

INTRODUCTION

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

Sir Walter Scott, **Guy Mannering**, ch. 37, 1815

In 1992, when I was first appointed as Mining and Lands Commissioner, there was no single publication in existence which provided any sort of overview to explain the current nature of this old and important function. Even tracking down the actual jurisdiction for me or anyone wishing to deal with the Office was a challenge, with responsibilities found not only in statute and regulation but even in an Order in Council, something which was not readily accessible or widely known. Over the years, learning from a considerable body of case law, those very able statutory officers of the legislation within my jurisdiction and parties and their representatives appearing in front of me, I have developed a healthy respect for the unique and breathtakingly complex entity which is the Office of the Mining and Lands Commissioner. I could not help but wonder that if I experienced such challenges to become informed, how were the lawyers acting on behalf of parties to regard this Office? My overriding concern has been for the parties and in particular the prospectors and junior mining companies in seeking to ensure that its long historic tradition and experience be permitted to remain intact.

I commissioned the writing of this history in the firm belief that the current status and role of the Mining and Lands Commissioner cannot properly be understood without a thorough understanding of the legislative vehicles used, selection of the “commissioner” and one time “judge” as the decision-maker, the history of the development of the legislation and relevant case law, all framed within the larger constitutional law context. To arrive at an informed appreciation, an analysis of what it means to be a “commissioner” is necessary as there is often the tendency to confuse it with “commissions”, commonly understood as forming part of the group of agencies, boards and commissions within the context of administrative law. A commissioner is but part of the august group of magistrates, justices of the peace or inferior courts which have a long history in English jurisprudence. Similarly, it is necessary to examine the history of the role of the Commissioner and one time judge through an examination of relevant developments in constitutional law which ran parallel to its own early legislative evolution. My goal throughout has been a complete understanding of the Office of the Mining and Lands Commissioner as it exists today.

In carrying out its functions under the **Mining Act**, the Mining and Lands Commissioner was characterized in the late 1950s by the Supreme Court of Canada as an inferior Court of appeal or review and somewhat more recently in the late 1990s by the then Ontario Court (General Division) as the Mining Court, having exclusive jurisdiction over any matter arising under the **Mining Act** and concurrent jurisdiction with what is now the Superior Court of Justice (General Division) in proceedings brought involving private civil and

property rights relating to or arising out of matters governed by the **Mining Act**. Still, some confusion exists around whether the Mining and Lands Commissioner is wholly an administrative law entity, although to be fair, the Office has never been listed as an agency, board or commission, or been made subject to most of the statutory reforms associated with such entities.

Throughout the writing of this short history, it has been my privilege to review, comment and discuss with its author, Marianne Orr, current Deputy Mining and Lands Commissioner and sometime counsel to the Office during my tenure, many of the points raised and cases referred to. Upon becoming increasingly familiar with constitutional cases dealing with the jurisdiction and constitutionality of inferior courts, greater insight became available for the drafting and interpretation of the **Mining Act**. What also became apparent was that many of the more recent amendments were crafted without the benefit of this historical appreciation and I believe to the detriment of the legislation and those seeking to appear under it. The process has provided me with a greater and more subtle understanding of the judicial intent found in those cases which directly examined the status of the Office. Each re-reading has provided new levels of comprehension which cannot be obtained from simply referring to the cases themselves or relying, in the case of *Dupont v. Inglis*, on the Supreme Court of Canada decision in isolation.

I am pleased with the end result, but not merely for its content and analysis. The short history is imbued with an enthusiasm and zest which, in my experience, I have come to count on from those dealing with this exciting and unique Office.

Linda M. Kamerman
Mining and Lands Commissioner
Toronto, Ontario
May 1, 2006

PREFACE

This short history came about as a way of celebrating the fact that the Office of the Mining and Lands Commissioner will have been in existence, as of May 2006, in one form or another, for one hundred years. The legislation that deals with the vast mineral resources in Ontario dates back to 1864.

It goes without saying that the opinions expressed in this paper are those of the writer only, and do not necessarily reflect the opinions of the Office of the Mining and Lands Commissioner.

The Mining Act is a formidable piece of legislation and it has formed the background to a myriad of mining recorders' decisions and stakers' tales that could fill volumes. In the same sense, treating the history of the Mining and Lands Commissioner in such a brief manner fails to do it justice. It's fitting though that the Mining and Lands Commissioner, after having dealt with so many decisions and tales for one hundred years should be recognized in some way – if not for the staying power, at least for the importance of the work entrusted to this statutory officer. The Commissioners of the past were men and this history reflects that fact in the telling. Times change, and this history reflects that as well.

