

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** and is answerable to the Minister and Cabinet, with the Deputy Minister as the point person for contact between the Commissioner's Office and the Minister. The Office of the Mining and Lands Commissioner (OMLC) is an independent judicial and administrative tribunal responsible for hearing and deciding matters under legislation administered by MNR 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." In recent history, the Minister of Natural Resources was responsible for mining until 1986 when the function was moved to the Ministry of Northern Development and Mines. The Commissioner 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 and the **Provincial Offences Act** applies. The Commissioner has exclusive jurisdiction to decide any matter which arises under the **Mining Act**, except matters concerning consultation with Aboriginal communities and the assertion or determination of Treaty rights. 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**. 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 the 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 this reporting period and involved a "plans & permits regime", improvements involving the protection of aboriginal sites and enhanced dispute resolution and adjudicative authority.

MNDM anticipates that Phase Three, involving IT changes such as map staking and the automation of processes will be implemented in a future reporting period, once corresponding regulations are drafted. 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 the natural resources jurisdiction. The Mining and Lands Commissioner has, by regulation, been assigned the authority, duties and powers 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 MNR, in relation to property tax assessment appeals. These appeals are filed with the Assessment Review Board (the ARB), 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 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.

2013/2014

The Deputy Minister of Natural Resources and the Mining and Lands Commissioner have agreed to undertake a review 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 MNR. Assistance in its close administrative relationship with MNR 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 includes 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 will be explored to find the best fit and to ensure compliance with established norms for governance, management and oversight. Alternatively, the OMLC may become subject to existing adjudicative tribunal governance legislation. This could result in its being moved to the Attorney General and being clustered in whole or in part with existing agencies.

Draft recommendations are anticipated at the end of the first quarter of the next fiscal year, with implementation potentially occurring before the end of the second quarter.

During the 2013/2014 fiscal year, the Office of the Mining and Lands Commissioner continued its practice of progressive and intensive case management, triage and alternative dispute resolution measures designed to expedite the resolution of all of the 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, 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. For cases requiring a hearing on the merits, hearing readiness has been targeted within three months of the issuance of the Order to File documentation. The Office has, as part of this procedure, prepared draft Exhibit Lists and Agreed Statements of Fact, where appropriate.

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 34 applications, appeals or referrals in 2013; 25 under the **Mining Act**, seven under the **Conservation Authorities Act**, one under Ontario Regulation 282/98 of the **Assessment Act** (involving the managed forests or the conservation lands property classes) one under the **Oil, Gas and Salt Resources Act** and none under the **Lakes and Rivers Improvement Act** or the **Aggregate Resources Act**. Two of the matters were heard under the **Mining Act** and the remaining matter was heard under the **Conservation Authorities Act**.<sup>1</sup>

A significant settlement rate (91%) continued for those matters which commenced in 2013. 23 mining, one conservation lands, six conservation authority and one oil and gas case 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 2013, the Office issued 24 interim and 20 final orders, for a total of 44, including six vesting orders and five orders involving exclusions of time under the **Mining Act**. The OMLC experience an unusually high statistical cluster in its ongoing cases involving complex jurisdictional issues. Considerable research, consultation and in-house discussions were involved in either resolving matters or determining how to proceed. The Commissioner held one case conference in a matter which failed to come to a satisfactory resolution. It is now the subject of an application for transfer to the Superior Court of Justice.

In 2013, the Office issued 216 pieces of correspondence in its ongoing matters, reflective of the complex nature of certain files.

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 fourteenth 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.

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<sup>1</sup> This calculation is based on a 15 month window to the end of the fiscal year 2013/2014. 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 met at 91%. 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 2013 calendar year, 92% of the cases settled. Those which did not settle, oftentimes took taking 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 decisions before the final decision.

By way of example only, one highly contentious matter, while having commenced just prior to the last reporting period, involved considerable OMLC resources. The Commissioner and the Deputy Commissioner issued 13 Orders (procedural or interlocutory) with the final Decision being issued in the second quarter of this reporting period. The Mediator/Registrar drafted and issued 125 items of correspondence in response to requests from counsel for the parties or at the request of the Commissioner and Deputy Commissioner.

On an annual basis, for the non-mining cases received during this reporting period, six of the seven conservation authority appeals, the conservation land referral received under the **Assessment Act** and the oil and gas application were all resolved without a hearing.

