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August 21, 2020

Carolyn Lee
Environmental Assessment Branch
Ministry of the Environment, Conservation and Parks
Government of Ontario
Email: carolyn.lee@ontario.ca

Re: Class EA amendments for Activities of the Ministry of Northern Development and Mines under the *Mining Act* (Ministry of Energy, Northern Development and Mines), Reference number 11028

Dear Ms. Carolyn Lee,

Transparency International Canada (TI Canada) is pleased to provide comments on the proposed Class EA amendments for Activities of the Ministry of Northern Development and Mines under the Mining Act. TI Canada acknowledges the importance of introducing changes that would ensure environmental protections while eliminating red tape and project delays. However, TI Canada also strongly encourages reforming the *Environmental Assessment Act* (EAA) to make the process more transparent and accountable. A transparent and accountable environmental assessment (EA) process, applied to both public and private sector projects, contributes to the approval of projects that are socially responsible, environmentally sensitive, and economically viable.

TI Canada is the Canadian chapter of Transparency International (TI), the world's leading anti-corruption movement. Founded in 1996, TI has chapters and contact groups in over 100 countries around the world with a Secretariat in Berlin. TI Canada was founded in 1998 and is the leading Canadian charity on anti-corruption.

As part of TI Canada's programming, we seek to enhance transparency and accountability in EA processes for mining projects in Canada. In this regard, as part of the global TI Accountable Mining Program[1], we completed a transparency and accountability risk assessment of the EA processes in three Canadian jurisdictions, including Ontario[2]. This study, which includes a national report and three jurisdictional reports, will be available on the TI Canada web page[3] in autumn 2020. The findings and recommendations in this submission are based on the forthcoming reports.

For this submission, we would like to present our comments and recommendations in two sections. The first section presents transparency and accountability gaps in Ontario's EAA regarding mining projects. These gaps threaten the government's ability to make fully informed decisions on an EA due to a lack of transparency in taking different actors' perspectives into consideration. These gaps also hinder society's ability to follow and understand the EA process and government decisions. The second section focuses explicitly on the proposed Class EA amendments. Comments for amendments in Section 2 are listed in Table 1. The amendment numbers from *Proposed Class EA Amendments (Version 02.6, Jan. 15, 2020)*[4] are used in Table 1.

In summary, TI Canada makes the following recommendations:

[1] Please see more information about TI's Accountable Mining Program here https://transparency.org.au/global-mining/
[2] The other two jurisdictions of research are British Columbia and the Yukon.
[3] https://transparencycanada.ca/
[4] Table of Proposed Class EA Amendments (Version 02.6, Jan. 15, 2020) https://prod-environmental-registry.s3.amazonaws.com/2020-07/1.%20ENDM%20Amendment%20Proposal%20Table.pdf (accessed August 17, 2020)

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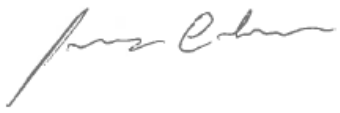
- The government should extend the EAA scope to include projects proposed by both public and private sector proponents and make an EA mandatory for all projects triggering clearly defined thresholds.
- If the Class assessment regime is maintained, provisions should be put in place for the government to consider the comprehensive impacts of a project and make a project's potential impacts publicly known.
- The government should provide a transparent definition of 'public interest' and criteria to measure its significance objectively.
- Federal, provincial and Indigenous governments should reach a consensus on who should be consulted for EAs of mining projects in a region of Ontario.
- The government and proponents should support Indigenous communities to develop their community consultation protocols.
- Ontario EAs could incorporate a co-creation process with Indigenous communities to identify valuable components to Indigenous communities that should be assessed in a given project.
- The government should develop measurable, detailed, and publicly available procedural guidelines for what counts as meaningful public consultation.
- The government should transfer responsibility for mining promotion to government agencies working with economic development to ensure the unbiased assessment of projects.
- The Minister for Energy, Northern Development and Mines should publicly disclose the rationale for EA-related decisions with substantive justifications.

TI Canada would be pleased to speak on any consultation follow up as required.

