

Northwatch Submission



In Response to

Bill 173 **Mining Amendment Act, 2009**

Presentation to Standing Committee on General Government

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August 13th, 2009 – Timmins, Ontario

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1. Introduction

On April 30th, 2009, *Bill 173, Mining Amendment Act, 2009* passed first reading in the Ontario Legislature, following its introduction by the Hon Michael Gravelle Minister of Northern Development and Mines. Following debate and second reading, it was ordered referred to Standing Committee Standing Committee on General Government on May 27th, 2009.

The Bill's drafting and introduction to the legislature followed a brief public consultation period in mid-2008. On August 11th, 2008 the Province of Ontario released a discussion paper on the "modernization" of Ontario's Mining Act. The release of the discussion paper followed an announcement during the previous week of public consultations in five cities on the "modernization" of the Act, which – according to the news releases at the time, were in support of the Premier's statements of the previous month. In a July 14th announcement of a land use planning process for Ontario's far north, Premier Dalton McGuinty announced his intentions to create a new system of Resource Benefits Sharing, and to reform and modernize Ontario's Mining Act.

Reforming And Modernizing Ontario's Mining Act

Our plan will ensure that mining potential across the province is developed in a sustainable way that benefits and respects communities.

We will ensure that our mining industry remains strong — but we also need to modernize the way mining companies stake and explore their claims to be more respectful of private land owners and Aboriginal communities. The Ontario government believes exploration and mine development should only take place following early consultation and accommodation of Aboriginal communities.

To ensure that mining practices are up to date in the far North and across the province, we will review the Mining Act.

Consultations will begin early next month. We will introduce legislation in the upcoming session and new rules would be in place for later next year.

Over two hundred comments were received prior to the end of the comment period on October 15th, 2008, and a decision was made by the Government of Ontario to proceed with development of legislative proposals after the close of the public consultation period and through the Fall of 2008 and Winter of 2009. Bill 173 is the result of that process.

Northwatch is a coalition of environmental and social organizations in northeastern Ontario. Founded in 1988, Northwatch's primary purposes are to advocate for the incorporation of environmental considerations into all instances of social and economic decision-making, and to support public participation in environmental and natural resource planning and decision-making.

Northwatch has a long history of involvement in mineral policy development, mine project reviews, and public interest research related to mining activities and impacts. Northwatch's contributions include membership in the Whitehorse Mining Initiative

Leadership Council, the Ontario Ministers' Mining Act Advisory Committee, and numerous multi-stakeholder initiatives, primarily at the federal level. Northwatch has also authored several mining-related reports, and provides information resources to members of the public with an interest in mining and the environment concerns.

2. Modernizing Ontario's Mining Act

Ontario is modernizing its Mining Act to ensure that this legislation promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way, while supporting a vibrant, safe, environmentally sound mining industry.

Modernization will bring the Mining Act into harmony with the values of today's society while maintaining a framework that supports the mineral industry's contribution to Ontario's economy.

"Finding a Balance: Discussion Paper on Modernizing Ontario's Mining Act"

The above stated intention, ie of modernizing Ontario's Mining Act to ensure that the Act "promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way" is an appropriate goal, and one that is consistent with the Premier's messages of July 14th, and indeed is consistent with the values and expectations of the people of Ontario. However, the review as framed by the Discussion Paper is much narrower, and inappropriately so.

While we agree with the Discussion Paper's assertion that "the purpose of the Mining Act, which applies throughout Ontario, is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario" we do not agree with the very narrow interpretation of the Act's application, ie being limited to activities that occur before and after mineral production, nor with any supposition that, because the Act has limited application, this review should be of extremely limited scope.

Several sections of the Act have a direct bearing on the impacts of a mining activity – in the exploration, development, operation or closure phases – on land or water. Further, closure activities, at least in cases of responsible mining, are not delayed until after mineral production but rather happen concurrent with mineral production. Finally, what is required is a review that will modernize mining itself, not just the Mining Act, and that is less likely to be achieved with a very narrowly scoped review, such as the one framed by the 2008 Discussion Paper.

3. Bill 173, Mining Amendment Act, 2009

In a broad sense, Bill 173 represents modest progress towards the modernization of mining in Ontario, or at least creates the potential for such progress. The extent of improvements made will be determined to a very large degree by the strength of regulations made under the Act. These regulatory requirements are outlined in Section 176, but have not yet been developed.

