

## Concerns over Aboriginal consultation and dispute resolution provisions ignored in final reading of *Mining Act*

When Ontario unveiled its proposed revisions to the *Mining Act* on April 30, 2009, they purportedly had already won the widespread support of industry stakeholders, environmentalists and Aboriginal groups. Fractious hearings before the Legislature’s Standing Committee on General Government have revealed that a number of serious irritants still remain. Despite the concerns raised during the hearings, the committee referred Bill 173 back to the Legislature with only a handful of technical amendments. The revised Bill passed Third Reading October 21, 2009.

Aboriginal groups are angry about the lack of pre-consultation and the fact that the reforms will not require “informed consent” before mining takes place on Aboriginal lands. Aboriginal and First Nations groups appearing before the committee have called Bill 173 a “mockery”, a “regulatory mess” and “insulting”. Even the Ontario Mining Association (OMA), while supportive of the general intent and directions of Bill 173, said the Aboriginal consultation provisions must be “clear, transparent and consistent with current case law”.

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### W+SEL expands Aboriginal law practice

W+SEL welcomes new associate Cherie Brant to our Aboriginal and Energy Law Practice.



Our First Nations and Métis law practice focuses on the intersection of Aboriginal law with resource and infrastructure development. We have negotiated precedent-setting agreements that facilitate practical solutions involving First Nations and Métis, municipalities, resource developers and the environment. We help clients reach reasonable agreements that are ‘win-win’ solutions and avoid the cost and disruption of court proceedings. When recourse to the courts and tribunals is necessary, we are experienced and determined advocates.

If you would like more information about the services we offer, please contact Cherie Brant at (416) 862-4829 or Juli Abouchar at (416) 862-4836.

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While the revised Act includes as part of its Purpose the clause “to encourage prospecting, staking and exploration in a manner consistent with Aboriginal and treaty rights including the duty to consult,” there is no guidance on how to implement this goal.

Kenning Marchant, an executive member of the Aboriginal law section of the Ontario Bar Association (OBA), told the committee that “clear standards” governing Aboriginal consultation and dispute resolution should be incorporated into the revised *Mining Act*. The OBA recommended that the Purpose of the revised Act be amended to emphasize “...the duty to consult and, where appropriate, accommodate, consistent with the honour of the Crown” to more accurately reflect Supreme Court jurisprudence. In accordance with current case law, consultation is a substantive obligation of the Crown that cannot be delegated to project proponents, except for defined procedural aspects.

The OMA called for the appointment of “government-appointed mineral development officers” who would shoulder “full responsibility not just for the approval but for the actual conduct of consultation, thus fulfilling the government's duty to consult.” The OMA and OBA recommendations were not incorporated into the amended Bill.

Since “consultation” can be such a vague term, the OBA also said that consultation standards should be attached as a schedule to the revised Act. “Standards are required on timing, on information exchange, on the rights recognition process and on impacts analysis,” Marchant said. “Guidelines are needed on what aspects can be procedurally delegated to project proponents.” The OBA said funding is needed to ensure Aboriginal communities and organizations are in a position to consult in a meaningful way.

The OBA suggested that the definition of those areas restricted from prospecting should be amended to include any “site of spiritual, historical or ceremonial significance for Aboriginal communities.” The OBA strongly recommended that a database of such sites be established.

The OBA warned that the Bill's dispute resolution arrangements for Aboriginal consultation are “vague and potentially controversial”. Rather than allow the minister to dictate, the ‘who’, ‘what’ and ‘why’ of dispute resolution – especially as the government is always a party to such a constitutional issue – the OBA recommended an alternative two-stage process. Conventional mediation would be followed, if necessary, by more formal adjudication through an independent tribunal, which could be either the courts or a special-purpose body authorized by the Legislature. Again, the committee did not incorporate these recommendations in the revised Bill; it did, however, more explicitly define the Minister's powers (in s.170.1(3)) resolving disputes.

W+SEL's Juli Abouchar, whose practice focuses on environmental, energy and Aboriginal law, is a member of the OBA committee that reviewed and commented on the *Mining Act* revisions. For more information, contact her at (416) 862-4836.

