

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 (MNR) and Northern Development, Mines and Forestry (MNDMF).

The purpose of the **Mining Act** is “to encourage prospecting, staking and exploration for the development of mineral resources, 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, and to minimize the impact of these activities on public health and safety and the environment.” The **Mining Act** functions as a comprehensive administration of mining lands within the province under the general administration of the MNDMF 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: to receive referrals from the Minister; to hear applications at first instance; to hear appeals from the decisions of Provincial Mining Recorders; and to hear appeals from the orders of the Director of Mine Rehabilitation. The responsibilities are varied and broad, including hearing and deciding staking disputes upon appeal or referral, the issuance of vesting orders, the hearing of prosecutions and broad jurisdiction to decide any matter which arises under the **Mining Act**.

Cognisant of its unique and rich history, the Supreme Court of Canada characterized the Mining and Lands Commissioner as an inferior Court of appeal. The Ontario Superior Court of Justice refers to the Office as the Mining Court.

The MNDMF continues its efforts to modernize the **Mining Act** pursuant to their five year plan and to roll out those amendments in phases, slated for January 2011 and March 2011. Any recent increases in caseload predate these changes, whose impact will become increasingly apparent over the next fiscal year. The Commissioner and staff were briefed on the latest changes¹ by the Senior Manager, Mining Lands Branch, MNDMF in November of 2010.

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¹ Phase 1 roll-out January and March 2011, includes:

1A January 1, 2011

- Requests by Surface Rights Owners in Northern Ontario for a withdrawal of minerals rights (35.1)
- Application for an exemption from mining lands tax (189)
- Application for the reduction or waiving of mining lands tax (199)
- Housekeeping sections

1B March 1, 2011

- Ministry's general powers to withdraw lands from staking (35)
- Restrictions on use of surface rights within mining claims (51)
- Introduction of map staking in Southern Ontario (38)
- Confirmation of staking to surface rights owners (46.1)
- Housekeeping Sections

The “Lands” portion of the title refers to the natural resources jurisdiction. The Mining and Lands Commissioner has 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. Also, participating municipalities may appeal the levy of their discounted equalized assessment for operation and maintenance of flood control structures. Substantive and procedural requirements are set out in Part VI of the **Mining Act**.

The Commissioner continued to consult with the MNR on ongoing conservation authorities issues, such as the current drafting of guidelines to the generic regulations, albeit in a limited and neutral manner.

The Commissioner hears classification issues concerning managed forests and conservation lands, programmes administered by the MNR, in relation to property tax assessment appeals. These appeals are filed with the Assessment Review Board (the ARB), offering a one window approach to assessment appeal matters. The ARB administers all appeals and refers those having managed forest or conservation land classification issues for initial determination by the Commissioner, which are deemed to be the decisions of the ARB. Any outstanding valuation issues will then be determined by the ARB. The expertise of the Commissioner in issues concerning natural resources was recognized when this jurisdiction was added in 1998.

The Commissioner has historically been *persona designata* to conduct such hearings as may be required under the **Lakes and Rivers Improvement Act**. 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. These two provisions are seldom utilized, however.

The Commissioner hears applications under the **Oil, Gas and Salt Resources Act** for the joining of interests within spacing units or within a field or pool, making decisions governing the overall operations. The Commissioner may also hear appeals from decisions of Ministry personnel in certain circumstances.

2010/2011

During the 2010/2011 fiscal year, the Office of the Mining and Lands Commissioner continued its practice of progressive and intensive 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 great 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 60 applications, appeals or referrals in 2010; 40 under the **Mining Act**, ten under the **Conservation Authorities Act** and nine under Ontario Regulation 282/98 of the **Assessment Act** (involving the managed forests or the conservation lands property classes). One matter was received under the **Oil, Gas and Salt Resources Act**. None were received under the **Aggregate Resources Act**. Two matters from previous reporting periods were heard; one under the **Mining Act** and one under the **Conservation Authorities Act**.

A significant settlement rate continued to be demonstrated for those matters which commenced in 2010. 39 mining, nine conservation authority and nine managed forest and conservation land cases 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 2010, the Office issued 63 interim and 46 final orders, for a total of 109, including five vesting orders and twelve orders involving exclusions of time under the **Mining Act**.

The Commissioner continues to intensively monitor and maintain delivery standards in the core business of adjudication as 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 eleventh 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.

