

Office of the Mining and Lands Commissioner
Mandate

The Mining and Lands Commissioner is appointed by the Lieutenant-Governor in Council pursuant to the **Ministry of Natural Resources Act**. The Commissioner is unique in government, having characteristics of both the courts and administrative tribunals. The Commissioner is responsible for hearing and deciding matters under legislation and programs administered by the Ministries of Natural Resources and Northern Development and Mines.

The purpose of the **Mining Act** is "to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario". The **Mining Act** functions as a comprehensive administration of mining lands within the province under the general administration of the Minister of Northern Development and Mines and various ministry personnel. This authority and the attendant determination of rights created by the legislation primarily rests with the Minister, through delegated authority to Ministry officials and with the Provincial Mining Recorders. The Mining and Lands Commissioner exercises a variety of statutory functions from an administrative and adjudicative perspective.

Prior to amendments to the **Mining Act** which became effective in 1991, the Mining and Lands Commissioner was and continues to be empowered to receive referrals from the Minister, hear applications at first instance and to hear appeals from the decisions of Provincial Mining Recorders. The responsibilities are broad, including hearing and deciding disputes, whether at first instance or on appeal, the issuance of vesting orders and the hearing of prosecutions. Following major amendments to the **Act** effective June 3, 1991, these duties were supplemented by the authority to hear appeals from the orders of the Director of Mine Rehabilitation.

In carrying out its functions under the **Act**, excepting mine rehabilitation, the Mining and Lands Commissioner has been characterized by the Supreme Court of Canada as an inferior Court of appeal or review, and more recently by the Ontario Superior Court of Justice as the Mining Court.

The Mining and Lands Commissioner has also been assigned the authority, duties and powers of the Minister of Natural Resources under the **Ministry of Natural Resources Act** to hear appeals from the decisions of conservation authorities made under the **Conservation Authorities Act** regarding their refusal to grant permission to a property owner for the development of lands within floodplains, hazardous lands, dynamic beaches and wetlands. Substantive and procedural requirements are set out in Part VI of the **Mining Act**.

In 1997, amendments to the **Conservation Authorities Act** allowed participating municipalities against which a discounted equalized assessment had been levied for both the funding of the operation and maintenance of flood control structures to appeal directly to the Commissioner. In 2000, further amendments to this **Act** changed the method of calculating municipal apportionments from the current "Discounted Equalized Assessment" method to the provincially approved "Current Value Assessment".

Until the end of 1997, the Commissioner heard appeals under the Conservation Land Tax Reduction Program, pursuant to the **Conservation Land Act**, from notices of the Ministry of Natural Resources that land is excluded from or ceases to be conservation land. Various tax reduction programs were replaced with tax incentive or exemption programs on April 1, 1998 as a result of amendments to the **Assessment Act**. The expertise of the Commissioner in issues concerning natural resources was recognized and the jurisdiction of the office was supplemented with managed forest appeals as well as appeals concerning the conservation land tax incentive program. As a result of reforms to the administrative justice system, these appeals are filed with the Assessment Review Board (the ARB), offering a one window approach to assessment appeal matters. The ARB administers all files and refers those having managed forests or conservation land classification issues for initial determination by the Commissioner. These decisions are deemed to be the decisions of the ARB. Any outstanding valuation issues will then be determined by the ARB.

The Commissioner has historically been persona designata under the **Lakes and Rivers Improvement Act**, which provides for an inquiry upon the request of an applicant who has received notice from the Minister of his intention to refuse approval or make an order. The inquiry would result in a report with recommendations to the Minister. Similarly, under the **Aggregate Resources Act**, appeals from refusals by the Minister of Natural Resources involving existing aggregate permits are heard by the Commissioner, resulting in recommendations after a hearing.

In 1997, a number of provisions were transferred from the Ontario Energy Board to the Commissioner. As a regulatory agency, the Energy Board's processes are lengthy, formal and costly to the applicants. This was believed to have had an adverse effect on exploration and production efforts in the province. The Petroleum Resources Centre, Ministry of Natural Resources, advocated the move, to allow producers access to the expeditious and informal resolution of issues. The Commissioner hears applications under the **Oil, Gas and Salt Resources Act** for the joining of interests within spacing units for the purpose of drilling or operating a well and will apportion the associated costs and benefits. The Commissioner also may order the joining of interests within a field or pool for the purposes of drilling or operating wells and flowing from this may designate the management of the field or pool and the apportioning of associated costs. In addition, a person who considers him or herself aggrieved by the Minister of Natural Resources' refusal of consent to transfer a well licence may appeal the Minister's decision to the Commissioner. In certain cases, the Commissioner has been the Minister's designee for appeals by persons considering themselves aggrieved by a decision or order of a petroleum resources inspector.

