



October 23, 2008

The Hon. Michael Gravelle
Minister
Ministry of Northern Development and Mines
99 Wellesley Street West
Room 5630
Toronto, Ontario
M7A 1W3

Attention Susan Capling

Dear Minister:

On behalf of the 18,000 members of the Ontario Bar Association (OBA) we are pleased to attach our submission to the Ministry of Northern Development and Mines consultation on modernizing Ontario's *Mining Act*. The members of the OBA's Working Group represent the practice areas of law relevant to the *Mining Act*, and they have put forward workable, transparent and effective recommendations for the consideration of the Ministry.

We appreciate the opportunity to participate in this important first step towards a new *Mining Act* and look forward to offering a substantive submission on the new legislation in the near future.

We trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
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Chair, Natural Resources Section
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**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

MINING ACT MODERNIZATION CONSULTATIONS

Submitted on *October 23, 2008*

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Submitted to:

Hon. Michael Gravelle, MPP
Minister of Northern Development and Mines
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About the Ontario Bar Association

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 18,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

Introduction

We have found it difficult to comment on the discussion paper as it lacks a core proposal upon which to comment. After considering how to best respond, we decided to make high level recommendations on the key topics at issue. Most of these are in the nature of principles that ought to guide modernization efforts.

A word about the OBA process for developing these submissions. The following OBA recommendations represent a consensus among the participating sections of the Ontario Bar Association – Natural Resources, Aboriginal, Environmental and Alternative Dispute Resolution. This is significant, as it indicates where a broader consensus might lie as the government seeks to resolve divergent stakeholder views.

1. General Principles

We have identified a number of general principles that should be reflected in the new *Mining Act*. Our starting point is the Canadian Constitution and related jurisprudence. A key task in the modernization effort is to ensure that the new *Mining Act* reflects constitutional provisions that recognize and affirm Aboriginal and treaty rights, provisions that did not exist when the *Mining Act* was promulgated. An equally important task is to ensure that the mineral wealth in Ontario continues to provide economic opportunities for Ontarians in an environmentally sustainable manner.

As such, we recommend that the following general principles guide a modernised *Mining Act*:

- 1.1 Section 35 of the *Constitution Act*, 1982 recognizes and affirms existing Aboriginal and treaty rights, including treaty rights that now exist by way of land claims agreements or may be so acquired.
- 1.2 The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, when considering Section 35 of the *Constitution Act*, 1982, has stated:
 1. “It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.” [paragraph 20]
 2. “Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.” [paragraph 37] “Precisely what is required of the government may vary with the strength of the claim and the circumstances.” [paragraph 38]
 3. “The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development...However, the ultimate legal responsibility for consultation and accommodation rests within the Crown. The honour of the Crown cannot be delegated.” [paragraph 53]
- 1.3 In considering modernization of the mineral tenure system in Ontario, the Crown needs to be mindful of
 - (a) the fundamental principles set out in paragraphs 1.1 and 1.2 above;
 - (b) the need to have a system which assures confidentiality to the staking process which is a competitive process;
 - (c) the intrusiveness and impact of staking and subsequent exploration activities,
 - (i) on Aboriginal interests,
 - (ii) the interests of surface rights owners, and
 - (iii) the environment; and

- (d) unintended consequences of legislated changes, such as unemployment, should activities such as physical staking be replaced by map staking.
- 1.4 The *Mining Act* should encourage prevention and management of disputes and include a provision for an alternative dispute resolution process.
- 1.5 Ontario needs to ensure that it continues to provide a climate that ensures its mining industry remains strong.

2. Guidance for the Process of Modernising the *Mining Act*

We make a number of recommendations related to the process of modernising the *Mining Act*:

- 2.1 The Crown should fund Aboriginal organizations to enable them to participate in the *Mining Act* modernization consultations in order to meet constitutional requirements for consultation, negotiation, accommodation and reconciliation.

This is consistent with Premier McGuinty’s statement that “We think exploration and mine development should only happen with the early consultation and accommodation with local Aboriginal communities.” [Modernizing Ontario’s *Mining Act*, paragraph 6]

- 2.2 The Crown should proceed expeditiously to resolve claims of Aboriginal communities. The disruptive consequences of unresolved Aboriginal land claims affect not only the Aboriginal communities and mining interests but also the economy as a whole.

- 2.3 In the process of preparing the modernization legislation, the Crown needs to

- (a) discharge its duty to consult and accommodate and avoid delegating its non-procedural responsibilities to third parties;
- (b) design the consultation and accommodation process and provide guidelines for that process (for example, by requiring differing levels of information disclosure based on the various stages of development); and
- (c) provide funding to Aboriginal communities as appropriate to each community’s circumstances to facilitate their effective participation in the consultation process.

3. Staking

Staking is an early step in mining exploration, but it will not necessarily lead to mine development. The lack of understanding about the very low percentage of staked claims that actually lead to mine development may contribute to misunderstandings and disputes.

