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Mining and Lands Commissioner annual report 2015-2016

The 2015-2016 annual report of the Ontario Mining and Lands Commissioner summarizes the organization's activities of the previous fiscal year.

Office of the Mining and Lands Commissioner

Mandate

The Mining and Lands Commissioner (Commissioner) is appointed by the Lieutenant-Governor in Council pursuant to the *Ministry of Natural Resources Act*. The Office of the Mining and Lands Commissioner (OMLC) receives administrative support from the Ministry for purposes of estimates, budgeting and IT and the Commissioner's point of contact and reporting is through the Deputy Minister. The OMLC is an independent adjudicative tribunal responsible for hearing and deciding matters under legislation administered by the Ministry of Natural Resources and Forestry (MNRF) and the Ministry of 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." Until 1986, the Minister of Natural Resources was responsible for mining, when the function was combined with the Ministry of Northern Development. Oversight of the OMLC remained with MNR. The *Mining Act* functions as a specialized and comprehensive administration of mining lands within the province under the general administration of the MNDM and various ministry personnel. Through delegated authority to Ministry officials, this authority and the attendant determination of rights created by the legislation rests primarily with the Provincial Mining Recorders, the Director of Mine Rehabilitation or the Minister.

In carrying out responsibilities under the *Mining Act*, the Commissioner exercises a varied and broad jurisdiction involving nearly 90 statutory functions dealing with primarily unpatented lands. There is jurisdiction over specified mining land interests as well as the right to grant easements over adjacent lands

of third parties for extensive access and servicing purposes in connection with the proper working of a mine. The Commissioner has exclusive jurisdiction to decide any matter which arises under the *Mining Act* with several exceptions. The Commissioner has no jurisdiction to cancel or annul Crown patents and the *Construction Lien Act* process applies to mining lands. Also, dispute resolution and aboriginal consultation processes with Aboriginal communities and the assertion or determination of Treaty rights under the *Mining Act* fall outside of the Commissioner's jurisdiction. The Ontario Superior Court of Justice has acknowledged the Commissioner's exclusive jurisdiction and further acknowledged that the Commissioner has concurrent jurisdiction with that Court involving private civil and property rights arising out of its proceedings which, if not waived, may not be challenged later. The Superior Court may also call on the Commissioner as a Referee in a proceeding or question which is governed by applicable sections of the Rules of Civil Procedure under the *Courts of Justice Act*. Provision is also made for movement of matters between the Commissioner and the Superior Court of Justice, upon the application of a party in either case or at the initiation of the Court in the latter, as the Court deems most appropriate.

The MNDM continued its efforts to modernize the *Mining Act* pursuant to their five year plan and has implemented those changes in phases. Phase One was implemented during an earlier reporting period (2011-2012) 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 was implemented during the 2013-2014 reporting period and involved a "plans & permits regime", improvements involving the protection of aboriginal sites and enhanced dispute resolution and adjudicative authority.

Phase Three will involve the implementation of online map staking and eliminating ground staking in Northern Ontario and paper staking in Southern Ontario. Administratively, MNDM will be looking to integrate current multiple electronic legacy systems into one electronic delivery system. MNDM will also be implementing a process whereby all existing mining claims would be changed into cell claims and boundary claims, with the entire Province having been surveyed into cells. Phase Three is a multi-faceted process, which will involve numerous steps to ensure opportunities for existing mining claim holders to provide as much GPS information as may be required on their claims. There will be a transition period for geo-referencing followed by a withdrawal of staking and a map freeze. All mining claims will then be converted to cell claims and boundary claims and then there will be a re-opening to on-line staking. The project is expected to be ongoing until late 2017. MNDM is involved in developing protocols and is expected to be carrying out inspections during the transition phase. Transitional provisions could potentially place added pressure on MNDM and the Commissioner to determine conflicting rights.

