THE 1999 ONTARIO FOREST ACCORD COMMITMENTS BY MEMBERS OF THE FOREST INDUSTRY, THE PARTNERSHIP FOR PUBLIC LANDS AND THE MINISTRY OF NATURAL RESOURCES

AND

ONTARIO'S LIVING LEGACY: A PROPOSED LAND USE STRATEGY

AND

MINISTRY OF NORTHERN DEVELOPMENT AND MINES MARCH 1999 MINERALS INDUSTRY ANNOUNCEMENTS

AN ANALYSIS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Publication No. 373

Prepared by:
Paul Muldoon, Theresa McClenaghan, Ramani Nadarajah, CELA Counsel
Laura Shaw, D. Zabelishensky - Research

May, 1999

130 SPADINA AVENUE, SUITE 301, TORONTO, ON. M5V 2L4
TEL: 416-960-2284, FAX: 416-960-9392, WEBSITE: WWW.CELA.CA

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PART I - INTRODUCTION

On March 29, 1999, the Ontario government released the document, "Ontario's Living Legacy." It also published the 1999 "Ontario Forest Accord," an agreement negotiated by the provincial government, non-governmental groups and the forest industry. Thirdly, the Ministry of Northern Development and Mines made an announcement pertaining to mining rights in the province. These three separate but related announcements amounted to the culmination of the "Lands for Life" consultation program dealing with proposed future land use in the Crown lands area of Ontario, in the described planning area. The Lands for Life planning area was south of 51 degrees north, and north of a line extending from Arnprior to Merrickville, Tweed, Bobcaygeon and Gravenhurst.[2] It was divided into areas described as "Boreal West", "Boreal East" and "Great Lakes St. Lawrence".[3] In effect, the "Land for Life" planning region comprises an area from Northwest

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[1]The analysis was carried out by Paul Muldoon, Theresa McClenaghan, Ramani Nadarajah, Laura Shaw and D. Zabelishensky in May, 1999.

[2]EBR posting March 29, 1999, infra.

[3]Ontario's Living Legacy: Proposed Land Use Strategy, Ministry of Natural Resources, March, 1999, p. 2.

Ontario, north west of Lake Nipigon at the Manitoba border, to North East Ontario, north east of Lake Abitibi at the Quebec border, and south to approximately the French River. The Strategy covers 39 million hectares of Crown lands and waters in a planning area covering 45 percent of the province.

The Lands for Life proposal has profound importance for the use and exploitation of Crown Lands for present and future generations. In light of the importance of the proposal, and the expertise of the Canadian Environmental Law Association (CELA), as described below, this submission provides a critique of the three components of the Lands for Life proposal.

A. EBR POSTING CONCERNS

This submission is made by CELA even though components of the comments are outside of the technical EBR comment period.[4] CELA trusts that these comments will be taken very seriously by the government because of the nature of the concerns. A longer comment period was called for by Eva Ligeti, the Environmental Commissioner for Ontario, due to the extensive announcements made on March 29, 1999. Since then, she has called for a re-posting of the announcements on the Environmental Bill of Rights registry for comment because many of the announcements made on March 29, 1999 were not included in the original posting. For example, the EBR posting of March 29, 1999 did not include the Forest Accord or the mining announcements in the notice of proposal and thus did not seek comments on those announcements.

CELA agrees that a longer comment period should have been extended under the EBR due to the lack of public involvement in the particulars of the March 29, 1999 announcements and the long term, far ranging impacts of these announcements for the future of land use in the planning area of the province of Ontario. The government did not extend the comment period. CELA is nevertheless conducting this analysis, and is aware of many other groups and organizations who are also still intending to provide substantive comments once the implications of the March 29, 1999 announcements are better understood. CELA strongly submits that all comments should be received and taken into account by the government.

This submission outlines who CELA is, the background to the three March 29, 1999 announcements, implications of the nature of the documents, a framework for CELA's analysis, including a public trust approach, biodiversity, and the legislative scheme in which forestry presently operates. The submission then provides a critique of the Lands for Life proposal and related announcements, dealing in turn with implications for Parks and Protected Areas, Forestry, First Nations and Metis peoples, Mining, Tourist operators, and Hunting and Fishing. The conclusions and recommendations are presented at the end of each section and are summarized for convenience at the end of the paper.

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[4]EBR Registry Number PB7E4001, Posting: Policy; MNR; Comment period March 29, 1999 to April 29, 1999.

A range of interests are affected by land use in the planning area. These include First Nations, Metis, Public interests in parks and protected areas, Public interests in the ecosystem across the entire planning area, Forest companies, Mining companies, Tourist operators, and Hunters and Fishers. The public interests include both a) conservation, biodiversity, habitat protection, species preservation, representation of landscapes and ecosystems, and ecosystem functioning and b) recreational use, from canoes and hiking to snowmobiles, with varying environmental impacts.

Among CELA's key conclusions and concerns are to the absence of First Nations interests from the negotiations and any effective plan to include them in further processes; the granting of increased tenure rights to the forestry industry which significantly strengthens timber companies' interest in resources allocated to them and may rquire the province to compensate them should lands be withdrawn from tenure arrangements by the province; and the fact that the 12% target for protected lands is insufficient to protect long-term ecosystem integrity and the vagueness of the process to increase protected areas.

B. ABOUT THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

The Canadian Environmental Law Association (CELA) is a public interest law group established in 1970 for the purposes of using and improving laws to protect the environment and conserve resources. Funded as a legal aid clinic specializing in environmental law, CELA lawyers represent individuals and citizens' groups in the courts and before administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

CELA has long been involved in casework and law reform activities with respect to forestry, Crown land management, and biodiversity conservation. In recent years, for example, CELA has:

- served as counsel for the Forests for Tomorrow (FFT) coalition at the 4 year-long Timber Management Class Environmental Assessment hearing before the Environmental Assessment Board (EAB);
- participated in proceedings before the Environmental Assessment Advisory Committee (EAAC) respecting bump-up requests regarding proposed timber management activities;
- participated in the ongoing Environmental Assessment (EA) being developed with respect to proposed timber management activities near Megisan Lake;
- participated in the proceedings held by Ontario's Forest Policy Panel;
- participated as a member of the Forest Sectoral Task Force of the Ontario Roundtable on Environment and Economy;

- participated as a member of the resources sub-committee of Ontario's Fair Tax Commission;

- provided comments on the *Crown Forest Sustainability Act, Red Tape Reduction Act (MNR) 1996* and the Bill 26 amendments to statutes administered by the Ministry of Natural Resources (MNR) ;

- provided comments on various policies and manuals proposed by the MNR, including Ontario's new wilderness policy;

- provided comments on the federal biodiversity strategy and endangered species legislation;

- provided submissions to the Ministry of Natural Resources Regarding the "Lands for Life" planning process in November, 1997; and

- provided comments during the Lands for Life Round Tables process, including comments following the October 30, 1998 posting of the "Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables."

PART II - BACKGROUND TO THE MARCH 1999 ANNOUNCEMENTS

A. GENERAL SCHEME OF RESOURCE PLANNING

Land use planning in the affected area is presently subject to a number of requirements. These include the *Environmental Assessment Act*, the Timber Management Class EA terms and conditions, the *Public Lands Act*, the *Crown Forest Sustainability Act*, the *Mining Act,* the *Provincial Parks Act*, the *Wilderness Areas Act*, the *Conservation Land Act*, the *Ministry of Government Services Act*, and the related regulations made under these statutes.

The requirements of the *Crown Forest Sustainability Act* ("CFSA") have been recently interpreted by the Ontario Courts (Divisional Court and the Court of Appeal), with respect to the Forest Management Planning Manual and the Forest Management Plans approved under that statute. Other specific instruments that apply to the planning area include Environmental Assessment Act Exemption Orders granted to the MNR by the Ministry of the Environment, including MNR # 26/7 as to Disposition of Crown Resources, MNR#61 as to designation of Provincial Parks and Conservation Reserves and MNR #59/2, as to Management of Parks in Ontario. These Exemption Orders include terms and conditions that must be followed with respect to the activities described

in the Exemption Orders.[5]

In February, 1997, the Ontario government embarked upon an ambitious program to develop a comprehensive multiple land use plan for the entire planning area. A series of citizens' Round Tables (Boreal West, Boreal East, and Great Lakes - St. Lawrence, respectively) were established by the MNR and continued until July 1998 when the various Round Tables submitted their recommendations to the government.[6] A proposal was released by the government in November, 1998, the Consolidated Recommendations Report, November 1998[7] with between 6 and 7 per cent of lands recommended for protection. That proposal was the subject of in excess of 14,000 individual public comments[8] to the government, primarily concerned with the inadequacy of parks and protected areas, both in terms of the proportion of the planning area and in terms of permitted uses in the protected areas.

Because of the level of public concern, the government decided not to proceed with the November, 1998 proposal. The government selected four forest industry companies and three environmental conservation groups, and commenced negotiations "behind closed doors".[9] The conclusion of that negotiation process was the 1999 Ontario Forest Accord, which contained commitments of the signatory forest companies, the three environmental conservation groups named in the Accord, and the Ministry of Natural Resources. The Accord was announced on March 29,

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[5]Ontario Regulation 682/94 made under the *Environmental Assessment Act*, "Exemption - Ministry of Natural Resources - MNR - 61"; Ontario Regulation 83/94 made under the *Environmental Assessment Act*, "Exemption - Ministry of Natural Resources - MNR-59/2".

[6]Ontario's Living Legacy, Government Response to the Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables, March 1999, p. 1.

[7]Ontario's Living Legacy: Proposed Land Use Strategy, Ministry of Natural Resources, March, 1999 (hereafter referred to as Strategy), p. 4.

[8]Strategy, p. 4 cites over 12,000 individual responses in response to the "Consolidated Recommendations Report".

[9]Presentation by Ric Symmes, Provincial Coordinator for Partnership for Public Lands to Ontario Association for Impact Assessment, May 5, 1999, Toronto. The Partnership for Public Lands ("PPL") includes World Wildlife Fund, Federation of Ontario Naturalists, and Wildlands League. The industry representatives included Domtar, E.D. Eddy, Tembec and others.

1999.[10] Included in the Accord is a commitment to protection of 12% of the planning area[11] as parks or regulated protected areas.

On March 29, 1999, the MNR released a document entitled "Ontario's Living Legacy: Proposed Land Use Strategy" (the "Strategy"), as its proposal for land use throughout the planning area. The Strategy includes many of the elements of the Forest Accord, but covers a much broader range of topics in terms of land use throughout the area. It deals not only with forestry, but also with tourism, mining, hunting, fishing, parks and protected areas.

The document creates four land use designations. "General Use" includes 70 percent of the planning area -- land that is not in either a specific land use designation or an Enhanced Management Area. This area is not regulated by a single specific piece of legislation; rather as the Strategy states "There is an extensive set of legislation, policy and guidelines that will direct management in General Use Areas". One can assume this list includes the *Planning Act, Environmental Assessment Act, Mining Act* and other legislation currently enforced.

