

Aboriginal Law Bulletin

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Bill 173: “Modernizing” Ontario’s Mining Legislation

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As one of Ontario’s oldest pieces of legislation, mining industry participants will generally agree that many of the *Mining Act’s* provisions were antiquated and out of step with modern staking and development activities. Starting in the summer of 2008, the Government of Ontario met with representatives from the mining industry, municipalities, environmental groups, private citizens and Aboriginal communities with the goal of “modernizing” the *Mining Act* (“Act”).

Ontario’s discussions with stakeholders focused primarily on five policy issues:

- The mineral tenure system (including free entry and security of investment);
- Aboriginal rights and interests related to mining development;
- Regulatory processes for exploration activities on Crown land;
- Land use planning in Ontario’s Far North; and
- Private rights and interests relating to mineral development.

On April 30, 2009, the legislature of Ontario introduced the 1st Reading of Bill 173 (the “Bill”), an act to amend the Act. Second reading took place on May 27,

2009. The changes to the Act are meant to promote mineral exploration and development by improving clarity and certainty of investment. The Minister of Northern Development and Mines, Michael Gravelle, has stated that any development must be balanced, however, against the needs of Aboriginal communities and private land holders.

The Bill makes sweeping amendments to the Act respecting the regulation of, among other things, prospecting land, staking mining claims, surface owners’ rights, exploration work, diamond mine royalties and, perhaps most significantly, consultation with Aboriginal communities. Pursuant to the Bill, mining activities are encouraged in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act*, 1982, including the duty to consult.²

The proposed amendments to the Act include:

- (1) the apparent transfer of, at least a component of, the Crown’s duty to

¹ Prepared with the assistance of Richard D. Butler

² Section 2.

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consult with Aboriginal communities to third party resource development companies;³

(2) a reduction in the lands available for resource development by: (a) excluding private lands in Southern Ontario; (b) expanding Aboriginal rights to restrict use of lands defined as sites of “Aboriginal cultural significance”; and (c) restricting uses that are inconsistent with community based land use plans;⁴

(3) a requirement for an exploration plan and an exploration permit prior to commencing prescribed exploration activities. Such plans and permits incorporate Aboriginal consultation requirements; and

(4) a new dispute resolution process for matters relating to consultation and Aboriginal or treaty rights.⁵

The practical requirements, and the attendant consequences, of the Act’s amendments may discourage resource development companies from conducting business in Ontario. Among other things, additional layers of regulation almost always result in increased administrative costs and greater exploration expenses. Aspects of the amendments also may have the unintended consequence of decreasing the certainty, clarity and timeliness that the industry needs to make investment decisions.

Duty to Consult

The Bill adds administrative layers to the Act by prohibiting the carrying out of any prescribed activity on a mining claim, mining lease or licence of occupation for mining purposes unless a person has: (1) submitted to the Ministry an exploration plan; (2) submitted to the Ministry an application for

an exploration permit; and (3) the Director of Exploration has issued an exploration permit.

Exploration Plan and Application for an Exploration Permit

The Bill requires that an exploration plan be submitted in accordance with any prescribed requirements, including any prescribed Aboriginal community consultation.⁶

Next, an application must be made to the Director of Exploration (the “Director”). The Director is tasked with deciding whether to issue an exploration permit and upon what terms and conditions. The nature of the application is not specified in the Bill. In deciding whether to issue an exploration permit, the Director shall consider, among other things, whether Aboriginal consultation has occurred.⁷

On its face, the Bill requires permit applicants to be proactive in their contact and consultation with Aboriginal communities. This type of private consultation, often by way of negotiated Memorandum of Understanding, has been a common component of mining project development in Ontario for some time. These sorts of arrangements work well where the company and the Aboriginal community share a desire to effect mutually beneficial development. Having said that, the amendments arguably enhance Aboriginal communities’ leverage in the negotiations of such arrangements.

The Act’s new provisions (and the proposed but yet to be drafted regulations) raise several questions such as the following: Will consultation be a condition precedent of obtaining an exploration permit and if so, will that only be in cases where a duty to consult exists? On what basis and in what

³ 78.1(1), 78.2(2), 139.2(4,1), 140 and 141

⁴ 204(2), 51.(4)(a), 35(1) and (2)

⁵ 105(1), 112(1), 170.1(1)

⁶ 78.1(1)

⁷ 78.2 (1) (b)

manner will the Director determine whether a duty to consult exists? In what manner, and to what degree, will the Crown participate in the required consultation? What if the duty to consult is owed by the federal Crown? How will the Director assess the corresponding obligation on an Aboriginal community to engage in good faith consultation?

These questions flow from the fact that the term “consultation” has a legal and constitutional significance. The Supreme Court of Canada jurisprudence clearly establishes that the duty to consult is owed by the Crown and, beyond procedural elements, cannot be delegated. To the extent that the Bill “downloads” or delegates to permit applicants what is properly the Crown’s duty, it could be deemed unconstitutional. This proposed structure may, therefore, be problematic insofar as resource companies with mining claims 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. Without a mechanism for ensuring Crown participation in consultation, the permit process may lead to increased uncertainty.

The Act permits the Director to impose any terms and conditions he or she determines are appropriate. Further, the Director may amend an exploration permit if, in his or her opinion, there is a change in circumstances that warrants an amendment. Such broad discretion, without even general parameters, adds further uncertainty to the new process.