The “Lands” portion of the title refers to natural resources jurisdiction. The Mining and Lands Commissioner has, since 1982, by permanent regulation [\[1\]](#), having been assigned the powers and duties 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 the 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, both programs administered by the [MNRF](#), in relation to property tax assessment appeals. These appeals are filed with the Assessment Review Board (the ARB) pursuant to the *Assessment Act*, offering a one window approach to assessment appeals. 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 jurisdiction for managed forest classifications under the *Assessment Act* was added in 1998. The conservation land appeals had previously been provided for by an Order-In-Council and were transferred to the *Assessment Act* at this time as well. 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 so that the appeal file may be closed.

The Commissioner has been persona designata for hearings under the *Lakes and Rivers Improvement Act*. Similarly, under the *Aggregate Resources Act*, appeals from refusals by the Minister of Natural Resources and Forestry to issue a permit to excavate aggregate or topsoil that is not the property of the Crown, or the revocation of or changes to conditions involving existing aggregate permits are heard by the Commissioner, resulting in recommendations after a hearing.

The Commissioner hears both pooling and unitization applications under the *Oil, Gas and Salt Resources Act*. In connection with such applications, access to subsurface oil, gas and salt resources may be provided in accordance with section 175 of the *Mining Act*. The Commissioner also hears appeals of refusals of the Minister to grant permission to transfer a well license or permit and makes recommendations.

2015/2016

The former Deputy Minister of Natural Resources and Forestry (DMO, MNR) and the Mining and Lands Commissioner agreed to undertake a review in the 2013/2014 fiscal year of the existing reporting and approvals relationship between the Office of the Mining and Lands Commissioner, the Ministry and the government. There are existing frameworks designed to ensure accountability, transparency and efficiency of all government programs and agencies.

As the Mining and Lands Commissioner is not a public body/commission, within the meaning of the *Public Service Act* of 2006, Regulation 146/10, it was not included in the legislation passed in 2009 to provide structured oversight and accountability for adjudicative tribunals with their host Ministries. The OMLC and DMO agreed that it would be untenable for the OMLC to continue without an appropriate accountability and transparency framework.

In March, 2014, the DMO engaged the Shore Consulting Group to undertake a thorough review of the OMLC. The scope of the review included an examination of the jurisdiction, mandate, relevance and organization of the OMLC. The uniqueness of the function has been recognized. Should its existence continue in its current form, potential processes, adequacy of resources and existing legislative frameworks were explored to find the best fit and to ensure compliance with established norms for governance, management and oversight to meet current government objectives for adjudicative tribunals. The Shore report was submitted to the DMO in December, 2014 along with a set of recommendations. Copies of the Report may be obtained from the DMO upon request with the caveat that it does not accept all of the premises outlined and that all of its recommendations will not be implemented.

Currently, the DMO has struck a transformation initiative which is generating and examining additional options with a view to determining and implementing the appropriate next steps towards the transformation of the OMLC to modernize the office and ensure alignment with existing frameworks governing all public servants and institutions.

As a first step, in October, 2015, a Memorandum of Understanding was signed by the Minister of Natural Resources and Forestry and the Mining and Lands Commissioner to formalize the relationship between the MLC and the MNRF and the operations of the OMLC. The MOU sets out the accountability relationships between the Minister and Commissioner. It clarifies the roles and responsibilities of the Minister, the Deputy Minister and the Commissioner and sets out expectations for operational, administrative, financial, staffing, auditing and reporting arrangements between the OMLC and the MNRF. It does not limit the Commissioner's independence as an adjudicative tribunal.

In accordance with the MOU, the Commissioner will be required to provide an annual Business Plan covering a minimum of three years from the current fiscal year, with a financial budget and a Risk Management Plan, 90 days prior to the end of each fiscal year. An Annual Report, once voluntarily provided by the incumbent Commissioner since the commencement of her tenure, has been formalized as a requirement. As part of implementation of these requirements, a temporary position was created to

assist the Commissioner and staff with ongoing strategic work and implementation. The seconded Executive Advisor will work with the Commissioner on day to day activities within the OMLC and assist within any on-going or new project work.

During the 2015/2016 fiscal year, the Office of the Mining and Lands Commissioner continued its practice of progressive case management, triage and alternative dispute resolution measures designed to expedite the resolution of 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, in most cases, 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.