Eighteen percent of the planning area is designated either as Forest Reserve or Enhanced Management Areas. Forest Reserves are not considered part of the 12% of the protected area. Forest Reserves are defined as "areas where protection of natural heritage and special landscapes is a priority, but some resource use can take place with appropriate conditions".[12] Mining and related access are allowed in Forest Reserves.

Enhanced Management Areas (EMA) do not fall in any of the four land use designations and are also not considered part of the 12% of protected areas. The Enhanced Management Areas fall into seven designations[13]: natural heritage; recreation; remote access; fish and wildlife; Great Lakes coastal areas; resource based tourism and intensive forestry.[14]

Twelve percent of the planning area is designated either as Provincial Parks or Conservation

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[10]1999 Ontario Forest Accord: "A Foundation for Progress", Commitments by members of the Forest Industry, the Partnership for Public Lands (as represented by the World Wildlife Fund, the Federation of Ontario Naturalists and the Wildlands League) and the Ministry of Natural Resources, March 1999. ("Forest Accord")

[11]Forest Accord, clause 2.

[12]Strategy, p. 21.

[13]Strategy, p. 22.

[14]EMAs are proposed to provide for a more detailed land use direction for special features or values. A range of resource activities are allowed in EMAs.

Reserves. A more specific break down of the land area in each category is not yet provided. Parks will be regulated by the *Provincial Parks Act* and Conservation Reserves will be regulated under the *Public Lands Act*. Further discussion of these designations and their regulation is contained in the "Parks and Protected Areas" discussion below.

In addition, on March 29, 1999, the Ministry of Northern Development and Mines (MNDM) issued a series of announcements with respect to the mining industry and the Living Legacy Strategy. These announcements included reassurances to the mining industry that it is "business as usual for existing claim holders and mining activity already underway" along with access for environmentally sensitive mineral exploration in protected areas; promises of written contractual guarantees to the mining industry from the province; 21 million dollars to "boost mineral exploration in Ontario", and a statement that there will be procedures developed to "borrow park land for mining while substituting it with land of equal natural heritage value."[15]

B. IMPLICATIONS OF THE NATURE OF THE DOCUMENTS

The status of the documents that comprise the three announcements is important because they will determine and shape the future of land use planning and decision making in the planning area.

1. Living Legacy Strategy

The Strategy describes itself as a document that will be "approved" following public submissions. It states that "the land use intent outlined in the Strategy will provide context and direction to land use, resource management, and operational planning activities on Crown land." The Strategy states that it will replace the *Northwest and Northeast Strategic Plans* and the *Southern Ontario Coordinated Program Strategy* for the planning area. It will supersede the 1983 *District Land Use Guidelines* wherever they address the same topics. It states that "existing land use direction will be brought into conformity with the Strategy after it is approved."[16]

The EBR posting about the Strategy characterized the posting as a "policy" and stated that the Strategy "is a guidance document that sets out a framework for future land use and resource management on Crown land in the planning area."[17]

The Strategy, following approval, will likely be best characterized as a government policy. However, policy is subject to government change. While not directly enforceable by citizens, there

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[15]March 29, 1999 MNDM announcements "Ontario Commitments to the Minerals Industry".

[16]Strategy, p. 31.

[17]EBR posting March 29, 1999.

may be some element of a binding nature to the Strategy insofar as the government will be unable to make arbitrary, unfair or unreasonable decisions that deviate from the strategy under principles of administrative law.[18] Furthermore, the Strategy itself provides that "Proposed amendments [to the Strategy] must not substantially alter the over-all intent of the Strategy." It then provides for amendment procedures, depending upon whether the amendments are "minor" or "major".[19]

2. The 1999 Forest Accord

The Forest Accord is written as if it is a binding contract between the signatory parties and it appears that the government, through MNR, has given contractual commitments to the parties with respect to its legislative, regulatory and policy agenda in the future. The legality of using this document in that way is highly questionable. More will be said of these concerns as to possible legal rights having been established by the Accord elsewhere in this analysis.

3. The March 29 Mining Announcements

The MNDM announcements appear to be non-binding announcements as to intended government policy. However, accompanying the announcements was a letter from the Minister to all Ontario claims holders, inviting them to sign an attached contract with the Ministry, purporting to give them certain rights in the future with respect to their existing claims.[20] Therefore, it appears that the MNDM may have created a new set of legal rights claimants, over and above their legal status under the relevant legislative framework. It is unclear at this date how many claims holders actually signed and returned the contract to MNDM, especially since their association recommended against signing it.[21] On the flip side, MNDM appears to be taking additional steps with respect to mineral claims holders and prospecting, such as imposing an immediate freeze on staking in parks and conservation reserves.[22]

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[18]Blake, Sara, Administrative Law in Canada, (2d ed.) Butterworths, 1997, p. 9. Government policies are also important to reviewing the reasonableness of decisions to issue instruments (e.g. permits or approvals) under s.41(a) of the EBR.

[19]Strategy, p. 32.

[20]Memorandum from The Hon. Chris Hodgson, to All Mining Claim Holders, re: Ontario's Living Legacy: A Complete Parks System, March 29, 1999.

[21]Prospectors and Developers Association. "Attention Ontario Claim Holders Have you Been 'Parked' by Lands for Life?", http://www.pdac.ca/lands.htm

[22]Email communication, John Gammon, MNDM, May 7, 1999, stating that "Staff from MNR and MNDM are in the process of creating maps that can be used for the purpose of applying Withdrawal from Staking Orders under the provisions of the Mining Act...Withdrawal Orders issued each day are being posted on a specific page of our web site for your immediate

PART III - FRAMEWORK FOR ANALYSIS - WHAT IS AT STAKE

CELA recognizes that any process attempting to arrive at land use decisions on the scale of these announcements includes negotiation and compromise. However, this section provides three general concerns with respect to the "Lands for Life" proposals. First, the proposals do not amount to a "public trust" approach to Crown lands. While potentially having a legal basis[23], a public trust approach certainly can be seen as a basic expectation of Ontarians with respect to the use and disposition of Crown lands. Next, the submission reviews the importance of protected areas from the perspective of biodiversity concerns. The submission then examines the impact of the proposals on the legal regime that has evolved over Crown lands over the past two decades.

A. THE PUBLIC TRUST DOCTRINE

Among the concerns raised by the three announcements from a public trust perspective with respect to Crown lands is a concern that the government has created enforceable economic rights to the economic resource users of Crown lands to such a degree that future governments and future generations will be precluded from making land use protection decisions. By arguably increasing the tenure of forestry and mineral interests in land use allocations, outside of the parks and protected areas designated, now, there will be huge economic costs to future governments who want to protect more land. This is partly because the process for additional protection is vague and non-specific, while the forest industry is given guarantees to present levels of fibre and wood supply, and without increased costs.[24] The assurances given to mining interests will be discussed in more detail below.

Crown lands in Ontario belong to the people of Ontario. The three March 29, 1999 announcements involve profound legal and value decisions. Among them is the question of the role of today's government in making long-term decisions for the use of Crown lands. There is a legal argument to be made as to the public trust doctrine for Crown lands. However, it is certainly the expectation of the people of Ontario that their government holds Crown lands for the people of Ontario, both present and future, and must make these decisions in a trust-like manner.

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information...located at http://www.gov.on.ca/MNDM/MINES/LANDS/livleg/lvlginxe.htm".

[23]Elder, P.S., "Biological Diversity and Alberta Law", (1996) 34 Alberta Law Review (No. 2) 293 at notes 110, 111. However, as a matter of statutory interpretation, Ontario's Parks legislation is not sufficient to establish a trust without legislative amendments, see *Green v. Province of Ontario* (1972), 34 DLR (3d) 20 (Ont. HCJ).

[24]Forest Accord, clause 10, which reads, "Agreement that the long term delivered wood costs and volumes available for industrial use will not be negatively affected by the Accord."

Crown lands in Ontario cover 88% of the province.[25] Crown lands are owned by Her Majesty the Queen in right of Ontario[26], subject to the underlying rights of the First Nations peoples insofar as their rights are "existing" and unceded or unextinguished as of 1982 when they received constitutional protection.[27, 28]

Land use on Crown lands and access to resources within the province of Ontario are matters of provincial jurisdiction.[29] However, as of 1982, Professor Lyon states, "the mystique of the 'Crown' and its dominance were replaced by the obvious truth that Canada, and its *Constitution*, belong to the people of this country. Lands and resources are held by governments for the use and benefit of the people. This trust attaches to the title to land... the *Constitution Act, 1867* tells us which order of government is subject to the trust."[30]

Professor Noel Lyon made a cogent argument that Crown lands are held by the Crown in trust for the people of Ontario, including future generations, as a matter of constitutional law.[31] He argued that "because the provinces own the territorial resource bases within their boundaries, they bear the greatest responsibility, and therefore should play the dominant role in pursuing sustainability....In particular, I will argue that public lands are held in trust for the benefit of the people, whose lands they are, and the terms of the trust are fixed, at least in general terms, by the

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[25]Estrin, David and John Swaigen eds., Environment on Trial, Emond Montgomery Publications: Toronto, 1993, at p. 273.

[26]Porritt, Edward, Evolution of the Dominion of Canada: Its Government and Its Politics, World Book Company, Yonkers-On-Hudson: New York, 1918, p. 56.

[27]*Constitution Act*, s. 35.

[28]Lyon, infra, "With the decisions in *Calder* [1973] S.C.R. 313 and *Sparrow,* [1990] 1 S.C.R. 1075, we now face the possibility that one of the "Trusts existing in respect thereof" to which provincial title to lands and resources is made subject by s. 109 of the *Constitution Act, 1867*, is a trust in unsurrendered Aboriginal homelands that have not been subjected to the valid extinguishment of Aboriginal title. And where extinguishment has been by unilateral action, or through coercion or misrepresentation in treaty processes, we may yet be faced with binding decisions of international tribunals upholding First Nations claims to an indefeasible right to occupy their traditional homelands or parts of them." at p. 364 - 365

[29]*Constitution Act*, 1867, s. 92.

[30]Lyon, infra, p. 365.

[31]Lyon, Noel, "Canadian Law Meets the Seventh Generation", (1994) 19 Queens Law Journal 350.

Charter."[32]

Similar concerns arise with respect to the MNDM announcements guaranteeing access to present mining rights and to future high quality mining opportunities, even within parks and protected areas (as unrealistic as those commitments may appear).[33]

Professor Lyon anticipated these concerns when he said, "where provincial powers of economic regulation are already well-established, especially in relation to Crown land and resources owned by the province, the Supreme Court should rely primarily on the public trust that exists for the benefit of the people of the province as the method of stopping provinces from using their powers in ecologically destructive ways....the Crown assumed at the outset responsibility for managing and protecting the people's lands and resources, resulting in a trust."[34]

B. BIODIVERSITY - LIVING UP TO INTERNATIONAL OBLIGATIONS

One of the issues raised by this section includes whether the three announcements contribute to Canada's meeting of its obligations under the Convention on Biological Diversity. Are areas protected consistently with international definitions of protected areas? Underlying this concern is the concern of whether the announcements contribute to biodiversity goals over the long term.