Sincerely,



James Cohen

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1. Comments and recommendations about the *Environmental Assessment Act* (EAA) for mining projects in Ontario

Based on our research, the most critical issues that jeopardize the effectiveness and benefits of performing an Ontario EA are: 1) gaps in Ontario's EA scheme; 2) community consultation effectiveness; and 3) ministerial discretion and possible conflict of interest due to the dual role of the Ministry of Energy, Northern Development and Mines in the EA process. These issues and our recommendations to mitigate them are discussed below.

1.1. Regulatory Gaps in Ontario's EA scheme

Ontario is the only Canadian jurisdiction lacking a mandatory project EA for private sector projects. Ontario's system of Class EAs and Individual EAs is unique among Canadian jurisdictions. Our research found that this system leads to transparency and accountability risks that are listed below.

Risk 1: Measuring public interest to trigger a comprehensive EA
Projects can be designated by the province to undertake an assessment based primarily on public interest. Public interest is also a criterion to class up or 'bump up' a streamlined assessment to a comprehensive assessment. However, according to the Auditor General's 2016 report[5], the Ontario Ministry of Environment, Conservation and Parks had denied all but one of the 177 public requests to have streamlined assessments bumped up to comprehensive assessments in the previous five-and-a-half years. Moreover, the same report[3] shows that only seven out of 42 public requests for projects to undergo an EA were approved between 1976 and 2016. As a result, 83% of currently operating mineral mines have not undertaken any full project assessments, either federally or provincially in Ontario[6]. Additionally, interviews conducted during our research show that how public interest is measured, how it triggers an Individual EA, or how it bumps up a project's EA category are vague for civil society and public to understand. Therefore, without a definition of public interest in the Class EA, a clear criterion for what would mobilize a designation is not publicly known, limiting civil society and the public's ability to hold the government accountable.

Risk 2: Voluntary agreements to perform an Individual EA
Our research found that the process of Individual EAs initiated through voluntary agreements is not clear for many actors, including industry consultants. The EAA does not apply for mining projects and mine development and operational activities are out of the Class EA's scope. Additionally, not all of those projects trigger the federal EA. Therefore, the reason why a proponent voluntarily agrees to perform an Individual EA, which would possibly be costly and delay the project, is not publicly known.

Risk 3: Lack of project cumulative effect evaluation
The implementation of a Class EA for different parts of a mining project (such as road extensions, reclamation and mine closure plans, tailings dam, and waste dump sites) under the current legislation conflicts with the objective of ensuring environmental protection. This is because:

- By assessing a project component as opposed to the entire project, the Class EA framework limits the completeness of an impact assessment for those reviewing the project.
- The final decision for an EA approval can be given without an assessment of the total impact of a proposed project.

[5] Auditor General of Ontario. 2016 Annual Report of the Office of the Auditor General of Ontario, Chapter 3-Section 3.06. http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf (accessed August 17, 2020)
[6] Calculated based on the data given in Appendix 2 of the Big Hole Report of Mining Watch Canada, 2014. https://miningwatch.ca/sites/default/files/the_big_hole_report.pdf (accessed August 15, 2020)

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- Cumulative effects of a specific project cannot be addressed with a Class EA as not all project aspects go through an EA.
- It is hard for communities to hold the proponent and the decision authority accountable for negative environmental and social impacts.

Recommendations:
Our research clearly showed that the most critical issues in the Ontario EA process are excluding private sector projects in the EAA, as well as the Class and Individual EA structure. The government's decision-making process lacks publicly accessible information regarding the thresholds that trigger an Individual EA, or that lead a Class EA to be bumped up to an Individual EA, which creates significant uncertainty.

Therefore, we strongly recommend that the government extend the EAA scope to include projects proposed by both public and private sector proponents and make an EA mandatory for all projects triggering clearly defined thresholds.

If the Class assessment regime is maintained, provisions should be put in place for the government to consider the comprehensive impacts of a project. Moreover, the sum of a project's potential impacts should be publicly known.

Finally, the government should expand on vague terms such as 'public interest', which is one of the most critical criteria to bump up a project to an Individual EA. The government should provide a transparent definition of public interest and criteria to measure its significance objectively.

1.2. Community consultation in the EA process

The effectiveness of consultations conducted by proponents with Indigenous and non-Indigenous communities is limited. Lack of meaningful consultation conflicts with the EA's intention to incorporate social, environmental, economic and cultural expectations and concerns into the decision-making process.

