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A New Paradigm for Aboriginal Consultation in Ontario

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The repeal and re-enactment of the *Canadian Environmental Assessment Act, 2012* (the "new CEAA") and amendments to other federal environmental legislation is the most significant change in federal environmental assessment ("EA") since the legislation was first created decades ago.[1] These amendments are clearly aimed at increasing investment in extractive industries by encouraging certainty, reducing regulatory duplication and shortening delays. The implications of these changes are vast and their full impact on extractive industries is not known.

In this article, we discuss how the new CEAA will interact with several changes to Ontario mining legislation to create a new Aboriginal consultation regime in Ontario.

Since the amendment of the Constitution in 1982 to include recognition of Aboriginal and Treaty rights, Canadian governments have been engaged in a process of reforming laws and policies to recognize these new rights. To prevent conflicts with Aboriginal peoples, the 2007 Ipperwash inquiry identified the regulation and development of natural resources on Aboriginal lands as a key area of reform. Justice Linden concluded that the

> management of natural resources must take into account the rights and interests of Aboriginal people more effectively. I believe there are ways of sharing and co-managing natural resources that are consistent with Aboriginal and treaty rights while serving the interests of first nations and the people of Ontario.[2]

It is against this backdrop that Ontario has announced new changes to facilitate Aboriginal consultation for mining in Ontario. As described below, the new regulations under Ontario's *Mining Act*[3] and the *Far North Act, 2010*[4] amount to a new paradigm for mining and Aboriginal consultation in Ontario. We hope that the requirements for consultation in Ontario will also satisfy federal CEAA requirements but this is far from certain.

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[1] S.C. 2012, c. 19, s. 52 ["*CEAA, 2012*"].
[2] Linden, Sidney B., *Report of the Ipperwash Inquiry*, Volume 2, (Toronto: Queen's Printer for Ontario, 2007) at page 44.
[3] R.S.O. 1990, c. M.14 ["*Mining Act*"]
[4] S.O. 2010, c. 18 ["*Far North Act*"].

The New *Canadian Environmental Assessment Act, 2012*[5]

While the new CEAA points to a significantly reduced role for the federal government in assessing environmental impacts, the same cannot be said for Aboriginal consultation. The new CEAA strongly promotes Aboriginal involvement in the environmental assessment process through increased communication and co-operation and requires that environmental assessments address a range of effects on Aboriginal peoples.

The new CEAA continues to promote communication and cooperation with Aboriginal peoples as one of the enumerated purposes of environmental assessments.[6] However, this purpose is given new force by an expanded list of environmental effects on Aboriginal peoples that must be taken into account.

The previous version of CEAA requires the consideration of the impact of any change on "the current use of lands and resources for traditional purposes by Aboriginal Peoples."[7] The new CEAA maintains this obligation but s. 5.1 also requires the consideration of any effect in Canada on Aboriginal peoples':

- health and socio-economic conditions;
- physical and cultural heritage; and
- structures of historical, archaeological, paleontological or architectural significance.

While each of these environmental effects was included in the previous version of CEAA, the assessment of their impact on Aboriginal peoples was not as explicitly stated. Community and Aboriginal traditional knowledge can also be taken into account in assessing environmental impacts. Unlike other classes of environmental effects in the new CEAA, impacts on Aboriginal peoples are not limited to federal government land or jurisdiction. These broadly defined categories of effects on Aboriginal peoples appear to apply throughout Canada and their precise definition will likely be the subject of litigation.

Changes to Ontario's *Mining Act* and Regulations

The purpose clause of the *Mining Act* has been amended.[8] Mineral resources must now be developed in a manner consistent with the recognition and affirmation of existing Treaty and Aboriginal rights, including the duty to consult. This change in purpose has

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[5] For a full summary of the changes in the new *Canadian Environmental Assessment Act, 2012*, please see our previous article available at: http://www.fmc-law.com/upload/en/publications/2012/0512_Focus_On_Mining.pdf.

[6] *CEAA, 2012*, *supra* note 1 at s. 4(1)(d).
[7] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 at s. 2(1).
[8] *Mining Act*, *supra* note3 at s. 2.

led to a new regulatory scheme that includes detailed consultation requirements at each stage in the mine development process from early exploration to mine closure.

Under the new regulations that came into force on November 1, 2012, Aboriginal peoples must be notified when mining claims are recorded within their traditional use areas.[9] Exploration plans are required for low impact activities (e.g. drilling with equipment under or equal to 150 kg) and exploration permits are required for moderate impact activities (e.g. drilling with equipment over 150 kg). For both exploration plans and permits, miners must notify / consult with Aboriginal peoples. Aboriginal peoples will have the ability to make their concerns and objections known at the start of the mining process. While this is likely to reduce conflicts, it could greatly lengthen the mine development process. Further, sites of Aboriginal cultural significance have been withdrawn from claim staking.