**Bill 173, proposed amendments to the *Mining Act*, was introduced for First Reading on April 30, 2009, passed Second Reading on May 27th, and was referred to the Standing Committee on General Government. Hearings were held during August, a series of amendments debated in September, and the amended Bill tabled in the Legislature on October 8, 2009. Bill 173 passed Third Reading October 21, 2009.**

**With the passage of the amendments to the *Mining Act*, the Ministry of Northern Development, Mines and Forestry will immediately begin to develop regulations and policies to implement many of the new provisions. These will cover**

- ◆ **the criteria for sites of Aboriginal cultural significance and the process for withdrawals**
- ◆ **exploration plans and permits to ensure these activities are carried out with the appropriate Aboriginal consultation**
- ◆ **closure plans for advanced exploration and mine development projects**
- ◆ **the dispute resolution process for Aboriginal-related mining issues**
- ◆ **the implementation of map staking**
- ◆ **a prospector awareness program to ensure they are aware of the new provisions.**



## Laying the groundwork for a resource benefits sharing plan

Historically, Aboriginal peoples have not been accorded their fair share of benefits – the revenues, employment opportunities or other economic spin-offs – derived from natural resource development in Ontario. In April 2009, the provincial government made an initial \$30 million commitment to addressing that deficit. However, the funds will not be budgeted and allocated until a resource benefits sharing plan is in place. A sub-table of the Ipperwash Inquiry Priorities and Action Committee (IIPAC), established by the Ontario government and First Nations and Métis leadership, is currently conducting economic research and collecting data on Crown revenues in order that First Nations can “understand the nuances and make an informed decision” on such a plan. The sub-table is determining just what could be considered a “natural resource”, exploring revenue sharing options and models, and reviewing treaties and historic agreements related to sharing benefits from natural resource development. The sub-table has drafted a “high level” plan to gather input from First Nations communities on the options for Crown resource revenue sharing. It would also like to bring federal authorities to the table. Full-blown consultations won’t begin until next year. At the same time, the province has initiated discussions on resource benefits sharing with each of the Grand Councils. W+SEL will track this initiative and provide updates on future developments.

## Ontario’s proposed *Far North Act* faces hostile reception

Aboriginal groups are trying to either kill or radically rewrite Ontario’s proposed *Far North Act*. Introduced on June 2, 2009, Bill 191 is designed to directly involve First Nations in a community-based land use planning process that would support the sustainable economic development of the region’s natural resources. The Bill was dissected during standing committee hearings this summer and is currently being revised on a clause-by-clause basis.

The “Far North” includes all the lands north of a line running from the Manitoba border in the west to James Bay in the east, or about 42 percent of Ontario’s land mass. At least half of the region – approximately 225,000 square kilometres – would be protected in an interconnected network of conservation lands. In addition, a moratorium would be placed on a number of activities – including the opening of a new mine, commercial timber harvesting, oil and gas exploration and development, and wind and waterpower projects – until a community land use plan is in place, a process that could take a great deal of time. Although prospecting and staking will still be permitted, the moratorium is expected to put a chill on the pace of future investment and development in the region.

Nishnawbe Aski Nation (NAN), a support organization for virtually every First Nations community in the Far North, has condemned Bill 191 and says it is prepared to “take all steps necessary” to stop the Bill from becoming law. NAN is adamant that any new legislation not preclude economic opportunities for

**Bill 191, an Act with respect to land use planning and protection in the Far North, was introduced for First Reading on June 2, 2009. In an unusual move, the Bill was immediately referred to the Standing Committee on General Government for review. Hearings were held in August and the committee is currently considering possible amendments. Additional consultation will likely be scheduled following Second Reading.**



future generations and that First Nations retain the capacity to develop natural resources where, when and if appropriate. “Our definition of protected areas means saving something for future uses,” NAN Grand Chief Stan Beardy told the committee.

NAN’s position was echoed, in part, by the Ontario Mining Association (OMA). The OMA told the committee it was concerned that the Bill “is strong on conservation targets but non-existent on development targets.” It says the development of ten new mines over the next ten years would be a reasonable target and would provide jobs and other economic benefits for Aboriginal communities. OMA also called for the allocation of greater governmental resources – in the order of “hundreds of millions of dollars” – to enhance the capacity for land use planning by First Nations, local authorities and companies in the Far North.

