



# *Mining Act Regulations*

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Development and Mines

**Submitted by:** The Ontario Bar Association



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The Ontario Bar Association (the "OBA") appreciates the opportunity to provide input to the Ministry of Northern Development and Mines (the "Ministry") on the proposed regulations under the *Mining Act*, introduced in conjunction with the Mining Act Modernization initiative.

## **The OBA**

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 17,500 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

This submission was formulated by our Aboriginal Law, Environmental Law and Natural Resources & Energy Sections whose 900 members represent every type of stakeholder in the mining industry, including mine developers and operators, investors, First Nations and Métis and community interests - all of whom are interested in an effective and efficient regulation of mining in this province.

## **Introduction**

The OBA supports the objective of the proposed Regulations. Clarifying the requirements for proponents, the role of government and the rights of stakeholders, including First Nations and Métis, is increasingly crucial if Ontario is to be home to a responsible, stable and efficient mining sector that successfully competes for investment money and jobs.

We have outlined below additions and changes to the regulations that are necessary to achieve the requisite clarity.

## **Defining Graduated Aboriginal Consultation Requirements**

According to the Environmental Registry posting, the proposed regulations would impose a "graduated" Aboriginal consultation requirement on proponents from early exploration to advanced exploration. However, there is no clear guidance with respect to what is required at each level of consultation. In addition the different levels of consultations are delineated according to physical activity and impacts when impact on treaty or Aboriginal rights is an equally, or more relevant, factor in determining the level of required consultation.

### **(a) More Specificity in Defining Requirements**

The ability to effectively consult within the contemplated time frames, of 30 days for Exploration Plans and 31-50 days for Exploration Permits, is only practical if the parties have, from the outset, clear guidance on the Ministry's expectations for each level of consultation.



Clear guidance as to the requirements for consultation is not only a practical requirement but a constitutional one as well. As outlined in *Halalt First Nation v. British Columbia (Environment)*<sup>1</sup> where the Crown elects to delegate consultation duties, it should do so explicitly and with a clear delineation of the areas of the Crown's responsibilities being delegated.

### **(b) Recognition of Impact in Defining Required Levels of Consultation**

Consultation in principle implies that the information material to impacts on Aboriginal or treaty rights recognized by section 35 of the *Constitution Act, 1982* is assembled and considered. Accommodation implies that such discussions focus on minimizing or mitigating impacts on treaty or Aboriginal rights.

The proposed regulations define levels of impact in physical work terms, rather than in terms of impacts on treaty or Aboriginal rights. For example, the thresholds between exploration "plans" and exploration "permits" are:

- cutting survey grid lines up to 1.5m wide.
- using drill equipment up to 150 kg in weight
- mechanized surface and overburden stripping up to 100 square metres within a 200 metre radius
- test pitting and rock trenching, 1 to 3 cubic metres total volume, to a maximum depth of 15 centimetres, within a 200 metre radius

However, in some circumstances even small scale trenching could disturb a sacred site or impair a trapline and thus have an important impact. In other circumstances, small scale activity could have negligible impacts, depending on location and site conditions.

The regulations should instead, or in addition, specify levels of impact on treaty or Aboriginal rights, particularly in relation to wildlife harvesting (hunting, fishing, trapping). Early stage information sharing, analysis and discussion should focus on these impacts. Then the scale and nature of both consultation and accommodation (e.g. mitigation, compensation) should be specified accordingly.

## **Information Sharing**

### **(a) Disclosure requirements**

Effective analysis of a project and useful consultation require information sharing. The regulations make some suggestions as to information required but should go further to impose reasonable disclosure

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<sup>1</sup> 2011 BCSC 945 (CanLII),



requirements on (a) proponents,<sup>2</sup> (b) the Crown, and (c) potentially affected Aboriginal parties. There is a basis for each of these disclosure requirements:

- (a) a proponent has disclosure obligations in order to obtain permissions under the *Mining Act* and regulations.
- (b) The duty to consult and accommodate is a duty of the Crown.<sup>3</sup> Given that useful consultation is not possible if the parties do not understand the claims and other factors involved, the Crown's obligation to provide information is clear. In addition, from an economic perspective, if Ontario is going to be competitive in attracting mining-sector investment, they will have no choice but to provide potential proponents with resources to assist them in navigating the complexities of land claims and other Aboriginal-rights in Ontario.
- (c) While the duty to consult belongs to the Crown, "...there is a reciprocal duty on Aboriginal Peoples to consult in good faith."<sup>4</sup> Good faith in this context requires full, true and plain disclosure of the rights being claimed and perceived impacts of a proposed activity or project on those rights.

