



July 3, 2009

The Hon. Michael Gravelle  
Minister of Northern Development and Mines  
Government of Ontario  
99 Wellesley Street West  
Room 5630  
Toronto, Ontario  
M7A 1W3

Dear Minister Gravelle:

**Re: EBR Registry No. 010-6559 – Proposed Legislative Amendments to the Ontario *Mining Act***

---

On behalf of the Prospectors and Developers Association of Canada (PDAC), we welcome the opportunity to submit this letter and the enclosed submission in response to Bill 173, *An Act to Amend the Mining Act*. The PDAC actively participated in the process leading up to the introduction of the legislative proposal on April 30, 2009 through our involvement in the public consultation that the government undertook in August and September 2008 in relation to the current *Mining Act*. On October 10, 2008, the PDAC submitted a detailed brief under EBR Registry No. 010-4327 in response to the Ministry of Northern Development and Mines August 2008 discussion paper entitled “Modernizing Ontario’s *Mining Act*”.

Consistent with our previous submission, we acknowledge and support the provincial government’s efforts to ensure that Ontario’s mining legislation promotes a vigorous and profitable industry, while concurrently respecting the evolving environmental and social values of our fellow Ontarians and other Canadians. In keeping with this approach, the companies and individuals who constitute Canada’s exploration and mining industry have continued to strive to demonstrate that all phases of the exploration and mining cycle can be conducted in an environmentally and socially responsible manner. We are particularly proud of the progress that PDAC member companies have made in this regard.

We therefore view Bill 173 as an important step towards addressing the five key issues that your ministry identified in its August 2008 discussion paper. However, after analyzing a number of the principal amendments that the government now proposes, we strongly believe that the bill, in its present form, should not be enacted into law.

While we trust that the enclosed submission will explain the PDAC’s position in sufficient detail, we would like to emphasize the principal issues and concerns that we have identified:

1. Aboriginal Relations and the Duty to Consult

We have concluded that Bill 173 is unlikely to achieve the government’s intended goal of promoting harmonious and mutually satisfactory relationships between exploration and mining companies and Aboriginal communities. On the contrary, we fear that the proposed amendments may diminish, rather than enhance, clarity and

2/...

certainty, particularly in relation to the duty to consult with Aboriginal communities and if appropriate, to accommodate any infringement of Aboriginal interests resulting from mineral exploration or mine development. We note that other members of the business community have made similar observations.

2. Prohibition Against New Mines in the Far North

In its October 10, 2008 submission, the PDAC urged the government to give particular consideration to the fact that mining is likely to be the only economic sector that can help First Nations in Ontario's Far North narrow the gap between their current standard of living and that of other Canadians, by delivering significant opportunities for employment, training and business development.

Under Bill 173, important, near-term opportunities will be lost if the legislation does not allow projects that have significant economic potential, and enjoy the support of local communities, to go ahead while community based land use plans are under development.

By prohibiting the opening of new mines in the Far North until these plans are in place, Bill 173 could also eliminate any potential value from the high-risk investments that have already been made to explore and develop the mineral resources of this region. Moreover, without a more functional approach, the moratorium on mining that would effectively prevail until land use plans are implemented will deprive Aboriginal and other Ontario communities of the significant benefits that the responsible development of mineral resources is clearly able to provide.

The PDAC's October 2008 submission also urged the government to carefully consider the long-term implications of withdrawing 50 per cent of the boreal forest region from mineral exploration and mine development, including the potential adverse consequences for northern communities, particularly Aboriginal communities. The association's submission in response to Bill 191, *An Act with Respect to Land Use Planning and Protection in the Far North*, will outline our continuing concerns in greater detail.

3. Extinguishment of Mineral Rights in Southern Ontario

We remain unconvinced that it is necessary to implement a blanket prohibition of exploration and development of Crown-owned mining rights under privately owned lands in Southern Ontario. In our view, this proposal could impair the entitlement of property owners to make informed decisions about their own interests, and likewise deprive the holders of existing mining rights under privately-owned land of the opportunity to bring the underlying resources into production.

4. Resolution of Disputes Related to Aboriginal and Treaty Rights

Bill 173 essentially provides no further information or detail in relation to the proposal to establish a special tribunal for the resolution of disputes pertaining to Aboriginal consultation or Aboriginal and treaty rights beyond the brief statements

that the government made when it first announced this concept in 2008. Moreover, the government has not explained why the Mining and Lands Commissioner, whose well-established functions are already defined in detail through existing legislation, could not adequately fulfill this function. We urge you to consider allocating these dispute-resolution responsibilities to the Commissioner on a provisional basis, and proceeding with the establishment of the new tribunal envisaged for that purpose only if the need to do so is clearly apparent.

5. Adverse Implications for Security of Tenure and Investment

If enacted in its present form, Bill 173 would impose significant new requirements throughout virtually all stages of the mineral exploration and mine development cycle. This is expected to be particularly the case at the exploration phase, where exploration plans and exploration permits will henceforth be required. These requirements involve Aboriginal consultation, potential “arrangements” with Aboriginal communities that are yet to be defined, and in some cases the resolution of disputes relating to Aboriginal and treaty rights pursuant to the entirely new and untried process outlined above.