The duality of judicial and adjudicative responsibility has been identified as a challenge faced by the Commissioner whose effects have been particularly felt in recent years. Since the inception of the Office in 1906, the Commissioner has variably been clothed with the express judicial powers of the High Court and been made a section 96 Judge of the Mining Court with a federal fiat. Amendments in 1956 saw all overt judicial references removed from the legislation, as is the case to date, but the underlying judicial authorities and substantially all powers remain. There have been two constitutional challenges, in 1923, finding that the powers dealing specifically with issues arising after the granting of patents were ultra vires, meaning beyond provincial powers and in 1958, finding that the powers examined, which are in the legislation today, were within the power of the province to make.

2008/2009

During the 2008/2009 fiscal year, the Office of the Mining and Lands Commissioner continued its practice of progressive case management and alternative dispute resolution measures designed to expedite the resolution of all of the various matters brought to the Office for determination. Included are pre-hearing conferences, held either "in-person" or via telephone conference call, to explore the potential for settlement, to narrow the issues in dispute and to ensure hearing preparedness for those matters proceeding to a hearing. Similarly, issues for preliminary determination, whether jurisdictional or procedural, continued to be dealt with prior to the hearing on the merits, thus eliminating unnecessary adjournments and delays. For cases requiring a hearing on the merits, hearing readiness has been targeted within three months of the issuance of the Order to File documentation. The Office has, as part of this procedure, prepared draft Exhibit Lists and Agreed Statements of Fact, where appropriate.

The majority of cases received during this reporting period were resolved in less than two months. However, when necessary, on average, it took two to two and a half months for the Office to receive the necessary documentation to proceed with an appeal/application and a further two and a half months to hear and decide the matter. A more detailed statistical outline is provided later in this report.

The Office received 73 applications, appeals or referrals in 2008; 27 under the **Mining Act**, five under the **Conservation Authorities Act**, 36 under Ontario Regulation 282/98 of the **Assessment Act** (involving the managed forests or the conservation lands property classes) and five under the **Oil, Gas and Salt Resources Act**. No matters were received under the **Aggregate Resources Act**. Four matters were heard under the **Mining Act**. One appeal was heard under each of the **Oil, Gas and Salt Resources Act** and the **Conservation Authorities Act**.

A significant settlement rate continued to be demonstrated for those matters which commenced in 2008. Statistics show that 22 mining, five conservation authority, 35 managed forest and conservation land cases and four oil, gas and salt matters fell within these parameters. These cases were disposed of prior to a hearing or an inquiry through either in-person or telephone conference call mediation sessions, pre-hearing conferences, or other methods of alternative dispute resolution including various forms of facilitation. In addition, the mediation services of the Registrar were requested by parties in several matters before the Ontario Superior Court of Justice.

In 2008, the Office issued 38 interim and 71 final orders, for a total of 109, including seven vesting orders and five orders involving exclusions of time under the **Mining Act**.

The Commissioner is committed to monitoring and maintaining delivery standards in the core business of adjudication to be shown through the collection of detailed statistics. The objective is the efficient and successful processing of files through adjudication, settlement or appropriate disposition, in a timely manner. This is the ninth year in which the collection of data for the reporting of metrics has been undertaken by the Office. The detailed statistical data collected on cases provides a more accurate picture of the adjudicative activities of the Office and will be developed and refined on a go-forward basis.

The following summarises performance measures for key commitments and targets achieved, as well as illustrating anomalous cases.

The Office continues to enjoy a considerable overall settlement rate. The target was to maintain its range of between 70 and 92%. The settlement rate was met at 92%. It is pointed out that even with many settlements, it is necessary for the Commissioner to make statutory decisions.

For mining cases, within the 2008 calendar year, 85% of cases settled. Those which did not could be described as labyrinthine, sometimes taking a period of years to reach their conclusion and often involving more than one hearing and a significant number of interlocutory decisions before the final decision.

On an annual basis for those cases received during this reporting period, 100% of the conservation authority and aggregate resources appeals, and 97% of the managed forest and conservation land referrals received under the **Assessment Act** were resolved without a hearing as did four of the five outstanding oil, gas and salt matters.

Four Deputy Commissioners provided assistance to the Commissioner as a result of her expanded jurisdiction, each having expertise in one of the **Conservation Authorities Act**, the **Oil, Gas and Salt Resources Act** or the **Mining Act**. Three of the Deputy Commissioners were initially appointed in June, 1998 and renewed for two further three year terms in June, 2000, July 2003 and July 2006, respectively. Two are paid on a per diem basis and had billings totalling 38 days and 18 days respectively, for fiscal 2008/09. The third Deputy Commissioner has a home position in the Legal Services Branch of the Ministry of Agriculture, Food and Rural Affairs. By agreement, 25% of her time was paid for through journal entry each fiscal year until her retirement during this reporting period. She then billed the tribunal for an additional 14 days. A fourth Deputy Commissioner was appointed in April, 2008 for a three year term and has a home position in the Legal Services Branch of the Ministry of Natural Resources. By agreement, a percentage of her time will be paid for through journal entry each fiscal year, commencing in 2009/2010.