Marianne Orr
Deputy Mining and Lands Commissioner
Guelph, Ontario.
March 1, 2006

Executive Summary

A Short History of the Ontario Mining and Lands Commissioner

The Mining Convention of 1905 followed on the heels of an exciting silver discovery in Cobalt, Ontario in 1903. It was felt that mining activity needed to be more regulated and that a Mining Commissioner should be appointed to decide disputes between claimants. The result was the **Mines Act** of 1906. While there had been mining laws in Ontario dating back to 1864, the **Mines Act** of 1906 was a comprehensive revision and update to those laws.

Legislators looking for a suitable template for the Mining and Lands Commissioner turned to the legislation establishing the Drainage Referee (**The Drainage Trials Act, 1891**) for their inspiration. The major difference between the two was that mining dealt with the disposition of Crown property and associated unpatented rights which had not been dealt with by the ordinary courts while drainage dealt with ordinary property, claims and rights which would otherwise be heard in the ordinary Courts.

The word “commissioner” finds its origins in old English law. A commissioner was the representative of the king’s or queen’s authority in a particular district in the country. The appointment of a Mining Commissioner in Ontario was intended to bring law and order to the mining community. The Commissioner was *ex officio* a justice of the peace and could deal with a variety of matters ranging from ordinary mining issues to the issuance of writs and special orders for the arrest and detention of judgement debtors. The Commissioner also had the powers of and could act as an official referee under the **Judicature Act** and the **Arbitrations Act**. The Commissioner appointee had to be a barrister of at least ten years’ standing and was deemed to be an officer of the High Court. This treatment of the Commissioner as a judge sitting in a court was further enhanced with the enactment of the **Mining Court Act** in 1924. In 1956, the title of Mining Commissioner was restored and, with the exception of changes under the **Ministry of Natural Resources Act** in 1973 (adding the word “Lands” to the title) the title has remained unchanged to this day. The Mining and Lands Commissioner no longer hears matters under only the **Mining Act**, but can expect to be called upon to deal with matters arising under the **Aggregate Resources Act**, the **Conservation Authorities Act**, the **Oil, Gas and Salt Resources Act**, and the **Assessment Act** and as the designated hearing officer under the **Lakes and Rivers Improvement Act**.

Over time, the jurisdiction of the Mining and Lands Commissioner has been the subject of careful analysis by all levels of court. Notable cases include *McLean Gold Mines and Re Munro and Downey*. The question asking whether the Commissioner was acting as a superior court contrary to the **British North America Act, 1867** was dealt with in the case of *Dupont v. Inglis* which came before the Supreme Court of Canada in 1958. That Court equated the Mining Commissioner with an “inferior court of review or appeal”. While the issues at every level focused primarily on the question of whether the Mining and Lands Commissioner was acting as a superior court, the courts hearing the appeals, in their approaches to the question, also posed another question as to whether the Mining Commissioner was a court or an administrative tribunal. In each instance, they found that the Commissioner was a court.

Dupont v. Inglis (1958) marked the end of a chapter in the history of the Mining Commissioner as it was followed by a series of legislative changes that found their origins in the government's review of individual civil rights at the hands of regulatory bodies. Implementing the recommendations of the McRuer Report, (which came out in installments starting in 1968 and which directed its attention to the practices of courts, agencies, boards and commissions), resulted in various legislative changes as well as the creation of the **Statutory Powers Procedure Act**.

While the rules governing practice and procedure before the Mining and Lands Commissioner can be established by regulations made by the Lieutenant Governor in Council under the **Ministry of Natural Resources Act**, this has not been done. The Mining and Lands Commissioner has relied on those provisions set out in the **Mining Act** and the **Statutory Powers Procedure Act** dealing with procedure, although reference has been made to the Rules of Civil Procedure from time to time.

The original intention behind establishing a Mining and Lands Commissioner was to create a functionary who would deal with disputes under provincial mining legislation. The legislators recognizing that an independent judicial officer was needed (as opposed to ministers) to hear disputes. The presence of such an official would also free up ministers who were having to deal with increasingly time-consuming cases and would offer an accessible and affordable venue for members of the mining industry who obviously needed an adjudicator to quickly and effectively sort out their disputes. The Mining and Lands Commissioner is assisted by deputies and, in addition to being called upon to deal with matters arising under legislation other than the **Mining Act**, can also expect to hear what used to be called summary conviction cases (now provincial offences).

The evolution of the MLC's powers and responsibilities over the years has created a legislative ambiguity that affects parties' perceptions of whether the Commissioner is a court or an administrative tribunal. Perceiving the Commissioner's original identity as an inferior court of review has been made difficult by the addition of administrative tribunal responsibilities and by the legislative requirement that procedural decisions be made in compliance with the **Statutory Powers Procedure Act**.