These obligations imply, and the many experiences in practice of various members illustrate the need for, reasonable disclosure on the part of all parties, or reasonable cooperation in facilitating disclosure. For example, proponents may be required to undertake environmental studies; First Nations may cooperate in making elders available to assist in identifying sensitive sites, or in providing traditional ecological knowledge, or in identifying First Nation trappers; the Crown has a duty to identify and disclose Aboriginal parties for consultation on a project-by-project basis. Disclosure can be subject to appropriate confidentiality protections.

A useful starting point in designing regulatory disclosure requirement is the information sharing requirements ordered by the Ontario Superior Court in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC). Here is a summary:

### Disclosure – Proponent

The proposed exploration program including:

- approximate location of drill holes

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<sup>2</sup> The proposed regulations use the term "exponent". As "proponent" has a widely understood meaning in resource development and environmental assessment, that term is preferred.

<sup>3</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

<sup>4</sup> *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), principle approved in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388



- description of drilling and related activity
- approximate location and composition of camps and activity in and around camps
- routes and flight times of air transport
- routes and transport times of land transport
- anticipated environmental impacts - air, noise, land, water, plants, animals, humans, ecosystems
- feasible mitigation measures, including costs and effects
- information pertaining to viability of ore deposits and related matters, subject to a confidentiality agreement
- copies of any press releases and public filings, with respect to exploration activity

#### Disclosure – Crown

Subject to applicable privacy laws:

- development activities permitted by Ontario within the area described by the FN as its traditional land use area
- anticipated impact of the exploration program on FN's treaty rights and on the environment
- cumulative effects potentially related to the drilling program (cf *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), leave to appeal to the Supreme Court of Canada refused: “the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt ... To take those matters into consideration as within the scope of the duty to consult”)
- other activities that have been or will be carried out on the land

#### Disclosure – Aboriginal Parties

- description of traditional territory;
- concerns of the community with respect to the Drilling Project
- Community's perspective on its treaty rights;
- First Nation information on:
  - location of trap lines, burial sites or any other cultural features, including camps, cabins, paths and trails, winter roads, roads and planned roads
  - the nature and timing of trapping and hunting activities of FN members



Such disclosure requirements imply a better division of labour than placing a disproportionate burden on any one consultation party.

### **(b) Information Resources**

In addition to the parties' disclosure requirements that fall out of the constitutional duty to consult, there is a practical need for the Crown to provide funding for information resources for potential projects. Our members have frequently encountered potential proponents who have chosen not to invest in Ontario because the Crown does not provide sufficient guidance in navigating Aboriginal claims. If Ontario is to successfully compete for mining-sector investment dollars, it is incumbent on the Crown to provide as much guidance and information as possible in an easily accessible format. It is suggested that one essential step is to build, and make accessible to proponents, a database that outlines land claims and other Aboriginal rights on specified lands. In addition, funding to allow Aboriginal communities to identify site issues as soon as possible is the only practical way to avoid the delay, inefficiency and relationship breakdown that ensues when site issues arise during exploration.

## **Proponents' Obligations**

### **(a) Proportionality**

Mining exploration involves costs but no revenues: revenues only start to flow when a mine is in production, typically many years after initial exploration. Many exploration projects are small scale; and only about 1 in 1000-2000 properties that are explored are brought into mineral production. For proponents, the exploration stage requires prudence in using limited shareholder and borrowed funds.

In order to ensure "due diligence" even small projects with modest impact footprints are sometimes asked to undertake extensive environmental and archeological studies and provide expensive benefits packages that can quickly make projects uneconomical unless they are large scale or are backed by very large companies. In Ontario, mining exploration is dominated by small companies.