Two Deputy Commissioners who are paid on a per diem basis, had billings totalling 23 and 38.5 days respectively, for fiscal 2013/14. The Deputy Commissioners were initially appointed in June, 1998 and 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. At this time, and in recognition of the complexity of the subject matter and the nature of the function, the Deputy Commissioners have not been 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 period of time. Efforts to secure a qualified appointee, being a member of the bar, began with MNR's Policy Liaison Officer in April, 2013 but, due to the untimely death of the selected candidate,

this initiative began again in late summer in cooperation with the office of the Deputy Minister. Qualified candidates were proposed by the Commissioner in the last quarter of this fiscal year and the matter now rests in the hands of the Minister and Cabinet.

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 continue their efforts to research and draft Orders for the Commissioner's 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 MNM. Otherwise, important work on claims will not be entered into the MNM 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 current 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 has been retrofitted to accommodate the hearing-impaired.

One particularly contentious hearing, involving numerous motions and a hearing on the merits, highlighted the physical and technological deficiencies of the hearing room and premises. At one point, there were 75 observers in attendance. The OMLC had not had any leasehold improvements since moving into its current space in 1981. It was on MNR's long-term capital improvement plan list but was moved up as a result of projections of further high profile,

potentially contentious and well-attended hearings where needs were immediate, pronounced and pressing. In this reporting period, with the Administrative Secretary taking the lead on behalf of the OMLC on this significant and complex project, through a series of meetings, which was undertaken with the input and assistance of Infrastructure Ontario, CBRE Commercial Real Estate Services and the Services and Infrastructure Management Branch of MNR, an overall leasehold improvement plan was tendered. Work was undertaken and completed during the latter part of this reporting period. The result is a space designed for the needs of a modern adjudicative entity including updated information technology support, high density filing and a common space designed to accommodate work flow.

The Commissioner, the Deputy Commissioners and the Mediator/Registrar met with the General Manager for Conservation Ontario and senior staff in September, 2013, to discuss their latest initiatives including their Whitepaper entitled *Watershed Management Futures For Ontario*.

The Commissioner, the Deputy Commissioners and the Mediator/Registrar were also briefed in September, 2013, by the Senior Manager of the Mining Lands Section of the MNDM on Phase III of the Mining Act Modernization (MAM) being Proposed Legislative and Regulatory changes.

The Commissioner attended the Canadian Institute for the Administrative of Justice (CIAJ) Conference which was held in Toronto in October, 2013. The theme of the conference was "How Do We Know What We Think We Know: Facts in the Legal System". This and two webinar courses offered jointly by Osgoode Professional Development and the Society of Ontario Adjudicators and Regulators (SOAR) on current issues in professional ethics served to complete the Commissioner's 2013 Professional Development Requirements for the Law Society of Upper Canada.

The Mediator/Registrar and the Administrative Assistant collaborated on the new OMLC OneSite initiative (which is being undertaken throughout the OPS) to make the policies and procedures of the tribunal more accessible and understandable for all Ontarians. The OMLC efforts in this regard have pre-dated or met all deadlines imposed for approvals.

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

Senior staff attended the annual Prospectors and Developers Association of Canada Conference in Toronto in March, 2014. The Commissioner and senior staff also attended the reception hosted by the Minister of Northern Development and Mines.

In an attempt to comply with mandatory and recommended course requirements which total 29 for the upcoming fiscal year, staff completed numerous training courses and workshops. In total, staff and the Commissioner completed 24 courses, with topics including service excellence, safe smart workplace, and a seminar on wellness and creating a healthy work-life balance. The Commissioner attended mandatory manager in-person training on Workplace Harassment and Discrimination Prevention and Workplace Mental Health Training for Managers. The Commissioner ensured she and all staff completed all mandatory courses; the

OMLC has, in previous years, taken mandatory OPS courses which MNR had deemed mandatory in anticipation of their importance.

It is noted that the office has two sets of Procedural Guidelines which can be accessed on its website; one for matters under the **Mining Act** and one for matters under all other **Acts** for which the office has jurisdiction.

Due to ongoing budgetary pressure, the Office began to track its hearing and office costs in 2003/2004 to more accurately predict its constant and variable costs. Greater scrutiny of its fixed costs has led to ongoing exercises to find and implement further economies. For example, the office conducted a cost analysis with detailed forecasting of all costs for all hearings. This analysis provides a valuable ongoing snapshot of all hearing related expenditures and ensures accurate monitoring of all costs throughout the fiscal year. Since its inception, approximately 33 percent of annual office expenses have been eliminated. This figure has remained steady since 2009/2010. The change from the Cash to the Accrual method of accounting now employed by the OPS, along with staff turnover has put this tracking on hold since mid-2012. Generating these figures and re-implementing this tracking method is a priority for 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 MNR 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.