Taken together, the new requirements could potentially result in significant delays that would impair the ability of developers to complete the assessment work necessary to keep mineral claims in good standing. We have concluded that the proposed legislation does not properly take these risks into account by ensuring the necessary safeguards, and fails to provide appropriate relief from forfeiture of mining claims because of circumstances beyond the reasonable control of the claim holder. The adverse implications of the proposed amendments should therefore be carefully reviewed, and the appropriate amendments developed to address their potential consequences.

6. Inadequate Rights of Appeal and Inappropriate Penalties

Rights of appeal, which are widely accepted as essential to ensuring a fair and balanced resolution of competing interests and claims, are lacking in several key provisions of the proposed amendments. We also note that the legislation would result in an unusually harsh and inflexible penalty for one class of offences.

7. Deferral of Critical Detail to Regulations

We are gravely concerned that, in its present form, Bill 173 would defer to regulations a remarkable amount of the detail that is essential to fully assessing the potential implications and ultimate consequences of the proposed legislation.

While there are numerous instances where this is the case, those of particular concern include the absence of meaningful detail in relation to the following provisions of the bill:

- the definitions of the terms “community based land use plan” and “Far North” envisaged by section 1 of the bill;

- the prescribed “prospector’s awareness program” that would be required under section 19 of the Act, as amended by Bill 173;
- the prescribed land use designations that may be made with respect to the Far North and the prescribed criteria for “sites of Aboriginal cultural significance” that the Minister would apply pursuant to the amended provisions of section 35(2) of the Act, in making an order to withdraw from prospecting, staking, sale or lease any lands, mining rights or surface rights owned by the Crown;
- the prescribed criteria that the Minister would apply pursuant to subsection 35.1(6) of the Act, as amended pursuant to Bill 173, in reaching a decision to withdraw mining rights under privately owned surface lands in Northern Ontario;
- the prescribed criteria for determining “sites of Aboriginal cultural significance” that the Minister would apply in making an order under section 51(4) of the amended Act, to restrict a claim holder’s right to use portions of the surface rights of a mining claim;
- the prescribed requirements for Aboriginal consultation that would be established under the bill for purposes of sections 78.1 and 78.2 of the amended Act;
- the “standard terms and conditions” for exploration permits that would be prescribed for application pursuant to subsection 78.2(3) of the Act, as envisaged by section 40 of Bill 173, and the terms and conditions for such permits to be prescribed by regulation pursuant to subsection 78.2(4) of the amended Act;
- the prescribed activities that could attract enforcement action pursuant to subsection 78.3(1), as likewise proposed in section 40 of Bill 173;
- the Aboriginal consultation requirements that would be prescribed for purposes of the amended versions of sections 140 and 141 of the Act that are envisaged by section 58 of the bill; and
- the regulations to be prescribed for purposes of subsection 170.1(2) of the amended Act to guide the activities or bodies appointed under subsection 170.1(1) to resolve disputes pertaining to consultation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights, all as proposed under section 80 of Bill 173.

If enacted, these and a number of other provisions of the bill have the potential to significantly impact the exploration and mining industry throughout the province, and therefore affect the future well-being of the many Ontario communities, including Aboriginal communities, whose residents rely on the responsible development of the province’s mineral resources for employment, business, taxation and other benefits. The opportunity for full public discussion of their potential implications should therefore be an integral part of the legislative review process. We submit that the current process falls short of this objective.

In our experience, it would be unusual for government to contemplate changes as extensive and consequential as those that would result from the proposed amendments to the *Mining*

*Act* unless the government had first undertaken an exhaustive internal study of their advantages and disadvantages, as well as the potential alternatives.

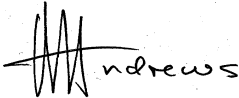
Ideally, the government's findings would, by now, have culminated in draft regulations, including those outlined in section 176 of the revised Act. If that were the case, the proposed regulations would be available for examination as part of the public consultation on the amendments to the Act envisaged by Bill 173.

While we understand that this may not yet be the case, we urge you to disclose as much information as possible on the key issues that we have summarized above and discussed in further detail in the enclosed submission. Doing so would significantly enhance the ability of all interested stakeholders to complete their assessment in a timely manner, as well as make their recommendations on a fully informed basis.

Alternatively, if the government is still developing the underlying rationale for any of the principal changes that the proposed legislation would implement, we recommend that you complete the necessary analysis and make the results and conclusions publicly available for comment, and that this be done before Bill 173 is brought back to the legislature for further consideration.

We thank you again for enabling the continued participation of the PDAC in this important initiative, and would welcome the opportunity to discuss our comments, concerns and recommendations with you or your officials in further detail.

Yours truly,

A handwritten signature in black ink, appearing to read "Andrews", with a stylized flourish above the name.