A modernised *Mining Act* must give Aboriginal people and the public the confidence that after staking takes place exploration and mine development will proceed in accordance with protections in the *Mining Act* and other legislation, and must include a transparent and fair process of engagement with Aboriginal people.

The OBA Committee believes that non-intrusive map staking combined with a Crown-initiated pre-staking consultation may provide an elegant solution to the competing needs of the exploration industry for confidentiality prior to staking, and the Aboriginal concerns about the impacts of the staking process. However we recognise that map staking cannot be implemented overnight and, in the transition period, the duty to consult must take place.

As such, we make the following recommendations:

- 3.1 The Crown should proceed on a priority basis to create the necessary database to implement a map staking regime. Such a map staking regime may need to be implemented on a region by region basis while the data base is being built. Several Canadian provinces have implemented or are implementing map staking.
- 3.2 In the interim, a transition process would include the following
 - (a) the current “free entry” physical staking regime should be maintained, subject to changes suggested in section 4 of this submission;
 - (b) a tripartite consultation process should be initiated between the Crown, Aboriginal organisations and the exploration/mining industry to determine which, if any, unstaked areas will be removed from the staking process;
 - (c) as part of (b), the Crown should support opportunities for Aboriginal organisations to learn more about opportunities offered by exploration and mining;
 - (d) the Crown should initiate a consultation process with Aboriginal organisations to develop a registry of Aboriginal interests; and
 - (e) claims that may emerge during this process which appear to be easily resolvable should be resolved expeditiously.
- 3.3 Staking, whether physical staking or map staking, should be without prejudice to Aboriginal or treaty rights or title claims.

- 3.4 If there are areas of Ontario where staking and early exploration are not to be allowed, such areas should be clearly and publicly identified and delineated by the Crown.

4. Post Staking Activities

- 4.1 After staking has occurred and good faith inquiries by the staker as to appropriate parties to contact have taken place, full and timely disclosure of all material facts and consultation with Aboriginal communities and surface rights owners should occur, and the consultation process should involve the determination of the interests to be protected which may be impacted by post staking exploration or mining. The Crown's obligation should be to facilitate such contacts and to provide general framework guidelines for meaningful consultation based on principles established in Canadian jurisprudence.
- 4.2 Recognizing that the economics of activities which occur after staking are different at each of the stages of (i) early exploration, (ii) advanced exploration and (iii) mine development, there will be an increasing number of factors to be dealt with in the consultations with both Aboriginal communities and surface rights owners. The Crown (whether through the Ministry of Northern Development and Mines or the Ministry of Aboriginal Affairs) should fund Aboriginal communities as appropriate to each community's circumstances to facilitate the consultation process.
- 4.3 Exploration and resource companies should be allowed to include their costs of consultation in their assessment work reports to maintain their mining claims in good standing.
- 4.4 Existing private resource sharing agreements in place with Aboriginal communities and organizations should be grandfathered and consideration should be given to facilitating future resource sharing agreements (see section 7 of this submission). Reference is made to the successful Quebec James Bay model.

5. Dispute Prevention, Management and Resolution

Modern collaborative alternative dispute resolution processes can make a material positive difference to the effective operation of regulatory regimes such as those required for mining. As such we make the following recommendations:

- 5.1 The Crown should consider establishing a dispute resolution framework in the *Mining Act*. This new Act should embed ADR principles with a focus on prevention, management and resolution of disputes. This will provide opportunities to identify and build on shared interests leading to collaborative successes as well as the prevention of disputes. These processes will need to be harmonized with other regimes for dispute resolution provided for in other applicable Ontario legislation such as the *Environmental Assessment Act*.
- 5.2 The dispute prevention, management and resolution framework should be designed to incorporate sensitivity to cultural and traditional approaches of Aboriginal people.

6. Best Practices and Environmental

Environmental assessment and protection are central to the approval, operation and decommissioning of mines. Many of these standards are covered by legislation other than the *Mining Act*, for example, the *Canadian Environmental Assessment Act*, the *Environmental Protection Act* and the *Ontario Water Resources Act*.

In addition, considerable guidance for environmental best practices during exploration exists in guidelines and codes of practice.

Our recommendations are based on the importance of taking advantage of existing regulatory regimes and best practices.