The majority of cases received during this reporting period were resolved in less than three 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 downturn in commodities prices in the mining industry was felt for the first time in recent memory. The Office received 43 applications, appeals or referrals in 2015; 19 under the *Mining Act*, 13 under the *Conservation Authorities Act*, ten under Ontario Regulation 282/98 of the *Assessment Act* (involving the managed forests or the conservation lands property classes) one under the *Oil, Gas and Salt Resources Act* and none under the *Lakes and Rivers Improvement Act* or the *Aggregate Resources Act*. Four matters were heard under the *Mining Act* (from a previous reporting period, including a hearing on costs) and one was heard under the *Conservation Authorities Act*. [\[2\]](#)

A significant settlement rate (98% over 15 months) continued for those matters which commenced in 2015. Nineteen mining, nine conservation lands, one managed forest, twelve conservation authority and one oil and gas 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 another method of alternative dispute resolution including various forms of facilitation. Again, this high settlement rate may be reflective of the diminished number of new cases and their relative complexities.

In 2015, the Office issued 14 interim and 42 final orders, totalling 56, including four vesting orders and five 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 sixteenth 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 over 70% to well over 80%, from 1993 to 1998. From 1999 to 2015 settlement rates continued to improve, with averages at or above 90%.

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 exceeded at 98%. 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 2015 calendar year, 100% of the cases settled. Cases which were not resolved prior to a hearing oftentimes took a significant amount of time to reach their conclusion and often involved more than one hearing and the issuance of a significant number of interlocutory orders before the final decision. For example, one mining matter in the previous reporting period required the issuance of 14 orders from commencement to completion as well as well over a hundred pieces of correspondence.

On an annual basis, for the non-mining cases received during this reporting period, 12 of the 13 conservation authority appeals, the nine conservation lands and the one managed forest referrals received under the *Assessment Act* and the one oil and gas application were resolved without a hearing.

Two Deputy Commissioners who are paid on a per diem basis, had billings totalling 31.04 and 6.5 days respectively, for fiscal 2015/16. The Deputy Commissioners were initially appointed in June, 1998 and were 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 recognition of the complexity of the subject matter and the nature of the function, the Deputy Commissioners were not limited to ten years in total for appointments.) Pursuant to a direction from the Deputy Minister's Office, one Deputy Commissioner was re-appointed for a three year term in August, 2015 and the other Deputy Commissioner was appointed for a one year term, as per her request, at the same time.

The *Ministry of Natural Resources Act* provides that the Commissioner may sit alone on hearings, appoint

one Deputy Commissioner to sit or must hear matters as a panel of three. Ongoing reliance on the *Statutory Powers Procedure Act* that parties waive this requirement has not been consistently successful.

Although the requirement that the Commissioner be a lawyer with ten years at the bar was removed from legislation in 1956, due to the nature and complexity of cases, the Commissioner has determined that mining cases must be heard by a lawyer. This echoes recognition subsequent to that date by the Supreme Court of Canada and the Ontario Superior Court of Justice which regard the OMLC as an inferior court of appeal and the Mining Court, respectively.

The OMLC has had only two adjudicators able to act in mining matters for a significant period of time. There is no formally prescribed process for the appointment of adjudicators to the OMLC, a situation which, it is anticipated, will be remedied with the implementation of recommendations stemming from the transformational measures to be implemented in the next fiscal year. In the interim, there is currently an open and transparent process underway in an effort to secure two qualified appointees, both being members of the bar, being conducted in cooperation with the Deputy Minister's Office (DMO) and the Strategic Policy and Economics Branch, the Communications Services Branch and the Human Resources Service Delivery Division of Ontario Shared Services. Interviews for two new Deputy Commissioners were conducted during this reporting period and the Commissioner has recommended two candidates to the Minister for appointment.

In any event, the inability to assign a three-person panel has resulted in several highly complicated mining matters being heard by one adjudicator, resulting in delay in the issuance of decisions. This is unsatisfactory, as collaboration on complex, highly entrenched matters is essential in order to ensure that orders be issued expeditiously.