Tony Andrews  
Executive Director

Encl. (1)

c.c. Mr. Chris Hodgson,  
President  
Ontario Mining Association

Mr. Garry Clark,  
Executive Director  
Ontario Prospectors Association

PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA  
L'ASSOCIATION CANADIENNE DES PROSPECTEURS ET ENTREPRENEURS

---

**SUBMISSION IN RESPONSE TO ONTARIO BILL 173,  
AN ACT TO AMEND THE MINING ACT**

---

Toronto, Ontario

July 3, 2009

## TABLE OF CONTENTS

	Page No.
<b>1. INTRODUCTION</b>	
1.1 Prospectors and Developers Association of Canada	1
1.2 Background to this Submission	1
<b>2. ABORIGINAL AND TREATY RIGHTS</b>	1
<b>3. PROHIBITION AGAINST NEW MINE OPENINGS IN THE FAR NORTH</b>	5
<b>4. EXTINGUISHMENT OF MINERAL RIGHTS – SOUTHERN ONTARIO</b>	7
<b>5. DISPUTE RESOLUTION – ABORIGINAL RIGHTS</b>	8
<b>6. MINERAL TENURE SYSTEM AND SECURITY OF INVESTMENT</b>	9
<b>7. RIGHTS OF APPEAL AND MINIMUM PENALTIES</b>	12

## 1. INTRODUCTION

### 1.1 Prospectors and Developers Association of Canada

The Prospectors and Developers Association of Canada (PDAC) is a national association that exists to protect and promote the interests of the Canadian mineral exploration sector and to ensure a robust mining industry in Canada. The association encourages the highest standards of technical, environmental, safety and social practices in Canada and internationally. The PDAC actively promotes greater participation by Aboriginal peoples in the mineral industry as well as greater understanding and co-operation between Aboriginal communities and mineral exploration and mining companies.

### 1.2 Background to this Submission

The PDAC is a frequent contributor to legislative and policy initiatives of importance to mineral exploration and mine development in Canada, as well as those that affect the activities of Canadian companies who operate in other countries. The association works in close collaboration with the provincial and territorial mineral industry organizations in each of the provinces and territories whose goals and objectives harmonize with those of the PDAC.

The PDAC actively participated in the public consultation process that the Government of Ontario undertook during the second and third quarters of 2008 in relation to the provincial *Mining Act*, and submitted a detailed brief to the EBR Registry in response to the August 2008 discussion paper of the Ministry of Northern Development and Mines entitled “Modernizing Ontario’s *Mining Act*. This document, dated October 10, 2008 is available on the PDAC’s website at: <http://www.pdac.ca/pdac/advocacy/land-use/081010-pdac-submission-ont-mining-act-review.pdf>.

The present brief, which builds on the PDAC’s previous contributions to the *Mining Act* review process, is intended to outline the principal comments, concerns and recommendations that the association and its members have thus far identified in relation to Ontario Bill 173, *An Act to Amend the Mining Act*, as tabled in the provincial legislature on April 30, 2009.

While we have devoted considerable effort to ensure a comprehensive review of the present bill, the PDAC may address additional issues when appearing before the Committee on General Government at the hearings on Bill 173 and Bill 191, *An Act with Respect to Land Use Planning and Protection in the Far North*, scheduled for August of this year.

## 2. ABORIGINAL AND TREATY RIGHTS

### 2.1 Member companies of the PDAC are keenly aware of the importance of establishing mutually rewarding relationships with the Aboriginal communities whose traditional lands are the subject of mineral exploration or development

- activities. While many of the initiatives undertaken by exploration and mining companies are informal in nature, others culminate in written agreements with First Nations that address employment and business opportunities, training, protection of the environment and respect for cultural values, among other subjects. While typically a challenge to negotiate, these agreements demonstrate an increasing acceptance on the part of both industry and Aboriginal communities of the need to minimize controversy and conflict, and instead strive toward their respective goals in an atmosphere of mutual respect and collaboration.
- 2.2 In submissions made on behalf of industry in other parts of Canada, the PDAC and its sister organizations have nonetheless called upon government authorities to take a firm leadership role by establishing rules that clearly define a basis for the relationships that should exist between those who are entitled to explore for and develop natural resources on publicly owned lands, and the First Nations who hold or exercise Aboriginal and treaty rights over and on those lands.
- 2.3 The PDAC therefore acknowledges the initiative of the provincial government to include provisions in Bill 173 that appear to be intended to implement legally enforceable mechanisms to ensure that the exploration and mining cycle proceeds in a way that fully respects the existing Aboriginal and treaty rights that section 35 of the federal *Constitution Act* recognizes and affirms.
- 2.4 Good intentions alone, however, are seldom sufficient. That may be especially so in this case, where governments, First Nations and the private sector struggle to assess the implications of the extensive series of court decisions that interpret section 35 of the *Constitution Act* and otherwise pronounce upon issues of Aboriginal rights, title and interests. Not surprisingly, significant challenges remain for each of these constituencies as they strive to integrate the results of those decisions into a cohesive and balanced framework that will guide their respective activities on a day to day, on the ground, basis.
- 2.5 Against this backdrop, we have identified several concerns, and offer our corresponding recommendations, in relation to a number of elements of the legislative proposal, as outlined below:
- (a) In its Winter 2007 Discussion Paper entitled “Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities”, the Ontario government affirmed its commitment to “...meeting **the province’s duty** to consult with Aboriginal peoples” (emphasis added).
  - (b) Taking note of this commitment, in its October 10, 2008 submission in response to EBR Registry No. 010-4327, the PDAC urged the government to give “...the highest priority to developing an official policy or regulatory scheme that clearly defines the role of government departments and agencies as well as the procedural aspects of consultation that proponents are expected to address.” The submission stressed that doing so was essential to ensure the fulfillment of the Crown’s duty to consult

and, if appropriate, to accommodate Aboriginal people in relation to the potential infringement of their Aboriginal rights, including Aboriginal title, or treaty rights.

