

Mining Act Amendments

By Richard Ogden and Kim Lawton

Changes to Ontario's Mining Act ("Act")¹ and regulations² which came into force on November 1, 2012 will have a substantial impact on Ontario's mining industry.

The changes affect prospecting, staking, surface owner's rights, exploration work, closure plans and voluntary rehabilitation. They add to compliance costs and, due to a current absence of policy detail and the centrality to the amendments of consultation with Aboriginal communities, create uncertainty. Some resource development companies may find further cause for pause before mining in Ontario. With respect to consultation, concern is valid but should not be new: the duty to consult with Aboriginal communities is a constitutional duty and so could already override otherwise valid regulatory approvals. The new regulations are designed to help the Crown satisfy that already-existing duty and to move projects forward. As such, our advice remains: build a relationship with Aboriginal communities by engaging early and often, and when the time comes, be prepared to make a deal.

COMPULSORY "MINING ACT AWARENESS PROGRAM"

Anyone applying for or renewing a prospector's licence must complete the Mining Act Awareness Program.³ This covers the mining sequence, including staking of claims, early exploration, and Aboriginal consultation requirements at various stages of the mining process.⁴ It is available online, takes 45-60 minutes, and credit is given for completion rather than for passing a test. After November 1, 2014, every holder of a prospector's licence must have completed the program.⁵

LANDS WITHDRAWN FROM STAKING

The Far North

Restrictions apply in Ontario's northern 450,000 km², which the Act now defines as the "Far North". No new mining can occur in any part of the Far North not covered by a Community Based Land Use Plan ("CBLUP"),⁶ as defined in the *Far North Act, 2010*.⁷ Where such a plan exists, no new mining can occur if the proposed mining is inconsistent with the area's designated land use.⁸ Only four plans are currently complete: Pikangikum, Cat Lake-Slate Falls, Pauingassi and Little Grand Rapids.⁹ As such, the present effect of this provision is a moratorium on new mines in large parts of the Far North.

This amendment is part of Ontario's "Far North Initiative" which aims to protect roughly half of northern Ontario's boreal forest.¹⁰ In protected areas, only tourism and traditional Aboriginal uses will be permitted; in the other half, as stated, resource development may proceed only where consistent with an existing CBLUP.¹¹

Sites of Aboriginal Cultural Significance

Aboriginal communities can now have sites of Aboriginal cultural significance withdrawn from availability for staking.¹² The criteria are:

- less than 25 hectares in surface area;
- strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons, including because of its traditional use by that community, according to Aboriginal traditions, observances, customs or beliefs;
- at a fixed location, subject to clear geographic description or delineation on a map; and

- identification is supported by the community, as evidenced by appropriate documentation.¹³

According to the Ministry of Northern Development and Mines (“MNDM”), examples include: “places of worship or other sacred purpose; burial grounds; traditional teaching or meeting places; ceremonial lands; and pictographs and petroglyphs.”¹⁴ The Act states that a withdrawal order does not affect pre-existing mining rights and tenure.¹⁵ However, the Minister may impose restrictions on portions of a mining claim holder’s existing surface rights if those portions are in respect of lands that meet the above criteria for sites of Aboriginal cultural significance.¹⁶

EXPLORATION PLANS & PERMITS

Proponents must now obtain an exploration plan or exploration permit for certain low- to moderate-impact exploration activities, and must meet specific Aboriginal consultation requirements. In September 2012, MNDM released a document entitled *Consultation and Arrangements with Aboriginal Communities at Early Exploration*, which provides some guidance on the practicalities of consultation and should be read with the regulations.¹⁷

Director and Officer Liability

Directors and officers are now defined to be “early exploration proponents” who must “conduct activities in a manner consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*.”¹⁸ This opens directors and officers to a new source of liability to shareholders, if a dispute with an Aboriginal community results in a loss of shareholder value. There is also potential liability to Aboriginal communities themselves, if the proponent “infringes” Aboriginal or treaty rights without “justification” (a term of art under section 35 of the *Constitution Act, 1982*), after negligently, recklessly or intentionally inadequate consultation. What is adequate? The proponent, as Crown agent, must meet the Crown standard as set out in case law: the Crown must act toward Aboriginal peoples with the goal of furthering

reconciliation. The Crown must consult in good faith, must act honourably, and must do so with dignity. There can be no sharp dealing. These then are the same standards for directors and officers of junior mining companies. An otherwise valid plan or permit will signal that the Crown is satisfied with the adequacy of consultation, but the potential for liability remains and directors and officers should be independently satisfied.

