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Submission with Respect to
Bill 173, *Mining Amendment Act 2009*,
An Act to Amend the *Mining Act*
(Ontario)

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ABOUT THE ONTARIO BAR ASSOCIATION

The Ontario Bar Association is a branch of the Canadian Bar Association, an organization of lawyers formed to provide support by the profession to the profession so that it may render better service to its members and the public. This is accomplished by both education and representation to government on topics of current concern.

As the voice of the legal profession our mission is to advance reasoned positions to the public, all levels of government and our regulator to improve the law and the administration of justice throughout Ontario

Our membership consists of over 17,000 lawyers, judges, law professors and law students representing every area of practice and drawn from every region in the province.

**SUBMISSION WITH RESPECT TO BILL 173, *MINING
AMENDMENT ACT, 2009,*
AN ACT TO AMEND THE *MINING ACT* (ONTARIO)**

All references in this submission to the “Act” are to the *Mining Act*, R.S.O. 1990, c. M.14 as amended to date and as proposed to be amended by Bill 173, *Mining Amendment Act*, 2009. References in this submission to “Sections” and “Subsections” and are to Sections and Subsections of the Act.

1. ABORIGINAL CONSULTATION

- 1.1 Proposed Section 2, which states the purpose of the Act, should be amended to expand the phrase “including the duty to consult” to read “including the duty to consult and, where appropriate, accommodate, consistent with the honour of the Crown” in order to reflect the instructions of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C. R.511 at paragraphs 16, 20 and 38 of that decision. In the alternative, the phrase “including the duty to consult” could be deleted as the text of section 35 of the Constitution Act, 1982 is clearly stated and has been interpreted and commented on by the Supreme Court of Canada and may continue to develop over time.
- 1.2 Standards for consulting Aboriginal interests should be set out in primary, not subsidiary legislation, because of the importance of the subject matter to both Aboriginal communities and the exploration and mining industry. The Crown has a duty to establish rules that (i) clearly define the relationships that should exist between Aboriginal communities and those who are entitled to explore for and develop natural resources on publicly owned lands and (ii) provide meaningful guidance for proponents (such as exploration companies) outlining the scope and nature of the consultation activities they are expected to undertake. For example, Section 78.1 states “that no person shall carry out an activity prescribed for purposes of this section on a mining claim, mining lease or licence of occupation for mining purposes unless the person has submitted an exploration plan, in accordance with any prescribed requirements, including any Aboriginal community consultation that may be prescribed”. We recommend that statutory guidelines and principles for consultation be stated in the primary legislation (rather than “guidelines – free” regulation making authority). An example of such a statutory approach is the manner in which principles for the protection of personal information are set out in a schedule to the *Personal Information Protection and Electronics Document Act*, s.c. 2000, c.5. We also draw to your attention that the Ontario Government has published consultation and accommodation guidelines at <http://www.aboriginalaffairs.gov.on.ca/english/policy/draftconsultjune2006.pdf>.
- 1.3 Similarly the Federal Government has guidelines at <http://www.aicn-inac.gc.ca/ai/mr/is/acp/intgui-eng.asp>. These could provide a good basis for

creating a schedule of consultation principles to be appended to and form part of the primary legislation.

- 1.4 There is also a concern in the exploration industry that vagueness of the proposed legislation, coupled with nuances such as “including any Aboriginal communities consultation that may be prescribed” leads to the inference that the Crown has down loaded responsibility for “consultation” to the proponent whereas the Supreme Court of Canada has clearly stated in *Haida, supra*, that only procedural aspects of consultation may be delegated. Without appropriate Crown participation in consultation, a bilateral agreement between an Aboriginal community and a proponent may not survive a constitutional challenge by, say, a new governing council in the Aboriginal community. We therefore recommend that the primary legislation specifically state that the Crown shall be responsible for the conduct of consultation that may not be delegated to a proponent, and state what the role of the Crown will be. As for what these roles should be, guidance may be taken from both the federal Major Projects Management Office, and the Ontario Power Authority, Renewable Energy Supply III RFP documents. Each is explicit, but not overly prescriptive, on the respective roles of the Crown, the proponent and the Aboriginal community.
- 1.5 The opening paragraph of section 170.1 (1) is vague and inadequate. This paragraph states:

The Minister may designate one or more individuals, or a body, to hear and consider disputes arising under this Act relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights, including disputes that may occur, [emphasis added]

Many questions are raised by this wording that are left unanswered by the draft legislation. What do the words “hear and consider” mean? Do these words contemplate formal mediation followed by adjudication if mediation is unsuccessful? Who will hear these cases? If mediation is offered, at what point in the process will it be offered and who will be called upon to provide mediation services (for example, will a roster be created)? While some of these questions may be addressed through regulations or in a code of procedure and/or practice directions, the legislation should at a minimum reflect a consideration of these issues and address explicitly the kinds of processes that will be used to resolve Aboriginal disputes and how they will intersect.

