

Modernizing legislation

Proposed changes to the Ontario Mining Act and a new land use regime in the Far North

■ Neal Smitheman and Tracy Pratt

The Government of Ontario recently embarked on a strategy to “modernize” the mining legislation in Ontario. Proposed amendments to the *Ontario Mining Act* arise, in part, from criticism that the Act does not appropriately balance industry interests with those of private land owners and Aboriginal communities.

Bill 173, or the *Mining Amendment Act, 2009*, was introduced to Parliament by The Honourable Michael Gravelle, Minister of Northern Development, Mines and Forestry, on April 30, 2009. Although the amendments are directed at promoting mineral exploration, Minister Gravelle has stated that mining activities are “encouraged” in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights.

Bill 191, or the *Far North Act, 2009*, was introduced to Parliament by The Honourable Donna H. Cansfield, Minister of Natural Resources, on June 2, 2009. The stated purpose of this Act is to provide for community-based land use plans (CBLUPs) in the Far North that directly involve First Nations in decision-making. The bill is designed around the concept of CBLUPs and the province’s goal of having 225,000 square kilometres of protected areas in the Far North.

Together, Bill 173 and Bill 191 radically change the landscape for mining exploration and investment in Ontario. Industry participants have taken particular note of the amendments respecting Aboriginal rights and interests.

The duty to consult

Bill 173 appears to be an attempt to transfer or delegate a component of the Crown’s duty to consult with Aboriginal communities to third-party resource development companies. Aboriginal rights are inherent rights

that certain Aboriginal Peoples of Canada hold as a result of their ancestors’ long-standing use and occupancy of the land, including, for example, the right to hunt, trap and fish on ancestral lands. Treaty rights refer to Aboriginal rights set out in a treaty entered into between a First Nation and the Government of Canada. Both of these rights are recognized and affirmed by s. 35 of Canada’s Constitution.

The Supreme Court of Canada, in a number of landmark decisions, has established that the federal and provincial Crown have a duty to consult with, and accommodate where appropriate, First Nations where there is knowledge of the potential existence of an Aboriginal or treaty right *and* where the Crown contemplates conduct that may affect it.

Canada’s highest court has attempted to define the principles governing the duty to consult with First Nations. First, the extent of the duty is proportionate to the strength of the claim and the potential impact on it. Although the content of the duty will vary based on the facts of each situation, the duty to consult requires the First Nation also to engage in good faith consultations. The duty does not amount to an Aboriginal “veto” power over development projects. Although the Supreme Court has articulated that third parties, including mining industry participants, are under no duty to consult with First Nations, certain recent clashes in Ontario between First Nation communities and junior resource development companies may be interpreted as eroding this private third-party interest boundary. The recent proposed amendments to the Act appear to take a similar approach.

Proposed legislation

Many of the proposed amendments to the *Mining Act*, and the introduction of the *Far North Act, 2009*, appear to

be an attempt by the province to legislate a framework for the consultation with First Nations that the Supreme Court of Canada says must occur. For example, the proposed amendments to the *Mining Act* require that an exploration plan be submitted in accordance with prescribed requirements, including prescribed Aboriginal consultation. The amendments also stipulate that an application must be made to the Director of Exploration (a newly appointed officer that does not currently exist), who will be tasked with deciding whether to issue an exploration permit and upon what terms and conditions.

In deciding whether to issue an exploration permit, the Director of Exploration shall consider, among other things, whether Aboriginal consultation has occurred.¹ To the extent that the amendments “download” or delegate to industry what is properly the Crown’s duty, the new legislation could be deemed unconstitutional. The proposed structure may be problematic insofar as resource companies with mining claims/leases are mandated to engage in time-consuming and expensive discussions, which could later be rendered moot by Aboriginal communities if the Crown does not fulfill its constitutional obligations.

Bill 191 effectively imposes a moratorium on any new mines in the Far North (the northernmost third of Ontario’s landmass and representing an area one and a half times the size of the Canadian Maritimes) and a development moratorium on at least 50 per cent of the Far North’s boreal forests (such

¹ Additional layers of regulation usually result in increased administrative costs and greater exploration expenses. The proposed legislation also lacks protective appeal mechanisms for claim holders should they face delays as a result of the new requirements.

protected areas are not yet defined). Bill 191 also creates an additional regulatory hurdle in the form of a CBLUP. Until a CBLUP is in place, no new mines can be opened in the Far North.

The proposed legislation has received negative commentary from industry as being vague or ill defined. The regulations, once drafted and circulated, may provide the necessary clarity, including assurances that the Crown is an equal and committed partner to the consultation process. There also is real concern about investing in a new prospect, or an expansion of an existing project, given the Bill 191 moratorium.

Aboriginal groups also have voiced criticism of the bills. First, the process for CBLUP designation requires First Nations to follow the legislative process set out by the Ontario government, a process that, ironically, was created without significant First Nations input.

Second, there is concern about the residual power left to the Minister in the form of regulation-making power. Several First Nations see this ministerial discretion as an “entrenchment of

the powers of Ministry of Natural Resources and contrary to the partnership model suggested. In particular, a number of First Nations condemn the arbitrary imposition of a 225,000 square kilometre protected area, which may run contrary to Impact Benefit Agreements (IBAs) these First Nations have negotiated or are in the process of negotiating with industry.

The proposed legislation, however, does require industry participants to be proactive in their contact and consultation with Aboriginal communities. This is a positive step for building better relationships between industry and First Nations. Indeed, this type of private consultation, often by way of negotiated memoranda of understanding,

exploration agreements and IBAs, has become a recent voluntary component of many mining project developments in Ontario. **COM**

Contributions to this article also were made by Michael Bourassa, the coordinator of Fasken’s Global Mining Group, and Richard Butler, an associate in the Dispute Resolution Group. This article is taken, in part, from a paper titled “An Attempt to Legislate the Duty to Consult with Canada’s First Nations? Proposed Amendments to Ontario’s Mining Act” by Neal Smitheman and Tracy Pratt, to be published in a newsletter of the International Bar Association.

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