

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 Two 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 will be implemented at the beginning of the next reporting period and will involve a “plans & permits regime”, improvements involving the protection of aboriginal sites and enhanced dispute resolution and adjudicative authority.

MNDM anticipates that Phase Three, involving IT changes such as map staking and the automation of processes will be implemented in a future reporting period once corresponding regulations can be drafted.

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 its decision, re-assess the property(ies) and use 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 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.

2012/2013

During the 2012/2013 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 38 applications, appeals or referrals in 2012; 24 under the **Mining Act**, seven under Ontario Regulation 282/98 of the **Assessment Act** (involving the managed forests or the conservation lands property classes) four under the **Conservation Authorities Act** and one under each of the **Lakes and Rivers Improvement Act**, the **Oil, Gas and Salt Resources Act** and the **Aggregate Resources Act**. Five matters from previous reporting periods were heard (as was one from the current reporting period involving three pre-hearing conferences and merits). Three of the six matters were heard under the **Mining Act** and the remaining three were heard under the **Conservation Authorities Act**.^[1]

A significant settlement rate (90%) continued to be demonstrated for those matters which commenced in 2012. 20 mining, five conservation lands, four conservation authority, two managed forest, one lakes and rivers, one oil and gas and one aggregate resource 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 Mediator/Registrar were requested by parties in several matters before the Ontario Superior Court of Justice.

In 2012, the Office issued 43 interim and 22 final orders, for a total of 65, including one vesting order and four 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 thirteenth 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 is always being developed and refined on a go-forward basis.

In 2010 the Mediator/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, at which time 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 2012 settlement rates continued to improve, although averages levelled out within the 90% range.

During the last reporting period, the Mediator/Registrar also compiled a list of over 100 lawyers (as well as correspondence from them) which praised the OMLC processes, often times remarking on its uniqueness. Anecdotally, comments were made that similar processes did not exist in other institutions which could benefit from them. While the Commissioner has in past reporting periods initiated discussions with York University's Osgoode Hall Masters of Law Program in Alternative Dispute Resolution in an attempt to attract a student to undertake further research on this project for their Major Paper or thesis, to date none have expressed an interest. The Commissioner intends to pursue this further with the Co-Directors of the Masters of Law Program in the next fiscal year. The course does not commence until the fall of 2013.

Descriptions of the OMLC contributions to the ADR community was published in the previous reporting period, written by the Commissioner and the 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 & Practice**, 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 for the current year was met at 90%. 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 are confidential. Any reasons drafted by the Commissioner must reflect this adjudicative reality.

For mining cases, within the 2012 calendar year, 83% of the cases settled. The few which did not can be described as labyrinthine, oftentimes taking a significant amount of time 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. By way of example, one referral to the Commissioner from the Minister of Northern Development and Mines involves an application to the Ministry of Natural Resources for an easement over unpatented mining claims. The affected lands may provide the only available access to lands known as the Ring of Fire. This matter has been highly contentious and while having commenced just prior to this reporting period, the Commissioner and the Deputy Commissioner have, to date, issued 12 Orders (procedural or interlocutory) with the final Decision to be issued early in the next reporting period, should no further questions or issues arise as a result of their deliberations. Should any questions arise, a further reconvening would be required. The office has also issued 85 pieces of correspondence in this one matter with staff, particularly the Mediator/Registrar, in response to that of counsel for the parties or at the request of the Commissioner and Deputy Commissioner.

On an annual basis, for those cases received during this reporting period, all of the conservation authority appeals, the managed forest and conservation land referrals, received under the **Assessment Act**, the lakes and rivers, the oil and gas and the aggregate resources appeals were resolved without a hearing.

Two 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**. The Deputy Commissioners were initially appointed in June, 1998 and renewed for five further three year terms in June, 2000, July, 2003, July, 2006, July, 2009 and July 2012, respectively, with their terms expiring

in July, 2015.

In January, 2012, a Policy Liaison Officer of MNR was engaged by the Commissioner to approach the Minister's Office regarding potential OIC reappointments or alternatively, new appointments. Both Deputy Commissioners were reappointed in July, 2012 for a further three year term. The Office of the Mining and Lands Commissioner is not caught by the **Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009**, S.A. 2009, C. 33, Sched. 5. Even prior to this, the appointments of Deputy Commissioners have been treated anomalously by the Public Appointments Secretariat. 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, echoing the recognition of the Supreme Court of Canada and the Ontario Superior Court of Justice that the OMLC functions as a Court for all but Mine Rehabilitation matters. Once trained, the Office has benefited enormously from the accumulated expertise of the Deputy Commissioners.