Cost discipline and proportionality to project size are important to ensure an economically feasible and competitive environment for the exploration industry in Ontario, and attendant job and business opportunities for Aboriginal peoples.

The principle of cost proportionality is now central to the *Rules of Civil Procedure* in Ontario, as stated in Rule 1.1:

“the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”

Similar principles should be developed and implemented in conjunction with the *Mining Act* regulations, to scale consultation and accommodation costs imposed on proponents to the scope and impacts of the





specific project. Regulations should fairly assign costs associated with discharging each party's obligations –proponent, Crown and Aboriginal – in the consultation process.

A proportionality program could include (a) some oversight consultation responsibilities being retained by the Crown rather than all consultation responsibilities being delegated; (b) increased Crown funding of Aboriginal parties; (c) more crown sponsored informational resources such as the database described above; and (c) cost proportionality guidelines set out in the *Mining Act* regulations.

### **(b) Accommodation Costs**

While the duty to consult and accommodate is a duty of the Crown, in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 the Supreme Court of Canada said:

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of “accommodate”. The terms “accommodate” and “accommodation” have been defined as to “adapt, harmonize, reconcile” . . . “an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise”: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

In contrast, Aboriginal parties may refer to a requirement for their free, prior and informed consent based on paragraph 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other



resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The Government of Canada's position is stated in Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, March 2011, at page 10:

On November 12, 2010 Canada issued a Statement of Support endorsing the United Nations Declaration on the Rights of Indigenous peoples (Declaration), an aspirational document, in a manner fully consistent with Canada's Constitution and laws. The Declaration describes a number of principles such as equality, partnership, good faith and mutual respect. Canada strongly supports these principles and believes that they are consistent with the Government's approach to working with Aboriginal peoples.

However, Canada has concerns with some of the principles in the Declaration and has placed on record its concerns with free, prior and informed consent when interpreted as a veto. As noted in Canada's Statement of Support, the Declaration is a non-legally binding document that does not change Canadian laws. Therefore, it does not alter the legal duty to consult. A copy of Canada's statement of support, along with other materials, can be found at: <http://www.ainc-inac.gc.ca/index-eng.asp>

If the consultation/accommodation parties cannot agree, then the only alternatives may be either that the project does not go ahead, or for the adequacy of consultation and accommodation to be the subject of prolonged and expensive litigation.<sup>5</sup> It is thus vital that the Crown play a facilitating role in accommodating Aboriginal interests. Otherwise, significant economic opportunities on terms acceptable to Aboriginal parties risk being lost and Ontario will be less attractive in the internationally competitive environment for future mineral development. The regulations should signal to this community a meaningful and facilitative role for the Crown in assisting with accommodation.

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<sup>5</sup> For example: *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2007 FC 567 (CanLII); appeal dismissed 2008 FCA 212 (CanLII); remanded March 29, 2012 to the Court of Appeal for British Columbia to be reconsidered in accordance with the decision in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 (CanLII), [2011] 3 S.C.R. 535.



## Dispute Resolution

Both the *Mining Act* and the proposed Regulations (O.Reg 240/00 and the EPPR) contemplate a form of mediation as an approach to dispute resolution. The OBA welcomes any opportunity to productively resolve disputes in this area without damaging ongoing relationships. While alternative dispute resolution can provide a path away from divisive and expensive litigation, it is critical that the provisions are properly tailored in the Regulations so that dispute resolution is a tool of efficiency rather than delay. In order to ensure this, the following principles should be recognized in the Regulations:

- (a) **Government Efforts to Facilitate** - The ability of the government to refer the matter to a third party facilitator should be conditional upon the government having exhausted its efforts to facilitate an agreement between the other two parties. This requirement falls out of the constitutional requirement that the Crown ultimately retains the duty to consult even if certain aspects of it have been delegated;
- (b) **Timely Decision-Making** - The alternative dispute resolution provisions cannot be a method by which the government can delay the decisions that it is obliged to make. The regulations should clearly outline that the Ministry will make a timely decision that consultation has or has not met consultation requirements as set out in the regulations. To the extent that a dispute could not be resolved before issuance of the permit, the government would have to determine the extent to which consultation obligations had been satisfied and, if such obligations had been fulfilled, a permit decision should follow. At that time, the parties would have an opportunity to pursue any appeal rights available to them. To the extent that ongoing concerns related to Aboriginal interests persist, dispute resolution may be considered, rather than (or in advance of) proceeding with an appeal.
- (c) **Consent of the Parties** - The Crown is one of three parties to a consultation process. The ability to trigger an alternative dispute resolution process should not belong exclusively to one party. Alternative dispute resolution is much less likely to be useful in this context unless all parties buy into the process and have input into how a particular mediation or arbitration will work. In addition, putting the decision exclusively in the hands of the Crown, creates the potential for it to become the delay tactic described in paragraph (b) above. Consequently, consent of all the parties should be required in order to trigger an alternative dispute resolution process. In addition, there should be a mechanism for all parties to assist in determining the details of the process, including the identity of the mediator or other facilitator and the process to be followed.



## **Proposal for a New Regulation under the *Mining Act* "Exploration Plans and Permits"**

### ***Environmental Bill of Rights, 1993 Process***

The Environmental Registry posting for the Exploration Plans and Permits Regulation ("EPPR") indicates that exploration permits would be subject to the *Environmental Bill of Rights, 1993* (the "EBR") process. However, the posting does not indicate whether or not an exploration permit could be subject to an appeal as part of the EBR process.

We expect that the exploration permits could be subject to such a hearing, however, either way, this should be definitively, expressly addressed in the regulation to provide clarity for proponents and facilitate efficient public participation.

It is also important to ensure that the EBR process does not delay those projects where other aspects of the consultation process will be quick (such as projects where the proponent and affected Aboriginal communities have an existing partnership and the claims and accommodation needs are known). In order to avoid stacking the EBR process on top of other time lines, it may be advisable for the Regulations to provide that, at the exclusive request of the proponent, the Application can be posted on the EBR immediately after it is filed. In that way, the 30-day EBR consultation period can start to run virtually as soon as the application is filed and will not delay a project that is otherwise expected to get underway quickly.

### **Standards for Early Exploration Activities and Site Rehabilitation**

According to the EPPR posting, the Ministry is proposing that the requirements for early exploration activities and associated site rehabilitation be included in standards that would be incorporated by reference into the EPPR. As indicated in the posting, the incorporation by reference approach (as opposed to actually specifying the requirements in the EPPR) makes it easier to amend such requirements. Given that the Ministry expects the standards to be "an evolving document", this seems like a reasonable approach provided that: (1) sufficient notice of any changes to the standards are well publicized (e.g., a dedicated web page on this topic on the Ministry's web site); and (2) a reasonable transition period is provided for amended standards. In short, the evolving document should be implemented in such a manner as to not unfairly result in non-compliance.

### **Phase-in of the Exploration Plans and Permits Regulation**

According to the EPPR posting on the Environmental Registry, the Ministry is proposing that the EPPR would come into force six months after it is filed. While six months may be reasonable notice for new exploration activities, it seems that this would likely adversely affect not an insignificant amount of on-going exploration work. Once the EPPR is filed (and the six months' period commences), a prudent



proponent may need to initiate steps to comply with the EPPR to avoid delaying the on-going work that may continue past six months prior to knowing whether the exploration in fact will be completed prior to the EPPR coming into force. This may, among other things, result in an inefficient use of resources by all involved, including the Ministry, any affected Aboriginal community, the exponent and any other stakeholders – since they may engage about a matter that is never addressed under the EPPR. As a result, we would recommend that ongoing exploration, at the time when the EPPR is filed, be “grandfathered” from the EPPR.

## **Proposal for Amendments to the Assessment Regulation (O.Reg. 6/96) Under the *Mining Act***

### **Assessment Work Credits**

The proposed regulations provide that Aboriginal consultation costs will be eligible for assessment work credit or in lieu of assessment work to keep claims in good standing, contingent on geoscience work being submitted. The OBA supports this approach. The timeframe for geoscience requirements should be realistic in relation to time required for consultation with Aboriginal parties.

