

Review of Ontario Mining Act October 15, 2008

Recommendations submitted by:

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The Canadian Boreal Initiative commends the Government of Ontario for stepping up to address some fundamental issues related to how mining, with a particular emphasis on mineral claim staking and exploration, is done in Canada. We support a healthy mining sector working within an updated regime which respects the rights and interests of Aboriginal communities. Our focus is on recommendations we feel are necessary but which we also consider can be implemented, based in part on experiences in other jurisdictions, and our work with communities, industry and conservation groups.

BACKGROUND – CBI AND THE SIGNIFICANCE OF THE BOREAL

Canadian Boreal Initiative

The Canadian Boreal Initiative (CBI) is guided by the Boreal Framework—a vision supported by leading resource companies, First Nations and conservation groups. Collectively, we support finding a balance between conservation and sustainable development of the boreal, in a manner that respects Aboriginal rights. A core goal of our framework is to work with governments and all interests to protect at least 50% of Canada's Boreal region and realize world leading sustainable development of the remaining landscape. We are very pleased that the Government of Ontario, through the recent announcement by Premier McGuinty, has committed to achieve this goal in the Far North.

CBI gets behind real solutions. Our forestry companies have over 42 million acres under Forest Stewardship Council certification; we lead the world on this. Our First Nations partners are shaping land use plans that truly balance protection with opportunity for sustainable resource development. We work with conservation groups to raise the standards for environmental performance. We have MOUs and have implemented numerous policy commitments with governments throughout Canada.

Canada's Boreal Region

Three countries on Earth today are home to the world's remaining large tracts of intact forest – Brazil, Russia and Canada. Of those, Canada stands out as clearly in the best position to take a stable, sustainable approach. This is a responsibility we have to the world.

At 1.4 billion acres and spanning 58% of our land mass, our boreal region stretches from Newfoundland to the Yukon.¹ Its future is of great importance to Canada as a whole and to the over 600 Aboriginal communities who make their home there.²

Our boreal region is an economic engine for our economy and northern communities. Many of these communities also want to balance development with protecting the land. Planning for sustainability of the Boreal region is the key to economic prosperity, cultural vitality and ecological integrity. This is as vital an approach in our current turbulent economic times as it was when the economy was stable.

Scientists are calling for large-scale protected areas to maintain wildlife and other ecological values across this landscape. There are some areas in the boreal where the need for such protection is critical. Woodland caribou, for example, are very sensitive to disturbance, and the Boreal population is in decline in parts of Canada. Unless critical habitat is protected and closed to industrial development, this already threatened species may be extirpated over much of its former range.³

OUR RECOMMENDATIONS

On Mineral Tenure System and Security of Investment

Recommendation #1: Establish a Permitting System for Mineral Tenure and Exploration

Instead of allowing mineral tenure and associated rights to be acquired by claim staking, legislation should establish a permitting regime allowing the exercise of discretion by government before rights are granted. Under permitting systems, permit holders are permitted to explore as licensees, but do not immediately and automatically acquire rights in minerals as they do under free entry. Mineral rights would be issued only where projects satisfy economic, environmental and social objectives, and do not conflict with the rights of Aboriginal people or private landowners.

Permitting systems are in place in Alberta¹ and in other Commonwealth jurisdictions such as New Zealand². A ‘hybrid’ system exists in the Northwest Territories where permits can be acquired annually that give permittees exclusive rights to stake claims within defined areas.³

A key advantage of a permit based system is that it enables governments in their discharging of consultation obligations with Aboriginal peoples, and also allows decisions on applications to be based on outcomes of these consultations or in consideration other public policy objectives such as conservation. This would enable prior and informed consent (see Recommendation #2) and ensure conformity to land use plans (Recommendation #3).

Permit-based systems can also be structured to either provide priority to early applicants (first in time - first acceptable application), or competitive processes (in which applications are assessed competitively against stated criteria and the best proposal is granted the permit).

The first-in-time process offers a level of competitive advantage similar to what is achieved through claim staking – applicants secure priority by submitting applications for review before their competitors. Companies should also be in a better position to attract and secure investment once permits are granted, as any uncertainties regarding prior and informed consent or conformity with land use plans will be resolved through the permitting process.

¹ *Mines and Minerals Act*, R.S.A. 2000, Ch. M-17, part 8. Also see Exploration Regulation, Alta. Reg. 284/2006

² *Crown Minerals Act*, 1991 (New Zealand), s. 22

³ *Northwest Territories and Nunavut Mining Regulations*, C.R.C., c. 1516, s. 29

On Aboriginal Rights and Interests

Recommendation #2: Ensure Prior and Informed Consent from Affected First Nations

Premier McGuinty has announced a commitment that “exploration and mine development should only take place following early consultation and accommodation of Aboriginal communities”. The current system does not provide opportunity for prior consultations with affected First Nations and Métis communities before dispositions occur, which has led to avoidable and costly conflicts (eg KI, Ardoch). Ontario’s laws need to keep pace with the body of case law and public policy on effective consultation with and accommodation of First Nations and Métis communities.

The solution in our view is to amend the *Mining Act* to require companies, as part of applications submitted under the permitting system referenced above, to provide detailed work plans and impact analyses as part of their applications.