Risk 1: Insufficient integration of Indigenous community concerns
Indigenous community members who shared their knowledge during our research are wary of working with companies and the government for fear of misrepresentation or misuse of the information they provided. Accurately representing social and cultural issues in an EA is often challenging for proponents and the government, given their limits in expertise and time, as well as the diversity within communities and different perspectives of actors. Moreover, there has been limited guidance on social and cultural criteria or a framework for proponents to effectively integrate social and cultural considerations in an EA that addresses Indigenous communities' concerns on misrepresentation or misuse of the information. As a result, in our research the current process was criticized by Indigenous communities, academics, and civil society for insufficient integration of Indigenous community concerns and ensuring meaningful consultation in the EA process for mining projects in Ontario.

Risk 2: Who will be consulted?
We received feedback during a workshop with EA consultants, mining company representatives and Indigenous community members where they indicated that sometimes there is no consistency between provincial government departments on which communities they are required to engage for a project.

Risk 3: Meaningful public consultation in the mining EA context

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Interviewees highlighted the necessity of enhancing the consultation guidelines to include more detailed recommendations for carrying out meaningful consultations. In addition to creating confusion among proponents, the lack of detailed guidelines hinders a communities' ability to identify if consultation did not meet the requirements of meaningful consultation.

Recommendations:
Federal, provincial and Indigenous governments should reach a consensus on who should be consulted for EAs of mining projects in a region of Ontario.

Another mitigation strategy would be for the government and proponents to support Indigenous communities to develop their community consultation protocols, which rights holders and private sector stakeholders highlighted to be a helpful tool to navigate consultations. The government could support Indigenous communities in pilot work on peer-to-peer development of a framework for community consultation protocols.

Ontario EAs could incorporate a co-creation process with Indigenous communities to identify valuable components to Indigenous communities that should be assessed in a given project. Such a process has been implemented in British Columbia, for example. There, Indigenous communities affected by a project are able to join a working group and comment on what 'valued components' a project must assess to determine environmental, social, and economic effects, which increases Indigenous communities' participation in an EA scoping phase.

Finally, developing measurable, detailed, and publicly available procedural guidelines for what counts as meaningful public consultation would make the consultation process consistent and effective for all actors and improve adherence to timelines.

1.3. Ministerial discretion and possible conflict of interest due to the dual roles of the Ministry of Energy, Northern Development and Mines in the EA process.

The minimal publicly available disclosure of the rationale of a given ministerial decision surrounding EAs undermines transparency. Additionally, in interviews, stakeholders raised concerns that the Minister responsible for promoting mining is also tasked with regulating the sector and is a key actor in the EA process for mining projects. Both issues weaken the objectivity of the decision process and the public trust about the robustness of the EA process.

Recommendations:
The government should transfer responsibility for mining promotion to government agencies working with economic development to ensure the unbiased assessment of projects. Furthermore, the ENDM Minister should publicly disclose the rationale for EA-related decisions with substantive justifications. This could help government agencies demonstrate full and fair consideration of projects and strengthen public trust and confidence on the process.

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2. Comments and recommendations about the proposed Class EA amendments for activities of the Ministry of Northern Development and Mines under the *Mining Act*

Table 1. TI Canada comments on the proposed Class EA amendments for activities of the Ministry of Northern Development and Mines under the *Mining Act*