- 6.1 Consider applicable guidelines, standards and codes of practice and establish a best practices framework for mineral exploration and development.
- 6.2 The interrelationship of the *Mining Act* with existing environmental laws needs to be recognized and harmonized. If the Crown intends to add further environmental protection requirements to exploration and mining, such provisions should be incorporated into existing environmental laws such as the *Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Environmental Assessment Act*.
- 6.3 If environmental aspects of mining are to be more broadly covered within the *Mining Act*, the Act should incorporate principles and objectives included in modern environmental legislation. These principles, which should be tailored to fit the context of the *Mining Act*, include
 - (a) the precautionary principle: (the *Canadian Environmental Assessment Act* (CEAA) provides as a purpose “to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects”; *Species at Risk Act* (SARA) provides in its preamble that if there are threats of serious or irreversible damage to a wildlife species, cost effective measures to prevent the reduction or loss of the species should not be postponed for lack of full scientific certainty”);
 - (b) sustainable development: (CEAA provides as a purpose “to promote sustainable development and thereby to achieve or maintain a healthy environment and a healthy economy”; the broad definition of “Environment” in the Ontario *Environmental Assessment Act* achieves the same with its inclusion of social and economic conditions);
 - (c) elimination of unnecessary duplication: (CEAA provides for co-ordination among federal authorities and between federal and provincial governments to eliminate unnecessary duplication; SARA provides for intergovernmental agreements and committees respecting environmental conservation);

- (d) public participation: (CEAA provides opportunities for timely and meaningful public participation throughout the environmental assessment process; the *Environmental Bill of Rights* achieves the same for Ontario government environmental decisions); and
 - (e) consideration of Traditional Knowledge: (CEAA requires an assessment of the impact of projects on the current uses of lands and resources for traditional purposes by Aboriginal persons; SARA provides for the consideration of traditional knowledge of Aboriginal peoples when assessing which species may be at risk and in developing recovery measures).
- 6.4 Consider environmental factors such as vulnerability and sensitivity in the exploration phases of
- (a) early exploration,
 - (b) advanced exploration, and
 - (c) mine development,
- in order to determine and address the need for protection associated with each phase.
- 6.5 Ensure that any new requirements are clear and any new process is straightforward.
- 6.6 Avoid introducing unnecessary delay or complexity.
- 6.7 Implement mechanisms for procedural fairness.

7. Resource Sharing

The Premier has stated “that Ontario will develop a system of Resource Benefits Sharing that would see Aboriginal communities benefit directly from resource development” [Modernizing Ontario’s *Mining Act*, paragraph 6]. Resource revenue sharing with Aboriginal peoples was recommended by the OBA to the Government of Ontario in its November 2004 submission. The Government of Quebec has entered into such an agreement with the James Bay Cree (La Paix des Braves, 2002).

Across Ontario there are examples of Aboriginal communities benefiting from agreements with the exploration and mining industry to provide training, employment, development of Aboriginal businesses and revenue sharing.

We recommend the following:

- 7.1 The Crown should consider a resource sharing framework with Aboriginal communities. Two models are proving to be successful in the Canadian context and should be considered:
 - (a) resource sharing on a provincial or regional basis to provide for a revenue pool for distribution on a provincial or regional basis; and
 - (b) the use of Impact Benefit Agreements or Participation Agreements between industrial proponents and Aboriginal community or communities where the mining activities are located.
- 7.2 To the extent that exploration and resource companies either reach private benefit sharing arrangements with Aboriginal communities or are required to contribute to the revenue pools referenced in paragraph 7.1, the costs of such contributions should be fully deductible from income for purposes of governmental tax and royalty levies.

8. Mineral Rights/Surface Rights

- 8.1 Once initial staking has occurred, notification should immediately occur together with particulars of future anticipated exploration and development activities as appropriate to each stage of (i) early exploration, (ii) advanced exploration and (iii) mine development, and the legislation should provide for a dispute resolution process.

- 8.2 Consideration should be given to the establishment of a Surface Rights Board to address financial compensation, environmental and remediation issues should private negotiation or dispute resolution fail. A robust ADR process should precede any such reference to a Surface Rights Board.

9. Land Use Planning

Premier McGuinty has stated that “The government will work with all northern communities and resource industries to create a broad plan for sustainable development. As well, local plans will be developed in agreement with First Nations. Each year, a number of communities will complete these local plans.” [Modernizing Ontario’s *Mining Act*, paragraph 16]

Consistent with this objective, we make the following recommendations:

- 9.1 Land use planning concerning new mines in the Far North should be the responsibility of the Crown. It is the Crown’s responsibility to consult with Aboriginal people, northern communities and industry in this regard.
- 9.2 If there are areas of the Far North where new mines will not be permitted, these areas should be clearly and publicly identified and delineated by the Crown.
- 9.3 Ontario should accommodate joint land and resource use planning boards with Aboriginal, provincial, and industry representatives on a local and regional basis. These boards should have the opportunity both to propose planning arrangements before development occurs, and to consider and evaluate specific land and resource development before they are approved.
- 9.4 A comprehensive protocol should be established by the provincial government in partnership with Aboriginal organizations and the Government of Canada that sets out the necessary financial, technical and human resources to be provided to Aboriginal communities so that they can participate in the above recommendations 9.1 to 9.3.
- 9.5 The Crown needs to be mindful of unintended consequences of this additional land use planning regime such as undue delays to exploration and/or development.

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