- 1.6 The dispute resolution process created under section 170.1 of the proposed Act should provide for an initial referral to mediation followed by referral to an independent tribunal for addressing disputes where mediation is not successful. In *Haida, supra*, at paragraph 44, the Supreme Court of Canada suggested that dispute resolution procedures like mediation or administrative regimes with impartial decision makers might be adopted to decide on difficult

Aboriginal consultation matters. In a recent research paper by Maria Morellato, entitled “The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights” (available online at http://www.fngovernance.org/research/maria_marletto.pdf), Ms. Morellato provides guidance on developing ADR processes, including the benefits of negotiated resolutions achieved through mediation and the function and structure of an independent tribunal, at pages 75-76. Describing the potential benefits of mediation in cases involving Aboriginal issues and the Court’s encouragement of its appropriate use, Ms Morellato states, at page 75:

The mediation process is consistent with the Courts’ decisions in *Haida* and *Mikisew* [*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69] encouraging a balancing of interests and negotiated resolutions. It is also consistent with the Court’s reasons in *Platinex* [*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.* (28 July 2006), Thunder Bay 06-0271 (On. Sup. Ct.)] directing that the parties attempt to reach agreement on the issues before them.

Where mediation is unsuccessful and adjudication is required, an independent tribunal would provide a forum for the most difficult duty to consult cases as an alternative to the courts (although the courts would remain available to the parties on appeal), and could also be granted a wider range of remedial solutions to Aboriginal issues than that which is available to the courts. At the very least, we recommend that the Act make provision for the creation of a tribunal at a later date through the insertion of a placeholder in the legislation.

- 1.7 The government is always a party to any constitutional issue and normal ADR conventions generally require some form of consent from all parties to participate in an ADR process. If ADR is to be imposed, the standards and requirements for ADR should be set out by the primary legislation.
- 1.8 Section 170.1 is silent as to what becomes of the report referenced in subsection 170.1(2) and the legal effect, if any, of that report. Presumably the report is received by the Minister and dealt with by the Cabinet. While a dispute is being heard under Section 170.1, is the Director prevented from approving a mine closure plan? The legislation is silent on this point. However, an order by the Director with respect to a mine hazard under Section 147 does not appear to be subject to the Dispute Resolution provisions.

2. LICENSING OF PROSPECTORS

- 2.1 The proposed text for Section 19, which requires evidence that an applicant has completed the prescribed prospector’s awareness program within 60 days “before the date of the application”, should read “before the date of the application for the prospector’s licence” in order to avoid a possible interpretation that the reference

to “application” is a reference to an application to record the staking of a mining claim discussed in the preceding Section 18.

- 2.2 The Act provides that the awareness program is to be prescribed by regulation. We recommend that the primary legislation adopt a code of “best practices”. PDAC’s e3Plus Framework for Responsible Exploration could be considered in preparing such a code of “best practices”.

3. CONFIRMATION OF STAKING NOTICE

- 3.1 Proposed Section 46.1 only addresses giving notice of staking to surface rights owners “in the prescribed manner”. We recommend that this notice obligation be stated in the primary legislation as being notice to the surface rights owner as recorded in the land registration office. For due diligence search purposes, proof of having given notice should be recorded on the Claim’s Abstract.
- 3.2 The Act is silent on who, if anyone, gives notice of staking to affected Aboriginal communities, although the Ministry has indicated that it would be providing such notification. We recommend that the primary legislation set out this standard and regulations could provide for the mechanism and mechanics of such a notification.

4. SOUTHERN ONTARIO AND NORTHERN ONTARIO

- 4.1 Where lands are withdrawn from prospecting, staking, sale or lease pursuant to Section 35.1, only the surface rights owner has been provided with a mechanism to apply to the Minister for an order reopening the mining rights for the lands or any part of them for prospecting, staking, sale or lease. There should be a provision similar to Section 35 which would give the Minister the power to reopen lands on application by a prospective or former holder of mineral rights, provided notice of the application is given to affected surface rights owners and Aboriginal interests, as applicable.

5. FAR NORTH

- 5.1 Paragraph (g) of Section 30 prohibits staking in any area of the Far North if a Community Based Land Use Plan has designated the lands for a use inconsistent with mineral exploration and development, and Subsection 204(2) prohibits a new mine opening if a Community Based Land Use Plan has designated the lands for a use inconsistent with the opening of a new mine. We recommend that where advanced exploration has occurred before this legislation comes into force, such projects should be grandfathered to allow a new mine opening rather than be subject to the discretion of the Lieutenant Governor in Council as contemplated by Subsection 204(3).
- 5.2 If **no** Community Based Land Use Plan is in place for an area, the opening of a new mine is prohibited. This means that staking, early exploration and advanced exploration are permitted. We assume that the other provisions of the Act

concerning Aboriginal consultation will apply to such activities. However, the difficulty lies in whether the uncertainties concerning the ability to take a discovery to mine production will result in exploration dollars being diverted to other jurisdictions that promise greater investment security.