- (c) We respectfully submit that Bill 173, as presently written, fails to give proper effect to the government's commitment to fulfilling its duty to consult with Aboriginal people. Moreover, the legislative proposal lacks any meaningful guidance for proponents (for example, individual prospectors or exploration companies) outlining the scope and nature of the consultation activities that they are expected to undertake.
- (d) Bill 173 provides no indication of the role that the Ministry of Northern Development and Mines or other provincial ministries will play in fulfilling the duty to consult with, and if appropriate, to accommodate the Aboriginal or treaty rights of First Nations. On the contrary, when taken together, subsections 78.1(1), 78.2(2), 139.2(4.1), 140(1) and 141(1), in the form proposed under the bill, strongly suggest that these duties are meant to fall predominantly, if not exclusively, upon the shoulders of the proponent.
- (e) Of even greater concern is the inference that the proponent, not the government, must likewise fulfill the duty to accommodate any infringement of an Aboriginal or treaty right, when the courts have clearly stated that this duty, like the duty to consult, is a duty of the Crown.
- (f) In part, these uncertainties are attributable to the use of what grammarians call the "passive voice" in each of the relevant sections. By way of illustration, here are the opening words of subsection 78.2(2) and those of paragraph (b), which together read as follows:

“(2) An application for an exploration permit shall be made to the Director of Exploration, and in deciding whether to issue a permit and what terms and conditions should apply to the permit, the Director shall consider,  
...  
(b) whether Aboriginal consultation has occurred in accordance with any prescribed requirements, which may include consideration of any arrangements that have been made with Aboriginal communities that may be affected by the exploration.”
- (g) The ambiguity as to consultation arises from the words “whether Aboriginal consultation **has occurred**”. The uncertainty as to accommodation is attributable to the words “...consideration of **any arrangements that have been** made.”
- (h) More specifically, neither provision identifies the party who is required to undertake the Aboriginal consultation, or the party who is expected to

make “arrangements” with the Aboriginal community that may be affected by the exploration.

- (i) We also note that the approach evidenced by the legislative proposal and the corresponding approach taken in EBR Registry Notice No. 010-6559 are not consistent. Unlike Bill 173, the EBR Notice clearly states that, in making decisions under the Act, “...the proposed amendments **signal that regard will be had to arrangements made between project proponents and potentially affected Aboriginal communities**” (emphasis added).
- (j) We respectfully submit that the provisions of the draft bill and the corresponding statement in the EBR Notice fall short of the standards of clarity and certainty normally observed in Canadian law and policy, and therefore require reconsideration and correction. Moreover, they fail to definitively reflect the judicial decisions that unequivocally confirm the duty of provincial governments to consult in a meaningful way with Aboriginal communities when any proposed provincial law, regulation, decision or action has the potential to infringe upon or adversely affect an Aboriginal right or treaty right or the exercise of such rights.
- (k) We therefore urge the Ontario government to amend the relevant provisions of Bill 173 to ensure the appropriate level of certainty and clarity for this critically important issue and to do so in a way that properly reflects the findings of the courts.
- (l) We also urge the government to clarify what is meant by the word “arrangements” as used in subsections 78.2(2), 140(1) and 141(1). As observed above, these provisions infer that the duty to accommodate is incumbent upon the proponent, not the Crown, and that the proponent fulfills this duty by entering into “arrangements” with any potentially affected Aboriginal community.
- (m) As already mentioned, exploration and mining companies increasingly take the initiative, on a voluntary basis, to reach a mutually satisfactory understanding with Aboriginal communities situated in the regions where industrial activities take place. If Ontario law will henceforth make accords of this kind mandatory, we respectfully submit that the legislation must define their scope, nature and purpose in much more detail than the description Bill 173 currently provides through its opaque reference to “arrangements”.
- (n) When evaluating these recommendations, we hope that the government will also give further thought to section 2, the “purpose” clause, as it would be amended by Bill 173.
- (o) Clauses of this kind play a key role in determining how the other provisions of a statute will be interpreted. For example, paragraph (a) of subsection 78.2(2) specifically identifies “the purpose of the Act” as one

of the four principal criteria that the Director of Exploration would be obliged to apply in deciding whether to issue an exploration permit and in determining the terms and conditions applicable to the permit.