The new exploration plan and exploration permit requirements in the *Mining Act* regulations are not expected to directly interact with the changes to CEAA, since they operate at different stages in the mine development process. However, Aboriginal consultation requirements for mine production and closure plans could significantly overlap with the Aboriginal consultation requirements under the new CEAA. At present it is unclear if consultation under the *Mining Act* will count as consultation under the new CEAA regime or if additional consultations will be required. If these two requirements are not harmonized it could lengthen the environmental assessment and Aboriginal consultation process.

The *Far North Act*, 2010

The *Far North Act, 2010* is essentially a land use planning statute for the northern-most 42% of Ontario.[10] This huge area is home to 24,000 people, over 90% of whom are Aboriginal.[11] While half of the 450,000 km^2 in the far north must be an interconnected protected area,[12] one of the most important pieces of information in the *Far North Act, 2012* is that mines cannot be opened until community-based land use plans are developed for each region in the far north.[13]

The land use planning process must be initiated by Aboriginal peoples in each area and the final plan must be approved by not only the Ontario government but also by each of the participating First Nation bands in the area. So far, only four land use plans have been developed in the far north and it could be a long time before a significant portion of the

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[9] O.Reg. 308/12: Exploration Plans and Exploration Permits.
[10] Ontario, Ministry of Natural Resources Press Release, *Far North Act Passes: McGuinty Government Committed to Economic Development and Environmental Protection*, (Toronto: Queen's Printer for Ontario, 2010), online: Ontario Newsroom <http://news.ontario.ca/mnr/en/2010/09/far-north-act-passes.html> ["*Far North Act Passes*"].
[11] Ontario, *Progress Report 2011*: *Community*, (Toronto: Queen's Printer for Ontario, 2011), online: Ontario Northern Economy <http://www.ontario.ca/ontprodconsume/groups/content/@onca/@initiatives/@progress/documents/document/ont06_026109.pdf> at p. 9.
[12] *Far North Act Passes*, *supra* note 10.
[13] O.Reg. 117/11: Prohibited Developments: Opening A Mine, at s. 1.

far north is open to development. The policies used to develop additional land use plans under the *Far North Act, 2010* will strongly influence whether these plans satisfy some or all of the EA and Aboriginal consultation requirements under the new CEAA.

South of the *Far North Act, 2010* area, Crown land use plans may be prepared under s. 12 of the *Public Lands Act*.[14] Where approved plans exist, activities carried out in the planning area must be consistent with the approved plan. At present, Crown Land Use Planning Guidelines are, for the most part, silent on addressing mining or the concerns of Aboriginal peoples and do not assess impacts on Aboriginal peoples or the natural environment as required by CEAA.

A New Aboriginal Consultation Paradigm

Between the changes to CEAA, the new *Mining Act* purpose clause and regulations and the *Far North Act, 2010*, Aboriginal law is now firmly embedded in the mine development process from start to finish. There are now regulatory and Aboriginal consultation requirements for miners in Ontario starting with early exploration plans and ending with mine closure plans. Aboriginal participation and cooperation is now a core part of the CEAA environmental assessment process. These changes, taken together, are beginning to operationalize the Aboriginal provisions of the Constitution and give some sense of what these rights mean in practice.

However, many questions remain unanswered. With all of these new Aboriginal consultation requirements at both the federal and provincial levels, it is unclear if there will be sufficient coordination (or harmonization) between Ontario and the Federal government to make this Aboriginal consultation regime work in practice. Aboriginal consultation at the provincial level must be accepted to meet federal requirements and vice versa. Federal-provincial harmonization of environmental assessments (including Aboriginal consultation) was a key recommendation of the Drummond Report but it has not yet been implemented into practice.[15]

At a minimum, coordination between federal and provincial governments should include:

1. The sharing and acceptance of information between federal and provincial authorities (including Aboriginal consultation information);
2. Allowing federal and provincial regulatory processes to run concurrently and
3. Timely review by both levels of government.

Otherwise, the new Aboriginal consultation regime will create significant delays for miners and we suspect that governments may be forced to use the highly controversial

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[14] R.S.O. 1990, c. P.43.

[15] Ontario, Commission on the Reform of Ontario's Public Services, *Public Services for Ontarians: A Path to Sustainability and Excellence*, (Toronto: Queen's Printer for Ontario, 2012), Recommendation 13-4 at pp. 240-341 (Chair: Don Drummond). For a summary of the changes in the Drummond Report that relate to mining please see our previous article on the subject available at: http://www.fmc-law.com/upload/en/publications/2012/0312_Hunter_Sahni_Drummond_Report.pdf.

cabinet override provisions contained in these statues to ensure that projects are not cancelled because of endless delays.[16]

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[16] *Far North Act*, *supra* note 4 at s. 12 and *CEAA, 2012*, *supra* note 1 at s. 49.