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Honourable Greg Rickford,
Minister of Energy, Northern Development and Mines
cc. Lori Churchill, Director, Indigenous Consultation and Partnerships Branch

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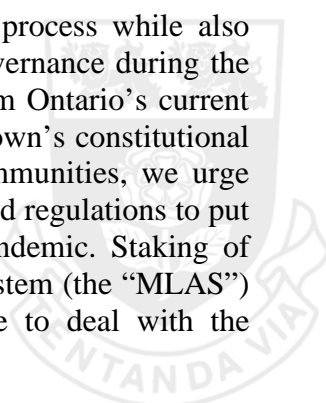
June 3, 2020

RE: COVID-19 and Permitting on Indigenous Territory

Dear Minister Rickford,

We write to you in our capacity as legal experts in the fields of Aboriginal law, Crown-Indigenous relations, and Natural Resources and Environmental law. As you are aware, many remote Indigenous communities are currently dealing with the COVID-19 pandemic. In many of these communities the pandemic is placing unique burdens on leadership and community members. The challenges remote Indigenous communities face with respect to housing, health care, and clean water exceed those faced by the rest of Ontario. Pre-existing social emergencies have been exacerbated by the pandemic, and already depleted resources are stretched thin. In our view, the pandemic requires an immediate cessation of mineral staking and permitting processes in order to avoid placing additional burdens on the limited resources in these communities during a time of crisis.

Including mining on the list of essential businesses permitted to remain in operation under Ontario's Emergency Order has pushed many communities past the point of being able to adequately monitor and respond to associated activities. Simply put, many do not have the time and resources to deal with the consultation burdens associated with the permitting process while also internally managing the urgent and novel demands of governance during the pandemic. Inadequate consultation is certain to result from Ontario's current stance on permitting and claim-staking. In light of the Crown's constitutional obligations to meaningfully consult with Indigenous communities, we urge you to use your powers under the *Mining Act* and associated regulations to put permitting processes on hold for the duration of the pandemic. Staking of mining claims under the Mining Lands Administration System (the "MLAS") should similarly be suspended as communities continue to deal with the emergency.



Indigenous communities are some of the most vulnerable with respect to outbreak risk and capacity to deal with cases of COVID-19 across Ontario and Canada. Aware of the heightened risks to their members, many communities took an “all hands on deck” approach with regards to prevention and preparation work from the earliest days of the pandemic. Community staff who might ordinarily address consultation requests have been asked to shift their focus to the public health crisis.¹ Elders who hold important and necessary knowledge about community protocols and local ecology may be unable to appropriately contribute because of their particular vulnerability. Simply put, these communities do not have the resources to simultaneously address the substantial demands of ongoing consultation communication as well as prevention and preparation for COVID-19 related risks. They have rightly and understandably chosen to prioritize the health and well-being of their members.

This position reflects the view of many Indigenous governance organizations across the country, who have demanded the suspension of consultation and application analysis until the pandemic has been resolved.² These demands come in the context of recent reports that mining companies have consistently ignored pandemic-related threats to the detriment of workers and communities within which they operate.³ Additionally, the technological adaptations embraced by many government and industry actors at this time, such as remote communication and video-conferencing, are not feasible in many of Ontario’s remote northern communities. Nor are these virtual alternatives appropriate in light of Indigenous cultural and political protocols for collective deliberation. Adequate consultation requires in-person interaction and discussion amongst community members, leaders and elders. It is imperative that these activities not be subject to compromise and therefore must be put on hold until pandemic-related risks abate. We urge you to consider these circumstances as you weigh the options available to you under the *Mining Act* and associated regulations.

Proceeding with consultation and engagement amidst the COVID-19 pandemic directly contravenes the Crown’s constitutional duty to consult and accommodate. As you know, the duty to consult and accommodate is rooted in the honour of the Crown, which requires that the Crown act with good faith to provide meaningful, good faith consultation appropriate to the circumstances.⁴ Canadian courts have consistently held that consultation which does not adhere to fair processes is not in keeping with the honour of the Crown, and is therefore inadequate. The provision of relevant information in an overwhelming, inaccessible, and culturally insensitive manner has been held to constitute an unfair process, as have the provision of unreasonable timelines for addressing substantive issues or placing unreasonable burdens on under-resourced communities to monitor Crown communications for new projects and impacts.⁵ Ignoring the capacity issues currently faced by many Indigenous communities would similarly not be in keeping with the honour of the Crown. The potential for overwhelming and inaccessible communication attempts, opportunistic staking and exploration, and unilateral decision making is high, and you must respond accordingly.

Too much is at stake for Indigenous communities in permitting decisions, the mineral staking process, and in consultation generally for these to occur in anything but a fulsome, complete manner. Demanding that resources be directed away from the pandemic to respond to such processes diminishes a community's ability to effectively deal with both the pandemic and the consultation process.

We understand Ministry officials have indicated that they are open to placing individual permit applications on temporary hold where communities indicate consultation requirements cannot be met in the circumstances. However, this piecemeal approach is not enough in the context of a global pandemic. We urge you to pre-emptively take this step for any mineral exploration and development processes where Indigenous interests may be at stake. Placing the onus on communities to monitor notifications and proactively raise their concerns with the Ministry is simply not in keeping with the honour of the Crown.

Again, as legal experts engaged in issues related to Indigenous peoples, resources management, environmental law and Indigenous-Crown relations, we urge you to reconsider. Governments are under intense scrutiny for how they react to this crisis, and we believe that putting public health and wellness first is the right way to proceed.

Sincerely,

Kent McNeil, Professor Emeritus

Deborah McGregor, Associate Professor & Canada Research Chair in Indigenous Environmental Justice

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Andrée Boisselle, Associate Professor & Co-Director, Intensive Program on Indigenous Lands, Resources and Governments

Amar Bhatia, Associate Professor & Co-Director, Intensive Program on Indigenous Lands, Resources and Governments

Estair Van Wagner, Assistant Professor & Director, Environmental Justice and Sustainability Clinic

Jeffery G. Hewitt, Assistant Professor & Director, Indigenous Bar Association

¹ Jorge Barrera, “Northern Ontario First Nations want pause to mining permits until COVID-19 subsides,” *CBC* (April 30, 2020), online: <<https://www.cbc.ca/news/indigenous/first-nations-mining-permits-ontario-covid19-1.5550033>>.

² Particularly strong demands have come from the Assembly of First Nations Quebec-Labrador (AFNQL) and from the Union of BC Indian Chiefs (UBCIC), each of whom has issued statements demanding suspension of the permitting process during the pandemic. These statements can be accessed online: <<https://www.newswire.ca/news-releases/matawinie-mining-project-the-bape-must-hear-the-atikamekw-nation-836772369.html>>; <https://www.ubcic.bc.ca/governments_must_respect_first_nations_jurisdiction>.

³ MiningWatch Canada, “Voices from the Ground: How the Global Mining Industry is Profiting from the COVID-19 Pandemic” online: <https://miningwatch.ca/sites/default/files/covid-19_and_mining_-_snapshot_report.pdf> at 5. This report specifically mentions the Lac des Iles palladium mine (operated by Impala Canada) in Northern Ontario. Despite a reported outbreak affecting at least 25 workers, the mine remained operational. The nearby Gill Bay First Nation has reported at least 8 infections in connection with the mine outbreak.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 41 [*Haida*].

⁵ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 49; *Gitxaala Nation v. R.*, 2016 FCA 187 at para 325; *Sau-geen First Nation v Ontario (MNRF)*, 2017 ONSC 2456, at para 47.