Chief Justice Winkler opened the Courts in September, 2010, calling for a fresh conceptual approach to family law dispute resolution. Asked to elaborate in an interview with the Lawyers Weekly, Mr. Justice Winkler stated that he believes that free early mandatory mediation could lead to considerable cost savings in an overburdened, judge-focused system. With his considerable experience as a mediator, Justice Winkler intuited that “triage” was the key and the form that this should take should be open for discussion.

The MLC was spurred by this address to analyse its considerable success in alternative dispute resolution and effectively “take its show on the road” with the object being to seek an audience with Justice Winkler as well as offer the benefit of its experience and expertise to the Society of Ontario Adjudicators and Regulators (SOAR). During this reporting period, the Registrar and the Administrative Assistant completed a detailed review of the settlement statistics of the office from 1992, when the current Commissioner assumed her duties and ADR was introduced until the present date, to ensure that the data would withstand critical scrutiny. The statistics showed a high settlement rate, ranging from 70% to well over 80%, from 1993 to 1998. From 1999 to 2010, settlement rates have significantly exceeded 90%.

The Registrar also compiled a list of over 100 lawyers (as well as correspondence from them) which praised the OMLC process, often times remarking on its uniqueness. Anecdotally, comments were made that similar processes did not exist in other institutions which could benefit from them. Work on this project will be ongoing during the next reporting period. The Commissioner has initiated discussions with York University’s Osgoode Hall Masters in Law Program in Alternative Dispute Resolution attempting to attract a student to undertake further research on this project for their Major Paper or thesis. The Commissioner has also discussed the uniqueness of the MLC approach with various chairs of the ABC community.

The following summarises performance measures for key commitments and targets achieved during this reporting period, 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 exceeded at 95%. It is pointed out that even with many settlements, it is necessary for the Commissioner to make statutory decisions.

For mining cases, within the 2010 calendar year, 98% of cases settled. The few which did not, from previous years, can be described as labyrinthine, oftentimes taking years to reach their conclusion and often involving more than one hearing and the issuance of a significant number of interlocutory decisions before the final decision.

On an annual basis, for those cases received during this reporting period, 90% of the conservation authority appeals, and 100% of the managed forest and conservation land referrals, received under the **Assessment Act**, were resolved without a hearing.

Three Deputy Commissioners provided assistance to the Commissioner during this fiscal year 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**. Two of the Deputy Commissioners were initially appointed in June, 1998 and renewed for four further three year

terms in June, 2000, July, 2003, July, 2006 and July, 2009. A new Deputy Commissioner was appointed in April, 2008, for a three year term and was reappointed for another three year term at the end of this reporting period. The new Deputy Commissioner was also appointed Acting Deputy Legal Director at the MNR Legal Services Branch, which decreased the time in which she was available to assist the Commissioner; this secondment draws to a close coincidental with the current fiscal year after which it is anticipated that she will be able to augment her assistance to the MLC.

Two Deputy Commissioners were paid on a per diem basis and had billings totalling 31 days and 14 days respectively, for fiscal 2010/11. The third Deputy Commissioner's home position is the Legal Services Branch of the MNR. By agreement, her time was paid for through journal entry, commencing in the previous reporting period.

Novel this fiscal year, one the Deputy Commissioner heard an appeal and issued a report with recommendations concerning the conditions for brine disposal.

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 reporting period centred on meeting requirements for the migration of the site to the new Stellent system (Oracle 10gR3) and for the launch of the new MNR public website which will adhere to the requirements of the new OPS standard.

The Office continued to access to the MNDMF's 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 2010/2011, the direct and worthwhile result was that no amended orders were issued for this reason.

Despite ongoing efforts to be proactive, the Office must emphasize that settlements and decisions can be delayed by factors beyond its control. It is not unusual to wait for decisions, information and/or documentation such as maps or surveys from parties, title searches, Ministries, other adjudicative bodies or regulators. Furthermore, when payments or issuance of shares are involved, parties will not execute consents to dispose of matters until outstanding amounts are paid in full. Given that the life of a mine from exploration through rehabilitation is counted in decades, it is not unusual for active cases to involve years of intensive negotiation prior to final settlement. In this regard, the time involved in finally disposing of a matter may appear to exceed normative expectations, but within the context of the mining industry, is not unusual or overly lengthy.