The Brundtland Commission called for governments to represent the full diversity of its landscape within a network or protected areas.[35] In its discussion of the importance of species and biodiversity conservation, the Brundtland report said, "...before science can focus on new ways to conserve species, policy makers and the general public for whom policy is made must grasp the size

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[32]Lyon, *supra*, p. 353.

[33]News Release, March 29, 1999, MNDM, "Hodgson says Living Legacy Good News for Northern Ontario". It stated in part, "Access for environmentally sensitive mineral exploration is being protected in areas of provincially significant mineral potential, and it is business as usual for existing claim holders and mining activity already underway." "We are satisfied with the degree of certainty *Living Legacy* provides for the long term", said Michael Wills of RBC Dominion Securities. "The government is willing to put its guarantees in a written contract and that substantially increases our comfort level."... "We are pleased that exploration will be allowed within the new protected areas", said Don McKinnon, directory of MCK Mining and Baltic Resources.

[34]Lyon, *supra*, p. 357

[35] Our Common Future, The World Commission on Environment and Development, Chairman Gro Harlem Brundtland, Oxford University Press, 1988 reprint, at chapter 6, "Species and Ecosystems: Resources for Development", pp 147 - 167.

and the urgency of the threat....Altering economic and land use patterns seems to be the best long-term approach to ensuring the survival of wild species and their ecosystems. This more strategic approach deals with the problems of species depletion at their sources in development policies, anticipates the obvious results of the more destructive policies and prevents damage now...."[36]

The importance of biodiversity is demonstrated by the international consensus which led to the Convention on Biological Diversity. In June l992, at Rio de Janeiro, at the United Nations Conference on Environment and Development, many countries including Canada signed the United Nations *Convention on Biological Diversity*. Canada ratified the Convention on December 4, l992. [37]Conservation of biological diversity has consistently been identified as one of the most pressing global environmental issues. In the preamble to the *Convention on Biological Diversity,* countries expressed concern that biological diversity is being significantly reduced by certain human activities. The *Convention on Biological Diversity* included in its objectives the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources. Biological diversity includes the variability among living organisms from all sources; and includes diversity within species, between species and of ecosystems.[38]

C. EVOLVING THE LEGISLATIVE AND ADMINISTRATIVE REGIME FOR CROWN LANDS: CROWN FOREST SUSTAINABILITY ACT; FOREST MANAGEMENT AREAS AND THE CLASS TIMBER MANAGEMENT ENVIRONMENTAL ASSESSMENT

The government has not yet implemented all of the requirements under the Timber Management Class EA, nor under the relatively new CFSA. Those requirements include provisions for sustainable forestry in the planning area. Questions raised include whether the March 29, 1999 announcements are consistent with the Timber Management EA terms and conditions and with the CFSA as to long term sustainable management. Many of these requirements are not yet fully in force or have barely come into effect. Assuming that the Accord and other announcements do not contemplate unsustainable practices, it may be that there is no need for any amendments. The requirements for public accountability, specific targets, reporting and much else is integral to sustainable management, and it is essential to ensure that these requirements are not affected by the announcements. Another issue is whether these legal requirements even need amendment at this stage. Neither is it obvious that additional parks and protected areas would require amendments to the CFSA or to the Timber Management Class EA terms and conditions.

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[36]Brundtland report, at pages 149-50 and 157.

[37]*Convention on Biological Diversity*, June 5, 1992; Canadian Instrument of Ratification, December 4, 1992.

[38]*Convention on Biological Diversity,* Preamble, Articles 1 and 2.

A four year environmental assessment hearing was held into the Timber Management Class EA. The Environmental Assessment Board issued its decision in that hearing on April 15, 1994, approving the undertaking of Timber Management Planning, comprising the interrelated activities of access, harvest, renewal and their planning, on Crown lands on which timber management activities are carried out, on forest management units, in the areas of the undertaking", subject to the terms and conditions of the approval.

The approval required public notice of timber management and public consultation in the preparation of Timber Management Plans.[39] The EA Board's decision required monitoring and reporting by MNR at the forest management unit level and at the provincial level, as to timber management activities and as to moose and fish habitat, tourism values, representative terrestrial invertebrate species, including species which utilize various specified habitats. In addition to its annual reporting requirements, every 5 years, MNR is required to produce a provincial State of the Forest report.[40]

The *Crown Forest Sustainability Act* came into effect on April 1, 1995, shifting the focus from the cutting and harvesting of timber, under the old *Crown Timber Act*, to "the broader forest value of sustainability, defined as the long term health of the Crown forest, and, to achieve that objective, to manage Crown forests to meet the social, economic, and environmental needs of present and future generations. (s.1)"[41] In a recent Court decision, Mr. Justice Campbell described the object of the CFSA as "to accommodate a variety of interests including wildlife, conservation, recreation, logging, wilderness preservation and jobs, and to sustain the forest for multiple uses for future generations." He explained that "The machinery to achieve sustainability is *a publicly accountable planning process* based on a statutory instrument called the Forest Management Planning manual, containing *objective indicators and determinations of sustainability against which the public can monitor the performance* of the Ministry. The new regime of forest management is based on the principle that sustainability for future generations should be based on the objective indicators set out in the Manual, and not on individual opinions about what is good for the forest."[42] (emphasis added)

The statutory provision for *indicators* are "particularly important and they are at the heart of the statutory scheme that revolves around the Manual .. they are the teeth of the Act...the concrete means by which the lofty principles of sustainability are carried into action on the ground in the forest...[without them] there is no way for the Minister or the public to know whether the

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[39]Conditions 5, 6 and conditions 7 - 14, Timber Management Class Environmental Assessment, Environmental Assessment Board, April 5, 1994, EA-87-02.

[40]Conditions 80, 81, Timber Management Class Environmental Assessment, *supra*.

[41]Campbell, J. in *Algonquin Wildlands League v. Ontario* (1998) 26 C.E.L.R. 163 (Ont. Ct. Gen. Div.; Div. Ct.) at 170 (affirmed, but varied, [1998] O.J. No. 4331 Oct. 27, 1998 (C.A.).

[42]*Wildlands* Div. Ct. at p. 170.

plans...although full of the statutory rhetoric of sustainability, will actually achieve the objectives of the act."[43] "The whole point of the Manual, and the whole point of the new statute, is that sustainability will no longer be determined exclusively by the judgment of Ministry officials on the basis of vague statutory principles." [44]

PART IV - CRITIQUE OF THE LANDS FOR LIFE PROPOSAL AND RELATED ANNOUNCEMENTS

A. PARKS AND PROTECTED AREAS

The issues explored in this section include the sufficiency of the protected areas system in the announcements, whether they meet Canada's international biodiversity commitments, whether the protected areas are protected with sufficient permanence, and whether the process to achieve additional protection is sufficiently certain.

1. Introduction

The present parks and protected areas system in Ontario has a multi-faceted legislative framework. The original rationale for establishment of parks was economic; more recently the emphasis is on their value in "national and global conservation strategies".[45] However, the authors of Environment on Trial noted that Ontario's legislative approach has not reflected the "emerging international emphasis on the ecological value of protected areas".[46] They outlined the need for the government to be required to act as trustees of parks to preserve their natural resources. Legislative requirements to protect additional natural areas are needed. Permanent protection for provincial parks is needed. The government must establish legislative prohibitions on logging and industrial activities adjacent to parks.[47, 48]

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[43] *Wildlands* Div. Ct. at p. 172.

[44] *Wildlands* Div. Ct. at p. 196.

[45] Environment on Trial, *supra,* at p. 273.

[46] *supra,* at p. 273.

[47] *supra*, at p. 273.

[48] McNamee, Kevin A., "Fighting for the Wild in Wilderness", p. 81 in Endangered Spaces: The Future for Canada's Wilderness, Monte Hummel, General Editor, 1989 Toronto: Key Porter Books.

2. The 12% Target is Not Enough

The Forestry Accord and the Land Use Strategy state that 12% of the planning area will be protected as parks and protected areas. While 12% is an improvement, protection of twelve per cent of the planning area is still insufficient as the following discussion shows. The Accord and the Land Use Strategy recognize the possibility of future additions to the system. CELA's concerns as to the sufficiency of this recognition are set out below. There are two aspects as to sufficiency of the amount of protected lands. The first is the issue of "representation," which is a primary goal of the World Wildlife Fund's Endangered Spaces campaign[49]. That is, are all of the diverse ecosystems and habitats, reflective of all of the diverse plant and animal species "represented" in protected areas? The other aspect is whether on the whole landscape a sufficient proportion of the lands and waters are protected as "wildlands" so as to ensure the ecological functioning of the entire ecosystem.

(a) Biodiversity

In Canada's Biodiversity, Ted Mosquin, Peter Whiting and Don McAlister describe the "12%" figure as "a crude minimum goal suggested by the World Commission on Environment and Development. Regretfully, ecological or biodiversity considerations (such as described n this report) were not considered in making this misleading, highly publicized, and dangerous estimate, which was based on ignorance of the importance of ecological processes.... Ecologists today seem to be unanimous in their view that 12% preservation is grossly insufficient to secure the survival of existing wild species and ecosystems and of the time-tested orderly functioning of the ecosphere."[50] They further state that "We can now conclude unequivocally that the Brundtland Commission's suggestion of 12% protected (implying 88% of the plant's natural systems can be destroyed) is not only grossly inadequate but also a formula for the destruction of the ecosphere's ancient stable norms." In the Canadian context, after discussing requirements for protection of 50% to 2/3 of the earth's surface, these authors stated that "The system of national parks and highly protected areas should be increased to 33% of Canada's total area, and should include all ecoregions."[51]

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[49]In addition to the representative areas issue, Canadian Parks and Wilderness Society states that even with the March 29, 1999 announcements, the Provincial Park class targets have still not been met. They point out that at least 3 new or enlarged wilderness parks are still required, but no new wilderness class parks were proposed. CPAWS calculated in December 1998 that meeting even the MNR's already existing targets to complete the parks system would require the designation of 6 million hectares in park designations in the planning area, or between 14.4% and 27.6% of the planning area.

[50]Mosquin et al, infra, at page 130-1.

[51]Mosquin, Ted, Whiting, Peter G., McAllister, Don E., Canada's Biodiversity, The Variety of Life, Its Status, Economic Benefits, Conservation Costs and Unmet Needs, 1995,

Hence, although 12% protected areas in the planning area is an improvement over the current situation, it cannot be considered the final goal. The proposal must not be judged on the 12% goal but on the process to increase that goal over time.

(b) Process to achieve more is vague

The "promise" of continuing with additional protected areas to fully complete the system is vague and unspecific.[52] An insufficient proportion of the land base is protected, even with the new announcements, with no level of assurance as to future lands. There is no certain commitment to an increase in protected future lands; there are no quantitative goals to increase protected lands in the announcements; and there is no specific process nor criteria for getting to the additional lands.