- (p) Consequently, section 2 can be expected to play a key role in determining whether or not exploration will be authorized in the first instance. As a result, it would likely assume a “gatekeeper” function in the implementation of the overall regulatory process, and therefore exert an important influence by either facilitating, or restricting, future exploration activities. It is therefore essential that this provision be drafted with the utmost care.
- (q) Given these factors, and keeping in mind the well established guidance of the courts in relation to the duty to consult and, if appropriate, to accommodate, we propose that section 2 be amended to read as follows:
  - 2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources in a manner that minimizes:
    - (a) any adverse impact of these activities on public health, safety or the environment; and
    - (b) any potential infringement of the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed pursuant to section 35 of the *Constitution Act, 1982*, or the exercise of those Aboriginal and treaty rights.
- (r) By omitting the words “including the duty to consult” that appear in this section of Bill 173, our proposed amendment is not intended to diminish the importance of that duty. Instead, we offer this recommendation in the hope that it provides a more faithful reflection of the law as it presently stands. By way of further explanation, we note that the courts have established that the duty to consult is one of *several* obligations that are incumbent on government when contemplating a decision or action that has the potential to infringe an Aboriginal or treaty right or the exercise of those rights.
- (s) It is therefore redundant to mention the duty to consult in the purpose clause, and potentially confusing as well. As presently written, section 2 could be interpreted to say that the “duty to consult” is one of the “Aboriginal and treaty rights” that section 35 of the *Constitution Act* recognized and affirmed in 1982. This is obviously not the case, given that the duty to consult is substantially a duty of the Crown.

### **3. PROHIBITION AGAINST NEW MINE OPENINGS IN THE FAR NORTH**

- 3.1 The PDAC respectfully submits that the approach embodied in sections 204 and 205, as amended by Bill 173, does not achieve an appropriate balance between

- prohibiting new mining operations in the Far North until “community based land use plans” are in place, and the legitimate expectation of exploration and mining companies that they will be entitled to enjoy the benefit of the expenditures that they have already made to acquire and explore properties in this vast region by bringing these properties into production.
- 3.2 We are cognizant of the fact that section 205, as it would be enacted under Bill 173, states that existing mineral tenure held in the Far North, as well as related approvals for exploration and development activities, remain valid even if a community based land use plan subsequently designates a land use for the area in question that is inconsistent with mining.
  - 3.3 However, because of section 204, the protection seemingly provided by section 205 will likely be of very little value. Section 204 makes it clear that the mineral tenure apparently protected under section 205 cannot be taken to production if the community based land use plan that is eventually implemented includes a land use designation for the area where the project is located “...that is inconsistent with the opening of a new mine.” More importantly, section 204 ensures that until the relevant land use plan comes into existence, the question of whether a new mine can be opened does not even arise.
  - 3.4 Taken together, these provisions mean that projects in the Far North that are currently underway, no matter how promising, are now at risk of being advanced to a near to final stage, but then foreclosed from mining operations until the applicable community based land use plan has been ratified.
  - 3.5 Moreover, if the land use designation that is ultimately established under the plan is incompatible with mining, the project will be forever prohibited from proceeding, unless the Lieutenant Governor in Council invokes the “override” provision set out in the proposed subsection 204(3). While furnishing some comfort, experience suggests that this provision is likely to be applied only in the most exceptional circumstances.
  - 3.6. The PDAC therefore recommends that the government reexamine this blanket prohibition, and consider incorporating a mechanism whereby existing projects that demonstrate significant economic potential, and have the support of local communities, could be “grandfathered” on a case-by-case basis, and thereby allowed to proceed to production while community based land use plans are being developed. In that regard, it is important to be aware of the experience in other provinces and in Canada’s northern territories where the development of such plans has often evolved into a lengthy and protracted process having, in some cases, no immediate end in sight.
  - 3.7 In further support of our recommendation, we urge you to consider the losses that would have been suffered by the Attawapiskat First Nation and other Aboriginal communities in the James Bay Lowlands region of the province, as well as many other individuals and enterprises in the province, if a restriction of this kind had precluded commencing production at the Victor Mine in 2007.

- 3.8 While neither Bill 173 nor Bill 191, the proposed “Far North Act”, thus far explicitly indicates, we would assume that “community based land use plans” are intended to eventually encompass all areas of the Far North where mineral claims have currently been staked. If that is the case, then the holders of those claims will put themselves at considerable risk by continuing to incur expenditures, notably those needed to satisfy assessment work requirements, only to discover, at the production decision stage, that a community based land use plan has designated a land use for the project area that is inconsistent with mining.
- 3.9 In light of these circumstances, we submit that claim holders should be entitled to apply for relief from assessment work requirements pending the development and final approval of the applicable community based land use plan. We therefore propose that section 67 of the *Mining Act* be amended to confirm explicitly that the Minister would grant the necessary order in response to an application of this kind.

