

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 judicial and administrative 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 or the Minister.

In carrying out responsibilities under the **Mining Act**, the Commissioner functions primarily as an inferior court of appeal. 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 prosecution of offences can be heard by either the Ontario Court of Justice or the Commissioner; the **Provincial Offences Act** governs procedures. 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 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. For purposes of Part VII mine rehabilitation appeals from the Director, the Commissioner's jurisdiction is that of an administrative tribunal.

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 a previous 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 was implemented during the previous 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 existing mining claims can 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, followed by a withdrawal of staking, map freeze, re-opening to on-line staking and transition period for geo-referencing, expected to be ongoing until early 2016, conversion and post-conversion. MNDM is involved in developing protocols and is expected to be carrying out inspections during the transition phase. Following the transition phase, all mining claims will be converted to cell claims and boundary claims. Transitional provisions are expected to 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, by regulation, 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 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 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 involving existing aggregate permits are heard by the Commissioner, resulting in recommendations after a hearing.

The Commissioner hears pooling and unitization applications under the **Oil, Gas and Salt Resources Act** in which all jurisdiction to order easements over the patented lands of adjoining landholders for various specified purposes to gain access to and service the pool or unit pursuant to section 175 of the **Mining Act** may be ordered. The Commissioner also hears appeals of refusals of the Minister to grant permission to transfer a well license or permit and makes recommendations.

2014/2015

The former Deputy Minister of Natural Resources and Forestry and the Mining and Lands Commissioner agreed to undertake a review in the previous reporting period 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 public body, within the meaning of the **Public Service Act** of 2006, Regulation 146/10, it was not caught by legislation passed in 2009 to provide structured oversight and accountability for adjudicative tribunals with their host Ministries. The Commissioner is a public servant. This situation does not fully capture the arm's length relationship for oversight of a hybrid inferior court of appeal and administrative tribunal.

To date, the Office of the Mining and Lands Commissioner has operated with direct oversight either internally or from MNRF. Assistance in its close administrative relationship with MNRF has ensured that the OMLC is in compliance with all Directives and Guidelines. The Commissioner instituted internal accountability documentation, adapted from those developed within the tribunal sector with modifications as necessary, for many years. Accountability of staff is in compliance with the public service model.

In March, 2014, the Deputy Minister 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 government objectives of transparency and accountability.

It is anticipated that the implementation of those transformational measures found to be appropriate pursuant to such recommendations will commence during the next fiscal year.

During the 2014/2015 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 Office received 38 applications, appeals or referrals in 2014; 21 under the **Mining Act**, five 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) ten under the **Oil, Gas and Salt Resources Act** and none under the **Lakes and Rivers Improvement Act** or the **Aggregate Resources Act**. Two matters were heard under the **Mining Act** (one from the previous reporting period) and none were heard under the **Conservation Authorities Act**.¹

A significant settlement rate (97% over 15 months) continued for those matters which commenced in 2014. Twenty mining, ten conservation lands, five conservation authority and two oil and gas cases 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 2014, the Office issued 31 interim and 38 final orders, for a total of 69, including four vesting orders and eight 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 fifteenth 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 2013 settlement rates continued to improve, with averages in the 90% range (and higher in 2014).

¹ This calculation is based on a 15 month window to the end of the fiscal year 2014/2015. 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.

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 97%. 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 2014 calendar year, 95% 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 required the issuance of 14 orders from commencement to completion.

On an annual basis, for the non-mining cases received during this reporting period, five of the five conservation authority appeals, the ten conservation land referrals received under the **Assessment Act** and the two oil and gas applications were all resolved without a hearing.

Two Deputy Commissioners who are paid on a *per diem* basis, had billings totalling 34 and 44.4 days respectively, for fiscal 2014/15. 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.

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 a qualified appointee, being a member of the bar, being conducted in cooperation with the office of the Deputy Minister and the assistance of the Strategic Policy and Economics Branch and the Communications Services Branch.

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

The Mediator/Registrar and the Administrative Assistant also continued their efforts to research and draft orders for the Commissioner to conclude those few matters which have been before the Ontario Superior Court of Justice for a period of 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.

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 during performance of surveys during hospitable field conditions, title searches and obtaining documentation, issuance of summonses for documentation and awaiting outcomes of actions pending before other decision-makers. Complex option and settlement agreements can involve multiple payments over time and/or 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 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.

At the commencement of the previous fiscal year, a number of workplace safety issues were addressed, including renovation of its lunchroom to meet building code standards, the replacement of carpets in staff offices and the retrofitting of the courtroom to ensure better acoustics. Through the OPS Accommodation Fund, the courtroom was retrofitting to accommodate the hearing-impaired.

The Commissioner and staff were briefed by the MNRF Great Lakes and Water Quality Section in May, 2014, concerning the requirements for the construction and operation of dams, location approval, operating plans and plan implementation pursuant to the **Lakes and Rivers Improvement Act**.

The Commissioner, the Deputy Commissioners and the Mediator/Registrar were briefed in August, 2014, by the Senior Manager of the Mining Lands Section of the MNDFM on Phase III of the Mining Act Modernization (MAM) being proposed legislative and regulatory changes.

The Mediator/Registrar briefed the MNRF Species At Risk Branch concerning the establishment of a tribunal, policies, procedures and the value of mediation in August, 2014.

The Mediator/Registrar spoke to all members (new and returning) of the Assessment Review Board in September, 2014, about the jurisdiction of the Mining and Lands Commissioner under the **Assessment Act** involving managed forests and conservation lands.

The Mediator/Registrar and the Administrative Assistant collaborated on the OneSite initiative (which has been undertaken throughout the OPS) to make the policies and procedures and the annual report of the tribunal accessible and understandable for all Ontarians. The OMLC efforts in this regard have pre-dated and met all deadlines imposed for approvals and implementation which occurred in September, 2014.

All staff attended an OPS webinar about Healthy Workplaces, Access and the Removal of Barriers and a webinar concerned with Living With Stress, in October and in November. The Administrative Assistant attended the **Mining Act** Awareness Program in Tweed and the Administrative Secretary took the lead on preparing the OMLC Accessibility Plan in accordance with the **Accessibility for Ontarians with Disabilities Act** which was well received; both occurring in October, 2014.

The Commissioner and the Mediator/Registrar attended the annual "Meet The Miners" reception at the Legislature in October, 2014. The theme was "Mining Builds Communities".

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

Staff attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2015. The Commissioner also attended the reception hosted by the Minister of Northern Development and Mines.

In order to comply with mandatory and recommended course requirements for the fiscal year, staff completed numerous training courses and workshops with topics including a webinar on workplace support systems, accommodations and addictions. The Commissioner ensured that she and all staff completed all mandatory courses and specifically, two courses on Integrated Accessibility Standards. The OMLC has, in previous years, taken mandatory OPS courses which MNRF had deemed mandatory. 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. It is anticipated that a comprehensive review of both sets of the Guidelines will occur in the next 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. 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, training and testing for court reporter translation services.

The Administrative Assistant continued to participate in the Web Communicators Network meetings, which allows 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.

The Executive Secretary took the lead in a number of projects including the set up/creation of knowledge records for the OPS Service Desk (including the deployment of accessible technologies and support contracts; the marketing, communication and the logistics of establishing the tribunal's hearing room as an accessible space OPS-wide which offers a video conferencing system as well as access to an accessible washroom).