(c) Needed proportion of wildlands protection

In addition to the concern of fully representing the range of biodiversity and habitat in Ontario is a separate concern as to the sheer percentage of wild space that must be protected in order to protect the overall functioning of our ecosystem. In response to the October 1998 Consolidated Recommendations, Ontario scientists reviewed available literature which had found that between 20 and 75% of the landscape must be protected as wild lands in order to ensure full species and biodiversity protection in various environments. The scientists' Statement concluded that "at least" twenty per cent must be protected[53]. Their statement also required that the protection be permanent. Studies reviewed by Canadian Parks and Wilderness Society have concluded that the 12% figure has no scientific basis and that protection of such a small amount of wilderness "is far too little to prevent mass extinction".[54]

Many studies would indicate that the percentage of wild lands protection needs to be at least 30%, fully protected, and even then, only if the highest value land, from an ecosystem perspective,

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Ottawa: Canadian Museum of Nature, at p. 133.

[52] Forest Accord, Clause 3, 6.

[53]Lands for Life: A Collective Statement of Conservation Concern from the Scientific and Academic Community. Presented to the Ontario government on November 13, 1998, described at CPAWS web site (http://www.cpaws.org), Jean Langlois, "Lands for Life', Parks and Protected Areas: How Much is Enough?" Mr. Langlois characterized the Statement as including "over 700 signatories from the Life Sciences faculties of every university in Ontario, academic societies, professional associations, museum curators and private sector professional consultants."

[54]CPAWS, Web Site, Jean Langlois, December 1998, "Lands for Life: Parks and Protected Areas: How Much Is Enough?", reviewing Soule, M.E. and Sanjayan, M.A. (1998) "Conservation targets: do they help? *Science* (279) 5359, 2060-2061.

is protected. For example, protection of stream corridor lands may accomplish far more over all protection than protection of the same amount of land elsewhere on the landscape.[55] CPAWS concluded in its December 1998 analysis that 20 to 30% of the planning area must be protected, and that it must be the "right" 20 to 30%.[56]

Recommendation No. 1

> The "Lands for Life" Proposal's goal of protecting 12% of the planning areas is laudable. However, the goal should be seen as strictly an interim goal. In order to meet the needs of biodiversity imperatives, overall functioning of the ecosystem, and species protection, a more ambitious target of 20 to 30% for future protected areas designation should be established along with a time frame and process to achieve the target. The commitment in the Proposal to increasing protected areas should be made more explicit, with more rigid timelines and scientific selection criteria.

3. "Protected" Areas are not Protected

(a) Provincial Parks

The Proposed Land Use Strategy states that the new provincial parks will be regulated under the *Provincial Parks Act*.

The Proposed Land Use Strategy states (at p. 19) that all commercial timber harvest, mining, and commercial hydroelectric power development will continue to be excluded from all existing and new Provincial Parks, but mineral exploration may continue in new parks. However, the Act gives the Minister broad discretion to make and amend park management plans. No public consultation or appeal process is envisioned by the recent changes to the Act. The MNDM announcements

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[55]Griffiths, Ron, Witness Statement, Exhibit 333 December 23, 1998, Evidence at London, Ontario, OMB PL968670; in the matter of City of London OPA 88, phase III; Griffiths, Ron, "Estimating the Development Capacity of Catchments that Maintains Water Quality: A How To Manual", (Draft), August 1998, Ministry of Municipal Affairs and Housing Policy Planning Branch, Toronto, at page 15: "If unimpaired water quality conditions are set as the target...then a development capacity for the Grey Country region can be established.... unimpaired water quality occurs provided that wildlands always composes more than 36% of the upstream catchment and that intensive agriculture never composes more than 15% of the upstream catchment.....Resource and ecological services provided by ecosystems are not isolated, independent items embedded in the landscape...Understanding and quantifying the interactions (trade-offs) between resources and services is an essential ingredient in watershed planning and sustainable development...."

[56]CPAWS, *supra*, "How Much is Enough"?

indicating that mining would be permitted in new parks will be discussed below.

(b) Conservation Reserves

Conservation Reserves will be created to "complement Provincial Parks in protecting representative natural areas and special landscapes." They will be governed by O.Reg. 805/94 under the *Public Lands Act*. Section 2 of that regulation states that land within a conservation reserve shall not be used for mining, commercial forest harvest, hydro-electric power development, the extraction of aggregate and peat or other industrial uses. The new conservation reserves will also be established using the existing policies outlined in *Conservation Reserves Policy and Procedure* (1997).[57]

However, new Conservation Reserves will allow mineral exploration if the area is identified as having very high mineral potential. If high mineral potential is determined, the reserve will be deregulated and new lands will be placed into regulation. These concerns will be discussed further below.

(c) International Definitions

At present the only timber harvesting allowed in parks is in a zone of Algonquin Park.[58] Under the Accord and the Strategy, forestry activities will not be allowed in parks and conservation reserves.[59] However, despite this, much of the land termed as "protected areas" does not meet the international definition of protected areas because they allow mining[60]. To meet international commitments to protected areas, the government must protect areas with permanent exclusion of mining, logging, hydroelectric development. Hunting must be allowed only on a case by case basis.[61]

Recommendation No. 2

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[57]Strategy, p. 19.

[58]Strategy, p. 19.

[59]Strategy, p. 19; Accord, clause 1, 2.

[60]EBR posting March 29, 1999, "Mineral exploration would be permitted in areas having very high mineral potential in new provincial parks and conservation reserves under controlled circumstances. If a site is to be developed for a mine, the area would be removed from the park or conservation reserve by deregulating it, and another area would be added to the park or conservation reserve to replace the deregulated area".

[61]IUCN Protected Areas Management Categories, please see "IUCN Protected Areas Management Categories" at http://www.OntarioParks.com/iuc.html (this version has eight categories).

As a general principle, all mining, timber, hydroelectric development and sport hunting in all new and existing parks and protected areas should be prohibited. Exceptions for hunting should be made only on a case-by-case basis in a transparent, prescribed manner.

4. Permanence of the protection

The announcements lack permanent protection for parks and protected areas, other than general statements that there will be a "regulatory context that provides permanence."[62] To the contrary, the mining announcements expressly contemplate moving parks boundaries. Even in areas without mineral potential, no permanence is provided. Moreover the Accord fail to stipulate any intention to enact legislative requirements to protect additional natural areas.

Recommendation No. 3

Enact a new Provincial Parks Act with the following provisions:

- Establish explicit, legislative trusteeship of provincial parks and protected areas
- Establish explicit, legislative permanence and define permanence
- Consult with First Nations before establishing new provincial parks and protected areas boundaries
- Require buffers in terms of permitted activities and intensity of permitted activities, around provincial parks and protected areas[63]
- Explicitly prohibit intensive forestry in adjacent and nearby lands if it will impact on provincial parks and protected areas
- Explicitly recognize in legislation the biodiversity objectives behind provincial parks and protected areas
- The MNDM mining announcements as to mining in provincial parks and protected areas, moving boundaries, and "borrowing of protected area land" must be explicitly revoked.

B. FORESTRY

Issues explored in this section include guarantees to the forestry industry with resulting constraints as to future additional protected lands, impacts of intensification of use, roads, and other concerns.

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[62]Forest Accord, Clause 1.

[63]Elder, P.S., "Biological Diversity and Alberta Law", (1996) 34 Alberta Law Review (No. 2) 293, text around notes 96 and 97.

1. Guarantees to the forest industry

The Accord provides to the signatory members of the forest industry guarantees of no increased cost, and at the same time, preservation of existing levels of pulp and wood supply. (Clause 2). It also provides for compensation payable by MNR "for capital investments for permanent infrastructure and processing assets directly related to regulated land withdrawals as a result of the Lands for Life process and any future unilateral withdrawals."(Clause 19). In CELA's November 1997 Submissions to the Round Tables, CELA cautioned against "tenure reform to strengthen the timber companies' interests in resources allocated to them, and to provide compensation to these companies for any future withdrawals of resource allocations." CELA pointed out at that time that the arguments as to some perceived need of "certainty and predictability" to make long-term investments in timber processing equipment were highly suspect. CELA argued in that brief that:

> "CELA is strongly opposed to tenure reforms which give the forestry companies a proprietary interest in the lands or resources allocated to them. At all times, the Crown must reserve its prerogative right to allocate, re-allocate or withdraw lands or resources within the tenure area. Similarly, CELA is strongly opposed to any notion that compensation should be payable to the forest industry where withdrawals or re-allocations of public lands or resources may be necessary or desirable for public interest reasons".[64]

Despite that caution, this is exactly what the MNR has done in the Accord, thereby constraining future governments, because of considerable costs consequences, from exercising decisions in the public interest as is appropriate at that time. The forest industry signatories to the Accord will arguably have legal claims to the compensation promised in the Accord, particularly as they can prove that they made expenditures and investments in reliance on this commitment. Not only is it a concern that future flexibility has been hampered, but also that these commitments have been given to a selected group of companies, based on an arbitrary, ad hoc, and non-public process.

Recommendation No. 4

Clear limits as to the forest industry guarantees must be immediately established, along with strict criteria as to when such guarantees would be provided. Any contractual commitments made by the government to specific industry members must be immediately publicized and if appropriate, all such commitments must be reviewed and if necessary withdrawn or amended.

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[64] *Submissions of the Canadian Environmental Law Association to the Ministry of Natural Resources Regarding the "Lands for Life" Planning Process*, CELA Brief No. 334, November 18, 1997 (hereafter referred to as CELA 1997), Prepared by Richard D. Lindgren, Counsel, at page 8.

2. Intensification of use

The Accord provides for the possibility of intensive forestry activities in certain areas. (Accord Clauses 5, 14, 15, 16, 17, 22 , see also Strategy p. 16). CELA noted in its November, 1997 brief that it was aware of "internal MNR/industry discussion of the possibility of allocating up to 60% of the non-protected public lands for 'intensive forestry'. CELA noted that, in principle, it could agree with the proposal to specifically designate certain lands for high-intensity timber management, subject to certain provisos. Those provisos included that high intensity be restricted to highly productive sites located close to mills and sufficiently isolated away from other forest uses or users.

However, CELA stated in November, 1997 and repeats now, that CELA cannot accept that 60% of public lands should be eligible for intensive forestry[65]. Although no specific percentages have been mentioned in the Accord and Strategy, neither have any ceilings as to proportion of intensive use been set. CELA is very concerned that at least two of the parties to the Accord may still be intending to seek very large proportions of the forestry lands as intensive forestry lands. As CELA pointed out earlier, many of the most productive lands are also the most biologically diverse. In addition, given the insufficient protection of only 12% of the planning area, CELA's concern as to the impact of high intensity uses on the overall ecosystem and on adjoining areas is magnified.

Recommendation No. 5

A quantified maximum total limit as to intensive forestry must be immediately established, along with an explicit requirement that intensive forestry must nevertheless meet the sustainability requirements of the Timber Management Class EA and the CFSA.

3. Roads

Several studies and submissions have noted the necessity for protected areas to be large and roadless in order to achieve the international commitments of permanent protection. CELA noted in its November 1997 Brief the importance of protected areas as being maintained "in a roadless, unfragmented wilderness, preferably in areas of 10,000 hectares or greater". [66] However, the Accord provides no assurance that any of the parks and protected areas will remain roadless; to the contrary, it provides for establishment of "crossing locations" across parks and protected areas in Clause 20. The Strategy's only reference to protection from roads is in "Remote Access EMA's". The category will not prohibit roads, but only provide that planning standards will be established for them.[67]

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[65]CELA 1997, Lindgren, p. 7.