Exploration Plans

Proponents who wish to undertake certain early exploration activities must submit an exploration plan¹⁹ and notify any surface rights owners.²⁰ MNDM will notify any Aboriginal communities potentially affected by the exploration plan activities,²¹ who will have an opportunity to provide written comments which MNDM will then consider.²² Proponents can conduct advance consultation but must first obtain from MNDM the list of communities with whom to consult.²³ Thirty days after the plan is sent to relevant Aboriginal communities, the proponent can commence the activities set out in the plan, unless MNDM requires the proponent to upgrade the application to an exploration permit or the proponent removes the plan from consideration.²⁴ MNDM can require more consultation but in such cases the short timeframe means that proponents must either withdraw the plan (and resubmit later) or accept that MNDM will upgrade the plan to a permit application.²⁵ Submission of an exploration plan is not compulsory until April 1, 2013.²⁶

The following low-impact activities require an exploration plan:

- geophysical surveys that require a power generator;
- drilling using drill equipment up to 150 kg in weight;
- cutting of survey grid lines up to 1.5 metres wide;
- mechanized surface and overburden stripping for a combined total surface area up to 100m², with no more than 200 metres separating strips; and
- test pitting and trenching of rock of one to three cubic metres, with no more than 200 metres separating pits and trenches.²⁷

Exploration Permits

The following low- to moderate-impact activities require an exploration permit:

- drilling using drill equipment greater than 150 kg in weight;
- cutting of survey grid lines greater than 1.5 metres wide;
- mechanized surface and overburden stripping for a combined surface area exceeding 100m² (but below the “advanced exploration” threshold), with no more than 200 metres separating strips; and
- test pitting and trenching of rock greater than three cubic metres (but below the “advanced exploration” threshold), with no more than 200 metres separating pits and trenches.²⁸

Before submitting a permit application, proponents must have notified surface rights owners.²⁹ Before approval, potentially affected Aboriginal communities must be consulted and, where appropriate, their Aboriginal and treaty interests accommodated. MNDM must make a decision on the permit including the adequacy of consultation within fifty days after the application, but can pause this process if it concludes there was inadequate consultation.³⁰ MNDM can amend an already issued permit if it determines that there has been a change in circumstances that warrants amendment. This broad discretion and the often contentious nature of relations with Aboriginal communities will contribute to uncertainty for proponents who have not adequately developed a relationship with the community. Exploration permits are not compulsory until April 1, 2013.³¹

Dispute Resolution Process

There is now a formal dispute resolution process for issues relating to consultation with Aboriginal communities that arise during the exploration permit application process.³² The Minister may refer disputes to independent individuals or bodies that the Minister has designated as able to hear and consider such disputes.³³ The appointee will attempt to facilitate consultation among the community, the proponent, and the Crown as represented by the Director.

The appointee does not make a ruling but prepares, within thirty days, a report with recommendations to MNDM, for the Minister's final decision.³⁴ MNDM will fund the individual or body hearing the dispute but it appears that it will not fund the parties.³⁵ Industry proponents therefore will have to consider bearing the cost of any counsel or other representatives of the Aboriginal community.

Many industry participants have criticized this process; we await the policy details and practical application. In any case, the delays which arose from the 2007 Frontenac roadblock experience demonstrate the value of a pressure-release valve. But most importantly, proponents should see the process as a means by which the Crown can satisfy its duty to consult regardless of what recommendations the independent appointee makes.

ASSESSMENT WORK REGULATION

Claim-Staking

Applications for a ground-staking permit must now include Global Positioning System ("GPS") georeferencing data.³⁶ MNDM has provided a set of standards for such data.³⁷ This requirement applies only to ground-staked claims on unsurveyed lands.³⁸

Work Credits

Costs of consulting with Aboriginal communities and costs of providing GPS data for existing claims are now eligible

for assessment credit.³⁹ Under certain conditions, MNDM will now accept from proponents who wish to maintain a claim in good standing payment in lieu of assessment work.⁴⁰

