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# MiningWatch Canada's Response to Ontario's *Bill 173, A Bill to Amend the Mining Act*

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Since the current process began last year MiningWatch Canada has taken a keen interest in "modernizing" the Ontario Mining Act. Since before the announcement of the consultation process we have been actively engaging with other NGOs and First Nations across the province to analyse the current mining regime and to develop solutions to the problems we have observed.

In the fall of 2008 we were one of the NGOs that provided input to Ecojustice and the Canadian Institute of Environmental Law and Policy (CIELAP) as they developed the comprehensive suite of recommendations in *Balancing Needs, Minimizing Conflict.* MiningWatch also developed its own submission to the consultation process. Both documents, along with a variety of other commentaries and submissions can be found on the MiningWatch website: http://miningwatch.ca/index.php?/Ontario/Modernizing_Mining_in_Ontario.

The recommendations made by MiningWatch, Ecojustice and CIELAP included:

- Implement land-use planning processes to identify areas that are not appropriate for mineral exploration and exploitation due to other conflicting values, and that First Nations and municipalities be able to identify such areas.

- Develop a consultation protocol with First Nations that recognises the need for Free Prior and Informed Consent (FPIC) of affected First Nations as required in the UN Declaration on the Rights of Indigenous Peoples.

- Environmental impact assessment for all stages of exploration and development. (Mining currently enjoys a unique exemption from the Environmental Assessment Act)

- Require application for prospecting and exploration permits and that granting of permits be contingent on demonstration of competency, and a positive outcome from consultations and impact assessments.

- Private landowners that do not own their mineral rights be given more rights including improved notification and a veto over mineral development on their land.

- Improvements to mine closure and financial security mechanisms for preventing companies from abandoning mine sites before full site reclamation has occurred.

- Increased fees and changes in taxation to ensure there are adequate resources for monitoring and enforcement of regulations and to improve the benefits of mineral extraction to the public.

- Revenue sharing with First Nations

- A moratorium on uranium exploration and exploitation.

On April 30, 2009 the Provincial Government released its proposed changes to the act in *Bill 173, An Act to Amend the Mining Act.* The Bill has been through Second reading in Queen's Park and a 60 day consultation period has been announced. While there are some notable improvements contained within Bill 173, it misses the mark on several key issues. Our review below is in two parts, Part I addresses our priority concerns and is reflective of our original recommendations. Part II reviews the act by section providing comments on all sections where the proposed changes are of particular interest or concern to MiningWatch.

## Part I – Priority Concerns

**What's in Bill 173 and what's missing?**

Of the nine issues listed above, Bill 173 makes some changes towards addressing five of them: land-use planning, consultation, permitting, surface rights owners, and fees. It is our assessment that while overall the changes do represent an improvement, most do not go far enough to achieve the objectives of modernizing the act and of minimizing the potential for conflicts.

Completely absent from the proposed legislation are any amendments addressing environmental assessment, improvements in mine closure and financial securities, revenue sharing, or uranium exploration and exploitation. It is possible, and we expect, that the government will address these issues in the near future; however, it is disappointing that the government has not taken the present opportunity to comprehensively address the full range of issues that were raised during the public consultations. Changes to other laws could easily have been included in this Bill.

***Public Concern about Uranium Ignored***

During the Toronto public consultation meeting, MNDM staff acknowledged that uranium exploration and exploitation was a significant concern for many of participants in the consultations. Minister Gravelle has commented that while uranium exploration and development wasn't part of the original scope of the consultations they had opened up the discussion to include it. While they were "open" to the discussion it seems the voices of thousands of Ontarians and 23 municipal governments have fallen on deaf ears.

## Overarching concerns

In our review we have found two overarching aspects of *Bill 173* to be of concern:

- The high degree of Ministerial discretion;
- Important aspects of the new regime are being left to the development of regulations.

An unacceptably high degree of Ministerial discretion is found in most aspects of the proposed amendments. From the very beginning of the mining process the Minister can give consent to staking in areas that would otherwise be off limits, and even if staked without Ministerial consent the prospector may then seek consent retroactively (Section 29)[1]. This type of discretionary approval re-appears again and again weakening the amendments and raising concerns about transparency and the potential politicization of the planning and decision making process.

Some of the most fundamental and potentially positive changes to the act lack substance as all significant details are being left to the development of regulations. Aboriginal consultation and dispute resolution, requirements for exploration plans and permits, changes to the Mining Tax and the rehabilitation of exploration sites are examples of promising steps where there is currently not enough details or commitments to be able to evaluate their real potential.