[66]CELA 1997, Lindgren, p. 4

[67]Strategy, p. 25.

Recommendation No. 6

> Clear statements should be made that protected areas will be protected from the construction of roads.

4. Discussion: Other Concerns

The publicly accountable, transparent process that the Ontario Divisional Court recently noted as critical to the new approach to sustainability was absent from the manner in which the Forest Accord was negotiated.

Of even greater concern is that none of the principles enumerated in the CFSA are mentioned in the Forest Accord and therefore it is not known if the parties intend to preserve the sustainability and accountability principles set out in amendments that they contemplate to the CFSA and to the Class EA terms and conditions. (Clause 15) The lack of specificity in the Accord as to which provisions of the CFSA and the Class EA that the parties envisage endeavouring to amend is very troubling.

That government has entered into a contractual agreement to seek future legislation is also of concern. The resources of the state will be brought to support legislative amendments on terms that only a few agreed to, with the interests of only a few reflected.

The problems with this approach are already illustrated as MNDM rushed in to provide reassurance to its constituency, and as negotiations with economic interests continue to ensure that those selected by government as deserving of protection receive favoured negotiation and reassurance.

Recommendation No. 7

> An in-depth analysis should be undertaken to determine whether the CFSA and the Class EA terms and conditions in fact need to be amended to implement the Accord and other proposals. It is suspected that the legislative framework at present is sufficient to accommodate the implementation of the proposal.

5. Conclusions

To foreclose future options is inconsistent with a public trust approach to management of Crown lands. It is not appropriate to provide guarantees of any particular level of wood supply nor of costs. Neither is it appropriate to guarantee payment today for capital investment as a result of future government land use decisions.

Biodiversity protection is threatened by the lack of land use buffers around parks and protected areas, and from permitting roads in all parks and protected areas. Biodiversity protection is also threatened

by the prospect of intensification of forestry without accompanying limits on possible intensification, and without a sufficient proportion of the land base protected from industrial uses.

The parties' intentions as to future amendments of the CFSA and Timber Management EA are unclear, and there is no clear statement as to an intention to preserve the sustainability and accountability principles contained in the CFSA and the Class EA terms and conditions.

C. FIRST NATIONS AND METIS

Much of the land in question is covered by several treaties with First Nations, including Treaty 9 (1905), Treaty 9 (1929), Robinson Superior Treaty (1850) and Robinson Huron Treaty (1850)[68] and includes reservation land, land claims areas and traditional First Nations activities areas. The existing aboriginal and treaty rights of the First Nations and Metis people received constitutional protection in 1982 under Canada's *Constitution Act*.[69]

1. Parks & protected areas

Establishment of the boundaries of parks and protected areas where no timber harvesting will be allowed may affect the ability of the MNR to comply with Condition 77 of the Timber Management Class EA for specific First Nations. The drawing of the boundaries of parks and protected areas without First Nation agreement may be a violation of Condition 77 and may further be a violation of the Ontario government's fiduciary duties to First Nations.

Condition 77 required MNR district managers, during the term of the EA approval, to conduct "negotiations at the local level with Aboriginal peoples whose communities are situated in a management unit, in order to identify and implement ways of achieving a more equal participation by Aboriginal peoples in the benefits provided through timber management planning..." These negotiations were to include job opportunities associated with mill operations, locating facilities in Aboriginal communities, providing timber licences to Aboriginal peoples where unalienated Crown

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[68] "Map of Indian Treaties in Canada", Surveys and Mapping Branch, Department of Energy, Mines and Resources, reprinted in Aboriginal Peoples and the Constitution: Treaties and Land Claim Agreements, Kent McNeil, editor, course materials, Osgoode Hall Law School, York University, 1998.

[69] *Constitution Act*, 1982, section 35(1), which reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." "Aboriginal peoples of Canada" are defined in section 35(2) as including "the Indian, Inuit and Metis peoples of Canada". Section 35(3) clarifies, "for greater certainty" that in subsection (1), "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

timber exists close to reserves, and other matters.[70]

The Strategy and the Accord contain no provisions providing assurance to Aboriginal peoples that they will be included in the benefits of the Accord and the Strategy. There is no discussion of the current compliance with Condition 77. There is merely a commitment to consult Aboriginal peoples. Condition 77 is poorly complied with to date and therefore this further commitment rings hollow. No consequences of any failure to consult are provided. Furthermore, there is no provision that the consultation and results must be to the satisfaction of the affected First Nations.

For areas affected by land claims, or for any unceded lands in the planning area, Ontario will be unable, as a matter of constitutional law, to displace the First Nations rights. First Nations also have unceded traditional rights and treaty rights in much of the planning area, to hunting, fishing, food gathering, ceremonial and other activities, and Ontario cannot unilaterally displace the First Nations from these rights. Similarly, Ontario cannot unilaterally extinguish First Nations' existing traditional and treaty rights over the remainder of the landscape, outside of reservation lands and outside of parks and protected areas.[71]

The Accord and the Strategy do contain rhetoric to the effect that the existing rights of Aboriginal peoples are not affected by the Accord. However, there is no provision as to how traditional uses of the land will be protected; as to what will happen if the planned forestry activities are inconsistent with traditional and Treaty rights to use the land. There is no recognition of the fiduciary duties owed to First Nations peoples by the province in accordance with recent Supreme Court of Canada jurisprudence such as the *Delgamuukw* decision.[72]

2. Conclusions and Recommendations

In order to deal with these issues, it is recommended:

> **8.** The primary conclusion is that, of course, First Nations peoples must speak for themselves and make the decisions as to how their existing Aboriginal and Treaty rights will be affected by Ontario. They have constitutional protection for these rights and Ontario lacks the jurisdiction to unilaterally affect them. The remaining recommendations in this section are some suggestions as to the most obvious ways in which Ontario can improve its approach and reduce the likelihood that it will impact upon First Nations Aboriginal and Treaty rights in an unconstitutional manner.
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> **9.** For areas impacted by the announcements where there are outstanding land claims,

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[70]Timber Management Class Environmental Assessment, Condition 77.

[71]Constitution Act, section 35.

[72]*Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

Ontario must promote the settlement of those claims before proceeding with other land use decisions.

10. First Nations communities must be consulted as to traditional activities before drawing new parks and protected areas boundaries, and before committing lands to industrial uses.

11. Treaty rights of affected First Nations must be reviewed with them before proceeding with the Land Use Strategy.

12. MNR must ensure the compliance with Condition 77 of the Class Timber EA before proceeding with any further mining or forestry land use decisions.

13. Explicit legislative recognition of the right to First Nations constitutional rights to continue Treaty activities and traditional activities in parks and protected areas unless otherwise agreed must be provided.

14. For land use decisions in lands affected by Aboriginal and Treaty rights, joint land use and management decision making procedures must be established.[73]

D. MINING

1. Introduction

The issues of concern in this section include the ecosystem hazards potentially presented by mining in protected areas and on adjacent areas; inconsistencies between the Accord, the Strategy and the MNDM announcements, the adequacy of mining regulation to protect against ecosystem hazards where mining is permitted and failure to comply with standards for international protected areas.

2. Impacts of Mining

The environmental impacts of mining, smelting and refining minerals and metals in Canada include liquid effluent discharges containing metals and other contaminants; acid mine drainage ["AMD"] from tailings disposal areas and waste rock piles; air emissions of sulphur dioxide, metals and particulate matter; and finding long-term mitigation solutions to environmental problems at inactive, closed and abandoned mine sites."[74] As a result, mining can have adverse effects on the

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[73]Erasmus, Georges, "A Native Viewpoint", in Endangered Spaces, *supra*, at pages 94 - 96.

[74]Canada, Environment Canada, *The State of Canada's Environment* (Ottawa, ON: Supply and Services Canada, 1991) at p. 11-8.

environment far beyond the immediate mine site. Moreover, mining disruption does not happen only as a result of highly-publicised mining accidents, but also during the normal cycle of prospecting, exploration, mine development, production and closure. Mining-related environmental impacts, such as AMD, can last for many years, decades or even centuries. Finally, it is often difficult if not impossible to rehabilitate an area impacted by mining to its original state or role in the ecosystem.[75]

An example from British Columbia shows what can happen when mining is allowed in protected areas. "Bob Ahrens, former parks director for Stratchona Park is quoted as saying the following [about the Myra Falls mine]: 'What harm is a ten acre mine in a park of 500,000 acres? Let me tell you about a 10 acre mine in one provincial park. This [mine] requires a hydro electric power development (or power poles into the park), a tailings disposal site, many roads, a camp, barge shipping and tugs on a major lake, loading out works, then a highway through the park (along water grades) all just for a starter. *That 10 acre hole influences 100,000 acres of the choicest parts of the park.*'"[76]

Additional impacts include the risk of accidental release of contaminants if containment measures fail catastrophically; long-term leaching or run-off from "normal" operations and closed mines, e.g. Acid Mine Drainage (AMD); wind-blown dust; road-kill of wildlife; and other human uses spreading into the park interior through the mining roads. Even one mine in or near a protected area can have a very large negative effect. In the words of a leading textbook on Canadian mining law: "Mineral exploration and mining are regarded as precisely the kinds of activity against which protection is needed, no matter how little is taken up with the actual mining".[77] In other words, protecting parts of the landscape against mineral exploration and mining is one of the main reasons why people want to set up parks in the first place.

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[75] Cf. P. Muldoon and M. S. Winfield, *Brief to the House of Commons Standing Committee on Natural Resources Regarding Mining and Canada's Environment* (Toronto, ON: Canadian Environmental Assessment Association and Canadian Institute for Environmental Law and Policy, April 16, 1999). See also Friends of the Earth Canada, "The Dark Legacy of Mining" at http://www.foecanada.org/campaign/mining/darklega.htm, especially the detailed discussion of environmental impacts in "The Big Picture" at http://www.foecanada.org/campaign/mining/bigpictu.htm (both accessed on May 16, 1999); and Environmental Mining Council of B.C., *More Precious than Gold: Endangered Spaces Discussion Paper on Mining and the Environment* [Workshop Draft, May 1997].

[76] Environmental Mining Council of B.C., "More Precious than Gold...." *supra*, at p. 9 [emphasis added].

[77] B. J. Barton, *Canadian Law of Mining* (Calgary, AB: Canadian Institute for Resources Law, 1993) at p. 175.

3. Laws Governing Mining and its Environmental Effects

The *Mining Act*[78] governs mining activity in Ontario throughout all the stages of prospecting, claim staking, exploration, development, mining operations, suspension, rehabilitation and closure.[79] Prospecting for minerals and staking of mining claims are permitted on"Crown land" (surveyed or unsurveyed). These activities are also allowed on land which the Crown has sold or leased where the mineral rights have been reserved to the Crown.[80] But the Crown may withdraw any of the above types of land from prospecting, staking or selling mineral claims.[81]

Recent amendments to the *Mining Act* have allowed the government to establish different claim staking regulations for different areas. The government subsequently passed special regulations for staking claims in some environmentally sensitive areas[82] and disruptive mineral activities in places such as the Temagami Skyline region.[83] The result was the re-opening of these areas to mineral exploration, lifting a moratorium previously imposed by government policy.[84]

4. The Proposals: What do the Announcements Say about Mining?

On March 29, 1999, the Minister of Northern Development and Mines issued three separate Press Releases assuring the mining industry that despite the Forest Accord and the Strategy, it was still "business as usual".[85]

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[78] *Mining Act*, R.S.O. 1990, c. M.14, as amended.

