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Ontario releases long-awaited amendments to *Mining Act*

On April 30, 2009, Ontario's Minister of Northern Development and Mines, the Hon. Michael Gravelle, introduced for First Reading Bill 173, the *Mining Amendment Act*, 2009. The Bill strikes a balance between preserving the competitiveness of Ontario for exploration and mining and addressing the concerns of surface rights holders. Importantly it implements the Crown's constitutional duties owed to Aboriginal people. Although the Bill leaves considerable detail for regulations, resource companies that have been engaging Aboriginal people will likely find alignment with the approach of the new regime.

The extensive package of amendments to the province's *Mining Act* would formalize consultation with Aboriginal communities affected by exploration and mining activities. It would also require prospectors to undergo "awareness" training, and introduce a dispute resolution process to resolve problems when discussions over exploration permits and closure plans run into difficulty. The details of the required consultation, training and dispute resolution mechanisms won't be known until the draft regulations implementing those programs are released for comment.

The *Mining Act* would be amended to remove most lands in Southern Ontario and certain designated land uses in Northern Ontario from the threat of mining in the future. These restrictions were designed, in part, to allay worries by cottage and home owners that mining rights could be granted to the land literally beneath their feet. However, existing mining claims, leases and licences would remain valid and application could be made to the Minister to reopen any lands closed to staking. New mines would not be permitted in the "Far North", an area to be defined in regulation, on any lands deemed "inconsistent" with mining.

While the Bill has received generally positive results from both the mining industry and Aboriginal groups, several groups have complained that not enough consultation was undertaken. There is also concern that staking would be allowed prior to the start of consultation. First Nations groups are calling for the funding and technical support that will be necessary to participate in future consultations and project assessments on an equal footing.

MNDM has established a website (at www.mndm.gov.on.ca/miningact/miningact_e.asp) to track the modernization of the *Mining Act*. The amendments can be viewed on-line at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2170

Consultation with Aboriginal communities has been formalized

Bill 173 would amend the purpose of the *Mining Act* to include the recognition of Aboriginal and treaty rights, as well as remove the final clause which limited the environmental protection provisions of the legislation strictly to the "rehabilitation of mining lands in Ontario". The revised section 2 would read:

> The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, *in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, including the duty to consult*, and to minimize the impact of these activities on public health and safety and the environment.

A new section (s.86.1) would be added to the Act requiring that lease holders conduct themselves "on the demised premises in a manner consistent with the protection provided to any such rights." This requirement would extend to every lease issued, including leases issued or renewed before the enactment of this section.

However, there is nothing in the Bill that would require prospectors or mining companies to engage in consultation prior to staking claims on Aboriginal or treaty lands (owners of surface rights would have to be notified with 60 days *after* a claim has been filed). Documentation that consultation has been undertaken would only be required before an exploration permit is issued by the Ministry.

The Minister would also be given authority to designate one or more individuals or a body to hear and resolve disputes related to Aboriginal consultation and treaty rights that may arise during the issuance, amendment or renewal of exploration permits, closure plans and such other circumstances as may be prescribed.

Prospectors would be required to undergo "awareness" training

An individual would not be able to obtain or renew a prospector's licence without providing evidence that he or she has successfully completed the "prescribed prospector's awareness program" within 60 days before the date of application. Existing license holders would be given two years to undertake the requisite awareness training. Details on the program will be set forth in regulations yet to be released under the Act.

List of lands removed from staking has been expanded

The list of restricted lands, where no claims may be staked except with the permission of the Minister, would be expanded to include: lots within a registered plan of subdivision; residential or cottage lots smaller than one hectare; railway lands; natural gas, oil or water pipeline corridors; airport lands; municipal lands improved for public purposes (public buildings, sports fields, parks, etc.); and lands associated with artificial reservoirs or dams.

In addition, Southern Ontario (defined as that part of the province lying south of the French River, Lake Nipissing and Mattawa River) has essentially been taken off the table. For any lands where there is a surface rights owner and the mining rights are held by the Crown, those mining rights would be withdrawn from prospecting, staking, sale and lease the day this provision comes into force. However, any existing mining claims, leases or licences of occupation would remain valid.

The Minister could similarly withdraw mining rights from designated lands in Northern Ontario depending on the "mineral potential of the lands as assessed by the Minister and any other criteria that may be prescribed." Again pre-existing rights are unaffected, and application can be made to reopen lands in both Northern and Southern Ontario. Lands with private surface rights and Crown mineral rights that are open for staking comprise only 1.4 per cent of Southern Ontario's landmass, and only 0.4 per cent of Northern Ontario's landmass.

A new Part XIV would be added to the Act to prohibit the establishment of a new mine in the "Far North" if there is no community-based land use plan for the area, or if the land use designation for the area is "inconsistent" with the opening of a new mine. The meaning and contents of such community plans will be set forth in the Regulations. Existing mining claims, leases, patents and licences would not be affected by any new or amended plan.

Exploration permit required before activity can take place on claim

The legislation would create a new position within the ministry, a "Director of Exploration", and no person would be permitted to carry out any prescribed activity on a mining claim, lease or licence of occupation without first preparing and submitting to the Director an "exploration plan". Such a plan would have to comply with, as yet unavailable, requirements, "including any Aboriginal community consultation that may be prescribed". In determining whether to issue an exploration permit, the Director would consider a number of factors, including the purposes of the Act, the Aboriginal consultations that have been undertaken, and any arrangements made with any affected Aboriginal communities and (other) surface rights holders.

Notification requirements and penalty provisions amended

The extensive Bill contains a number of other amendments, including the following:

- Surface rights holders must be notified of mining claims within 60 days of the application to stake a claim.

- Records, maps and abstracts of mining claims could be available, at the minister's discretion, through the Internet.

- Before advanced exploration or mine production may commence, a proponent must consult with potentially affected Aboriginal communities about closure plans.

- Liability for an offence under the Act or its regulations, would be extended to any "officer, director, employee or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence".

- The penalty for wilfully neglecting or refusing to obey any order or award of the Mining and Lands Commissioner would be raised from $10,000 to $100,000 and/or imprisonment of up to one year.

- In addition to the revised schedule of fines and penalties, the Court would also be permitted to issue orders to recover any monetary benefit related to an offence, and to prevent, eliminate or ameliorate any damage that may be directly or indirectly related to the offence.

There are also a number of technical changes related to "map staking" and other application requirements, the resolution of disputes over claims, the recording of orders, judgments, certificates and writs, the compensation of surface rights holders, notices of royalty on diamonds, rights and easements over other lands that may be conferred by the Commissioner, the authority to issue regulations, and fees and forms. Finally, Part IV, dealing with oil and gas exploration, underground storage and salt solution mining, and Part X, which sets forth the duties of and powers of inspectors, have both been revised.

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