## Land Use Planning

One of the most progressive changes in Bill 173 is the requirement for all new staking and mining developments to recognise aboriginal community land-use planning processes in the Far North (Section 204).

Though a potential improvement over the status quo, this amendment is of concern to some northern First Nations that do not want to have their autonomous land use planning processes subsumed under provincial jurisdiction. There are also serious gaps in the protection provided. Claim staking will be able to continue prior to the completion of land-use plans (a process that can take many years), and exploration activities will be allowed on existing claims up to the point of requiring a closure plan. This threshold is currently the extraction of 1000 tons of ore, any underground work, or surface stripping over 10,000 $m^2$ or resulting in the removal of 10,000 $m^3$ of material. It remains to be seen if this threshold will change under the new regulations.

Notwithstanding these significant concerns, these amendments do begin to address the issues of land and decision-making rights for northern First Nations. Unfortunately, no such empowerment of local decision-making is offered for communities in the Near North or Southern Ontario. While conditions undeniably change dramatically from north to south with increasingly complex sets of interests to be balanced in the south, not affording Near North and Southern communities similar opportunities to engage in land use planning and directing mineral development is a contradiction of the principle of fair and equal treatment before the law.

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[1] All section references are for the Mining Act itself as it would be revised, not for sections of Bill 173.

**Free Prior and Informed Consent**

A cornerstone of Bill 173 is the recognition of Aboriginal rights to consultation (Sections 2, 78, 139.2, 140 and 141). In essence the amendments make apparent the existing legal requirement to consult with aboriginal groups. Bill 173 does not, however, include reference to "accommodation" which is also a requirement under the constitution and supported by case law. In our submission we recommended that a truly modern mining act would recognise the right to Free Prior and Informed Consent of aboriginal as stated in the UN Declaration on the Rights of Indigenous Peoples. In response to the bill several First Nations have stated that the bill does not go far enough in recognising their right to consent, or to say no, to mining developments. They correctly argue that if consultation is to be meaningful, the option to say "no" must be on the table. [2]

Because the details of the proposed consultation are being left to regulations it is not clear whether the right to say no will in fact be an option. A dispute mechanism will be put in place, but again no details are offered (Section 170.1). In the existing act there are 33 sections to describe the role of the Commissioner, yet no details are offered in Bill 173 about the fundamentally important consultation or dispute resolution processes.

With the lack of details on a consultation process it is not clear to what degree the Ontario Government would be downloading its obligation to consult onto the industry. The duty to consult and accommodate lies with the province, not industry.

**Exploration Permits**

Issuing of permits for exploration (Section 78) is a necessary and positive amendment that could provide opportunities to publicly evaluate the potential impacts of mineral development projects and to address concerns about a project as early as possible in the mining sequence. We are certainly pleased to see that Bill 173 includes provisions for permitting, and that granting permits will be contingent on aboriginal consultation and "arrangements" with surface rights owners. Missing from the proposed amendment is that the granting of a permit should also be dependent on a consideration of the potential environmental impacts, and consultation with other interested parties (ex. municipalities, neighbouring residents, conservation authorities, tourism operators).

Another concern regarding the proposed amendments is that it is not yet clear what types of exploration activities will require submission of a plan (with no mechanism for approval) and which will require a permit (necessitating approval of the activities by the government). We recommend that all exploration activities require a permit and be subject to consultation and that the degree of information and analysis required in a request for a permit vary with the type *and* extent of exploration activities.

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[2] What's missing in Mining Act changes? The Right to Say NO. Press Relase by Mushkegowuk Council, Kitchenuhmaykoosib Inninuwug and Ardoch Algonquin First Nation, May 25 2009.

**Surface Rights Owners**

By withdrawing all lands in southern Ontario (Section 35.1 ) where the crown owns the mineral rights and the surface rights are privately owned, the government has given some relief to private property owners who were concerned about their properties being staked out from under them. Unfortunately, the proposal does nothing to address existing mining claims in conflict with surface rights owners. During the recent spike in mineral prices substantial areas of southern Ontario have been staked including private and crown lands. Gary Clark of the Ontario Prospectors' Association was quoted in the Ottawa Citizen saying that "If it's not staked now, odds are pretty good it's because it's moose pasture, not really important [for minerals]."[3]

Surface rights owners in the Near North have been offered less protection for their properties. They have the option to request withdrawal but the decision is contingent on an assessment of the mineral potential (Section 35.1). As with Southern Ontario, this opportunity is not available for surface rights owners whose property has already been staked as existing claims will remain.