#### **4. EXTINGUISHMENT OF MINERAL RIGHTS – SOUTHERN ONTARIO**

- 4.1 If enacted in the form proposed under Bill 173, subsection 35.1(2) would withdraw from prospecting, staking, sale and lease any mining rights for lands in Southern Ontario where a private individual holds the surface rights and the Crown holds the mining rights.
- 4.2 Subsection 35.1(5), as contemplated by the bill, provides a different approach for the lands that have the same ownership profile, but happen to be situated in Northern Ontario. In that case, there is no automatic withdrawal. Instead, the surface rights owner may apply to the Minister for an order withdrawing the mining rights. Subsection 35.1(6), if enacted, would instruct the Minister to “...consider the mineral potential of the lands as assessed by the Minister...” as well as any other criteria that the applicable regulations may prescribe.
- 4.3 While many surface rights owners in Southern Ontario are expected to welcome the withdrawal of mining rights pursuant to subsection 35.1(2), others may take a different view. More specifically, there may well be a number of property owners who are prepared to liquidate their surface rights, thereby realizing the value of their initial investment, and thus enable mining operations to proceed.
- 4.4 The PDAC therefore recommends that the legislation incorporate a mechanism that would be the “mirror image” of the mechanism provided for Northern Ontario landowners under subsection 35.1(5). This mechanism would allow a surface rights owner in Southern Ontario to apply to the Minister for an order reversing the withdrawal of mining rights effected by subsection 35.1(2). To the extent required, regulations could be developed in order to provide the Minister with any criteria or standards to be applied in making a decision to grant or deny the application.

- 4.5 We submit that this would represent a more balanced and equitable approach and enable surface rights owners to participate more fully in decisions affecting their individual property rights and to enjoy potential economic benefits at their option.
- 4.6 A mechanism of this kind would also facilitate more informed decision-making in instances where third parties hold mining rights on lands that are subject to private ownership of surface rights, but have not yet been fully evaluated for their mineral potential. During the exploration process, parties often pursue mineral tenure surrounding or contiguous with the ground originally staked in light of the possibility that economic mineralization may extend beyond the boundaries of the property that is initially acquired. This is known as “perimeter staking”, and may play an important role in ultimately determining the full geographic extent of a potential economic deposit.
- 4.7 Under the proposed amendments, perimeter staking around an existing mineral tenure, whether by the holder of that tenure or by another party, would be entirely precluded if the surface rights of the adjacent properties are privately owned. This scenario strongly suggests that a mechanism that could potentially reverse the blanket withdrawal of mining rights in Southern Ontario, on application by the surface rights holder, is worth considering.

## **5. DISPUTE RESOLUTION – ABORIGINAL RIGHTS**

- 5.1 Section 2 of the *Mining Act* defines the “Commissioner” as the Mining and Lands Commissioner appointed under the *Ministry of Natural Resources Act*.
- 5.2 If enacted in the form proposed under Bill 173, section 105 of the Act would grant the Commissioner broad powers to settle issues relating to claims as well as other disputes that arise under the legislation. However, the jurisdiction of the Commissioner is defined to explicitly exclude any matter relating to “...consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.”
- 5.3 Instead, section 170.1, as contemplated by the bill, authorizes the Minister to “...designate one or more individuals, or a body, to hear and consider disputes...relating to consultation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights.” While subsection 170.1(2) would require the individuals or body to “...make a report to the Ministry setting out recommendations”, there is no indication of the subsequent steps that would be taken in order to achieve a final resolution of the issues at hand.
- 5.4 We respectfully suggest that the government has not provided an adequate explanation of its reasons for denying the Commissioner the jurisdiction to hear and resolve disputes of this kind. Likewise, we submit that the government has not disclosed the reasons justifying the need to establish a separate tribunal for this specific purpose. In addition, as noted above, the proposed amendments do

not provide a complete description of the dispute resolution process that would result pursuant to section 170.1.

- 5.5 Given these gaps, it is difficult to comment in full detail on this part of the legislative proposal. However, if the underlying motivation is to ensure that specialized knowledge is applied to the resolution of disputes related to consultation, Aboriginal rights or treaty rights, we submit that this need could be properly addressed pursuant to section 6 of the *Ministry of Natural Resources Act*, as outlined below:
- (a) Subsection (1) of that provision authorizes the Lieutenant Governor in Council to appoint "...a Mining and Lands Commissioner **and one or more deputy mining and lands commissioners**" (emphasis added).
  - (b) In turn, subsection (6) provides that "...[w]here two or more deputy commissioners are appointed, the Commissioner and two of the deputy commissioners may hear any matter, application or appeal to the Commissioner as a tribunal of three and a hearing by the tribunal shall be deemed to be a hearing before the Commissioner and the decision of the majority shall be the decision of the tribunal."
- 5.6 Existing legislation therefore provides a ready mechanism to constitute panels of individuals having the knowledge and expertise required to resolve matters pertaining to consultation, Aboriginal and treaty rights, or the assertion of Aboriginal or treaty rights, without having to resort to the establishment of an entirely new tribunal or procedure. Moreover, preserving the role of the Commissioner would enhance the likelihood that matters of these kinds would be resolved in a more efficient, expeditious and consistent manner.
- 5.7 In addition, we would point to the detailed procedural rules applicable to the Commissioner's exercise of his or her jurisdiction, notably those set out in sections 116 through 130 of the present *Mining Act*. In contrast, the government has so far given no indication of the corresponding rules it envisages will guide the conduct of matters brought before the "...one or more individuals, or a body..." designated by the Minister under subsection 170.(1) to hear and consider disputes relating to consultation or Aboriginal or treaty rights.
- 5.8 We therefore urge the government to re-evaluate its current approach and reconsider ways in which the Commissioner and deputy commissioners could carry out these important functions.

