Committee on the Elimination of Racial Discrimination
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Submission on Canada's 19th and 20th Periodic Reports

Fundamental Improvements Needed: The Mining Sector and Indigenous Rights in Canada

By MiningWatch Canada

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MiningWatch Canada was formed in 1999 by environmental, labour, and aboriginal groups in Canada to institutionalise their work on mining issues; and by Canadian international development, human rights, and social justice groups to support partner organisations and communities in the "Global South" facing incursions and abuses resulting from the activities of Canadian mining companies.

Our Board and staff have expertise and experience in environmental policy and campaigning, community and labour organising, community economic development, organisational management and fund-raising, international development and international solidarity, and indigenous rights. Five of our twelve Board members are indigenous.

We work to stop irresponsible mining – where mining activities damage people's health and the environment, where local opposition to projects is ignored, where people lose land and livelihoods without fairly negotiated compensation, and where human rights are not respected. The principle mechanisms to achieve this goal are transparent and effective legislation and regulations that take into account the true ecological and social costs, and are designed to protect human rights, Indigenous rights, the environment, human health, and local economies.

As part of the core functions of our organization, MiningWatch monitors developments in how the mining industry impacts Indigenous communities both within Canada and where Canadian mining companies operate internationally.

We were very pleased to see attention drawn to Canada's lack of mechanisms for controlling Canadian companies' operations outside the country in the committee's Concluding Observations of Canada's 17th and 18th reports. We remain very concerned about this issue and are part of a joint submission on the topic being filed with the committee under separate cover. In this submission, we wish to draw the Committee's attention to ongoing serious problems in Canada with regard to Indigenous peoples and the mining sector.

Discrimination against Indigenous peoples' access to resources and benefits from resource development from their traditional lands is a key factor limiting the socio-economic development of many Indigenous communities in Canada. The committee rightly pointed Canada to its poor record on addressing the issue of discrimination in the access to land, and made viable recommendations for improvements, including the implementation of the findings of the 1996 Royal Commission on Aboriginal Peoples in its Observations on the 17th and 18th Reports (paragraph 21).

The Committee's observations and recommendation regarding the lack of progress in settling land claims and the forced reliance of Indigenous peoples on the courts to resolve disputes (paragraph 22) are also very relevant to our work on mining issues. Across Canada, mining has historically been and continues to be an industry that dispossesses Indigenous people of their lands.

We also appreciate the Committee's recommendation to Canada to endorse the UN Declaration on the Rights of Indigenous People (UNDRIP) and ILO 169 (paragraph 27), as these instruments explicitly require the Free Prior and Informed Consent of Indigenous peoples to mining or other major projects in their territories. Further, we request the Committee consider the work of UN Special Rapporteur James Anaya on the impact of extractive industries on the rights of indigenous peoples, the report of the Inter-American Commission on Human Rights, titled '*Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System*' and the work of the Expert Mechanism on Indigenous Peoples on the full and effective participation of indigenous peoples on decisions that affect them.

Canada's 19th and 20th Reports to the Committee have failed to meaningfully address the interrelated issues of discrimination over access to land, the lack of progress in negotiated land rights settlements, and Canada's implementation of related international instruments.

The section of the report forming the federal government's response is disappointing because of the absence of detail, progress reporting and commitments for improvement, and the lack of any reference to the UNDRIP and Canada's belated endorsement of the declaration.

The provinces' comments in the report to the Committee offer no commentary what so wever regarding land rights, title, resource use or the UNDRIP. This is extremely problematic given that provincial governments have jurisdiction over so-called "crown lands" and are the principle authority over mineral development activities and other natural resource sectors in each province.

In paragraph 101, the report from Canada states that "Canada continues to negotiate self-government agreements with Aboriginal communities, which leads to the enhanced enjoyment of economic, social and cultural rights." In fact, very little progress has been made in recent years towards settling land-based conflicts through land claim processes or other negotiations and Indigenous peoples continue to rely on the courts, civil disobedience and other pressure tactics in order to defend their rights.

Another fundamental problem with the Canada report is its failure to explain how any progress in concluding land claim negotiations actually leads to the asserted goal of improved well being for Indigenous peoples.