The Commissioner has initiated discussions with the MNR and the MNDMF about amending the **Ministry of Natural Resources Act** in order to provide her with greater flexibility in assigning Deputy Mining and Lands Commissioners to hearing panels. The current wording of this **Act** reflects concerns present in 1971 when it was last amended, but fails to take into account more modern pressures on the adjudicative process.

The Commissioner has also proposed to obtain a Regulation, pursuant to section 31 of the **Law Society Act** to have her annual law society fees placed in abeyance, which is the case with Case Masters, Prothonotaries and members of the Ontario Municipal Board.

The Registrar worked with various MNR staff to finalize the OMLC Threat Risk Assessment and Building Physical Security Plan Development and Approval Process as well as the Emergency Response Plan, both being OPS initiatives.

The Registrar addressed the Mining Law class at the Faculty of Law at the University of Western Ontario in January, 2011, concerning the jurisdiction and process of the Mining and Lands Commissioner, with special reference to ongoing efforts at MNDMF to modernize Ontario's **Mining Act** pursuant to Bill 173.

All staff attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2011 and the Commissioner attended the annual reception of the Minister of Northern Development, Mines and Forestry at that time. Staff also attended the Ontario Mining Association's annual "Meet The Miners" reception in Toronto in March, 2011.

All staff completed the mandatory training courses and workshops through the MyOPS e-learning site, including those on the HST, travel, meal and hospitality expense directives, Bill 168 – An Overview of Health and Safety, Workplace Discrimination and Harassment Prevention and Workplace Violence Prevention.

It is noted that the office has two sets of Procedural Guidelines which can be accessed on the website; one for matters under the **Mining Act** and one for matters under all other Acts for which the office has jurisdiction. At the request of the Commissioner, the Registrar took the lead during this reporting period in drafting a simplified Hearing Guide for individuals and parties appearing before the tribunal. Significant input was provided by the Commissioner, the Deputy Commissioners and staff. The information contained in the Hearing Guide is meant to address any questions which may arise concerning the policies and procedures of the office before, during and after hearings. It is anticipated that this information will be of greatest assistance to unrepresented parties.

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 ongoing exercises to find and implement further economies. For example, the office conducted a cost analysis with detailed forecasting of all costs for all hearings. This analysis provides a valuable ongoing snapshot of all hearing related expenditures and ensures accurate monitoring of all costs throughout the fiscal year.

During the previous reporting period, the Administrative Secretary continued the ongoing audit of its equipment leases to meet the Green Team specifications while also addressing the unique needs of our off-site office. Cost analysis by the Administrative Secretary concerning the retirement of leased equipment to acquire multi-purpose green equipment is being undertaken and she is negotiating one month contracts with the Vendors until a decision can be made regarding the future leasing process adhering to the Green Team Initiatives.

A number of employee engagement initiatives were undertaken in this reporting period including a two day intensive workshop focusing on work practices and communication wherein a consultant was hired to focus upon team building exercises. Results were reflected in the performance development plans of all staff and in the performance management plan of the Commissioner. 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. Staff volunteered for a number of OPS initiatives including the United Way and the Federated Health Campaigns. The Administrative Secretary also volunteered to introduce speakers and attend classes at Showcase Ontario. She also is on the Diversity Initiative for the Province and for the Southern Regional Diversity Group which entails monthly conference calls, webinar meetings and yearly face-to-face meetings in Peterborough regarding pertinent issues to create equality for all. After taking a two day government course with a group called n-Gen, the Administrative Secretary attended yearly breakfast meetings and monthly conference calls. This group is primarily interested in how the different generations (Traditionalists, Baby Boomers, Y-Generation & N-Generation) can work cooperatively to provide a positive and productive workforce. N-Gen works with both the private & public sector across North America.

The Commissioner also continued to take independent French instruction with a view towards conducting hearings in the future, if necessary. The Commissioner plans on taking the CCAT on-line decision writing course in French during the next reporting period.

The Office also undertook numerous green office initiatives and will be modernizing and streamlining its computer and communications equipment with a multi-functional device during the next reporting period in order to be in full compliance with the MNR and OPS-wide Green Strategy.

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 continued to house the executive coordinator/project manager for the Ministry of Natural Resources Facility Director's Council on an interim basis.

The Administrative Assistant continued as Fire Warden for the Office and implemented safety modernization measures including organizing the purchase of a new fire extinguisher and new office safety and security rules including evacuation rules.