NAN characterized the consultation process to date as “rushed, insensitive to the First Nations” and said it violated the province’s legal duty to consult with First Nations. “Bill 191 isn’t a partnership,” said Chief Beardy. “It is an entrenchment of the powers of MNR [Ministry of Natural Resources], and it is a violation of our treaty understanding that we would coexist and share [resources] as equal partners.”

Not all Aboriginal organizations are committed to killing the legislation. The Windigo First Nations Council, which provides technical and advisory services to seven First Nations groups in northwestern Ontario, considers the proposed legislation “an acceptable and necessary way” to build a foundation for economic, social, cultural and environmental development. “The legislation binds both the province and the First Nations to the approved community plans,” the Council said. However, it condemned “the arbitrary imposition of a 225,000-square-kilometre protected area.”

The Windigo Council said it will not accept the status quo of absolute provincial discretion in land and resource decision-making. It insists that “any further discussions or negotiations on the Far North legislation be conducted directly with First Nations and tribal councils as it relates to their traditional lands and treaty territories, on a government-to-government basis.”

Brad Maggrah, president of the Ontario Coalition of Aboriginal People (OCAP), says the province must extend its consultation efforts beyond those living on *Indian Act* reserves. “The Ontario government must open the doors to consultations for Indians on and off-reserve and the Métis to ensure the transparency and legitimacy of this process,” Maggrah told the committee. “To date, we have received no funding or support from this province and we have not been involved in the drafting of the legislation and the Crown has not respected our interests.” As it is currently written, OCAP says Bill 191 discriminates against the Métis, non-status people and status people living off-reserve and “will result in more conflict and legal disputes”.

The province has proposed a 25-year Growth Plan for Northern Ontario to “guide future policy development and infrastructure investments”. The Growth Plan covers all 800,000 square kilometres of Northern Ontario and is designed to ensure its economic and employment growth. More a grab bag of proposed policies and programs than a coordinated strategy, the Growth Plan is intended to

- ◆ strengthen the “mineral industry cluster” and maximize the economic benefit of increased mineral exploration and production
- ◆ create regional economic zones to help communities plan their economic, labour, infrastructure, land-use, and population needs
- ◆ increase the participation of Aboriginal people in the future economic growth;
- ◆ achieve better health status for Aboriginal communities
- ◆ improve the inter-regional transportation network, broadband services and transmission line capacity
- ◆ educate and train Northerners for careers in growing fields
- ◆ encourage the use of green technologies.

Public meetings will be held in November and December to solicit feedback from stakeholders. The deadline for written comments on the proposed Growth Plan is February 1, 2010. See [www.placestogrow.ca](http://www.placestogrow.ca)



## Ontario supports Aboriginal access to green energy boom

As part of its rollout of Ontario's *Green Energy Act*, the Ministry of Energy and Infrastructure has announced two programs to help Aboriginal groups and local communities participate in the renewable energy boom. These initiatives should provide greater access to capital markets, help reduce the interest rates on loans for eligible borrowers, and fund many of the plans and studies needed to push projects forward. In addition, renewable energy projects with significant Aboriginal participation will be eligible for "price adders" under the Ontario Power Authority's feed-in tariffs (FIT) program, as well as reduced security payments for applicants.

Although full details are not expected to be released until the new year, the \$250 million **Aboriginal Loan Guarantee Program (ALGP)** will guarantee up to 75 percent of an Aboriginal proponent's equity in an eligible project, up to a maximum of \$50 million per project. In turn, Aboriginal communities would be required to create wholly-owned corporations to take on all aspects of the project, such as signing contracts and entering partnership agreements. The Ontario Financing Authority, an agency of the Ministry of Finance, is expected to administer the program.

A second government initiative, the **Aboriginal Energy Partnerships Program (AEPP)**, will provide funding for many of the key developmental stages needed to bring projects on stream. These include preparation of community energy plans, pre-feasibility and feasibility studies, business cases, resource assessments, and environmental and technical studies. The program would also establish the **Aboriginal Renewable Energy Network**, an online-based centre for sharing knowledge and best practices. The AEPP will be managed through the Ontario Power Authority (OPA) following a directive by the Minister. Specific arrangements, delivery partners and access to services are still to be determined and will be implemented with continued advice from Aboriginal leaders and experts in the area of renewable energy development.

