwest & Ethical Investments L.P.**'s approach to investing incorporates the thesis that companies integrating best environmental, social and governance practices into their strategy and operations will provide higher risk-adjusted returns over the long term.

We would like to offer an investor perspective on elements that should be included in a modernized Ontario Mining Act. Your discussion paper, *Modernizing Ontario's Mining Act: Finding a Balance*, defines five critical policy issues which must be addressed. Our submission relates to three of these issues: the mineral tenure system, Aboriginal rights and land use planning in Ontario's Far North.

In recent years, high profile conflicts between mining companies and Aboriginal people in Canada have led to costly project delays and, in some cases, complete project cancellation. Examples include the disputes between Platinex and the Kitchenuhmaykoosib Inninuwug First Nation; between Northgate Minerals and the Gitksan First Nation and Tse Kay Nay First Nation; and between UR Energy and the Akaitcho Dene First Nation. Aboriginal governments are frustrated by what they view as infringements of their treaty rights and by the failure of mining companies, in some cases at least, to deliver socio-economic benefits to affected communities while minimizing environmental impacts.



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One source of conflict is the free entry tenure system¹, which provides miners with exclusive rights to Crown-owned minerals. It presupposes that mining represents the highest and best use of land. We believe the free entry system is not working. It is not consistent with changing attitudes towards the environment or with evolving case law on Aboriginal rights, and the conflicts it generates expose mining companies and their investors to increased uncertainty and risk. To alleviate this situation, we recommend that the Government of Ontario abandon the free entry system and move to a permit-based tenure system.

A further step to mitigate the risk of conflict would be incorporating the principle of Free, Prior and Informed Consent (FPIC) into the Mining Act. FPIC has been defined as:

the right of a local community to be informed about mining operations on a complete and timely basis and to approve a mining operation prior to the commencement of operation. This includes participation in setting the terms and conditions addressing the economic, social and environmental impacts of all phases of mining and post-mining operations².

FPIC is an emerging standard for corporate engagement with Aboriginal people. It has been incorporated into the United Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization's Indigenous and Tribal Peoples Convention 169, and the report of the World Commission on Dams.

In February 2008 we released a report, *Winning the Social License to Operate: Resource Extraction with Free, Prior and Informed Community Consent*, highlighting the emergence of FPIC and its value as a way for companies to increase investment security. We enclose a copy of the report with this submission³.

As underscored in our paper, FPIC is an active and ongoing best practice to win and keep community consent. Consent should not be confused with consultation. Consultation, as a passive, one-way process, is not sufficient. In seeking consent, companies must accept the possibility that their project might not proceed. However, projects based on FPIC face less risk, greater certainty of proceeding, and less incidence of community opposition. FPIC should be seen as an investment to ensure that the extractive project will succeed: the financial, operation and reputational costs of not obtaining community consent can be very high⁴. To enhance investment security, we recommend that the Government of Ontario

¹ Issues surrounding the free entry tenure system are discussed in detail in the following reports: International Boreal Conservation Campaign, *Mineral Exploration Conflicts in Canada's Boreal Forest* (2008), <http://www.interboreal.org/miningreport/MineralExplorationConflicts-Report-May2008.pdf>.

West Coast Environmental Law, *Undermining Our Future: How Mining's Privileged Access to Land Harms People and the Environment*, (2004), <http://www.wcel.org/wcelpub/2004/14094.pdf>

² Environmental Law Institute, *Prior Informed Consent and Mining: Promoting Sustainable Development of Local Communities* (2004), http://www.elistore.org/reports_detail.asp?ID=10965

³ The report can be found at <https://www.ethicalfunds.com/SiteCollectionDocuments/docs/FPIC.pdf>

⁴ The World Resources Institute report *Development without Conflict: The Business Case for Community Consent*, (2007) <http://www.wri.org/publication/development-without-conflict> provides examples highlighting the financial costs of not obtaining community consent.

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should also adopt Free, Prior and Informed Consent as a corporate requirement and provincial standard in determining whether or not a mining project should proceed.

As a member of the Boreal Leadership Council, a collaboration between companies, NGOs and Aboriginal people, we support the Boreal Forest Conservation Framework. In this context we commend the Government of Ontario's recent announcement of the Far North Planning Initiative, proposing protection of more than half the Northern Boreal lands as well as broader land use planning for sustainable development, which would be consistent with the Framework. However, as stated in your discussion paper, the process of comprehensive land use planning in the Far North is expected to take 10 to 15 years. We believe that incorporating a permit-based tenure system and FPIC into the modernization of the Mining Act will help to ensure that mineral claim staking and exploration in the interim period do not undermine the Far North Planning Initiative. It is critical that government initiatives for modernization of the Mining Act and for sustainable land use planning should be mutually supportive.

As stated in your 2006 *Mineral Development Strategy*, Ontario aims to remain "one of the world's leading mining jurisdictions while, at the same time, supporting responsible and sustainable mineral development that benefits communities and all Ontarians"⁵. We believe that investment security in the Ontario mining sector would be enhanced by a Mining Act incorporating a permit-based mineral tenure system and the principle of Free Prior and Informed Consent, in the context of a comprehensive land use plan that recognizes a variety of perspectives on the highest and best use of land.

Please do not hesitate to contact us for further discussion of the issues raised in this submission.

Sincerely,

Northwest & Ethical Investments L.P.



Robert Walker
Vice President, Sustainability

⁵ Province of Ontario, (2006), page 6, http://www.mndm.gov.on.ca/mines/mds/documents/MinDevStrategy_e.pdf