[79] Mining in provincial parks is governed by the *Provincial Parks Act*, R.S.O. 1990, c. P.34, as amended, and O. Reg. 594, R.R.O. 1990. This statute and regulation are discussed in the next section of this memo.

[80] *Mining Act*, ss. 27 (a) and (b).

[81] *Mining Act*., s. 27(d). See also the definition of "Crown land" in s. 1, ibid., which excludes any land reserved or appropriated by the Crown for another purpose.

[82] O. Reg. 356/98, available at http://www.gov.on.ca/MNDM/MINES/LANDS/legsregs/oreg356e.htm.

[83] O. Reg. 349/98, available at http://www.gov.on.ca/MNDM/MINES/LANDS/legsregs/oreg349e.htm.

[84] Ontario Legislative Assembly, Hansard (December 8, 1997), Debate on the Red Tape Reduction Act (Bill 120) (Ministry of Northern Development and Mines), second reading, at 2030-2100 (see especially comments by Mr. Pina, Ms. Martel and Mr. Wildman).

[85]March 29, 1999, MNDM announcements "Ontario Commitments to the Minerals Industry."

MNDM's announcements included assurances to:

- Protect existing rights of all forms of mining land tenure in new parks and conservation areas;

- Guarantee low impact staking and exploration in unclaimed areas of provincially significant mineral potential located inside new parks and conservation reservers;

- Ensure the mining and exploration industry and MNDM will develop procedures to stake in environmentally sensitive areas, monitor and inspect environmentally sensitive areas, conduct review of policies, regulations and practices, take areas with strong positive indicators to advanced exploration stage, borrow lands for mining while substituting it with land of equal natural heritage value and restore land to the parks system when mining is finished ("floating protected areas"); and

- Require any future expansion of parks and protected areas to be based on mutual agreement among the mining industry, forestry industry, in addition to public consultation.[86]

In addition, the Ministry announced a $19 million program to uncover specific locations for prospecting and exploration companies in their search for new mines.[87] In addition, MNDM announced its intention to provide $2 million dollars to the Ontario Prospectors Assistance program ("OPAP") in an effort to boost mineral exploration in Ontario. The injection of the additional two million dollars brings the total government funding this year to OPAP to $4 million.[88]

The March 29, 1999 announcements by the Minister of Northern Development and Mines also promise that the Ministry will work with the exploration and mining industry to develop special rules for mining in any of the new protected areas if and when such activity is permitted.

MNDM followed the March 29, 1999 announcements by sending a contract to every mining claim holder in Ontario reassuring them that it would be business as usual. MNDM requested claim holders who had been "parked" or otherwise affected by the government's Lands for Life process to sign and return the contract. However, MNDM's proposed contract and its announcement did little to reassure the Prospectors and Developers Association of Canada (PDAC). The PDAC posted a notice on its web site, urging mining claim holders not to sign the contract. A legal opinion received

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[86]News Release #150 and Backgrounder, March 29, 1999, MNDM "Hodgson say *Living Legacy* Good News for Northern Ontario".

[87]News Release #149 and Backgrounder, March 29, 1999, MNDM, "Hodgson Announces $19 million for 'Operation Treasure Hunt'".

[88]News Release #148 and Backgrounder, March 29, 1999, MNDM, "Hodgson Announces $4 Million for Ontario Prospectors".

by PDAC had raised concerns that claim holders existing rights could be jeopardized by signing the contract. PDAC advised claim holders that "signing the contract could prejudice [claim holders's] future rights for compensation."[89] Subsequently, MNDM has issued withdrawal of staking orders, but MNDM's memo to claims holders stated that areas designated as having "Provincially Significant Mineral Potential" "will be reopened to exploration and staking under regulations to be developed for such areas."[90]

5. Critique of the Mining Announcements

(a) Mining is Allowed in Protected Areas

In 1988, the Ontario government reinstated a previous ban on new prospecting and mining in provincial parks in 1988. However, that "no-mining" policy has never been incorporated into the *Provincial Parks Act*, or the parks regulations, which still allow the government to permit prospecting and mineral development in provincial parks.[91] As of 1993, "... exploration and development [could] only proceed on the pre-existing claims, leases, patents, or licenses of occupation, which [were] outstanding in fourteen different parks".[92] While no *new* mining-related activity has been permitted in provincial parks since then[93], there are still 23 *existing* provincial parks which could be readily opened up to mineral exploration by merely changing government policy.[94,]

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[89]Prospectors and Developers Association of Canada, "Land of Life Cautionary Announcement" located at http:/www.pdac.ca/lands.htm.

[90]Memo from Mr. John Gammon, Assistant Deputy Minister, Mines and Minerals Division, Ministry of Northern Development and Mines, dated May 7, 1999, re: Ontario Living Legacy - New Parks and Conservation Reserves.

[91]Environment on Trial at pp. 285 and 292-293. See also Barton, infra, at p. 176. Currently, mining in provincial parks is governed by s. 20 of the *Provincial Parks Act*, R.S.O. 1990, c. P-c. P.34, as amended, and O. Reg. 594, R.R.O. 1990. (See also s. 31 of the *Mining Act*.).

[92]Barton, *supra*, at p. 176.

[93]There were probably no new permits of licenses issued under Reg. 954 since at least 1994. The Ministry's database does not track mining permits or leases issued under Reg. 954, as distinct from all other licenses and permits, however. Therefore, it is difficult to verify the status of mineral exploration or development in any of the provincial parks listed in Reg. 954.: Randy Schienbein, Supervisor, Mining Lands Dispositions Office, Ministry of Northern Development and Mines, Sudbury, Ontario (Telephone Interview, May 13, 1999).

[94]Environment on Trial, *supra*, at p. 285. The parks are listed in O. Reg. 954, R.R.O. 1990, which has not been amended to date.

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In contrast to the situation with some provincial parks, mining is completely prohibited in all conservation reserves established by regulation under the *Public Lands Act*.[97] The prohibition on mining was one of the conditions for exempting the process of designating conservation reserves from the *Environmental Assessment Act*.[98] The proposed Land Use Strategy and the March 29, 1999 mining announcements are unprecedented in that it marks the first time that the Ontario government has signalled an intention to allow mining in any conservation reserves. Implementing the Ontario Government's March 29, 1999 announcement will require changes in regulation to allow mineral exploration and, potentially, mine development, in all the newly-established provincial parks and conservation reserves.

Any proposed changes to regulations to permit mining in protected areas is contrary to sound protected area management principles. It assumes that it would be possible to find an equivalent amount of land adjacent to a protected area to compensate it against the land impacted by mining. However, many protected areas are designated because of unique features not found elsewhere. Furthermore, there may be no "buffer zone" of undeveloped land around the park from which to take "compensation" land, due to the intensive resource use on the non-protected part of the landscape envisaged in the Land Use Policy. When part of a "floating protected area" is used for mining, it risks permanent damage to the rest of the protected area, and the inability to ever rehabilitate the affected lands so that they can be returned back to the protected area.

Permitting mining in protected areas also assumes mining harm to surrounding protected area could be mitigated with little risk to the protected area and that mining lands could be rehabilitated

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[95]Curiously, many of the 23 provincial parks where mining could take place under current regulations are classified as "Wilderness" or "Natural Environment" parks by the Ontario government. These parks are also rated "#1" (Strict Nature/Scientific Reserve) or "#2" (National Park [or equivalent]), using categories developed by the International Union for the Conservation of Nature (IUCN). The IUCN makes it clear that mining should not be allowed in any #1 or #2 parks. Moreover, the Ontario government is publicly committed to manage the provincial parks system based "on accepted scientific principles" and a "global commitment" to help Canada comply with the *United Nations Convention on the Preservation of Biological Diversity.*

[96]http://www.mnr.gov.on.ca/MNR/parks/glob.htm (accessed on 1999-05-11).

[97]Public Lands Act, R.S.O. 1990, c. P-34, as amended, and O. Reg. 805/94, as amended.

[98]O. Reg. 682/94 [Exemption MNR-61], s. 6. Compare with the lack of such a requirement for the process of designating provincial parks, *ibid*. Further, the Environmental Assessment exemption granted to the process of managing provincial parks leaves the issue of what activities are allowed in parks up to government policy, "as amended from time to time" (O. Reg 83/94 [Exemption MNR-59/2], s. 2).

back to protected area standards. As discussed above with respect to mining impacts, these are not valid assumptions. The assumption that parks and protected areas are easily replaced is also not valid because " ...the habitats of many endangered and threatened species are at least as rare, certainly no more movable, and much more subject to irreparable damage than mineral deposits."[99]

Recommendation No. 15

Ensure that the prohibition of mineral exploration and development is incorporated into the *Provincial Parks Act* and the *Public Lands Act* explicitly.

Recommendation No. 16

Ontario should develop a system for protected areas, based on scientific criteria, to ensure representation of the full diversity of its landscape within a network of protected areas on Crown lands. This system of protected areas should comply with Canada's international obligations under the Biodiversity Convention. Ontario should also ensure that it is using the most up to date version of the commonly accepted scientific principles developed by the IUCN when classifying protected areas and deciding on permitted uses. (Ontario should encourage other Canadian jurisdictions to use the same version of the IUCN system.)[100]

Recommendation No. 17

Repeal O. Reg. 954, R.R.O. 1990, which grants government authority to permit mining in 23 provincial parks with nothing more than a change in policy.

Recommendation No. 18

Mining claims should not automatically exclude land from protected area status.

(b) Inconsistencies between Documents

MNDM's announcements appear to have been issued with no meaningful public consultation with the public or even the PPL. Moreover, these announcements appear to be fundamentally at odds with key provisions in the Accord. Not surprisingly environmental groups, including the PPL voiced

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[99]Environmental Mining Council of B.C., "More Precious than Gold...." *supra*, at p. 6.

[100]Sources: *United Nations Convention on Biological Diversity*; Whitehorse Mining Initiative *Accord* and *Final Report* of Working Group on Land Access. (See also Brundtland Commission, as cited in Environment on Trial at p. 273)

serious concerns over MNDM's unilateral announcements.[101] The following are highlights of some of the major inconsistencies.

- The Mining announcements give assurance to the mining industry that the "government will respect the existing mining rights in new parks and conservation areas" is fundamentally at odds with Article 1 of the Accord, which promises that parks and protected areas would exclude mining "with a regulatory context that provides permanence.[102]

- The provision in the Mining announcements allowing "low impact staking and exploration" in unclaimed areas of "provincially significant mineral potential located inside new parks" also conflicts with Article 1 of the Accord, which specifically excludes mining in parks and protected areas. [103]

- Section 5 of the May 29, 1999 contract (which accompanied Minister Hodgson's memorandum to all mining claim holders) permitting exploration and other mining activities up to the "time a new provincial park or protected areas is created" conflicts with Article 2 of the Accord, which provides for interim protection from mining activities for areas proposed as parks or protected areas.