## 6. MINERAL TENURE SYSTEM AND SECURITY OF INVESTMENT

- 6.1 In the August 2008 discussion paper entitled "Modernizing Ontario's *Mining Act*", the Ministry of Northern Development and Mines identified the mineral tenure system and security of investment as one of the five critical policy issues that required consideration during the on-going review of the legislation. The PDAC's submission dated October 10, 2008 likewise stressed the importance of this issue, and

- urged the government to ensure that any amendments to the *Mining Act* do not compromise the integrity of the existing mineral tenure system or put the security of the investments made to conduct mineral exploration at further risk.
- 6.2 The PDAC submits that the new regulatory requirements contemplated by Bill 173, notably those related to the obligation to secure an exploration permit and the requirement to conduct Aboriginal consultation, may expose mineral tenure to new forms of uncertainty that the current draft of the bill does not adequately address.
- 6.3 Of potentially even greater concern is the process contemplated by section 170.1 for the resolution of disputes arising under the Act relating to "...consultation with Aboriginal communities, Aboriginal or treaty rights, or the assertion of Aboriginal or treaty rights." The section makes it clear that the disputes that will be resolved under the new process include those that arise "...in relation to decisions on the issue, amendment, renewal or cancellation of, or the terms and conditions imposed on, an exploration permit issued under section 78.2." This process is therefore potentially of great importance during the exploration phase of the mineral development cycle.
- 6.4 As outlined on the website of the Ministry of Northern Development and Mines, in order to hold a mineral claim in good standing, "...exploration work (referred to as assessment work) must be performed and reported to the Crown for approval, within specified time limits." Assessment work can take many different forms that include traditional prospecting in the field; physical examination of mineral showings; geological and geochemical surveys; airborne and surface geophysical surveys; exploratory drilling; and assays and analyses.
- 6.5 Section 65 of the current *Mining Act* establishes the requirement for assessment work in order to keep a mining claim in good standing. In turn, section 72 provides that the interest of the claim holder is automatically forfeited for failure to perform the assessment work required by section 65.
- 6.6 While Bill 173 provides little detail as to the specific activities that will require an exploration permit, it seems virtually certain that most forms of assessment work will require that such a permit be issued. It therefore follows that an exploration permit is virtually certain to be essential for a claim holder to keep mineral claims in good standing by enabling the holder to perform the obligatory assessment work.
- 6.7 In its present form, Bill 173 fails to recognize the potential impact of the new requirement for an exploration permit on the ability of claim holders to perform and complete the assessment work that is required in order to keep mineral interests in good standing.
- 6.8 Notably, in determining whether or not to issue such a permit, the Director of Exploration must consider "...whether Aboriginal consultation has occurred in accordance with any prescribed requirements", and including "...any arrangements that have been made with Aboriginal communities that may be affected by the exploration." The Director is also charged with considering any "arrangements" that have been made with surface rights owners.

- 6.9 There is no precedent in the existing legislation for the proposed requirements for exploration permits, Aboriginal consultation, “arrangements” with potentially affected Aboriginal communities, or “arrangements” with surface rights owners. More importantly, the dispute resolution process proposed under section 170.1 is entirely untested. Consequently, there is no direct experience as to the effort, time or expense that may be required in order to fulfill the requirements for the issuance of an exploration permit or to undergo the dispute resolution process contemplated by section 170.1.
- 6.10 Accordingly, despite appropriate efforts to fulfill these requirements, the claim holder may simply run out of time and therefore be precluded from performing the required assessment work mandated under the Act. If that is the case, automatic forfeiture under section 72 would result.
- 6.11 In its present and proposed forms, the *Mining Act* would provide at least three mechanisms to ensure that claim holders are not unjustly deprived of their interests through circumstances that may be beyond their direct control:
- (a) Subsection 73(1) grants a recorder the authority to order “...an extension of time for performing assessment work or filing a report on such work if an application for the extension is made within 30 days before the time for filing the report expires and the **prescribed conditions** for an extension are met” (emphasis added).
  - (b) Subsection 64(3.1), as proposed in Bill 173, would provide that “...[w]here a note of **pending proceedings** is made on a mining claim abstract, the mining claim shall be deemed not to be forfeited to the Crown under clause 72(1)(b) until the note of pending proceedings is cancelled” (emphasis added). Pursuant to other provisions of section 64, “pending proceedings” are defined to include proceedings before a recorder, before the Mining and Lands Commissioner or before a court.
  - (c) Subsection 67(1) would entitle a holder, under certain limited circumstances, to apply to a recorder or to the Mining and Lands Commissioner for an order
    - (i) “...excluding a period of time in computing the time within which work on a mining claim must be performed or reported, or both, or within which application and payment for a lease may be made”;
    - (ii) “...fixing the date or dates by which the next or any prescribed unit of assessment work must be performed or reported, or both, or by which a payment in place of assessment work must be made, or by which an application and payment for lease may be made; and”
    - (iii) “...relieving the holder of a requirement to perform units of assessment work or to make payments for any period excluded.”
- 6.12 Subsection 67(4) would grant the Minister the discretion to make an order of the kind described in subsection 67(1) “...if the holder applies to the Minister within 30 days

before the anniversary date and the Minister is satisfied that **special circumstances** exist” (emphasis added).