Two key areas of improvement are:

- ?? the amendment of the Act - including its Purpose - to require that prospecting, staking and exploration for the development of mineral resources be conducted in a manner that is 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
- ?? the requirements for exploration plans and permits as outlined in Section 78

Our review of Bill 173 includes a review of progress made on our recommendations provided in October 2008 in response to the Discussion Paper on “modernizing” the Mining Act, and a section-by-section review on key elements of Bill 173.

The review of progress made in implementing our October recommendations follows the same format as our commentary on the Discussion Paper, but some points of duplication which has been included in our October submission (due to overlap in the Discussion Papers subject areas) have been eliminated for the sake of improved conciseness.

3.1 Progress Report on Modernizing Mining in Ontario

Progress Report: Mineral tenure system and security of investment <i>Potential adjustments to the mineral tenure system, including free entry, to assure investment security while taking into account other interests, including Aboriginal community concerns and private landowners issues</i>	
October 2008 Comments	Progress Made with Bill 173
A permitting system must be established for early exploration activities, ie any activities beyond the initial staking of a mineral claim	This is authorized by the Section 78 provisions for exploration plans. The effectiveness of this Section will be decided in regulation.
An inventory of natural, cultural and social values within a claim block must be a pre-requisite of any application for an exploration permit (a system is already in place in forest management planning; the Natural Resource Values Information System could be adopted and expanded to meet permitting requirements for mineral exploration)	No progress made; could be addressed in regulation as part of detailing of assessment credit and permitting processes
The permitting process must be sequential and tied to each step in the exploration and development process; failure to implement	As per above, this could potentially be achieved by

the rehabilitation plan would result in no further permits being issued	the regulations required by Section 78.
<p>Progress Report: Aboriginal rights and interests related to mining development <i>Potential approaches to consultation and accommodation related to the broad range of mineral sector activities as they affect Aboriginal and treaty rights.</i></p>	
October 2008 Comments	Progress Made with Bill 173
Shared decision-making processes with First Nations must be developed on a government-to-government basis	Despite the Act being amended to require that prospecting, staking and exploration for the development of mineral resources be conducted in a manner that is 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, the revised Act does not commit to shared decision-making processes with First Nations must be developed on a government-to-government basis.
Revenue-sharing with Aboriginal peoples must be based on fairness and a recognition of the inherent land rights of indigenous peoples, in addition to constitutional and case law and obligations flowing from treaties between the Crown and First Nations	This has not been achieved.
<p>Progress Report: Regulatory processes for exploration activities on Crown Land <i>Potential approaches to regulating exploration activities, including consultation and accommodation with Aboriginal communities.</i></p>	
A rehabilitation plan – reflective of the inventory of natural, cultural and social values that have been identified – must be developed and used as the basis for any applications for exploration permits and financial assurances must be posted as security that the rehabilitation work will be done according to the rehabilitation plan and standards	This could potentially be achieved by the Section 78 provisions, but the extent to which it will be achieved will be determined by the regulations.
Public consultation is an important element of the review of permit applications including proposed rehabilitation plans and measures and financial assurances	Public consultation is not recognized in Section 78.
Environmental assessments at each stage of the mining sequence; the “level” of environmental assessment should be matched to the	This has not been

“level” of mining activity / disturbance; for example, while an environmental screening may suffice for very early exploration – in the context of a permitting system similar to that outlined above – a full environmental assessment (EA) would be required for advanced exploration, and a full EA with a public hearing prior to the opening of a mine	achieved, but modest progress has been made with the introduction of a permitting system for exploration work.
Progress Report: Land use planning in Ontario’s Far North <i>Potential approaches to the requirement that new mines in the Far North would need community land use plans supported by local First Nations.</i>	
October 2008 Comments	Progress Made with Bill 173
Community interests and land uses should be the drive for the land use planning system, rather than mineral development	This has potentially been addressed in Bill 191.
Community or local land use plans should be developed in the context of regional land use plans	This has potentially been addressed in Bill 191.
Ecological objectives and values should be identified in the earliest stages of the land use planning process	This has potentially been addressed in Bill 191.
Progress Report: Private rights and interests relating to mining development (mineral rights/surface rights issues) <i>Potential approaches to address mineral rights and surface rights issues.</i>	
October 2008 Comments	Progress Made with Bill 173
The process must recognize natural heritage values as well as built values in the development of an exploration program, or determination of compensation	This has not been addressed; the repeal of Section 32 has weakened the recognition of natural heritage values.
The system must require the consent of surface rights holders prior to any disturbance as a result of prospecting or mineral exploration on private property, and consent and a compensation package prior to any mining on or under land where the surface rights are privately held	Considerable progress has been made, although actual outcomes will depend on the regulations which are not yet developed.
Progress Report: Elements of the Review <i>The government identified five critical policy issues must be addressed in this review of Ontario’s Mining Act (Mineral tenure system and security of investment; Aboriginal rights and interests related to mining development; Regulatory processes for exploration activities on Crown Land; Land use planning in Ontario’s Far North; Private rights and interests relating to mining)</i>	
October 2008 Comments	Progress Made with Bill 173
<u>Financial assurances</u> : the system of financial assurances for mine closure has been in place since the early 1990’s, with major changes implemented without prior public consultation in the late 1990s; numerous weaknesses have been identified, including a lack of transparency, but there has been no comprehensive review done of this important mechanism for insuring that mines are rehabilitated responsibly and that mines that are currently operating or under development do not become the abandoned and orphaned mines of the future, for which the environment and taxpayers will bear the burden	No progress was made; this was not addressed by Bill 173.