Bulk Samples

The process for obtaining permission to extract bulk samples for testing has changed. As previously required, proponents must obtain permission to test mineral content.⁴¹ The regulations now specify that material extracted will constitute a "bulk sample" if the amount of mineral bearing substance extracted exceeds 100 tonnes, with some limited exceptions. Further, if a proponent proposes to sell or dispose of the end products of the mining, milling or refining of the bulk sample, the proponent will need a "disposition permission".⁴² Finally, some activity undertaken to extract the bulk sample, such as excavating or drilling, may require an exploration plan or exploration permit, or be subject to the regulation that applies to mine development and closure.⁴³

CLOSURE PLANS AND REHABILITATION

Proponents must now consult with Aboriginal communities prior to the submission of an application for a certified Closure Plan or Closure Plan Amendment.⁴⁴ Proponents will deliver a "notice of project status" or "notice of material change" and the Director will determine which communities to consult with and to what degree.⁴⁵ Proponents must

also submit a consultation plan.⁴⁶ Because Closure Plans and amendments are drafted at an advanced stage of mine development, they are relatively few. As such, MNDM has indicated they will be "considered on a case by case basis, tailored to the circumstances of each project."⁴⁷

There is also a dispute resolution process available prior to the submission of a Closure Plan or amendment.⁴⁸ Again, the Director can refer a dispute to an independent appointee, who attempts to facilitate consultation.⁴⁹ At the conclusion of the process, the appointee submits to the Minister a report and recommendations within thirty days after having received the referral or within such other time as agreed to by the Director.⁵⁰ MNDM will cover the costs of the appointee and costs associated with the process but it appears that the proponent must bear its own costs and potentially those of the community.⁵¹

The Act now permits individuals and companies to apply to rehabilitate, voluntarily and without becoming liable, a pre-existing mine hazard on Crown or other prescribed land.⁵² MNDM will direct the applicant with respect to consultation, including which Aboriginal communities it must consult.⁵³ MNDM has stated that permission would be determined on "a case by case basis and taking into account that the work being done is intended to rehabilitate an existing mining hazard".⁵⁴

¹ [Mining Act, R.S.O. 1990, c. M.14](#)

² [O. Reg. 306/12](#) Amending [O. Reg. 45/11](#) (General) Mining Act; [O. Reg. 307/12](#) Amending [O. Reg. 240/00](#) (Mine Development and Closure under Part VII of the Act) Mining Act; [O. Reg. 308/12](#) (Exploration Plans and Exploration Permits) Mining Act; [O. Reg. 309/12](#) Amending [O. Reg. 6/96](#) (Assessment Work) Mining Act; [O. Reg. 310/12](#) Amending [O. Reg. 43/11](#) (Claim Staking and Recording) Mining Act; and [O. Reg. 311/12](#) Revoking [O. Reg. 192/06](#) (Permission to Test Mineral Content) Mining Act.

³ [Mining Act, R.S.O. 1990, c. M.14](#) Section 19(1).

⁴ MNDM has information here: [Mining Act Awareness Program](#).

⁵ [Mining Act, R.S.O. 1990, c. M.14, s. 21 \(9\)](#).

⁶ [Mining Act, R.S.O. 1990, c. M.14, s. 204\(2\)](#).

⁷ [Far North Act, S.O. 2010, c.18](#).

⁸ [Mining Act, R.S.O. 1990, c. M.14, s. 204\(2\)](#).

⁹ MNDM has information here: [Community Based Land Use Planning](#).

¹⁰ MNDM has information here: [Far North Land Use Planning Initiative](#).

¹¹ Far North Planning Advisory Counsel has information here: [Consensus Advice to the Ontario Minister of Natural Resources](#).

¹² [Mining Act, R.S.O. 1990, c. M.14 S. 35\(2\)\(a\)](#).

¹³ [O. Reg. 45/11, s. 9.10\(1\)](#).

¹⁴ MNDM has the policy document here: [Sites of Aboriginal Cultural Significance – Withdrawals and Surface Rights Restrictions](#).

¹⁵ [Mining Act, R.S.O. 1990, c. M.14 S. 35\(3\)](#).

¹⁶ [Mining Act, R.S.O. 1990, c. M.14 S. 51\(4\)](#).

¹⁷ MNDM has the document here: [Consultation and Arrangements with Aboriginal Communities at Early Exploration](#).

¹⁸ [O. Reg. 308/12, ss. 1 and 2](#).