- The Mining announcements statement that "any further expansion parks and protected areas requires mutual agreement among the mineral industry, the forest industry and the partnership of Public Lands" is inconsistent with Article 6 of the Accord, which establishes a Ontario Forest Accord Advisory Board to develop a strategy for additions to the parks and protected areas.[104]

Overall, it appears that MNDM's March 29, 1999 announcements have severely undermined the government's credibility with respect to its commitment to protect Ontario's forest under the terms and conditions stipulated in the Forestry Accord.

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[101]Letter dated April 26, 1999 from PPL to Minister Hodgson.

[102]See section 1 of Backgrounder "Ontario Commitment to the Minerals Industry" accompanying News Release # 150, March 29, 1999, MNDM "Hodgson says Living Legacy Good News for Northern Ontario."

[103]See section 2, Backgrounder "Ontario's Commitments to the Minerals Industry" accompanying News Release # 150, March 29, 1999 MNDM "Hodgson says Living Legacy Goody News for Northern Ontario.

[104]See Section 4 of Backgrounder "Ontario's Commitments to the Minerals Industry" accompanying News Release #150, March 29, 1999, MNDM "Hodgson say Living Legacy Good News for Northern Ontario."

Recommendation No. 19

Abide by the Partnership for Public Lands recommendations that MNDM should hold unsigned any March 29, 1999 contracts.

Recommendation No. 20

That MNR withdraw that portion of the EBR registry proposal that would change parks and conservation reserve policies to allow mineral exploration.

(c) Adequacy of Mining Regulation to Protect Against Hazards

The implications of the March 29, 1999 mining announcements are even more troubling when viewed against the backdrop of amendments proposed to the Mining Act under Bill 26. In particular the Bill 26 amendments, introduced in 1995, weakened the Mining Act provisions requiring approval of closure plans by MNDM. [Closure plans require mining companies to prepare a rehabilitation plan to remediate a site from the adverse impacts caused by mining activities. The amendments make approval of the closure plans by MNDM optional]. Bill 26 also weakened the requirement that mining companies post reliable financial security to ensure that if they go bankrupt the public would not bear the cost for site remediation. [The Bill proposed that companies would have to simply have to meet a corporate financial test, the details of which still have not been released by MNDM]. The Bill also exempted information related to financial assurances for mine closures provided by mining companies from the requirements of the Freedom of Information and Protection of Privacy Act and removed the requirements that mining companies provide annual report on the implementation of the closure plans to MNDM. The amendments also exempted mining claim holders from liability for pre-existing mine hazards; and exempted proponents who voluntarily surrender mining lands from future environmental liabilities even if they arise as a result of the proponents actions.[105]

The Bill 26 amendments were criticized by CELA for effectively reversing the amendments made to the *Mining Act* in 1989 to ensure that the costs of remediating mine sites was borne by the mining industry as opposed to the public.[106]

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[105]Canadian Institute of Environmental Law and Policy*, Ontario's Environment and the "Common Sense Revolution": A Second Year Report* (Toronto, ON: The Institute, July 1997) at pp. 106-107. For a detailed discussion of the impact of Bill 26 amendments, see Canadian Environmental Law Association, *Brief to the Standing Committee on General Government Regarding the Environmental Implications of Bill 26* ,CELA Brief No. 276, December 22, 1995, at pp. 27-33.

[106]*Brief to the Standing Committee on General Government Regarding the Environmental Implications of Bill 26*, CELA Brief No. 276, December 22, 1995, at pp 32-33.

The Bill 26 amendments also de-regulated mineral exploration in public lands, by eliminating the need for mining companies to obtain a permit to carry out clearing, mechanical stripping sampling, drilling and blasting, moving heavy equipment and drilling rigs and building trails.[107]

The negative effects of this deregulation will impact the majority of the land affected by the Living Legacy Proposed Land Use Strategy where mineral exploration and mining will be permitted.

Unfortunately, with the May 29, 1999 mining announcements, the Ontario government has repeated many of the mistakes of 1983 that took years to rectify[108]. It may take many more years before the policy damage is undone again. The physical damage to protected areas, if they are opened up to mining, may take even longer to repair.

One way to avoid repeating the same mistakes with each round of new parks announcements is to amend the *Provincial Parks Act* and the *Public Lands Act* to clearly make the boundaries of protected areas permanent and to prohibit mining activities in them.[109] Another option is to insist that the government follows the consultation process described in the Forestry Accord before changing protected area boundaries or policies on mining.

Recommendation No. 21

Ontario should reject the notion of "floating protected areas" for mining or any other industrial land use.

Recommendation No. 22

Amend *Provincial Parks Act* to give government power to establish reserves pending the declaration of Parks. During the park reserve stage government should not be allowed to issue permits for mineral exploration or any other industrial activity in the reserve.

E. TOURIST OPERATORS

1. Introduction

Tourist operators and others players in the recreational area have a vital interest in outcome of the "Lands for Life" proposals. Tourism has been an important industry for northern Ontario. It has the potential to facilitate community diversification, economic stability and job creation. Moreover,

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[107]Ontario 's Environment and the "Common Sense Revolution", *supra,* p. 106.

[108]See Conclusion.

[109]Cf. Hummel, *supra* at p. 180; and *supra*, at pp. 313-315.

environmental tourism of northern areas provides a vital mechanism that allows those in urban centres to understand and appreciate wilderness and park resources. Finally, protecting land for tourism use may help protect it for wildlife, biodiversity and ecosystem functioning as well.

The 1994 Class Environmental Assessment for Timber Management on Crown Lands recognizes the importance of tourism. As noted by the Board, "[T]he tourist industry deserves special attention, because the negative effects of timber management can be especially severe on the economic interests of specific tourist operators: remote outpost tourism, road access tourism and venture tourism. Each of these could face different problems as a result of timber management."[110]

The *Timber Management Guidelines for the Protection of Tourism Values*, approved in 1987, seeks to minimize harm to tourist operations by protecting the visual appeal of forest landscapes. The Guidelines require timber management planners to consult with tourist operators. According to Condition 36 of the *Timber Management Environmental Assessment*, if there is any disagreement on how to deal with the tourism concern, this must be spelled out in the timber management plan.[111]

In 1997, the Ontario government approved the *Resource-based Tourism Policy* that has its goal to promote the development of the resource-based tourism industry in both an ecologically and economically sustainable manner.

CELA has promoted policies and mechanisms to further resource-based tourism through community employment objectives and community transition objectives. For instance, CELA has recommended that industries which commit to additional long-term employment per unit of resource allocated should receive greater initial allocations.[112]

Despite the benefits arising from the tourist industry, it appears that the tourism industry's interest are negatively affected by the proposals. As it will be noted, the extent of the impact will be dependent upon on how the proposals are implemented.

2. What the Lands for Life Proposals Say

Section 3 of the *Ontario's Living Legacy* document outlines the interface between the proposed land use strategy and tourism. The document, and other components of the announcements,[113] outlines

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[110]Timber Class Environmental Assessment, *supra,* p. 337.

[111]Ibid., p. 339.

[112]CELA 1997, *supra,* at p. 6.

[113]Other aspects of the announcements include:Existing authorized seasonal recreational camps will be permitted to continue indefinitely in new provincial parks and will be eligible for enhanced tenure, but not purchase of land (EBR posting March 29, 1999).

a number of actions that are designed to support tourism, including:

- permitting the continuation of existing tourism operating in all land use designations;
- updating and strengthening existing forest management guidelines for the protection of tourism values;
- establishing a new process for negotiating Resource Stewardship Agreement; and
- developing a dispute resolution process.[114]

The Strategy also commits to updating the *Timber Management Guidelines for the Protection of Tourism Values* by 1999.

One of the key features in this regard is the Resource Stewardship Agreements (RSA). Essentially, these agreements seek to "formalize the relationship between the resource-based tourism and forest industries."[115] The Strategy outlines guides for the development of these agreements. According to the Strategy, the establishment of RSAs will be phased in as forest plans come up for renewal. The RSA policies must be consistent with the land use intent of of the land use areas that are established in the land use strategy.

3. Implications

On one hand, one can surmise that the use of RSAs may have some beneficial impact in diminishing the disputes between the tourism and forestry interests. However, the intent of the land use proposal may have some important, but negative, implications for tourism.

Of concern to the tourism industry should be the statement in the Strategy that "Protection for tourism operations which is beyond that provided in the updated *Guidelines for the Protection of Tourism Values* will normally occur on a 'beneficiary pay' basis."[116]

This statement can be interpreted as indicating that the tourism industry which requires lower

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Existing authorized tourism facilities and recreation trails will be permitted to continue in new provincial parks, subject to management prescriptions determined through management planning (EBR posting March 29, 1999).

Establishment of new tourism facilities may be considered in planning for individual conservation reserves (EBR posting March 29, 1999)

[114]Strategy, p. 8.

[115]Strategy, p. 9.

[116]Strategy, p. 9.

forestry impacts in a particular area, may be required to pay to compensate the forestry industry for the lower intensity or greater geographic buffer between their respective activities. The Forestry Accord more clearly states this intention:

> MNR and the forest industry will support the principle that the increased costs and lost volumes incurred by the forest industry as a result of resource (tourism) stewardship agreements which provide tourism protection *in excess of that resulting from the normal application of tourism guidelines*, will be the basis for calculating a charge *to the beneficiary* to offset the forest industry's costs or losses. *The partnership for Public Lands agrees that they will not oppose the beneficiary pay concept for resource stewardship agreements*[117]. (emphasis added)

The implications of the "beneficiary pay" basis could have disastrous effects for the Ontario northern tourism industry. First, it is important to note that none of the announcements *promotes* tourism, ecotourism or any other recreational based industries. The proposals essentially freeze the tourist industry (in terms of allowing present activities to continue) and then only gives them the protection as that afforded by the *Guidelines.*

Secondly, not only do the announcements fail to promote the industry, but they actually work against the protection and enhancement of tourism. Clearly, the Accord and other announcements serve to protect the supply of fibre for the forest industry subject to the Tourism guidelines which are really based on ensuring the retention of certain aesthetic qualities in tourist areas. Any additional protections negotiated through the RSA will presumably be at the overt expense of the tourist industry. It is submitted that the "beneficiary pays" principle sends a clear message that forestry industry interests are more important to promote than other economic interests. It will also present a significant chill to the tourist industry since any additional "benefits" will be expensive to a sector that is not known for its high profit margins.

The proposed land use strategy should not create built-in biases against the tourism industry. To the contrary, the document should develop a foundation to build the industry in order to reap the benefits as set out above.

Recommendation No. 23

> The *Ontario's Living Legacy - Proposed Land use Strategy* document should be amended in the following ways:
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> (a) the tourism industry should be recognized as a key industry sector in the north and mechanisms should be included to promote and enhance the industry so long as those mechanisms are ecologically sustainable; and

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[117]Forest Accord, clause 29.