If the exploration permitting process is adequately defined and implemented then there may be an opportunity to address concerns about impacts on surface rights owners whose properties have already been staked. Yet, as stated above, it is very unclear whether the amendments will deliver on this opportunity.

**Fees, Penalties and the Mining Tax**

Changes under Sections 164, 166 and 177.1 provide for increased fines and the possibility of levying fees for any activities related to the Act. Maximum fines are increased significantly with maximums of $100,000 for many contraventions; a ten-fold increase! The higher fines could act as an incentive for compliance, however for fines to be effective deterrents, there must be a reasonable likelihood of an offender being caught and prosecuted.

Section 187 gives greater flexibility in implementing a mining tax, as it is no longer limited to a consideration of the amount of Crown land being used for an operation. A tax on production (not profit) would be a positive and important change to recognise that the industry is based on non-renewable public asset. A tax on waste generated would create incentives for more efficient operations and potentially limit the development of low grade high volume projects. A tax on profits of production would not be effective as there are many ways for the companies to manipulate their costs to avoid showing profits. Again with the lack of detail offered in Bill 173 it is impossible to know what the current government plans to do with this opportunity.

There is no indication in Bill 173 that additional revenues from fees and fines would be used to increase the monitoring and enforcement capacity of the MNDM.

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[3] Ontario to change laws governing prospecting on private property, Lee Greenberg, *The Ottawa Citizen*. April 30, 2009.

**Withdrawal of Other Lands**

A certain degree of protection from staking, exploration and mine development has been afforded through the withdrawal of certain categories of lands under Section 29 (unless staking occurs by the consent of the Minister). Protected lands include cottage and residential lots less than 1 ha (100m x 100m or 2.5 acres). On lots over 1 ha there is a set back of up to 100 m within the property, or to the property boundary, whichever is closer. (Given the withdrawal of private surface rights lands in the South this will effectively apply only to surface rights lands in the Near North.)

Nowhere in the existing act or in Bill 173 is there a set back for staking or exploration to residences or cottages farms etc. on properties adjacent to lands open to staking. In fact the only setback from a property is afforded to the churches and the dead. Section 30 provides for a 45 m buffer around a church, cemetery or burial ground! A minimum 100 m setback around all cottages, residences and farms would be a very reasonable addition to the act.

Bill 173 (Section 35) will provide for the withdrawal of areas identified as Aboriginal cultural sites with the criteria for such sites to be determined in the regulations. While such designations can be effective at protecting the heritage and culture of First Nations, more often they are used to protect a relatively small area, while allowing mineral or other forms of development to continue across the majority of the landscape. This piecemeal and fragmented form of protection can run contrary to traditional Aboriginal concepts of the land and its importance. Protection of aboriginal culture is best left to the First Nations themselves by ensuring they have capacity to review mining projects and have the ability to say no to projects that are not in their community's interest.

**Will Bill 173 modernize mining and minimize and resolve conflicts?**

The changes proposed in Bill 173 show improvements over the status quo. It is, however, unfortunate that several key issues raised during the consultation process have been completely left out. The government has chosen to delay addressing these issues, and certainly they will have to in the future as more conflicts around environmental impacts, uranium, mine closure and revenue sharing are inevitable.

The focus of Bill 173 is access to land and certainly this has been the fundamental issue in many of the recent mining conflicts in Ontario. The inconsistent application of new approaches across the province, the amount of details of key aspects of the bill that are being left to the regulations, the lack of a clear process for public participation and the failure to recognise the importance of Free Prior and Informed Consent of First Nations leave us with little confidence that the proposed changes will indeed bring the Mining Act into the 21st century.

## Part II – Review by Sections

**Section 2**. Provides a new purpose statement – inclusion of aboriginal and treaty rights and broader concern for public health and environment, not to be dealt with just through rehabilitation as the old purpose read. The purpose is, however, still to "encourage" prospecting, exploration and mining vs. to regulate or "provide management of". Use of the latter wording would make the Mining Act consistent with the Aggregate Resources Act. The recognition of Aboriginal rights is restricted by references to "existing" rights and to Section 35 of the constitution.

Suggested wording for **Section 2**:
"The purpose of this Act is to regulate prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of treaty rights, and of existing Aboriginal rights, and those rights that may be hereafter acquired, including, but not limited to those rights now recognized or may be hereafter recognized under **S. 35** of the *Constitution Act, 1982*."

**Section 19.** Implementation of "awareness training" for licensing of prospectors could provide greater accountability and would help ensure that prospectors know the ground rules and best practices for prospecting. Training materials and approaches regarding Aboriginal issues must be developed in conjunction with the Province's First Nations. It is worth noting that there are over 30 subsections devoted to a Prospector's licence – considerably more than other aspects of equal or more fundamental importance such as aboriginal consultation and restoration of exploration sites.