The OBA further recommends that this principle extend to inclusion of consultation costs in the rules for flow-through shares, and that the Government of Ontario make representations to the federal Minister of Finance to that end.

## **Proposal for Amendments to General Regulation (O.Reg. 45/11) Under the *Mining Act*.**

### **Sites of Aboriginal Cultural Significance**

The proposed regulations set out criteria for identification of sites of Aboriginal cultural significance, including that they be strongly associated with an Aboriginal community for social, cultural, ceremonial, sacred or traditional use reasons; be delineated on a map, and be documented by the community. Such sites can then be withdrawn or otherwise restricted from mineral exploration under the Act.

However, the process for withdrawals is not set out in the regulations – a significant omission. We would recommend that such an important issue not be left to policy. There have been 2 significant withdrawals of land from mineral exploration in Northwestern Ontario in recent weeks, and an additional suspension of logging in the Whiskey Jack forest.

It is important that the process be known to interested parties, and that it include opportunities for representations on their interests. Interested parties could include Aboriginal parties other than the Aboriginal party requesting withdrawal of a site; and those with mineral claims on or adjacent to the site proposed for withdrawal.



The proposed regulations contemplate that sites may be 4-24 hectares in extent. Clarification is required as to whether a series of contiguous sites within this size range could be withdrawn.

Clarification is also required on the Ministry's compensation policy where lands subject to existing claims are proposed for withdrawal. The Platinex and God's Lake settlements have been widely noted and emphasize the need for clarity regarding compensation.

Clarification is also required with respect to the disposition of mineral interests in the event the designation of the site should change in the future. For example, in the case of the Platinex settlement, the mineral claimant retains a right to a net smelter royalty in addition to compensation received.

In addition, the regulations should make express provision for a government-funded, publicly-accessible, map-based registry of sites of Aboriginal cultural significance, at a scale sufficient to permit easy identification on the ground by prospectors and mineral explorers.

## **Proposal for Amendments to the Mine Development Closure under Part V of the Mining Act (O.Reg. 240/00)**

### **Mine Development and Closure**

Under the proposed regulations, Aboriginal consultation must be carried out before a certified Closure Plan is submitted. The Ministry will direct the proponent with respect to the required consultation, and require interim reporting.

It is assumed this means that the Ministry will be available to advise a proponent before a closure plan is developed on what the detailed consultation requirements will be. The OBA supports this approach and notes that its recommendations regarding disclosure (above) will enhance this process.

With respect to the proposed amendment regarding Aboriginal consultation to be carried out by a person voluntarily rehabilitating an existing mine hazard, we recognize that the government may have a duty to consult Aboriginal communities with respect to proposed rehabilitation of an existing mine hazard. However, the provisions of section 139.2 of the *Mining Act* are intended to encourage voluntary rehabilitation by persons that are not responsible for creating the mine hazard. To protect persons voluntarily rehabilitating mine hazards from liability under the *Environmental Protection Act* or the *Ontario Water Resources Act* but subject such persons to comparable Aboriginal consultation requirements comparable to those required in conjunction with Closure Plan is unduly onerous and could dissuade voluntary rehabilitation. We would suggest that the government delegate Aboriginal consultation responsibilities only in the rare circumstances where the proposed voluntary rehabilitation measures present a risk of exacerbating the existing mine hazard. Otherwise, we expect the voluntary rehabilitation is in the public interest, including the interests of any Aboriginal communities. To the extent Aboriginal consultation is necessary, it should be conducted by the government itself.



## **Statutory Scheme**

The proposals in this submission are directed to achieving efficient best practices in mining exploration and development.

In the OBA's 2008 submission on the *Mining Amendment Act*, we stressed that many requirements, particularly in relation to Aboriginal consultation, were not clearly spelled out in the statute, and should be.

The OBA recommends that the Ontario Government be open to possible further statutory amendment of the *Mining Act* if that is necessary to ensure efficient, fair and pragmatic arrangements of the kinds set out in this submission.

## **Conclusion**

Thank you for this opportunity to comment on the proposed amendments to existing regulations and new regulations under the *Mining Act*. The OBA supports more clarity in the regulation of Ontario's mining industry and hopes that our comments will assist in achieving this.