(b) the "beneficiary pays" principle in the Resource Stewardship Agreements should be omitted.

F. HUNTING & FISHING

1. Introduction

Hunting and fishing is an important adjunct to the tourism industry. The issue with respect to the release of the Lands for Life announcements is to what extent are fishing and hunting interests affected.

At present, hunting is permitted in some provincial parks on a case-by-case basis within defined seasons.

2. What the Lands for Life Proposals Say

The March 29, 1999 EBR posting describes that bait fishing, commercial fishing, commercial fur harvesting and wild rice harvesting will be permitted to continue indefinitely in new parks except in nature reserve parks and zones. Sport hunting is to be permitted in all new provincial parks and park additions except in nature reserve parks and zones.

3. Implications

There are two implications of the proposals with respect to hunting and fishing. First, it has been argued that permitting recreational hunting in almost all of the new parks "is a major change to the Ontario Provincial Parks Planning and Management Policies, under which recreational hunting and similar uses are normally dealt with on a case-by-case basis."[118]

It is unacceptable to have a blanket policy of assured hunting and such uses even before new parks and protected areas are formalized. Instead, there is need for careful study and an understanding of the implications for sustainability for such uses are permitted. Hence, the best approach is that such uses should be determined on a case-by-case basis.

The second implication is with respect to First Nations and aboriginal interests. It may well be that such policies of allowing hunting and other uses in new parks and protected areas may affect their current or future rights to such resources. Any such uses should await a determine of what rights First Nations have and how best to accommodate demands on similar resources.

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[118]CPAWS web site, *supra*, "The Outcome of Lands for Life".

Recommendation No. 24

Hunting in new parks and protected areas should only be allowed after a careful assessment as to the sustainability of such practices on a case-by-case basis.

Further, hunting and fishing rights must be subject to those rights and interests granted to, or those still to be determined, for First Nations and aboriginal interests.

PART V - CONCLUSIONS

A. GENERAL

The key conclusions and concerns in this submission include: there is insufficient recognition of the concept of management of Crown lands in the public trust; insufficient protection for biodiversity; and insufficient assurance of long term ecosystem sustainability. CELA concludes that the 12% target is not enough protection; that "protected areas" and parks" are not sufficiently protected; that the protection offered lacks permanence and that the protection afforded to mining in protected areas must be definitively removed. CELA's concerns as to forestry include the manner of intensification of forestry on the landscape and its impact on adjacent lands and on protected areas. There are also concerns about the guarantees given to forestry, the amount of land where forestry may be intensified, increased forest industry claims for compensation in the event of future additional areas being protected, and the provisions for roads across protected areas. With respect to First Nations and Metis peoples, the primary concern is that land use decisions are being made before their Aboriginal and Treaty rights as protected by the Constitution have been delineated in a mutually satisfactory way. There is also concern as to the track record of compliance with the already existing Condition 77 from the Timber management Environmental Assessment. There are concerns as to the short and long term implications for the future of tourism in the planning area and as to the proposed "beneficiary pay" concept that would see tourist operators potentially paying forest companies not to impact their tourist operations. The primary conclusion as to hunting is that the policy for hunting in parks and protected areas ought to be considered on a case by case basis for several reasons including impacts on sustainability, implications for First Nations and Metis peoples and possible conflicts with other recreational users.

In conducting this analysis, CELA staff have spoken to many people. The Accord and announcements could be interpreted in a number of ways. The events leading up to the March 29, 1999 announcements bear a striking resemblance to the events of 1983 in the Ontario parks story. The story is related by Arlin Hackman, former executive director of Wildlands League:

> "There were two milestones along the road to the 1983 decisions...The first was the public release by the Minister on March 12, 1982, of the *Report of the Task Force on Parks System Planning. ...* Predictably, the announcement of 245 specific candidate parks provoked dismay and outrage among the forest and mining industries. A

> virtual firestorm of public debate followed...In 1982 alone, open houses... drew more than 10,000 people... More than 10,000 written submissions were received by the Minister....The second milestone was a low-profile but influential, closed-door meeting in January 1983. Presided over once again by the Minister, it was attended by representatives of twenty-seven stakeholder groups, including half a dozen conservationists.... By all accounts the case for parks and wilderness protection was well argued by conservationists at the meeting. Led by Monte Hummel, park proponents were also the only ones to open the door to compromise, not on the number of parks but on permitted uses in wilderness areas. It was proposed that logging should be flatly prohibited, that mineral exploration should be low-impact (aerial) with the added proviso that any subsequent mines would be removed from the park and compensated by adding comparable parkland elsewhere, and that sport hunting and commercial tourist operations should only be considered on a park-by-park basis.... The final decisions, made public on June 2, 1983, revealed that the Minister, given an inch, had taken the proverbial mile. Of the 245 original candidate parks, 90 were dropped and many of the remaining 155 were whittled down in size, due to resource conflicts, for a total reduction of 3 million hectares! No mechanism was established for recovering this lost ground through future park proposals.... Though logging was to be excluded from the promised parks, mining, sport hunting, and commercial tourism would be allowed in most, including the wilderness parks, with no mention of the special conditions Hummel had proposed at the January meeting. "Blue book" management policies were cast aside. The whole business was exempted from environmental assessment ... and land-use plans became land-use guidelines of little force."[119] (In 1988, the new Minister of Natural Resources restored the "blue book" vision of wilderness as government parks policy and committed the last batch of parks promised in 1983.)

One of the concerns of CELA's analysis is to ensure that parks and protected areas commitments receive sufficient legislative and regulatory protection and permanence so as to both meet international commitments for protected areas and to ensure that the protected areas that the Ontario public are expecting as a result of the March 29, 1999 announcements are not lost with a mere reversal of individual Ministerial or cabinet preferences.

B. CONSOLIDATED RECOMMENDATIONS

To address the concerns identified in this report, the following recommendations are re-iterated:

1. The "Lands for Life" Proposal's goal of protecting 12% of the planning areas is laudable. However, the goal should be seen as strictly an interim goal. In order to meet the needs of

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[119]Hackman, Arlin, "Ontario's Park System Comes of Age", in Hummel, ed., *supra,* at pp. 176-8.

biodiversity imperatives, overall functioning of the ecosystem, and species protection, a more ambitious target of 20 to 30% for future protected areas designation should be established along with a time frame and process to achieve the target. The commitment in the Proposal to increasing protected areas should be made more explicit, with more rigid timelines and scientific selection criteria.

2. As a general principle, all mining, timber, hydroelectric development and sport hunting in all new and existing parks and protected areas should be prohibited. Exceptions for hunting should be made only on a case-by-case basis in a transparent, prescribed manner.

3. Enact a new Provincial Parks Act with the following provisions:

- Establish explicit, legislative trusteeship of provincial parks and protected areas
- Establish explicit, legislative permanence and define permanence
- Consult with First Nations before establishing new provincial parks and protected areas boundaries
- Require buffers in terms of permitted activities and intensity of permitted activities, around provincial parks and protected areas[120]
- Explicitly prohibit intensive forestry in adjacent and nearby lands if it will impact on provincial parks and protected areas
- Explicitly recognize in legislation the biodiversity objectives behind provincial parks and protected areas
- The MNDM mining announcements as to mining in provincial parks and protected areas, moving boundaries, and "borrowing of protected area land" must be explicitly revoked.

4. Clear limits as to the forest industry guarantees must be immediately established, along with strict criteria as to when such guarantees would be provided. Any contractual commitments made by the government to specific industry members must be immediately publicized and if appropriate, all such commitments must be reviewed and if necessary withdrawn or amended.

5. A quantified maximum total limit as to intensive forestry must be immediately established, along with an explicit requirement that intensive forestry must nevertheless meet the sustainability requirements of the Timber Management Class EA and the CFSA.
6. Clear statements should be made that protected areas will be protected from the construction of roads.

7. An in-depth analysis should be undertaken to determine whether the CFSA and the Class EA terms and conditions in fact need to be amended to implement the Accord and other proposals. It is suspected that the legislative framework at present is sufficient to accommodate the

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[120]Elder, P.S., "Biological Diversity and Alberta Law", (1996) 34 Alberta Law Review (No. 2) 293, text around notes 96 and 97.

implementation of the proposal.

8. The primary conclusion is that, of course, First Nations peoples must speak for themselves and make the decisions as to how their existing Aboriginal and Treaty rights will be affected by Ontario. They have constitutional protection for these rights and Ontario lacks the jurisdiction to unilaterally affect them. The remaining recommendations in this section are some suggestions as to the most obvious ways in which Ontario can improve its approach and reduce the likelihood that it will impact upon First Nations Aboriginal and Treaty rights in an unconstitutional manner.

9. For areas impacted by the announcements where there are outstanding land claims, Ontario must promote the settlement of those claims before proceeding with other land use decisions.

10. First Nations communities must be consulted as to traditional activities before drawing new parks and protected areas boundaries, and before committing lands to industrial uses.

11. Treaty rights of affected First Nations must be reviewed with them before proceeding with the Land Use Strategy.

12. MNR must ensure the compliance with Condition 77 of the Class Timber EA before proceeding with any further mining or forestry land use decisions.

13. Explicit legislative recognition of the right to First Nations constitutional rights to continue Treaty activities and traditional activities in parks and protected areas unless otherwise agreed must be provided.

14. For land use decisions in lands affected by Aboriginal and Treaty rights, joint land use and management decision making procedures must be established.

15. Ensure that the prohibition of mineral exploration and development is incorporated into the *Provincial Parks Act* and the *Public Lands Act* explicitly.

16. Ontario should develop a system for protected areas, based on scientific criteria, to ensure representation of the full diversity of its landscape within a network of protected areas on Crown lands. This system of protected areas should comply with Canada's international obligations under the Biodiversity Convention. Ontario should also ensure that it is using the most up to date version of the commonly accepted scientific principles developed by the IUCN when classifying protected areas and deciding on permitted uses. (Ontario should encourage other Canadian jurisdictions to use the same version of the IUCN system.)

17. Repeal O. Reg. 954, R.R.O. 1990, which grants government authority to permit mining in 23 provincial parks with nothing more than a change in policy.

18. Mining claims should not automatically exclude land from protected area status.

19. Abide by the Partnership for Public Lands recommendations that MNDM should hold unsigned any March 29, 1999 contracts.

20. That MNR withdraw that portion of the EBR registry proposal that would change parks and conservation reserve policies to allow mineral exploration.

21. Ontario should reject the notion of "floating protected areas" for mining or any other industrial land use.

22. Amend *Provincial Parks Act* to give government power to establish reserves pending the declaration of Parks. During the park reserve stage government should not be allowed to issue permits for mineral exploration or any other industrial activity in the reserve.

23. The *Ontario's Living Legacy - Proposed Land use Strategy* document should be amended in the following ways:

> (a) the tourism industry should be recognized as a key industry sector in the north and mechanisms should be included to promote and enhance the industry so long as those mechanisms are ecologically sustainable; and
>
> (b) the "beneficiary pays" principle in the Resource Stewardship Agreements should be omitted.

24. Hunting in new parks and protected areas should only be allowed after a careful assessment as to the sustainability of such practices on a case-by-case basis.