The Mediator/Registrar and the Administrative Assistant continued their efforts to research and draft routine but technically complex orders for the Commissioner to conclude those few matters which have been before the Ontario Superior Court of Justice (OSCJ) for years. This follows a discussion between the Commissioner, and then Associate Chief Justice J. Douglas Cunningham in October, 2006, to ensure that any mining matters before the Superior Court of Justice or Court of Appeal will be remitted to the OMLC for processing to its administrative conclusion. This final step of removing notations or vacating certificates of pending proceedings from abstracts of unpatented mining claims ensures that performance of annual assessment work can be resumed and administered by MNDM. Otherwise, important work on claims will not be entered into the MNDM data base for access by all prospectors and geologists and for the general advancement of mineral exploration in the Province. Since 2006, no problems have been encountered. The audit continues on the part of the Mediator/Registrar and Administrative Assistant of all files prior to 1992. Prior to the commencement of the tenure of the current Commissioner, the OMLC did not maintain a record of matters before the Courts and all files had been archived. Staff's ongoing efforts and success represent hundreds of mining claim units returned to active exploration activity. In this reporting period, two

OSCJ matters, which commenced in 1992, were remitted to the OMLC for complex exclusion orders.

Unlike metrics for adjudicative tribunals and despite ongoing efforts to be proactive, settlements and decisions may be delayed by many factors beyond the control of the OMLC. Examples of delays incurred include the performance of surveys during inhospitable field conditions, the requirement for title searches and obtaining other documentation, the issuance of summonses for documentation and awaiting outcomes of actions pending before other decision-makers.

Complex option and settlement agreements can involve multiple installment payments over time and/or the issuance of shares, in which case parties are reluctant to execute consents to dispose of matters until outstanding amounts are paid or shares are issued in full.

Given that the life of a mine from exploration through rehabilitation is measured in decades, it is not unusual for active cases to involve years of intensive negotiations prior to final settlement. In this regard, the time involved in disposing of many matters may appear to exceed normative expectations, but within the context of the mining industry, is not unusual or overly lengthy.

A number of workplace safety issues were addressed on an ongoing basis. Through the OPS Accommodation Fund, the courtroom was retrofitted to ensure better acoustics to accommodate the hearing-impaired. The OMLC is also examining the possibility of accessing video conferencing capabilities.

Staff attended the OPS GIS Summit in June, 2015 via web conferencing. The theme was “Connecting Spatial Frontiers” and the summit outlined the growing diversity in the use of GIS in both technology and geography in the OPS.

The Commissioner, the Deputy Commissioners and the Mediator/Registrar were briefed in June, 2015, by the Senior Manager of the Mining Lands Section of the MNDM on the implementation of Phase III of the Mining Act Modernization (MAM) being proposed legislative and regulatory changes.

In conjunction with the 2015 Pan Am and the Para-Pan Am Games, which occurred in Toronto from June to August, 2015, the OMLC submitted the transportation demand reduction tracking template outlining the implementation of modified commuting and work arrangements for all staff to accommodate the increased traffic flow in Toronto during those months. The Report was requested by the MAA/MNRF as part of an OPS-wide initiative to reduce traffic by 25%. The OMLC significantly exceeded that objective.

Two of the seven priority areas laid out by the Premier for the MNRF in September, 2014, included engaging with ministries, municipalities and stakeholders in a review the *Conservation Authorities Act* and the strengthening of Ontario’s wetlands policies with the objective being the cessation of the net loss of wetlands. Towards those ends, the Commissioner, the Deputy Commissioners and the Mediator/Registrar met with staff from the Natural Resources Conservation Policy Branch in September, 2015 concerning the

identification of opportunities to improve the existing legislative, regulatory and policy framework that currently governs conservation authorities in Ontario. The Commissioner and the Mediator/Registrar were also briefed by the Natural Heritage Section, Natural Heritage Conservation Policy Branch of the MNRF in November, 2015, concerning Wetland Conservation in Ontario: A Discussion Paper, which was designed to generate discussion to identify and understand government priorities for wetland conservation in Ontario.

In September, 2015, the Commissioner and the Mediator/Registrar attended the Society of Ontario Adjudicators and Regulators course entitled “Staying Squeaky Clean: Ethics for Public Service Staff” being a presentation of the principles of ethical conduct.