Proposed Amendment No.	Commentary	Recommendation
5, 7, 11, 12 and 13	Substituting physical and map (paper) staking for an online registry is a key improvement in the proposed amendment to enhance transparency and provide equal opportunity for all actors to register a claim. However, allowing anonymous companies to register a claim significantly undermines transparency.	By modernizing the EAA, Ontario has the opportunity to make its EA process more transparent. To achieve this, we recommend that the government require public disclosure of all beneficial owners of a company registering for a claim.
30	The proposed amendment for *1. Subsection 39. (2) Surface rights for a mining claim on agricultural lands* allows the Minister to award or sell surface rights of agricultural land owned by the Crown to a mining claim holder without any requirements for public hearing or consultation. There are also no requirements concerning the disclosure of the rationale to justify the decision and demonstrate full and fair consideration of impacts. "*The Minister's decision to award or sell surface rights on agricultural lands does not have a direct impact on the lands in question*." Awarding the surface rights will give the proponent the right to explore and exploit the mineral resources, so the decision could lead to potential negative impacts in the future. Even though it is mentioned that future activities will be subject to other permits and approvals, the proponent might face challenges after spending substantial resources and time due to other ministries' policies, as well as other natural resource sector and local communities' conflicting priorities. Therefore, the proposed amendments could lead to a higher risk for business and as well as potential disputes between the proponent, local communities, civil society, and decision authorities. Such a practice would strengthen the perception of higher permitting risk	Opening agricultural land to mining is possible as long as the decision-making process is transparent, and decisions are justified. Therefore, it is recommended that opening agricultural land to mining should not be a pre-assigned category A activity. Opening Crown agricultural land to mining should require public consultation with a minimum of 30 days comment period. Also, possible impacts of opening agricultural land to mining should be analyzed holistically as part of the land use planning at the regional level. Especially, the decision of opening Crown agricultural land without any public consultation and detailed assessment should not be a responsibility of the Minister who is also responsible for promoting mining in Ontario. This can lead to a conflict of interest. Thus, it is recommended that the Ministry responsible for land use planning and agriculture should make the final decision. Alternatively, the responsibility of promoting the mining sector should be handed over to a different department, as opposed to being the ENDM Ministry's responsibility.

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	and reduce the investment attractiveness of the province.	
30	The proposed amendment for *"Subsections 52. (1) and (4) Permission to test and/or dispose of mineral content (also referred to as "bulk samples")"* may be misused in the form of running a small-scale operation selling the mineral content without proper permits and licenses. Additionally, the amendment assumes that "*the removal of bulk samples* ***is generally performed from sites*** *that already have existing access roads or trails, and all overburden has already been removed, and also bulk sample applications are usually accompanied by an exploration permit application or advanced exploration closure plan"*. However, it is not clear what the responsibility of the proponent and the Ministry would be, how activities would be monitored, and who would be accountable for negative impacts if these assumptions would not be met in a specific case. Finally, the Minister who is responsible for promoting mining will give permission "*to mine, mill, refine or dispose of more than the prescribed quantity (i.e., between 100 and 1,000 tonnes) of any Crown-held mineral-bearing substance on a mining claim".* Without any publicly available rationale supported by evidence or consultation to accompany the permission, this could emphasize society's perception that environmental and social impacts are being disregarded.	To ensure accountable operations, we recommend: • excluding selling bulk samples from *Subsections 52. (1) and (4)*, • limiting the proposed amendment for brownfield sites, • Putting a cap for removable bulk sample amount in a specific time frame, and • ensuring that the activity will not require further infrastructure to prevent potential environmental or social negative impacts. If the provision about ministerial permission will be kept, we recommend that the process should include publicly accessible information about *"existing access roads or trails and the brownfield conditions"*, as well as the justification of the permission given by the Minister.
30	The amendment *Lands Not Open for Registration without Consent of Minister (ss.29. (1) and (2)* suggests that the Minister may open these lands based on criteria of possible land use change over time and without conducting a consultation. The Minister also does not have to provide evidence to justify the decision publicly.	Land use plans should be up to date. Thus, if the use of restricted lands has changed over time, this should be published and accessible by all actors. More importantly, land use planning and the decision to change the status of "restricted" lands should be performed with the participation of relevant ministries and other actors at the regional level.