- 5.3 Long delays in putting a Community Based Land Use Plan in place could have a detrimental economic impact on both Aboriginal communities and on industry. Such delays are a disincentive to completing the assessment work necessary to keep mineral claims in good standing necessitating reliance on the discretionary relief from forfeiture provisions of Section 185. We also recommend that the costs of Aboriginal consultation be expressly recognized as qualifying as assessment work for purposes of maintaining claims in good standing.
- 5.4 The proposed legislation does not address whether holders of mineral claims, leases, patents and licences of occupation will have status to participate in the Community Based Land Use Plan process. We recommend that the primary legislation address this topic.

6. EXPLORATION PLANS AND PERMITS

- 6.1 It has been suggested that the prescribed activities for purposes of Section 78.1 cover “pre-staking” exploration activities such as airborne, digging and rock collecting. We recommend that the primary legislation clarify that it does not apply to pre-staking activities which by their nature must be kept confidential.
- 6.2 A purpose of the Act is the minimization of environmental impact. The Act provides that this purpose could be met through permit terms and conditions (s. 78.2(2)(a)), without providing guidance to the Director, applicants or other stakeholders about how this will be achieved. We recommend that this provision be protective of the environment during exploration and not duplicate existing environmental laws which mainly apply to post exploration activities. We recommend that the regulations incorporate best industry practices. The Prospectors and Developers Association of Canada Environmental Excellence in Exploration Guidelines (PDAC E3) could be considered in developing such guidelines.
- 6.3 We recommend that the Act (not the regulations) set out the process for: applying for an exploration permit; criteria for issuance, refusal or renewal; amendment; cancellation and appeal rights.
- 6.4 What kind of environmental information will be required to be provided to support an application for an exploration permit? We recommend that the regulations set out what kind of information the applicant is expected to provide, and standard terms and conditions, including for example a code of best practices.
- 6.5 When considering whether to issue an exploration permit will the Director (i) require copies of “arrangements” made with surface owners or “agreements” made with Aboriginal communities and (ii) evidence of actions and precautions to

be taken to minimize the environmental impacts of the proposed exploration activity? This topic is not addressed in the primary legislation. Typically agreements made between a proponent and an Aboriginal community are confidential.

- 6.6 The requirement for an exploration permit creates a potential timing issue. An applicant who has applied for, but not obtained a required exploration permit, should be protected from forfeiture under Section 72 if the applicant is unable to complete sufficient assessment work during the period of time between when a claim is staked or the mineral rights otherwise acquired and when an exploration permit is issued.
- 6.7 The draft legislation does not address whether exploration permits are required for brownfields sites.

7. RESTRICTED LANDS

- 7.1 Sections 29 and 30 do not reference natural heritage, environmental features which may be of “provincial interest” and environmentally sensitive areas as not being open for staking. We recommend that these references be expressly provided for in the primary legislation, in part in order to avoid a conflict with other legislation such as the Planning Act’s Ontario Provincial Policy Statement (2005) section 2.1 and also to ensure that the scope of the regulation-making powers incorporate these references.
- 7.2 Consideration should be given to expanding paragraph (e) of Section 30 to read
“(e) within 45 metres of a church, cemetery, burial ground or site of spiritual, historical or ceremonial significance for Aboriginal communities”.
- 7.3 How will a prospector know where the lands of referenced in paragraph (e) of section 30 are located unless the lands are formally and publicly identified and withdrawn from staking?
- 7.4 Section 86.1 amends all leases issued under the Act so that the lessee’s rights are subject to protection for existing Aboriginal or treaty rights in Section 35 of the *Constitution Act*. It is essential that the implementation of the Crown obligation include sufficiently detailed statutory and regulatory guidance for all interests affected, as suggested in various places in this submission.

8. DISPUTE RESOLUTION OF CLAIMS OTHER THAN DISPUTES INVOLVING ABORIGINAL INTERESTS

- 8.1 The Act provides that all mining disputes will be heard by the Mining and Lands Commissioner appointed under the *Ministry of Natural Resources Act* except for matters relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.

- 8.2 The Commissioner has long been recognized for its expertise in resolving mining disputes through informal mediation services provided by its Registrar. The Commissioner's 2008 Annual Report (available on line at <http://www.mnr.gov.on.ca/en/Business/OMLC/index.html>) indicates that the Commissioner's office has an 85% success rate for the settlement of mining disputes through informal mediation. It is our view that this high rate of success is attributable, in part, to the prospect of a formal hearing before the Commissioner if the matter does not resolve.
- 8.3 With this high rate of success, we recommend that mediation be formalized as part of the hearings process and expressly promoted as the preferred method of dispute resolution of mining disputes.

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