In a document prepared for the recent Crown-First Nations Gathering, The Assembly of First Nations states:

> By any objective standard the current federal Comprehensive Claims Policy (CCP) is a complete and costly failure. It has resulted in endless negotiations and almost no agreements. This reflects its principal failure – its inability to achieve reconciliation between the pre-existing Aboriginal title of First Nations and the de facto sovereignty of the Crown. Reconciliation, according to the Supreme Court of Canada, is the underlying purpose of section 35 of the Constitution Act, 1982 – this is a rejection of the doctrines of discovery and terra nullius. The CCP is out of step with domestic Canadian law and international law, including the UN Declaration on the Rights of Indigenous Peoples and the Inter-American Declaration on the Rights and Duties of Man.[1]
>
> Meanwhile, as the endless negotiations continue, the poverty level keeps climbing as First Nations continue to be denied meaningful involvement in the development of their traditional territories.

Current land claim processes in Canada require Indigenous people to renounce existing rights and title to their land in exchange for a limited set of defined rights and title within the land claim. Many Indigenous peoples oppose this process of renunciation and have called for a process that affirms and recognizes the extent and scope of existing rights and title. The Union of BC Indian Chief's states that it is the federal and provincial governments' desire to create certainty that drives this interest:

> These agreements are not fair or equal: there is no sharing. The Crown gets complete recognition of its sovereignty, its underlying title to our lands and the supremacy of its laws over our governments and People. Indigenous groups get limited recognition of title to reduced pieces of land, the right to co-manage resources (along with government and third parties interests) and self-government which is subject to Canadian and provincial laws.[2]

Problematic and as unsuccessful as they may be for most of Canada's indigenous peoples, self-government agreements and comprehensive land claims are only being negotiated where historic treaties were not signed. Where historic treaties were signed, the provincial and federal governments fail to implement them or respect them, claiming that Indigenous title to the land does not exist. This belief is based on a unilateral interpretation of the treaties which is increasingly coming under question through research into the historic process of treaty signing, recognition of the oral tradition of the Indigenous signatories and legal proceedings.

The recent Keewatin court decision from Ontario suggests that the province's unilateral authority over lands presumably ceded in an historic treaty, were not ceded to the province at all. This means that past and current exercises of authority by the province, the overwhelming majority of which were to the exclusion of First Nations, were and are contrary to Canadian law. First Nations jurisdiction and First Nations land rights are the

[1] Assembly of First Nations. 2012. 2012 FIRST NATIONS PLAN: Honouring our Past, Affirming our Rights, Seizing our Future. www.afn.ca/uploads/files/2012firstnationsplan.pdf

[2] Union of BC Indian Chiefs. Certainty, Canada's Struggle to Extinguish Aboriginal Title, http://www.ubcic.bc.ca/Resources/certainty.htm#ixzz1kKKBxsWg

subject of a pervasive and continuing discrimination, particularly vis a vis the jurisdiction and land rights derived from provincial authority, including subsurface rights.

Oral history and the alternative interpretations of the treaties are showing that the Indigenous peoples who signed the treaties agreed to share their lands, not give them up to the Crown, and that they were assured extensive protection of their traditional activities without exception.

Provincial and federal governments claim to satisfy their obligations to protect Indigenous rights through provisions of consultation and accommodation regarding mineral development projects. Provinces do not acknowledge a requirement for consultation and accommodation for early stages of mineral development and have no policies or requirements in place for requiring consultation and accommodation, let alone the higher standard of FPIC, for mineral exploration within indigenous traditional territories.