**Section 29** Identifies areas not open to staking and gives new protection to cottages and residences on surface rights only lands on lots under 1 ha, but only to 100m or the property line on lots over 1 ha. Consent of Minister may override these withdrawals, even if requested after staking has occurred..

Recommended change: no staking within 100m of any cottage or residence, and remove ability to retro-actively request Ministers' consent.

**Section 30** identifies other areas to be withdrawn but without the explicit option of ministerial consent. The most significant addition here is that in the Far North there will be no staking in areas identified as inconsistent with mineral exploration and development under an aboriginal community land use plan. Until such plans are completed, staking may continue as per status quo. This option for community based decision making is only offered to the Far North, not to more southern First Nations, municipalities or conservation authorities.

Recommended change: give all aboriginal communities right to develop land use plans and recognise official municipal plans or watershed plans by conservation authorities as being able to withdraw lands.

**Section 32** is repealed removing the former protection of "garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are

growing". Other areas that were protected under this section are would be withdrawn under other sections. These issues are largely mute with the withdrawal of SRO lands in Southern Ontario and the option to withdraw in Northern Ontario.

**Section 35** provides the Minister with the power and discretion to withdraw lands and re-open lands to staking. Special consideration given to lands needed for highways, power corridors, renewable energy projects, Far North land use plans, and sites that meet a yet to be determined criteria for sites of Aboriginal cultural significance.

**Section 35.1** - Areas where only the surface rights are privately owned and mineral rights are held by the crown are withdrawn from staking in S. Ontario (this has been put in place as of April 30). This doesn't apply to existing claims or leases but they will withdrawn if they lapse. In Northern Ontario surface rights only landowners may request to have withdrawn. Mineral potential will be considered in decision to withdraw any lands in near north

**Section 38** provides for the possibility of *map staking*. Minister Gravelle has since come out with a statement of the intent to introduce map staking across the province in the next three to five years. In his statement the Minister notes the success of such systems in BC, Quebec and Newfoundland. I don't know of any thorough review of the impacts of map staking. Allies in these provinces have, however, expressed concerns regarding the claims rush that occurred shortly after implementation, and regarding the premis that anyone, anywhere in the world can, for a very modest fee establish an interest in a piece of their province. Other concerns about map staking include the potential loss of jobs for those involved in staking, the ability of larger companies to claim vast areas and restrict access of smaller companies, and the lack of any evidence to land users regarding the staking The government suggests that these jobs will be replaced by jobs in early exploration, that this is a more modern and efficient approach, and that the social and environmental impacts of claim staking can be eliminated through map staking.

**Section 46.1** will introduce a requirement to inform surface rights holder within 60 days of a claim being staked. There is no similar notification requirement for First Nations, though there will be requirements to "consult" with First Nations before undertaking some, as yet to be determined mining activities.

**Section 51** will allow the recorder to withdraw surface rights to mining claims for highways, renewable energy projects, transmission lines, and pipelines. Disputes to go to the Commissoner or a hearing.

**Section 65** introduces the opportunity for companies to make a payment in lieu of doing exploration work in order to maintain a claim. This could have the benefit of reducing the amount of disturbance and damage caused by exploration work done on highly speculative claims.

**Section 78 Exploration Plans and Permits**

**Section 78.1** will require the submission of exploration plans required for as yet undetermined exploration activites. Details of plans not determined but to include aboriginal consultation as prescribed. It's not clear if plans are to be reviewed or approved or simply submitted.

**Section 78.2** will require that for other, presumably more intensive/intrusive exploration activities, an operator must apply for a permit. The granting of an exploration permit is to consider: purpose of Act, aboriginal consultation and consideration of arrangements with SRO property owners and any other "prescribed circumstances".

**Section 78** used to be about giving 24 hr notice to SRO property owners. No clear requirements for consultation or notice given in the new Section 78.1 – just submit a plan. This could weaken the already weak requirement of notification of property owners for activities that do not fall under the requirement to obtain a permit.

These requirements only apply after a claim is staked. With a new map staking there would be no on-the ground impact before these new aspects kick in but a new interest on the land is created through staking, which may be of concern to First Nations.

The distinction of plans vs. permits could be eliminated to simply have a permit system with a gradient of requirements depending on the type of activity. All permits would require consent of First Nations, SRO property owners and municipal or local governments. The requirements of permits would also include graduated environmental assessment requirements, site reclamation plans and confirmation of financial and technical capabilities to perform and rehabilitate the site. While the details could be laid out in the regulations these basic aspects should be put into the body of the Act.