The Executive Secretary attended the OPS Inclusion Speaker Series concerning accessibility and inclusion in Sault Ste. Marie, Ontario in October, 2015 and also, served on the Inclusion Council during this reporting period.

The Commissioner attended the annual “Meet The Miners” reception at the Legislature in November, 2015. The theme was “Mining Builds Communities”.

The Mediator/Registrar spoke at the Pre-Latornell Conservation Symposium, one of Ontario’s premier environmental events, in November, 2015. The topic was the jurisdiction of the MLC with specific reference to section 28 of the *Conservation Authorities Act* as well as a discussion of the MLC’s hearing process and an outline of some of the creative solutions which have been reached through mediation.

All staff participated in the MNRF initiative “Appreciation in Motion” in December, 2015. The Mediator/Registrar was awarded in the “Innovation, Going The Extra Mile And Service Excellence” category and the Administrative Assistant received a Lifetime Achievement award. The Administrative Assistant and the Executive Secretary also received an award for “Collaboration, Inclusion and Innovation” for their work on the Digital Accessibility Working Group.

The Mediator/Registrar and the Administrative Assistant continued to work with MNRF 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.

The Mediator/Registrar attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2016 as well as Queen’s Park Day in early March, being a reception for MPP’s sponsored by Conservation Ontario.

The Administrative Assistant and the Executive Secretary took the lead on the OneSite initiative (which has been undertaken throughout the OPS) to make the policies and procedures, the annual report and all orders of the tribunal accessible and understandable for all Ontarians. OMLC efforts in this regard have pre-dated or met all deadlines imposed for approvals and implementation. Both aforementioned staff attend

regular meetings of the Digital Accessibility Working Group of the OneSite initiative.

In order to comply with mandatory and recommended course requirements for the fiscal year, staff completed numerous training courses and workshops. The Commissioner ensured that she and all staff completed all mandatory courses. The Commissioner and one Deputy Commissioner have also met their annual professional development requirements for the Law Society of Upper Canada.

It is noted that the office has two sets of Procedural Guidelines; one for matters under the *Mining Act* and one for matters under all other *Acts* for which the office has jurisdiction. While a comprehensive review had been outsourced and commenced during this fiscal year, due to unforeseen difficulties, work has now been returned in-house, utilizing the expertise of the author of the original Guidelines, Deputy Commissioner Orr, who is designing one combined set of Rules for all areas of OMLC jurisdiction. It is anticipated that active collaboration and input will be obtained from incoming Deputy Commissioners and that these Rules will be available for consultation with stakeholder groups for finalization this fiscal year.

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 Ministry of the Attorney General has made significant use of the MLC boardroom and hearing room, including conducting interviews, training and testing for court reporter translation services.

The Administrative Assistant was acknowledged by the Premier, the Minister of Natural Resources and Forestry and the Commissioner for her 35 years of valuable public service, which occurred during this reporting period.

The Administrative Assistant continued to participate in the Web Communicators Network meetings, which allow members of MNRF to meet and share innovative ways to better coordinate and present external web content and she took the lead in making the website compliant with the *Integrated Accessibility Standards Regulation (IASR)*.

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

A focal point of the OMLC has always been succession planning. Towards that end, at the end of this reporting period, two six month secondment agreements have been drawn up, one in-house and one OPS, for administrative cross-training purposes. It is anticipated that those duties and responsibilities of the Executive Secretary will be imparted to the outside seconded individual while at the same time those of the Administrative Coordinator will be imparted to both.

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Footnotes

- [1] ^ Commencing in 1971, the Ministry of Natural Resources Act was amended to provide assignment of these powers and duties to the Commissioner. Each appeal would involve a separate regulation naming the individual appellant(s) and the specific conservation authority involved, with the first being O.Reg. 473/74, until O.Reg. 364/82 provided for a general assignment of the Ministers powers and duties to the Commissioner for all conservation authority appeals.
- [2] ^ This calculation is based on a 15 month window to the end of the fiscal year 2015/2016. 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.

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