Although the MLC Website went live at the end of 2005, ongoing scanning of the Commissioner's Orders in both the HTML and the PDF formats continued, based on an audit of procedural and interlocutory decisions of importance. The site is a research tool for the dissemination of information and decisions and has been very well received. Work in this fiscal year centred on meeting requirements for the MNR Web Communications Refresh Project, with a significant number of postings having been delayed due to the migration to Stellent.

The Office continued to access to the Ministry of Northern Development and Mines' Client Claims System (CCS), whereby it could maintain high standards of service delivery and accuracy on Orders it issues which by operation of statute have a direct impact on the operation of the Claims System. In 2008/2009, the direct and worthwhile result was that no amended orders were issued.

Despite ongoing efforts to be proactive, the Office also noted that settlements and decisions can be delayed by a number of factors beyond its control. For example, the Commissioner often has to wait for decisions, information and/or documentation such as maps or surveys from parties, title searches, Ministries, other adjudicative bodies or regulators. Furthermore, in matters where significant amounts of money or title to land is being transferred from one party to the other as a result of a settlement, it takes time for those transactions to occur. Parties will understandably not execute "consent to dismiss" or "consent to grant" forms until their settlements are full and final.

Commissioner Linda Kamerman had major surgery at the start of the fiscal year and her responsibilities were assumed by Deputy Commissioner Marianne Orr and Registrar Daniel Pascoe. Her recovery required ongoing accommodation for a period of six months, affecting travel and other activities, but administrative direction and oversight was maintained throughout.

Support from the mining community and MNDM was sought for a proposal for legislative amendments to the procedural and jurisdictional provisions governing proceedings before the Commissioner in the upcoming **Mining Act** consultations. Deputy Commissioner Marianne Orr attended a meeting of the Minister's Mining Act Advisory Committee (MMAAC) to present the MLC's case and seek support. Subsequent discussions with the MNDM **Mining Act** Secretariat resulted in the conclusion that this proposal did not conform with its terms of reference. Similarly, examination of the terms of reference for Open For Business proved incompatible with desired objectives for proposed legislative amendments. This initiative has been placed on hold pending such further legislative opportunities which arise from time to time.

The article entitled "The History of the Mining and Lands Commissioner" written by Deputy Commissioner Marianne Orr to mark the 100th anniversary of the Office in 2006 was published in the **Canadian Journal of Administrative Law and Practise**, Vol. 21, pp. 223, August, 2008, Carswell Thomson Professional Publishing.

The Registrar consulted with the French Language Services Commissioner in April, 2008, concerning the best use of alternative dispute resolution practises within their operation. The Registrar was also asked by the Natural Resources and Energy Section of the Ontario Bar Association to review their submission to Cabinet concerning the modernization of the **Mining Act**.

The Registrar attended the 24th National Council of Canadian Administrative Tribunals Conference on Administrative Justice which was held in Gatineau, Quebec, in June, 2008. The Registrar also attended the Conference of Ontario Boards, Agencies and Commissions which was held in Toronto in November, 2008.

The Registrar addressed the Members of the Assessment Review Board (ARB) during two separate sessions in Toronto in June of 2008, concerning the jurisdiction of the Commissioner pursuant to Ontario Regulation 282/98 of the **Assessment Act** (involving the managed forests and the conservation lands property classes) and the process followed by the Office when referrals are received from the ARB.

The Registrar spoke to the Mining Law class at the Faculty of Law at the University of Western Ontario in London, Ontario, in January, 2009, concerning the jurisdiction of the Office under the **Mining Act** as well as its Procedural Guidelines and case management practises.

The Registrar attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2009 and the Commissioner attended the annual reception of the Minister of Northern Development and Mines.

Due to ongoing budgetary pressure, the Office began to track its hearing and office costs in 2003/2004 to more accurately predict its constant and variable costs. Greater scrutiny of its fixed costs has led to an ongoing exercise to find and implement further economies. During the previous reporting period, the Office audited its equipment leases and re-evaluated its needs. Cost analysis concerning the retirement of leased equipment to acquire multi-purpose equipment, is being undertaken.

A number of employee engagement initiatives were undertaken in the previous reporting period and then continued. The Commissioner retained a management coach who assisted in ongoing team building initiatives including a day session with all staff. Regular team meetings were held to inform and involve staff, to establish priorities and results and to discuss deliverables and results based planning initiatives on a proactive basis. The Secretary spent one week in the Sudbury Provincial Recording Office of the Ministry of Northern Development and Mines to acquire grounding in the programs and processes which result in applications and appeals to this Office. Staff volunteered for a number of OPS initiatives including the United Way and Federated Health Campaigns.

The Office continued to make its hearing room available to the Agency, Board and Commission Community and to other Ministries. The hearing room was also used for examinations for discovery for matters before the Commissioner.

The Office also housed the executive coordinator/project manager for the Ministry of Natural Resources Facility Director's Council on an interim basis.