Exploration activities are presumed by provincial regulators to be inconsequential to Indigenous rights and title even though environmental and social impacts may result. Although it fails to provide a complete listing of potential impacts, the government of Canada does acknowledge that impacts from exploration may occur in Natural Resources Canada's online *Mining Information Kit for Aboriginal Communities.*[3]

In the past year, MiningWatch been in communication with the following First Nations experiencing un-wanted exploration activities, or exploration activities occurring with no prior consultation: Wolf Lake Algonquin (Quebec), Eagle Village Algonquin (Quebec), Barrier Lake Algonquin (Quebec), Lac Simon Algonquin (Quebec) Innu Takuaikan Uashat mak Mani-Utenam (Labrador), Wahgoshig Algonquin (Ontario), Kitchenuhmaykoosib Inninuwug Oji-Cree (Ontario), Constance Lake Oji-Cree (Ontario), Garden Hill Oji-Cree (Manitoba), West Moberly Dane Zaa (British Columbia), Neskonlith Secwepemc (British Colubmia) and the Tsilhqot'in (British Columbia). This is in no-way a comprehensive list but simply those First Nations who have contacted MiningWatch for information and assistance.

Four of the aforementioned First Nations have had to resort to legal action to force companies to the negotiating table; in two other cases, media and direct lobbying pressure on companies sufficed to bring them into consultation. In two of these cases, the First Nations had to engage with operators on the ground to oblige them to leave their territory, most these communities face ongoing conflicts.

When First Nations have faced governments and companies in court over consultation on early stages of mineral development, they have by and large been successful. Examples include: Kitchenuhmaykoosib Inninuwug and Ardoch Algonquin v. Ontario (2007), Ross River Dena Council v. Government of Yukon (2011), West Moberly v. British Columbia (2011), Wahgoshig v. Solid Gold Resources (2011), Constance Lake v. Zenyatta Ventures (2011) and Tsilhqot'in v. British Columbia (2011).

Though successes in court could be seen as a positive outcome, as the Committee has pointed out, resolving issues in the courts by default is inappropriate as it places a significant financial burden on the Indigenous communities. The number of successful court cases

[3] http://www.nrcan.gc.ca/minerals-metals/aboriginal/mining-information-kit/3596#exp1-3

should be a clear indication to provincial governments that their legislation and policies need to be modified.

The number of conflicts occurring over mineral exploration in Ontario is particularly disconcerting given that the province has recently reformed its mining act, which now requires consultation on exploration activities. Ontario is the first province to do so but regulations have not yet been set in place to make this requirement legally binding and conflicts continue to arise.

In Quebec, a mining reform process (Bill 14) has paid scant attention to issues of Indigenous consultation, accommodation and consent, and has not meaningfully involved the Indigenous people of Quebec in the drafting of the legislation. The Chiefs of Wolf Lake and Eagle Village Algonquin expressed their concerns in a letter to Quebec Premier Jean Charest and issued a press release with the following comment:

> The Chiefs' letter states that "[w]ithout an agreed upon process for addressing our Aboriginal Rights and Title, mineral development activities in our territory are likely to result in increasing tension and conflict between mining companies, Quebec and our Algonquin peoples." Bill 14 only vaguely acknowledges the need for Aboriginal consultation "depending on the circumstances". Moreover, Bill 14 has been developed without any consultation with the Algonquins and does not address many of their concerns with the current system of allocating mining rights. [4]

In the absence of clear government requirements, some Indigenous peoples are establishing their own criteria to engage with provincial governments and exploration and development companies. The Nunatsiavut Government (Inuit of Labrador) has developed its own mining code with a requirement for consent and it is able to enforce it on the land where title has been recognised. Other First Nations without recognised title have to rely on the goodwill of companies, pressure tactics and the courts to assert their own regulations.

In the absence of provincial regulations and policies of FPIC for exploration activities, some responsible operators are choosing to engage and sign agreements with the Indigenous peoples on whose territory they plan to operate. These agreements may include communication plans, provisions for employment and training opportunities, financial compensation and plans for future negotiations should the project proceed beyond exploration. While these agreements have been effective at improving the relationship with Indigenous communities and improving the social performance of the exploration companies, there is little consistency and nothing *requires* companies to engage – putting Indigenous peoples at a significant disadvantage in the negotiating space.

As projects proceed to the stage for review of proposed mine projects, legislation and government policies in the provinces do not address the need for FPIC of Indigenous peoples before approval is granted.