**Section 81** has changed little and still provides "entitlement to a mining lease" if provisions of the Act are followed. We recommend that leases should not be granted until an EA for the proposed mine has been completed and approved.

**Section 84** has not changed substantially and still provides for leasing of surface rights for mining purposes – again no requirement for EA. Requirements for EA should be met before crown lands are leased.

**Section 86.1** qualifies that the rights of a lessee are subject to protection provided for **existing** Aboriginal or treaty rights in Section 35 of the Constitution. Though an important improvement the langue used is problematic – see Section 2.

**Section 140** has some confusing wording but does add Aboriginal consultation to the requirements for submitting a closure plan for advanced exploration and mine production. Public notice is still dependent on the Director requiring the company to do so and as with other exploration and granting of leases there is no need for consent of municipalities.

Advanced exploration and mine production should require permits. Granting of permits would require submission of operation and closure plans that have the consent of Aboriginal communities and municipalities and show consultation with other stakeholders. Environmental assessments should also be required.

**Section 145** deals with Financial Securities and has not been changed at all. We strongly recommend the removal of the potential to self assure for rehabilitation through the "compliance with a corporate financial test", or the us of another form of security acceptable to the Director. (145(1) 5. and 6.) Given the potential for rehabilitation costs to change during the operating life of a mine costs of necessary securities should be re-evaluated every 3 years. Estimated reclamation costs should be evaluated by an independent third party and be made public.

**Section 154.6** provides the government with new powers of access and investigation regarding the inspection of records related to diamond royalties.

**Section164** increases the maximum fines for offences against the act from $10,000 to $100,000, and maximum fines for making false statements from $10,000 to $25,000. There is also clarification given that the actions of contractors and employees of companies are the responsibility of the company.

**Section 166** also increases the maximum fine for ignoring orders of the Commissioner from $10,000 to $100,000.

**Section 170.1** gives the Minister authority to appoint an individual or body as an Aboriginal dispute resolution process. The scope of the resolution process would be restricted to activities requiring exploration permits (not staking or exploration plans) and closure plans for advanced exploration and mine development. The scope should not be restricted to the activities further into the mining sequence but include staking and all activities related to mining.

**Section 175** has not been changed and continues to give operators the ability to ask for sweeping concessions to lands and water for mining activities. Such concessions should be subject to consent and environmental assessment as with other aspects identified above.

**Section 176** will give the MNDM the ability to make regulations on many different aspects of the mining sequence once the bill is passed. Many of these are fundamental issues and should not be left to the less democratic regulatory process. Leaving important issues to the regulations also means that they are more susceptible to changes in the future as changes would not require amendments through the legislature, though there would be opportunities for consultation.

The following aspects of the amendments should be expanded upon within the legislative amendments and not left to regulatory process:

- restoration / reclamation following exploration activities
- criteria for sites of Aboriginal cultural significance
- Aboriginal consultation
- Aboriginal dispute resolution

**Section 177.1** will give the government the ability to charge fees "in respect of anything that is required by the act". Depending on how this is implemented it could help to self finance the permitting system as well as any inspection and monitoring necessary to ensure compliance with all provisions of the act.

**Section 187** changes the mining tax from one that is, by definition, based on the area of land of an operation to any format the government sees fit to implement. This would create the opportunity to implement a tax on production or even on waste generated. A tax on production (not profit) would be a positive and important change to recognise that the industry is based on non-renewable public asset while a tax on waste generated would create incentives for more efficient operations and potentially limit the development of low grade high volume projects. A tax on profits of production would not be effective as there are many ways for the companies to manipulate their costs to avoid showing profits.

**Section 204 and 205** create a new part of the act (XIV) on the Far North. This section addresses land use plans and restricts new mine development (advanced exploration or production mining) from opening in areas where there is no community land use plan or where the plan does not allow for mineral development.

The Lieutenant Governor in Council may over-ride a community land use plan if it is in the "social and economic interests of Ontario". This clause, though likely to be rarely used and being somewhat removed from the political processes at Queens Park, is inconsistent with a government to government decision making process that many First Nations are demanding.

**Section 205** gives protection to existing claims, mining leases, patents and licences of occupation regardless of community land use plans. Presumably claim holders would not be able to get an exploration permit if it was in conflict with a land use plan, however this is not explicit.

Section 205 should be changed to give protection to claims but not allow any new activity unless there is consent and agreement with a land use plan.