Supreme Court of Canada jurisprudence is clear that Aboriginal communities do not have a “veto” power. How this jurisprudence will be reflected in the Ministry’s decisions under the Act is yet to be seen.

Approval for Rehabilitation of Mine, Advanced Exploration and Mine Production

The Bill inserts a requirement of Aboriginal consultation in connection with advanced exploration, the approval for rehabilitating a mine and mine production.⁸

In determining whether to grant approval for these activities, the Director must consider whether consultation has occurred in accordance with any prescribed requirements. These consultation provisions raise similar questions and issues as those related to exploration permits.

Reduction of Development Land

Withdrawal of Lands:

The Bill takes a new approach to mineral exploration where Crown mineral rights are on land where the surface rights are owned privately. In Southern Ontario, for lands where the Crown holds the mining rights but not the surface rights, those mining rights will be withdrawn from prospecting, staking, sale and lease. In Northern Ontario, surface right owners will be able to apply to the Minister for an order to withdraw the mining rights from staking. In making that decision the Minister shall consider the mineral potential of the lands and any other criteria that may be prescribed. The Minister’s decision appears to be final.

In exercising this discretion, the Minister may consider whether the lands meet the prescribed criteria as a site of “Aboriginal cultural significance”.⁹ The Minister may also impose restrictions on a mining claim holder’s right to use portions of the surface rights of a mining claim if the portions of the surface rights are on lands that meet

⁸ Rehabilitation: 139.2 (4.1); Advanced Exploration: 140(1); Mine Production: 141(1)

⁹ 35(1)

the prescribed criteria as sites of Aboriginal cultural significance.¹⁰

For example, among other things, it is not clear yet: (a) what criteria and what process will be applied; (b) what type of supporting documentation or “evidence” will be necessary; (c) what level of “proof” will be required; and (d) what if any input other stakeholders will have in determining that a site is of “Aboriginal cultural significance”.

Far North – Community Based Land Use Plan (CBLUP)

Industry participants will recall the Government’s announcement last year that it reserved at least 50% of the Far North’s boreal forests from development.¹¹ In addition to this significant withdrawal of land from mining, the Bill also stipulates that no new mines can be opened in the Far North unless there is a CBLUP for the area where the project is located and the land use designated for the area is consistent with the opening of a new mine.

The requirement of a CBLUP prior to the opening of a new mine likely will add further delays to the exploration and development schedules of resource companies. Although the nature of the CBLUP needs further elaboration, this requirement appears to present additional opportunities to prevent new mines from being opened.¹²

¹⁰ 51(4)

¹¹ In July 2008, the Provincial Government announced the withdrawal of 225,000 square kilometres of boreal forest in the “Far North” from development. That represents an area one-and-a-half times the size of the Maritimes.

¹² It is worth noting, however, that the Lieutenant Governor in Council may permit a new mine opening if the project is in the social and economic interests of Ontario.

Dispute Resolution

The Bill introduces a resolution process for disputes relating to consultation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights arising from the Act and its requirements.

The Bill provides for the designation of individuals or a body to hear and consider disputes including disputes respecting exploration permit decisions, advanced exploration, mine production and any other prescribed circumstances. The designated individuals/body does not make a ruling. Rather, it prepares a report making recommendations to the Ministry. The Mining and Land Commissioner has no jurisdiction for matters falling within the new dispute resolution process. There is no right of appeal to the Commissioner.

The ultimate decision appears to be left to the Ministry, notwithstanding that the Ministry is effectively a party to the dispute. The process has the potential for long delays, without the benefit of an independently-made final decision. It will be interesting to see how the process works in practice.

Conclusion

The Act’s amendments undoubtedly increase the level of regulation of exploration in Ontario and thereby impose additional requirements and costs on industry players. Further, among other things, Aboriginal communities may view the Act as imposing processes that they cannot fund or that are not sufficiently sensitive to their internal decision-making. Unfortunately for all stakeholders, perceived weaknesses in the process may lead to more disputes between industry and First Nations and increased recourse to the courts. It is yet to be seen whether the Ministry will strike an appropriate balance that will recognize and satisfy First Nations’ rights to be consulted without shutting down the resource development business in Ontario.

*Post-script***Bill 191: The “True” North**

Bill 173 tells only half the story; Bill 191 completes it. Bill 191 effectively imposes a moratorium on all mining in the Far North (see map* below). Unless and until a CBLUP is in place, no new mines can be opened in the Far North. A CBLUP has no force and effect until the council of each First Nation involved in the CBLUP “has passed a resolution approving the plan”.

Prior to any discussion concerning a CBLUP, a Far North Land Strategy must be prepared by the Minister who must provide opportunity for the involvement of the First Nations. Thus, all new mining is on hold in the Far North for some time. Although companies can continue to prospect, stake, engage in exploration and obtain a mining lease or licence in accordance with the *Mining Act*, why would anyone want to given the strictures of Bill 191?

For more information on the subject of this bulletin, please contact the authors.



* Image from Ontario Ministry of Natural Resources:

<http://www.mnr.gov.on.ca/en/Business/FarNorth/2ColumnSubPage/266506.html>

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