There is provision for a degree of consultation and accommodation in the review of projects but meaningful engagement of Indigenous peoples is constrained by access to technical

[4] Algonquins Oppose Quebec Mining Act and Proposed Changes in Bill 14, Monday, August 22, 2011 http://www.miningwatch.ca/news/algonquins-oppose-quebec-mining-act-and-proposed-changes-bill-14

expertise, timelines for review that do not ensure meaningful consultation, and the politicization of final decisions on a project.

First Nations in northern Ontario have been forced to go to court in order to have their interests reflected in the review of major mineral development projects in their traditional territories. Pic River Ojibway submitted many recommendations for the review of a proposed platinum mine near their community but these were ignored by the federal government agency responsible for the process. The Matawa First Nations have also gone to court in order to try to ensure a meaningful review for a massive multi-billion dollar proposed development that would include an open pit chromite mine, a mill, extensive transportation corridors and a ferrochrome processing facility.

In British Columbia, the Nak'azdli and Tsilhqot'in have been profoundly disappointed with review processes of mining projects in their territories. The Mt. Milligan project in Nak'azdli's traditional territory has been approved and is under construction despite the Nation's opposition and legal proceedings in which they are claiming that the government did not meet its obligations for consultation and accommodation. The Tsilhqot'in are facing the proposed Prosperity Gold-Copper Mine that was approved by a provincial review process that proceeded without any substantive consultation with the affected First Nations. A more extensive and consultative federal process rejected the project but the proponent, 3 months after having its proposal rejected, has re-submitted the project using an alternative mine plan that was already discredited in the previous review. The Tsilhqot'in now have to re-engage in a burdensome review process to defend their territory.

In order to gain support for a mine project in the advanced stages of development, it is now standard practice for Indigenous peoples and mining companies to sign agreements to accommodate the First Nations for potential impacts on their rights and title. These "Impact Benefit Agreements" (IBAs) typically include revenue sharing, employment and training, environmental monitoring, conflict resolution and communications aspects.

In most of the provincial Indigenous territories where historic treaties and unceded lands predominate, there is no requirement for negotiation of IBAs under provincial mineral legislation and policies. Agreements are negotiated and signed in a regulatory vacuum and are often kept confidential, making it difficult to achieve consistency or any incremental improvements between project agreements.

Indigenous organizations, NGOs and academics have attempted to fill the void through development of an IBA toolkit[5], creation of a research network[6] and conducting training sessions on IBAs across the country. While these make important contributions, they should not be seen as alleviating the provincial and federal governments from their obligations under Canadian and international law.

An excellent overview of one of Canada's first IBAs – the agreement for the Voisey's Bay Nickel Mine – was presented to the Office of the High Commissioner for Human Rights during an expert seminar on Indigenous People's Permanent Sovereignty by current

[5] www.ibacommunitytoolkit.ca
[6] www.impactbenefit.com

MiningWatch Board member Armand MacKenzie[7]. While this case is a positive example of reconciliation and has helped set the stage for more recent IBAs, the summary of the seminar failed to recognise the enormous burden the Innu and Inuit faced in getting the agreement. It has also not met their expectations. A 2010 inquiry into a protracted labour dispute at the mine reported that:

> The Innu and the Inuit peoples of Labrador each believe that they are given only minimal employment advantages and little respect for their culture and their employment aspirations, despite the commitments made to them in the IBAs. This perception is inconsistent with the positive relationship intended by these IBAs.[8]

Late in 2010, Canadians were made aware of the deplorable conditions in which the people in the Cree community of Attawapiskat are living. Extensive media coverage informed Canadians of an acute housing crisis, poor water and sanitation infrastructure and lack of proper school facilities. Sadly these conditions are not unique to Attawapiskat. The fact that the community has an IBA with a profitable diamond mine 90 km upriver from the community has done little to address the serious infrastructure deficit faced by the community. Prior to the national attention members of the community blockaded the winter road that provides access to the mine in an effort to improve the benefits for the community.

Other Indigenous communities have spoken out favourably regarding the IBAs they have signed with mining companies. These include Inuit of Nunavik (northern Quebec) who have an IBA with the Raglan mine, and three Ojibway communities in nothwestern Ontario that have an IBA with the Musselwhite mine.