Aboriginal and community-based renewable energy projects may be eligible for "price adders" under **OPA's Feed-in Tariff (FIT) Program**. The FIT program provides long-term power purchase contracts to qualifying proponents for energy generated from renewable sources, including biomass, biogas, landfill gas, on-shore and off-shore wind, solar photovoltaic and waterpower. The FIT rate varies depending on the renewable energy source, the size and positioning of the facility, whether power is supplied during peak periods, and other considerations.

The Aboriginal or community participation level (as defined in the FIT rules) determines the percentage of the maximum price adder that will be added to the FIT contract price (see the table on the following page). For example, if an Aboriginal partner exercises 50 to 100 percent control of a project, it will be eligible for the full price adder of an additional 1.5 cents/kWh (in the case of a

**To be eligible for ALGP support, renewable energy generation and electricity transmission projects must be commercially viable. A project would be required to have**

- ◆ **agreements in place to sell or transmit electricity at a pre-determined cost (e.g. power purchase agreements for generation or regulated rates for transmission projects)**
- ◆ **experienced proponents and business partners with track records in construction and infrastructure operation**
- ◆ **commercial financing commitments in place.**



FIT Rate (¢/kWh)	Wind	Solar (Ground mounted)	Water	Biogas	Biomass	Landfill gas
Basic FIT rates	13.5-19.0	44.3	12.2-13.1	10.4-19.5	13.0-13.8	10.3-11.1
Maximum Aboriginal price adder	1.5	1.5	0.9	0.6	0.6	0.6
Maximum community price adder	1.0	1.0	0.6	0.4	0.4	0.4

wind power project); 40-49% control qualifies for 80% of the price adder; 25-39% control qualifies for 50% of the price adder; and 10-24% control qualifies for 20% of the price adder.

In addition, projects controlled by Aboriginal communities (with a greater than 50 percent participation level) qualify for a reduced security payment of \$5 per kilowatt (kW), regardless of the type of renewable energy. The FIT Program was launched October 1, 2009, offering priority access to the available connection capacity for projects that have already reached certain development milestones. Connection capacity will be allocated according to a different set of rules beginning November 30, 2009. Further information, including the full price schedules, FIT rules and application forms, is available on the OPA website at <http://fit.powerauthority.on.ca/>

## Six Nations bids for 'Green Hub' designation

Six Nations of the Grand River Territory has teamed up with the County of Brant to attract renewable energy research, development, manufacturing and production facilities to southwestern Ontario. The Green Energy Economic Accord (the "Accord"), signed in September, focuses on the joint development of one or more Green Energy Parks on fully serviced lands near the Highway 403 interchanges.

The Accord partners are hopeful that the area will be designated one of the "green hubs" the Ministry of Energy and Infrastructure plans to establish to support implementation of its *Green Energy Act*. If successful, any company looking to sell green energy technology or set up in Ontario would be directed to the partnership. A number of other communities reputedly are vying for such a designation, including Oshawa, Sault Ste. Marie, Haldimand-Norfolk and Chatham-Kent.

Six Nations and Brant County have formed a green energy and economic development commission, with members from both councils, to promote green energy initiatives. Other municipalities are invited to join the commission, with the City of Brantford already expressing interest. In the meantime, the partners are looking for federal/provincial interest free loans to finance the land acquisitions and development, and will seek to have the location designated under the province's *Tax Incentive Zones Act*.

**The Accord makes it clear that participation in the initiative does not absolve either Canada or Ontario from resolving land claim issues on lands considered for the green hubs or others in the Six Nations Tract. "This is not a definitive document. It's kind of like sitting in a canoe going into a foggy bunch of water," said Chief Bill Montour of Six Nations at the signing of the Accord. "It's a way forward so that we can work together."**



## Alberta Court rules membership card proof of Métis status

A recent Alberta Provincial Court case (*R. v. Lizotte*, 2009 ABPC 287) has confirmed that settlement Métis in that province have a legal right to hunt or fish as “Powley Métis” pursuant to section 35 of the *Constitution Act, 1982*. Moreover, the membership cards issued to settlement Métis in Alberta are sufficient proof of identity to exercise that right, at least within 160 kilometres of the settlement in which they reside. However, additional litigation will be needed to determine whether non-settlement Métis enjoy the same rights.