A number of jurisdictions require exploration companies to file detailed work plans before authorizations may be issued for certain types of work, such as drilling, blasting or other activities where ground disturbance will result. Such work plans enable regulators to ensure that activities meet approved standards, to assess the likely impacts of activities, and facilitate consultations with potentially affected First Nations communities. Newfoundland/Labrador, for instance, requires applicants to file work plans and obtain approvals from both the Province and from the Inuit authority prior to undertaking exploration work in Northern Labrador within the Nunatsiavut land claim area. Where issues of concern are raised by the community, comments may be provided to the proponent who may then choose to modify the proposed scope or schedule of work and resubmit the application for reconsideration. Where fundamental objections are raised, the project does not proceed.

Such a system also enables the scale of required work planning, impact analysis and consultation activity to be commensurate with level of proposed activity or the nature of the impacts. As the project proceeds through the mining cycle from exploration to full mine development, further iterations of the process (submission of applications followed by First Nations consultations) can occur, either annually or on an as required basis.

The existing mineral tenure and exploration system provides very little flexibility to the Crown in regulating exploration activity. There are currently few effective mechanisms to address concerns and conditions. Designing a process which enables applications for exploration and mining activities to be reviewed by First Nations and Métis communities as projects proceed is more likely to build understanding and reduce conflict and uncertainty for communities, the industry and for investors.

On Mineral Exploration in Relation to Land Use Planning

Recommendation #3: Require Permitted Activities to Conform to Land Use Plans

Mineral exploration should be situated within a broader policy framework for land use that balances conservation with development and ensures that environmental protection, First Nations cultural values and other public policy objectives are achieved. Requiring comprehensive land use planning before new mineral tenures are granted would prevent conflicts and assist governments in meeting consultation obligations to Aboriginal peoples.

Currently, land is either ‘open to staking’ or withdrawn. A more flexible approach could permit exploration to occur where permitted and with reference to land use plans, and higher level

considerations about the type, amount and intensity of exploration activities can be engaged. Several jurisdictions in Canada have regulatory systems in which conformity to land use plans are required for as a condition for authorizations of various activities required for exploration.⁴

Other industry players are increasingly recognizing the need for a better approach to land use to avoid the gridlock of competing demands. The need for planning as a precursor to industrial development was recognized by the national forest sector at the most recent National Forest Congress. The joint position statement from the Forest Products Association of Canada and the Canadian Boreal Initiative that “planning for conservation of ecological and cultural values should occur prior to new forest tenures in the unallocated parts of Canada’s boreal, in a manner that respects the constitutional rights of Aboriginal peoples.” To improve land use for everyone, governments need to ensure that this kind of planning is undertaken with all interests at the table before allocating development rights that prejudice balanced outcomes.

On Ensuring Conformity with Conservation and Reclamation Standards for Exploration Activities on Crown Land

Adopting our Recommendations 1-3, which provide for discretion on the part of government before activities are permitted, require consultation with affected First Nations and Métis communities, and ensure conformity with land use plans, would go a long way towards ensuring that exploration and mining activities meet conservation and sustainability objectives.

However, there should also be a requirement for financial assurance, so that that in the event that a company is unable to complete required mitigation work, there would be adequate funds available to do so.

Recommendation #4: Require Financial Assurances at the Exploration Stage

At present, financial assurances or performance bonds are not required for the exploration phase; consequently, abandoned or improperly reclaimed exploration projects can become public liabilities. To encourage compliance with standards and prevent negative impacts which are harmful to conservation values and to industry’s reputation for good stewardship, financial assurances sufficient for remediation should be required of exploration companies as part of the initial approval process.

Finally, there should be a requirement for environmental assessment prior to the initiation of work with a significant environmental footprint. This will most often occur at or prior to the advanced exploration stage, and in all cases before a mining operation commences.

Recommendation #5: Environmental assessment (EA) must occur issuance of any permits for mining operations.

EA must incorporate First Nation participation and funding to facilitate such participation. The current Declaration Order which exempts mine permits and leases from environmental assessment should be rescinded, and a rational process of triggering environmental assessment requirements prior to permitting work with a significant environmental footprint should be implemented.

⁴ See, for example, the *Mackenzie Valley Resource Management Act*, R.S.C. 1998, c. 25; in force in the Northwest Territories.

CONCLUSIONS

Modernizing Ontario's *Mining Act* in accord with the Premier's vision for accommodating Aboriginal rights, respecting the interests of private landowners, and balancing the need for sustainable development with the global imperative for conservation is a bold and vitally important step for the Province.

We believe that our recommendations would, if enacted:

1. enable government to exercise discretion in granting mineral rights;
2. ensure effective consultation with and accommodation of First Nations and Métis peoples before mineral rights are vested in third parties;
3. foster mineral exploration within a broader policy framework for land use that balances conservation with development while ensuring that environmental protection and other public policy objectives are achieved; and
4. maintain a viable climate for investment and improving opportunities for Aboriginal and Northern communities to benefit from responsible mineral exploration and development.

We offer this respectfully and look forward to the next stage in this process.

REFERENCES:

¹ Lee, Peter, Dmitry Aksenov, Lars Laestadius, Ruth Nogueron, and Wynet Smith, *Canada's Large Intact Forest Landscapes*, (Edmonton: Global Forest Watch Canada, 2003), pp. 40-41.

² Canadian Boreal Initiative. *The Boreal in Balance: Securing the Future of Canada's Boreal Region*, (Ottawa: Canadian Boreal Initiative, 2005), pp.1.

³ Environment Canada. 2006. Woodland Caribou Boreal Population. Available online at: http://www.speciesatrisk.gc.ca/search/speciesDetails_e.cfm?SpeciesID=636.