- ¹⁹ [O. Reg. 308/12, s. 5 \(1\).](#)
- ²⁰ [O. Reg. 308/12, s. 6 \(1\).](#)
- ²¹ [O. Reg. 308/12, s. 7 \(1\).](#)
- ²² [O. Reg. 308/12, s. 7 \(2\).](#)
- ²³ [O. Reg. 308/12, s. 6 \(3\).](#)
- ²⁴ [O. Reg. 308/12, s. 9 \(1\).](#)
- ²⁵ [O. Reg. 308/12, s. 8 \(1\).](#)
- ²⁶ [O. Reg. 308/12, s. 22 \(2\).](#)
- ²⁷ [O. Reg. 308/12, s. 4 and Schedule 2.](#)
- ²⁸ [O. Reg. 308/12, s. 11 and Schedule 3.](#)
- ²⁹ [O. Reg. 308/12, s. 13 \(1\).](#)
- ³⁰ [O. Reg. 308/12, s. 15 \(1\).](#)
- ³¹ [O. Reg. 308/12, s. 22 \(1\).](#)
- ³² [O. Reg. 308/12, s. 21 \(1\).](#)
- ³³ [O. Reg. 308/12, s. 21 \(2\).](#)
- ³⁴ [O. Reg. 308/12, s. 21 \(4\).](#)
- ³⁵ [O. Reg. 308/12, s. 21 \(5\).](#)
- ³⁶ [O. Reg. 43/11, s. 2.1.](#)
- ³⁷ MNDM has provided the standards here: [Georeferencing Standards for Unpatented Mining Claims.](#)
- ³⁸ [O. Reg. 43/11, s. 2.1.](#)
- ³⁹ [O. Reg. 6/96, s. 3.1\(2\); O. Reg. 6/96, s. 3.1\(1\).](#)
- ⁴⁰ [Mining Act, R.S.O. 1990, c. M.14, s. 65\(1\).](#)
- ⁴¹ [Mining Act, R.S.O. 1990, c. M.14, s. 52\(1\).](#)
- ⁴² [O. Reg. 45/11, s. 9.3\(2\).](#)
- ⁴³ [O. Reg. 308/12 Schedule 2 and Schedule 3; O. Reg. 240/00, s. 3\(1\).](#)
- ⁴⁴ [O. Reg. 240/00, s. 8.1\(1\).](#)
- ⁴⁵ [O. Reg. 240/00, s. 8.1\(1\).](#)
- ⁴⁶ [O. Reg. 240/00, s. 8.1\(3\).](#)
- ⁴⁷ [Proposal for Amendments to the Mine Development and Closure under Part VII of the Mining Act \(O.Reg. 240/00\).](#)
- ⁴⁸ [O. Reg. 240/00, s. 8.2\(1\).](#)
- ⁴⁹ [O. Reg. 240/00, s. 8.2\(2\).](#)
- ⁵⁰ [O. Reg. 240/00, s. 8.2\(4\).](#)
- ⁵¹ [O. Reg. 240/00, s. 8.2\(5\).](#)
- ⁵² [Mining Act, R.S.O. 1990, c. M.14, s. 139.2.](#)
- ⁵³ [Mining Act, R.S.O. 1990, c. M.14, s. 139.2 \(4.1\).](#)
- ⁵⁴ [Proposal for Amendments to the Mine Development and Closure under Part VII of the Mining Act \(O.Reg. 240/00\).](#)

AUTHOR

Richard Ogden

Richard's practice includes high-profile corporate-commercial cases, multi-jurisdictional disputes, constitutional matters, class actions, and appeals and judicial review applications. Before joining WeirFoulds, Richard was a Senior Policy Advisor in the Ontario government, advising on the duty to consult Aboriginal peoples. He has published academic articles on Aboriginal rights law and taught Aboriginal rights law as an adjunct professor at the University of Toronto Faculty of Law.

Contact Richard at 416.947.5027 or rogden@weirfoulds.com.

AUTHOR

Kim Lawton

Kim's corporate and securities practice includes mergers and acquisitions, corporate governance, corporate re-organizations, banking & finance, public and private conventional equity offerings, regulatory compliance, mutual fund offerings, and mining finance.

Contact Kim at 416.947.5096 or klawton@weirfoulds.com.

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.

Information contained in this publication is strictly of a general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters.

If you are interested in receiving this publication or any other WeirFoulds publication by e-mail, or if you would like to unsubscribe from this newsletter, please let us know by sending a message to publications@weirfoulds.com.