- 6.13 These provisions have clearly acknowledged the need to provide safeguards against the irreversible loss of mineral tenure in extenuating circumstances. Nonetheless, the PDAC recommends that Bill 173 be amended to take into account a broader range of conditions that could potentially prevent the claim holder from undertaking the assessment work necessary to keep his or her interest in good standing.
- 6.14 In doing so, particular attention should be paid to delays associated with the requirement to secure an exploration permit under section 78.2, and delays related to completing the Aboriginal consultation or the “arrangements” with potentially affected Aboriginal communities or surface rights owners that the Director of Exploration must take into account under that section when deciding whether to issue such a permit. Specific reference should also be made to the delays resulting from the application of the dispute resolution process contemplated by section 170.1, if that process is ultimately enshrined in the legislation.
- 6.15 These changes could potentially be implemented through one or more of the following:
- (a) defining the “prescribed conditions” under subsection 73(1) for the grant of an extension of time so as to include delays of the kinds outlined above;
  - (b) amending section 64 to provide that proceedings before the Director of Exploration to obtain an exploration permit, the process to complete Aboriginal consultation, the entering into of “arrangements” with potentially affected Aboriginal communities under paragraph 78.2(2)(b), or the implementation of “arrangements” with surface rights owners under paragraph 78.2(2)(c), would constitute “pending proceedings”;
  - (c) amending section 64 to make it clear that the dispute resolution process contemplated by section 170.1 would likewise constitute a “pending proceeding”; and
  - (d) expanding the list of criteria for the granting of an order pursuant to section 67, including the “special circumstances” contemplated by subsection 67(4), to include delays arising from the need to comply with the new regulatory requirements contemplated by Bill 173, notably the obligation to secure an exploration permit under section 78.2 or the requirement to settle Aboriginal and treaty rights-related disputes pursuant to section 170.1.
- 6.16 We therefore recommend that the government give serious consideration to these concerns and issues, and amend the legislation in order to address them.

## **7. RIGHTS OF APPEAL AND MINIMUM PENALTIES**

- 7.1 A number of provisions of the draft legislation explicitly state that certain decisions or determinations that are made under the Act cannot be appealed, while other provisions fail to provide a right of appeal.

- 7.2 Section 51, as proposed under Bill 173, is an example of the first. It provides that the Minister can issue an order restricting a claim holder's right to use portions of the surface of a claim where the surface rights are on lands that "...meet the prescribed criteria as **sites of Aboriginal cultural significance**" (emphasis added). The section goes on to say that such an order cannot be appealed.
- 7.2 However, it is not immediately obvious how the prohibition against an appeal in section 51 can be reconciled with the amended form of section 105 proposed in Bill 173. This provision allows an appeal to the courts in relation to "...matters relating to consultation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights."
- 7.3 The PDAC fully respects the interest of First Nations in preserving and protecting specific sites that are significant to their distinctive cultures. However, to our understanding, such sites do not have a separate and independent basis at law, and therefore fall within the overarching umbrella of "Aboriginal rights". If that is indeed the case, then like other matters relating to Aboriginal or treaty rights or the assertion of such rights, decisions of the Minister or disputes that involve sites of Aboriginal cultural significance should be subject to the same avenues of appeal as other decisions involving Aboriginal or treaty rights. Given that such decisions may have important consequences for other parties, it is especially important that they be subject to the ultimate supervision of the courts.
- 7.4 We therefore recommend that the prohibition against an appeal from a decision of the Minister in section 51(6), as it would be enacted under Bill 173, be deleted.
- 7.5 We likewise urge the government to give further thought to the merits of providing a right of appeal from an order of an inspector or an order of a Director of Exploration pursuant to subsection 78.3(1), in the form proposed under the bill, in relation to a "prescribed activity" that is "...being carried out in contravention of this Act or the regulations relating to exploration plans or exploration permits." At the very least, we submit that the person or company affected by an order of an inspector should have the right to appeal the inspector's order to a Director.
- 7.6 The need to provide an appropriate right of appeal is reinforced by the nature of the penalty that subsection 78(3) indicates would be imposed on a person who contravenes such an order. Subsection 78(3) provides that, in addition to any other penalty imposed under the Act, such a person "...is liable on conviction to a fine of **not less than \$25,000** for each day on which the activity is continued in contravention of the order" (emphasis added).
- 7.7 It should be noted that subsection 78.3(3) is the only provision of the legislation that would impose a mandatory minimum penalty. The other offence provisions adopt the more conventional approach, which is to specify a *maximum* penalty.
- 7.8 Without a description of the "prescribed activities" that could constitute the essential elements of the offence created by subsection 78.3(1), it is difficult to comment further on the proposal to prescribe a significant mandatory minimum penalty for such an offence. Nonetheless, from a general policy perspective, we submit that compelling reasons must exist in order to justify depriving a court of its

customary discretion to determine the magnitude of the penalty that is properly imposed in each case, having regard to the relevant circumstances.

- 7.9 Given the apparent absence of any justification for the present approach, we recommend that subsection 78.3(3), as contemplated by Bill 173, be amended to specify a maximum penalty, rather than a mandatory minimum penalty, consistent with the other offence provisions set out in the legislation.