<p><u>Exit Tickets:</u> under Section 183(1) of the Mining Act companies can apply to “surrender” their mining lands to the Crown, “ <i>upon such terms as are acceptable to the Minister</i>”; to the best of our knowledge there has only been once such application made, and that application process was never completed; during that period (2001-2002) we made comments on the application as posted on the Environmental Bill of Rights electronic registry, met with Ministry staff, and raised concerns at the staff and Ministerial level about the absence of any clear criteria for “terms” being “acceptable to the Minister” and our concerns about liabilities being transferred to the Crown and the people of Ontario; this mechanism needs a careful examination if it is to be retained in a “modernized” Mining Act, and several changes must be made, including the development of criteria for decision-making and improved public notice and comment opportunities</p>	<p>No progress was made; this was not addressed by Bill 173.</p>
<p><u>Public consultation:</u> the requirements for public consultation and engagement during the exploration, development and operating stages of a mine are extremely limited, particularly in comparison to the requirements of other sectors, such as forestry, energy or waste management; these provisions should be reviewed and expanded to bringing mining into the 21st century in terms of public oversight</p>	<p>No progress was made; this was not addressed by Bill 173, although regulations under Section 78 could include public consultation on exploration permits, but this will be determined in regulation.</p>
<p><u>Mine Reporting:</u> reporting requirements – such as for mine closure activities – have been reduced through a series of amendments made the Act outside of a comprehensive review; the current level of reporting should be reviewed, its adequacy assessed, and mechanisms to make the reporting process more transparent should be explored</p>	<p>No progress was made; this was not addressed by Bill 173.</p>
<p><u>Approvals Process:</u> there are numerous agencies involved in the issuing of permits or approvals for a mineral development, including the Ministry of Natural Resources and the Ministry of the Environment; however, the Ministry of Northern Development and Mines is generally regarded as the “lead” ministry, but there is no coordinated approach to the review process(es) and permitting requirements, which can lead to both inefficiencies and reduced effectiveness as well as serious inconsistencies (Northwatch has reviewed mine proposals for which the proponents provided very different descriptions of the “project” for Environmental Protection Act approvals than for the closure plan); the review should include means by which approvals process can be improved, including through increased public involvement, better coordination, and checks and balances for consistency and continuity</p>	<p>No progress was made; this was not addressed by Bill 173.</p>

3.2 Section by Section Review of Bill 173

Section	Northwatch Comment
<p>1.(4) The definition of "inspector" in subsection 1 (1) of the Act is repealed.</p>	<p>The rationale provided for removing the definition is that in Section 75(1) the inspectors may not be as defined in Part X of the Act, however, Section 78.3(1) also uses the word "inspector"; and Part X outlines the duties and powers of an inspector in detail.</p> <p>REC: reinstate an amended definition of inspector that is applicable to all Parts of the Mining (ie. Parts II, IX and X)</p>
<p>2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, <u>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</u>, and to minimize the impact of these activities on public health and safety and the environment.</p>	<p>We support the proposed changes to the purpose of the Act, but are of the view that if the Act was to be "modernized" its purpose would be more neutrally stated than as being "to encourage prospecting, staking and exploration" and it would reflect Part VII of the Act and its authority of mine operations and closure.</p>
<p>7. (1) Subsection 19 (1) of the Act is repealed and the following substituted:</p> <p>Prospector's licences</p> <p>(1) Any person who is 18 years or older is entitled to obtain a prospector's licence upon providing evidence that he or she successfully completed the prescribed prospector's awareness program within 60 days before the date of the application.</p>	<p>We support this new requirement for a prospectors awareness program as part of the process of obtaining a prospectors' license, but are concerned that it is inadequate to the task of protection natural and community values from potential impacts associated with the prospecting and exploration stages of the mining sequence. Other tools or approaches should include certification programs, permitting regimes, etc.</p>
<p>A "housekeeping" amendment is needed in Section 26(2) of the current Mining Act to make the statement gender neutral (currently reads "the Minister shall determine and notify the holder of the license revoked of the period of time during which a license shall not be issued to hm")</p>	<p>RECOMMENDATION: correct to gender neutral language</p>
<p>13. Section 32 of the Act is repealed.</p>	<p>The rationale for repealing Section 32 is that it the Section dealt with lands not open for staking, and that these lands are now addressed in Sections 29 and 30. However, what is left out of the new Sections 29 and 30 are the "gardens, orchard, vineyard, nursery, plantation or pleasure ground" of the current Section 32. Also at issue is the failure of these revised sections to adequately protect natural heritage values.</p> <p>RECOMMENDATION: reinstate Section 32, or</p>