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		Additionally, even though land use in restricted lands have changed over time, the decision for opening these lands for registration should be made after consulting affected actors to mitigate future conflicts and avoid delays.
32	The proposed amendment "*on categorization is based on a screening process, and only those projects administrative in nature or are* ***unlikely to result in negative environmental effects*** *are considered as low-risk or have no environmental effects"*. 'Unlikely to result in negative environmental effects' is a vague criterion and difficult to measure quantitatively or qualitatively. However, the current text *"only those projects that are administrative in nature or which* ***do not change land use*** *that is already permitted under existing mining rights are considered to have no environmental effects"* refers to land use, which is objectively measurable.	The government should keep the current text or delete vague terms that are difficult to measure, such as 'unlikely to result in negative effects'.
32	*"It should also be noted that ENDM's discretionary rehabilitation activities* ***always result in net positive environmental effects.*** *As noted in Section 2.5.2.2 of the Class EA: Due to the beneficial intent of discretionary rehabilitation activities (i.e., the rehabilitation of mine hazards), there should always ultimately be either a* ***positive overall environmental effect or improved human health and*** *safety when rehabilitation is finished."* "*As described in Section 2.2.3, MNDM has prioritized the rehabilitation of abandoned mine sites based on threats to human health and safety and environmental contamination risks."* *"This means that rehabilitation projects that ENDM undertakes have been previously prioritized (through a risk assessment process) by the ministry to address existing potential and actual negative environmental effects, including threats to human life and significant environmental contamination."*	The Ministry should consider performing Individual EAs for all mining projects and thus, evaluating a proposed mining project's activities and phases as a whole.

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	The emergency actions to prevent mine hazards and eliminate health and safety risks are critical. Thus, it is reasonable to consider the immediate emergency actions on previously disturbed mining land as no impact Class. However, the lack of full environmental baseline data, which is a significant disadvantage of the Class EA structure, and the lack of consultation to integrate local community suggestions into the rehabilitation activities (i.e. post-closure land use) conflict with the mandate of improving, not only not harming, the environmental and socio-economical aspects. Also, it degrades ENDM's objective of *"aligning the level of assessment and level of risk."*	
36	***3.1.2 Anticipated Level of Public Interest*** *"The results of the project screening, and the consideration of the anticipated level of public interest, will enable ENDM to assign the proposed project to the appropriate category. A component of the screening process is the consideration of* ***the anticipated level of public interest in, or response to, the proposed projec****t. When assigning a project to a category consideration will be given to the following."* Similar to the current process, the proposed amendment is missing an explanation on how the ENDM would measure the level of public interest to assign the proposed project to a category. The intension of using public interest as a parameter to assign a category and bump-up the category of a project could be a good and inclusive practice. However, neither the current legislation nor the proposed amendments have a clear definition of what public interest is. They also do not include the criteria to measure the level of public interest objectively.	Therefore, TI Canada recommends defining 'public interest' and publishing clear and measurable criteria to be used to justify the reason for rejection or acceptance of bump-up requests. Well-defined criteria to measure the public interest can help Ministry staff to mitigate delays in the EA process by avoiding possible conflicts and establishing public trust and confidence in decisions.

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	"*Should **the level of public interest or response be different than what was anticipated,** ENDM may reassign the proposed project to a lower or higher category."* The proposed amendment does not explain how the ENDM would objectively and tangibly measure the level of public response. A clear definition of what would cause the ENDM to reassign a project hinders the public's ability to hold the government accountable. "*If the project screening indicates that there is minimal potential for negative environmental effects, **but there is uncertainty about the anticipated level of public interest or response** (e.g., replacing a shaft cap on an abandoned mine hazard that has existing access but which is in close proximity to a residential area, ENDM may choose to issue a Notice Requesting Input into a **Screening Process with a minimum 30-day consultation period.***"	Defining tangible and measurable criteria would decrease the levels of uncertainty and make the process consistent and effective for all actors, and improve adherence to consultation timelines.
37	The current version explains *3.2.1 Category A: No Potential Environmental Effects* as "*Projects with no potential environmental effects may either be administrative in nature **or do not change the land uses that are already permitted under the existing mining rights** (e.g., correction of an error on a title document)*." The proposed version indicates "*Projects with no or low potential environmental effects are either administrative in **nature or do not result indirect impacts to the environment** (e.g., correction of an error on a title document or a surface rights lease).*" The proposed version makes the tangible criterion (e.g. land-use change) an intangible one (e.g. not result in indirect impacts on the environment). Even though the second criterion is more	TI Canada recommends the addition of measurable sub-criteria to objectively evaluate if a proposed action may result in indirect impacts on the environment. The sub-criteria could include the area of disturbance, linear disturbance, greenhouse gas emissions, air, water, soil, flora, fauna characteristics etc.

