

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 and Mines (MNDM).

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 MNDM 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 MNDM continued its efforts to modernize the **Mining Act** pursuant to their five year plan and will implement those changes in phases. Phase One was implemented during this reporting period and involved, among other issues, subsection 35.1(8) of the **Mining Act** which states that in Northern Ontario, for lands where there is a surface rights owner and the mining rights are held by the Crown, the Minister may issue an order withdrawing the mining rights from prospecting, staking, sale or lease if the surface rights owner files an application. In making the decision, the Minister shall consider the mineral potential of the lands, among other factors. The tribunal notes that any existing mining claims, leases or licences of occupation for mining rights would not be affected by such an order.

Phase Two of MNDM’s modernization efforts are set to be implemented during the next reporting period and involve a “plans & permits regime”, improvements involving the protection of aboriginal sites and enhanced dispute resolution and adjudicative authority.

As noted, MNDM anticipates that further efforts (phases) will occur in future reporting periods.

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 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 office is also involved indirectly at the ARB triage stage by asking MPAC to apply the MLC's decision and re-assess the property(ies). The office then uses that information to follow up with the parties as to whether they still wish to pursue their valuation question on appeal with the ARB or, whether the result of the MLC decision(s) has addressed their concerns. The office then advises the ARB of the manner in which the property owner wishes to proceed.

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.

2011/2012

During the 2011/2012 fiscal year, the Office of the Mining and Lands Commissioner continued its practice of progressive and intensive case management, triage 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 51 applications, appeals or referrals in 2011; 36 under the **Mining Act**, 11 under the **Conservation Authorities Act** and three 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**. One matter from a previous reporting period was heard; and three from the current period were heard; two under the **Mining Act** and one under the **Conservation Authorities Act**. [\[1\]](#)

A significant settlement rate continued to be demonstrated for those matters which commenced in 2011. 36 mining, eight conservation authority, one managed forest and one conservation land case fell within these parameters. These cases were disposed of prior to a hearing or 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 2011, the Office issued 49 interim and 33 final orders, for a total of 82, including seven vesting orders and 17 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 twelfth 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.

In 2010, the MLC undertook to analyze its considerable success in alternative dispute resolution and case triage with a view to offering the benefits of its experience and expertise to the Society of Ontario Adjudicators and Regulators (SOAR), the Conference of Canadian Administrative Tribunals (CCAT) and the judiciary.

During the previous 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 and evaluate the practice of choosing a fifteen month window as the basis for this metric. The statistics showed a high settlement rate, ranging from 70% to well over 80%, from 1993 to 1998. From 1999 to 2011 settlement rates have increased and now consistently exceed 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. The Commissioner initiated discussions with York University's Osgoode Hall Masters of Law Program in Alternative Dispute Resolution attempting to attract a student to undertake further research on this project for their Major Paper or thesis. To date, none have expressed an interest but the Commissioner intends to pursue this further with the new Masters of Law Program Director in the next fiscal year.

The efforts to date in this initiative appear in a paper by the Commissioner and Mediator/Registrar entitled "Case Management Practices and Alternative Dispute Resolution Practices at the Office of the Mining and Lands Commissioner" in the **Canadian Journal of Administrative Law & Practise**, Vol. 24, No. 3, November, 2011, Carswell Thompson Professional Publishing.

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 met at 88%. It is pointed out that even with many settlements, it is necessary for the Commissioner to ensure compliance with incumbent legislation and provide reasons for findings of statutory compliance; reasons for settlement and the process leading up to it are conducted without prejudice and confidential. Any reasons drafted by the Commissioner must reflect this adjudicative reality.

For mining cases, within the 2011 calendar year, 92% 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. For example, two current cases date to 2000 and 2007, respectively. In the older matter, the Commissioner has issued, to date, 18 Orders (procedural or interlocutory) and the office has prepared 58 pieces of correspondence. For the 2007 matter the corresponding figures are 6 Orders and 24 pieces of correspondence, respectively.