Dion Lizotte was charged with hunting without a licence after he shot a large bull moose in September 2007 about 70 kilometres south of Paddle Prairie where he lives. Although Lizotte produced a card that identified him as a member of the Paddle Prairie Métis Settlement, provincial wildlife officers demanded genealogical records that would substantiate his ancestry back to the late 1800s.

Judge Brian R. Hougestol disagreed. “The Crown wants to create a parallel world of unnamed bureaucrats to analyze Métis genealogical records and second-guess the work of the Settlements,” Hougestol wrote in his judgment released September 29, 2009. “This is inconsistent with the [*Métis Settlements Act*], and with common sense.” He concluded that “the Crown’s position in this case is inconsistent with the Alberta government’s historical approach to the Métis people.”

Hougestol declined to rule on the validity of a provincial policy, drafted in 2007 by Alberta Sustainable Resources Development (SRD), which says Métis only have a right to exercise their hunting rights within 160 kilometres of the settlement in which they live. The interim agreement, previously in place, allowed them to hunt or fish on any Crown land in the province or any private land so long as they had received the owner’s permission.

However, the ruling does not address the right to hunt and fish for any Métis who does not hold a valid settlement card. While over 80,000 Métis reside in the province, just 9,000 are listed on the settlement rolls. The Métis Nation is currently defending two other illegal hunting cases in southern Alberta in an effort to win the right for all Métis to hunt and fish throughout the province. A number of similar cases are still outstanding.

## B.C. Court supports EA office’s approach to consultation

The Supreme Court of British Columbia continues to clarify the Crown’s duty to consult, but says such consultation must be balanced against other statutory requirements. In a judgment released September 17, 2009 (*Nlaka’pamux Nation Tribal Council v. Griffin*, 2009 BCSC 1275), Justice Sewell ruled that the province’s Environmental Assessment Office (EAO) had initiated a consultation process that, in terms of both scope and content, “cannot ... be said to be unreasonable”. In a complex case that involved overlapping claims, historical infringements, and dissent among First Nations parties, the Court

**Gerald Cunningham, president of the Métis Settlements General Council, says the *Lizotte* decision affirms two important points. First, Métis settlement members under Alberta law are automatically Métis under the relevant aspects of the “*Powley*” case (in which the Supreme Court of Canada ruled that Métis have a constitutional right to hunt, fish and gather for sustenance). Secondly, the case ensures Métis are able to hunt off settlement, at least within a 160 km radius.**



complimented the EAO in accommodating the conflicting views of the tribal council and one of its member bands. However, the Court said it was still too early in the process to determine whether the EAO will, in fact, adequately discharge its duty to consult and accommodate if appropriate.

Belcorp Environmental Services Inc. and the Village of Cache Creek had proposed to extend a municipal landfill site on lands northeast of Vancouver that were within, or close to, the asserted traditional territory of the Nlaka'pamux Nation. The EAO had issued an order prescribing consultation with the Ashcroft and Bonaparte Indian bands, impact and benefit sharing agreements, and involvement of First Nations in all phases of the EA; however, the order excluded Nlaka'pamux Nation Tribal Council (NNTC), a council comprised of certain First Nations communities including the Ashcroft band. Although the Ashcroft band supported the project, the NNTC did not and had also expressed long-standing opposition to the original landfill operation and its access corridors. NNTC petitioned the Court to quash the initial consultation order issued by the EAO and to declare that the EAO Director had "failed to comply with his constitutional and legal duty to consult with the NNTC in good faith".

The Court concluded that "the government acted appropriately in this case in making a decision to implement separate consultation protocols with the Ashcroft Band and the NNTC. I can see no objection in principle to requiring the proponents to consult with a specific Band if the government also undertakes appropriate consultation with the First Nation. That must be particularly so when there is a clear divergence of opinion between the putative representative of the Nation and the representatives of the Band."

The Court also noted that the government has a statutory duty to undertake the environmental review in a thorough, effective and expeditious manner. This duty must be balanced against its obligation to consult. "It is to be expected that this balancing will require a flexible approach by Government to adapt to the particular circumstances of each case," the Court advised.

**In dismissing the claims set out in the petition, the court determined that it was appropriate to involve the bands in the assessment of the on-the-ground impacts of the proposal. Given the broader nature of the concerns raised by the NNTC, the only truly effective way to accommodate them was through government-to-government negotiations. The landfill proponents would have no useful role to play in such talks.**