The two Deputy Commissioners were paid on a per diem basis and had billings totalling 51 days and 40 days respectively, for fiscal 2012/13.

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 site is located within the MNR Internet, under the auspices of the Deputy Minister. This reflects the financial and information technology support that the OMLC receives from MNR, but in no way is it a reflection on its adjudicative independence, which is absolute.

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 2012/2013, the direct and worthwhile result was that no amended orders were issued for this reason.

The Mediator/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. The Office is not notified of the 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 initiated a meeting 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 Mediator/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 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 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. Amending the **Ministry of Natural Resources Act** in this manner is not under consideration at this time. 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 Calgary in May, 2012. The theme of the latter conference was "Mapping New Frontiers". A wide range of leading edge topics was covered including public institute support for enhanced and interactive website design, to aid unrepresented parties, and on-line Dispute Resolution. The Commissioner returned with numerous ideas for moving the Office forward strategically to enhance delivery of services. This work is currently in the development stages.

The Commissioner also attended the Canadian Institute For The Administration Of Justice (CIAJ) conference which was held in Calgary in October, 2012. The theme of the conference was "The Courts and Beyond: The Architecture of Justice in Transition". This is the first time the Commissioner attended a conference offered by this organization, despite being a member since 1993. The theme covered numerous ideas and initiatives on re-thinking the administration of justice, including re-design the roles and responsibilities of courts and tribunals and further initiatives concerning on-line access to justice and issues of sustainability in the adjudicative model. Attendance at this conference complemented and enhanced the Commissioner's ideas for strategic re-tooling of the institution of the OMLC; any prospective proposed changed will be discussed with client groups, the Ministries whose legislation the Commissioner is charged with adjudicating and with the Courts.

Deputy Commissioner Orr attended an Aboriginal Law Course on "Consultation and Other Emerging Issues" which was held in Toronto in November, 2012.

The Mediator/Registrar and the Administrative Assistant continued to work with MNR staff to implement 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.

All staff attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2013.

All staff completed a number of training courses and workshops through the MyOPS e-learning site, including the mandatory courses on "Compliance with Integrated Accessibility Standards Regulation", which was developed in partnership with the Centre for Leadership and Learning and "Working Together", which was a new training resource developed by the Ontario Human Rights Commission.

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.

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 and in this reporting period, through ongoing judicious financial management, the office returned 8% of its budget to the MNR.

The Commissioner has deferred formalized French instruction, opting for independent study, but plans on attending a one week French immersion course in late 2013. The objective in so doing is to adequately prepare for the CCAT (Conference of Canadian Administrative Tribunals) decision-writing course in French.

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 Ring of Fire hearings highlighted the physical and technological deficiencies of the hearing room and premises. One motion in particular was attended by in excess of 50 observers. The OMLC has been on MNR's long-term capital improvement plan but has been moved up as a result of these pronounced needs. In the current fiscal year, a number of workplace safety issues have been addressed, including renovation of its lunchroom to meet building code standards and the replacement of carpets in staff offices. For 2013/14 an overall renovation plan is being tendered. Ultimately, the result will be space designed for the needs of a modern adjudicative entity including updated information technology support, high density filing, common space designed to accommodate work flow and the relinquishment of a portion of its existing space for the dual use of other government offices in the building and use by the tribunal during hearings as break out rooms or for mediation.

The Superior Court of Justice found that the MLC erred in its hearing of a **Conservation Authority Act** appeal in failing to meet the correctness standard in its interpretation of subsections 2(1) and 3(1) of Ontario Regulation 155/06 and referred the matter back for reconsideration. An independent legal opinion was commissioned to provide greater understanding and guidance of the Court's findings. Essentially, the Court found that the regulation, equally applicable to all CA regulations, does not provide an absolute prohibition to development of vulnerable land. The Mining and Lands Commissioner cannot assume that particular lands are absolutely prohibited from development and permission until the facts are examined and discretion is applied to determine what policy, if any, should be considered and how it should be applied. Policies cannot be applied as rigorously as regulation. Policies are not to be considered exhaustive or necessarily conclusive. In this regard, all Deputy Commissioners were provided with a synopsis of the impact of the Court's decision and how to move forward adjudicatively on these important appeals which are heard on behalf of the Minister of Natural Resources, through assignment of his powers and duties to the Mining and Lands Commissioner by regulation. The case in question was returned for re-consideration but the parties have opted to attempt to settle the matter; no conclusion has been reached at the time of this writing

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 retired in July, 2012, having worked for the office for almost eight years. The Commissioner hosted a well-attended retirement celebration at the office to mark the occasion.

[1] This calculation is based on a 15 month window to the end of the fiscal year 2012/2013. 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.