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	comprehensive, it should be defined with measurable sub-criteria.	
37	Both text request "*more comprehensive consultation process*" in the respective sections given below. However, it is not clear what would be considered a comprehensive consultation in practice. *"3.2.3.1 Notification* ***A more comprehensive consultation process** is required for projects assigned to Category C than for projects assigned to lower categories.* *3.2.2.1 Notification* ***A more comprehensive consultation process** is required for projects assigned to Category B than for projects assigned to Category A."*	It is recommended for the Ministry to provide a definition of a "comprehensive consultation process" with minimum requirements and guidelines. This would help proponents and consultants to carry out consultations and allow for Indigenous communities and civil society to evaluate consultations. This addition would considerably contribute to improving the problem of meaningful consultation discussed in the first section of the document. This recommendation is valid for all sections mentioning a "more comprehensive consultation process" in the proposed amendments.
37	*"3.2.3.2 Project Review* *Since these projects **have moderate potential environmental effects**, more information and analyses may be needed to identify these effects and potential mitigation measures.* *3.2.2.2 Project Review* *Since these projects may **have short-term environmental effects,** more information and analyses may be needed to identify these effects and potential mitigation measures."* Both the current and proposed text are not clear on what the terms moderate and short-term environmental effects mean. Without a clear and measurable definition, it is challenging for the decision authority staff to evaluate and monitor projects. Similarly, it creates uncertainty for proponents and makes it challenging for the public to hold authorities accountable.	TI Canada recommends defining thresholds instead of using relative terms like 'moderate' and 'short-term' to classify the effects. Additionally, focusing only on environmental effects is a shortcoming of Class EAs as most projects also have social effects. Therefore, there should be a provision of social impacts that might be triggered by projects with moderate or short-term environmental effects. The recommendation also applies to other relative terms used in the current legislation and other proposed amendments.
37	**3.2.4 Individual Environmental Assessment** *"…outside of the scope of its Class EA, or has significant potential environmental effects that are not predictable or manageable…"*	TI Canada recommends publishing a list of environmental effects based on sector and project types with clear definitions and, when

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	First, it should be acknowledged that the scope of Class EAs may not be known by a non-experienced audience, such as the general public. Second, significant potential environmental effects could be relative for Individuals, communities and specific regions. Similar to other sections of the Class EA category classifications, the Individual EA classification is also vague.	applicable, thresholds for what would be considered a "significant" effect. Currently, screening to determine the Class of a project, according to Table 6[7] is open to discussion and assumptions.

In addition to proposed amendments, TI Canada recommends the consideration of issues that could potentially undermine transparency and accountability in Class EA for mining projects. These are listed in Table 2.

Table 2. Recommendations to improve transparency and accountability of MNDM's Discretionary Activities under the Mining Act (Table 1)[8]

Mining Act Section	Comments	Recommendations
29. (1) and (2) 39(2)	• List of land that might be open for staking with the consent of the Minister. • Surface rights for mining operations on agricultural lands might be awarded by the Minister for parts of the surface rights. The dual role of the Minister to promote mining and make decisions on open lands that are not primarily available for mining is a conflict of interest. Also, there is no requirement to provide the rationale for the decision.	The government should transfer the responsibility of mining promotion to government agencies working on economic development to ensure the unbiased assessment of projects. Furthermore, the Ministry should publicly disclose the rationale for EA-related decisions with substantive justifications. This would help government agencies demonstrate full and fair consideration of projects and strengthen public trust and confidence on the decisions.
53. (1) and (2)	Disposition of Crown-owned chattels. If removal of any buildings, structures, machinery, chattels, personal property, ore, mineral, slimes and tailings would be more costly than the cost of these materials and equipment for the proponent, it would be left on purpose, and the cost of them could not be covered by selling these. The difference must be paid by taxpayers.	Terms and conditions of disposition of chattels should be defined, and insurance should be required to cover all the expenses to dispose of these if the proponent does not remove them in six months.

[7] Ontario Ministry of Northern Development and Mines, A Class Environmental Assessment for Activities of the Ministry of Northern Development and Mines under the Mining Act, 2012. https://www.mndm.gov.on.ca/sites/default/files/class_ea_approved_minor_amendments.pdf, pp. 38-41 (accessed: August 17, 2020)
[8] Ibid.