	amend Sections 29 and 30 to fully reflect the range of values Section 32 protected
<p>35.1 (1) In this section,</p> <p>"Northern Ontario" means that part of the province of Ontario lying north of the south shores of the French River, Lake Nipissing and Mattawa River; ("Nord de l'Ontario")</p> <p>"Southern Ontario" means that part of the province that is not in Northern Ontario. ("Sud de l'Ontario")</p>	<p>We agree with the boundary between northern and southern Ontario as described in Section 35.1(1); we disagree with what appears to be preferential treatment being given to surface rights holders in Southern Ontario as compared to surface rights holders in northern Ontario in the case of surface rights holders where the mining rights are held by the Crown (ie in Southern Ontario they are withdrawn from staking; in northern Ontario the surface rights holder must apply)</p>
<p>Assessment work or payments Types of work eligible for credits, etc.</p> <p>(1) The types of work that are eligible for assessment work credits, the method of calculating and approving the credits for work performed or payments made in place of assessment work, and the distribution of assessment work credits to mining claims shall be determined in such manner as is prescribed.</p>	<p>:Engagement with First Nations, base line environmental studies and inventories of natural values and attributes prior to exploration work, and remediation work should all be eligible for assessment work credits.</p>
<p>78. The Minister may appoint one or more officers or employees in the Ministry as Directors of Exploration.</p>	<p>We support this amendment</p>
<p>Exploration plan</p> <p>78.1 (1) No person shall carry out an activity prescribed for the purposes of this section on a mining claim, mining lease or licence of occupation for mining purposes unless the person has submitted an exploration plan, in accordance with any prescribed requirements, including any Aboriginal community consultation that may be prescribed.</p> <p>Activities to comply with requirements</p> <p>(2) All activities described in an exploration plan that are carried out shall be carried out in accordance with any prescribed requirements.</p>	<p>We support this amendment, and consider it to be the key improvement in Bill 173. However:</p> <ul style="list-style-type: none"> ?? the effectiveness of this change will be unknown until regulations are developed ?? the Section does not clearly identify requirements for public consultation of exploration plans and permits ?? the Section does not clearly identify requirements for environmental protection, inventories and baselines studies, or remediation

PART X
Inspections

Inspectors

156. The Minister may appoint any person or class of persons as an inspector, including a geologist employed in the Ministry, and may limit the duties and powers of an inspector in the document making the appointment.

Duties of an inspector

157. The duties of an inspector include any or all of the following: ...

Aboriginal Consultation - Dispute Resolution

Dispute resolution

170.1 (1) The Minister may designate one or more individuals, or a body, to hear and consider disputes arising under this Act relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights, including disputes that may occur,

Part XIV

Far north

No new mines

204 (3) Despite subsection (2), the Lieutenant Governor in Council may, taking into account any prescribed land use planning objectives, permit a new mine opening for a project described in that subsection if the project is in the social and economic interests of Ontario.

We support the addition of this section, notwithstanding the following:

- as previously noted, the definition of "inspector" should be modified but retained in Section 1(2)
- inspections should be done on a regular basis
- there should be public reporting of inspection findings and followup

As previously indicated, we support the Act - including its Purpose - being amended to require that prospecting, staking and exploration for the development of mineral resources be conducted in a manner that is 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. With respect to the specifics, including Part X11 provisions for the resolving of disputes arising from "Aboriginal consultation" we defer to the Indigenous communities, organizations and representatives.

We adamantly disagree with Subsection 204(3), which in effect says "no new mine unless there is a new mine" and effectively strips this section of any credibility.