Clearly, the experience with IBAs is mixed and our intention here is not to do a comprehensive review of this experience. We do wish to highlight the fact that across the regions of Canada where most mineral exploration and development activity is occurring (Newfoundland and Labrador, Quebec, Ontario, Manitoba, BC), there is no legislative or policy context for FPIC, revenue sharing or negotiation of IBAs. Important exceptions to this are the area covered by the Nunatsiauvut land claim and to a lesser degree, the area covered by the James Bay and Northern Quebec Agreement.

In BC, the provincial government has indicated its willingness to sign revenue sharing agreements with First Nations for mine projects. These, however, are being done on a case by case basis and we are concerned that the agreements are being used to further divide Indigenous opponents and Indigenous supporters of mineral development. The first agreements announced were for areas of the province where there are First Nations taking a stronger stance over the protection of their territories than those who support industrial developments and mining.

While exploration agreements, IBAs and revenue sharing provide for better relationships and benefits from mineral development, when Indigenous communities do not give their consent to a project due to fundamental concerns about the potential impacts of the project, such

[7] MacKenzie 2006. Submission to Expert Seminar On Indigenous Peoples' Permanent Sovereignty Over Natural Resources And On Their Relationship To Land, 25, 26 and 27 January 2006 Palais des Nations. http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/BP5Sovereignty.doc

[8] NL Labour Relations Agency. 2010. Report of the Industrial Inquiry Commission in the matter between Vale NL and Unites Steel Workers, Report No. 1. http://www.gov.nl.ca/LRA/voisey_bay.html

agreements can serve no practical purpose. Saying "no" to a mine development remains exceedingly difficult for Indigenous peoples across Canada.

In our comments above we have repeatedly referenced the burden that Indigenous peoples in Canada face when they confront the mining industry and try to ensure the protection of their rights and title to their land and resources. This burden was well documented for the context of Indigenous people in British Columbia by the Harvard Law School's International Human Rights Clinic in the 2010 report *Bearing the Burden: The Effects of Mining on First Nations in British Columbia*.[9] The summary of the report states:

> The experiences of Takla Lake First Nation, which is based in remote northern British Columbia, illustrate that the province's mining laws are a problem in practice as well as on paper. While Takla has good relations with some mining companies, it has generally been ambivalent or even hostile to new projects. This attitude stems largely from the fact that community members feel excluded from the process that reviews proposals and inundated with mining claims and projects on their traditional territory. In addition, Takla—home to exploration sites, a major open-pit mine, and several abandoned operations—has seen the range of harms caused by different stages of mining. Members of Takla widely report destruction of habitat, a decrease in wildlife, and a fear of health problems from contaminants. Because of Takla's close ties to the land, these effects cause cultural as well as environmental injury. Finally, even those members who are willing to accept mining say that they have not received the benefits that are supposed to accrue from the industry—in particular, revenue sharing and employment opportunities. Takla's story—its experience with disenfranchisement and harms accompanied by few benefits—illustrates that the current legal regime needs reform to better preserve First Nations' lands and culture.

Recommendations

1. Canada and provincial governments should recognize and implement legislation and policies that require consultation and FIPC for all mineral exploration and development activities.

2. The role of Indigenous peoples in formal environmental assessment and project review processes should be strengthened to meet obligations for consultation, accommodation and FPIC, and should be considered a nation-to-nation dialogue.

3. Given its fiduciary responsibility to Aboriginal peoples, Canada should reverse its direction on "regulatory" streamlining and cutting funding for environmental review agencies and in particular the funds for Aboriginal participation in review processes as these actions risk further discriminating against Indigenous peoples and their ability to meaningfully participate in decisions about their lands.

[9] http://www.law.harvard.edu/news/spotlight/human-rights/related/bearing_the_burden_oct_2010.pdf

4. Revenue sharing and the development of Impact Benefit Agreements should be mandatory for all new projects but should not rely on the case by case negotiation of companies and Indigenous peoples. Minimum standards and expectations for such agreements should be developed jointly by provincial and territorial governments, and Indigenous peoples.