On an annual basis, for those cases received during this reporting period, 73% of the conservation authority appeals, and 66% 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, respectively, with their terms expiring in July, 2012. 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 the previous 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. In January, 2012, a Policy Liaison Officer of MNR was engaged by the Commissioner to approach the Minister's Office on potential OIC reappointments or alter-natively, new appointments. Appointments of Deputy MLCs have been treated anomalously by the Public Appointments Secretariat, recognizing the unique status of the office. Prospective appointees have not gone before the Tri-Partite Committee on OIC appointees

and have, to date, not been limited to a maximum of ten year total appointments as a result of the considerable technical expertise and attendant training required. Also, the Commissioner has determined that the Mining Act cases require being heard by her or a Deputy Commissioner who is a member of the Ontario bar due to their legal complexity. The length, breadth, complexity and development of legislative provisions over 148 years require rigorous study and training to ensure hearing-readiness for the adjudicator. Once trained, the Office has benefited enormously from the accumulated expertise of the Deputy Commissioners.

Two Deputy Commissioners were paid on a per diem basis and had billings totalling 33.5 days and 10.0 days respectively, for fiscal 2011/12. 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.

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 continues to be very well received.

The Office continued to access to the MNDM'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 2011/2012, the direct and worthwhile result was that no amended orders were issued for this reason.

The Registrar and the Administrative Assistant also continued their efforts to identify, research and draft Orders for the Commissioner's signature to conclude those few matters which have been before the Ontario Superior Court of Justice for a period of years and the Office is not notified of completion of those proceedings. There is no legislative requirement that the Superior Court transfer the matter back to the Commissioner to remove notations of pending proceedings from the abstracts of the unpatented mining claims involved and issue an order excluding the time during which the matter was before a court. The Commissioner did meet with Associate Chief Justice J. Douglas Cunningham to discuss the matter in October, 2006. The **Mining Act** contains Reference provisions, so that the Superior Court of Justice or Court of Appeal is empowered to transfer the file to the MLC for processing to its administrative conclusion. Since that time, no problems have been encountered. However, the Registrar and Administrative Assistant have undertaken an audit of all files prior to that time. Prior to 1993, the Office did not maintain a record of matters which were proceeding in the then Divisional Court. The files for these matters have been archived. They were successful on a number of occasions. These efforts are ongoing and involve hundreds of mining claim units for which annual assessment work does not occur as a result of outstanding litigation.

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 MNDM 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. As a result, two member panels, the most cost-effective means of dealing with complex and challenging cases, can occur only with the parties' acquiescence. Otherwise, panels must consist of either one or three.

The Commissioner also unsuccessfully attempted to obtain agreement to a new Regulation, pursuant to section 31 of the **Law Society Act** to have her annual law society fees placed in abeyance, as is done with Case Management Masters, Prothonotaries and members of the Ontario Municipal Board. The Law Society advised that an adjudicative position under consideration must be mandated as a full-time position by its enabling statute. Although the Commissioner (and

between 1924 and 1956, the Mining Judge), has always been full-time in practice, this has never been formalized in statute. Had she been successful, this would have represented a \$1900 savings (or 1.7%) of the Office operating budget.

The Commissioner attended the annual Council of Canadian Administrative Justice (CCAT) conference which was held in Ottawa in June, 2011. The theme of the latter conference was “Dialogue Between Courts And Tribunals: Ten Top Issues In Administrative Law.”

In early November, the Commissioner and staff briefed MNDM’s new Adjudication Unit regarding the jurisdiction of the Commissioner and her approach to pre-hearing consultation, mediation and adjudication. The **Mining Act** specifies that hearings of Provincial Mining Recorders, who are not Order in Council Appointees, are not subject to the **Statutory Powers Procedure Act**. As a result, they were overlooked by the adjudicative community. At the Commissioner’s suggestion, the Adjudication Unit joined the Society of Ontario Adjudicators and Regulators (SOAR), attended their annual COBA (Conference of Ontario Boards and Agencies) and took part in the week-long SOAR training designed for new adjudicators.

Deputy Mining and Lands Commissioner Orr also attended the COBA conference which was held in Toronto in November, 2011. The theme of the conference was “Balanced Justice”.

The Registrar and the Administrative Assistant continued to work 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 Protocol for the office, both being OPS initiatives. The Administrative Secretary attended the “Issues in Emergency and Security Management” course sponsored by SOAR.

The Registrar addressed the Mining Law class at the Faculty of Law at the University of Western Ontario in January, 2012, concerning the jurisdiction and process of the Mining and Lands Commissioner, with special reference to ongoing efforts at MNDM 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, 2012.

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. Staff also completed other courses concerning diversity, service excellence and health and wellness.

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. Since its inception, \$15,000 or approximately 33 percent of annual office expenses have been eliminated. This figure has remained steady since 2009/2010. In this reporting period, through ongoing hyper-vigilance to minimize hearing costs, coupled with an anomalous adjudicative year characterized by less hearing-related travel and several requests for decisions based on written submissions only, the office returned 8% of its budget to the MNR.

During the previous reporting period, the Administrative Secretary continued her ongoing audit of its equipment leases to meet the Green Team specifications while also addressing the unique needs of our stand-alone, independent office. Cost analysis by the Administrative Secretary concerning the retirement of leased equipment to acquire multi-purpose

green equipment was undertaken and implemented. The Office also participated in the Green Print Project Phase 2, reduction of print imaging devices and renewal of new equipment that meets energy star ratings. As a result, the Office has reduced its overall leasing costs and took advantage of impetus to “de-clutter” the Office of obsolete technical machinery, also removed all surplus furniture to surplus.

The Commissioner also continued to take independent French instruction with a view towards completing the CCAT (Conference of Canadian Administrative Tribunals) decision-writing course in French. The Commissioner is now exploring private French immersion opportunities with a view to maximize French competency prior to enrolling in the decision-writing course. The Commissioner had taken her entire course load of social sciences and a computer course in French during one undergraduate semester as a visiting student at University of Ottawa and has determined that immersion would be the best way to remediate her French prior to enrolling in the French decision-writing course.

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. With the increase of Ministry of Attorney General occupancy of the building, MAG has made increased use of the MLC boardroom and hearing room, including conducting interviews and testing for court reporter translation services.

The Office housed the executive coordinator/project manager for the Ministry of Natural Resources Facility Director’s Council (FDC) until midway through this reporting period. By mutual agreement, this arrangement ended as the FDC relocated to a more convenient location.

The Administrative Assistant continued to participate in the Web Communicators Network meetings, which allows members of MNR to meet and share innovative ways to better coordinate and present external web content.

The Administrative Assistant also continued to act as Fire Warden for the Office.

The Administrative Secretary is also a member of the Southern Regional Diversity team whose mandate is: “Enable, inspire and take meaningful action to coordinate, support and deliver diversity related initiatives which contribute to the achievements of the MNR business goals and the diversity vision and plan of the OPS. She has been a member since its inception and this year, attended the first anniversary celebration in Peterborough in November, 2011, in which she coordinated the booths for each group who attended. She also attended the Southern Regional Exploration Day and separately, the Annual Meeting, both in Peterborough in February and has been accepted for the 2012-2013 Diversity Mentoring Partnership Program. Her partner will be Doug Green, Head, Strategy, Information and Program Management, MNR.

The Administrative Secretary is also a long time member of the n-Gen People Performance Inc. who work with behavioural models focused on age. At her suggestion, this group ran a successful half day course for the Southern Regional Diversity Group and the Northwestern and Northeastern Regional Groups.

¹ This calculation is based on a 15 month window to the end of the fiscal year 2011/2012. As part of the analysis undertaken on the success of its case triage and Alternative Dispute Resolution practices, a statistical review from inception of the initiatives in 1992 was undertaken. As a result, this 15 month window for analysis was shown to withstand critical scrutiny.