NORTON ROSE FULBRIGHT

Legal update

Ontario passes the *Aggregate Resources and Mining Modernization Act*

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Environmental
Mining and resources

On May 9, 2017, Ontario passed the *Aggregate Resources and Mining Modernization Act* (Act). The passage of the Act marks a further step in Ontario's ongoing overhaul of the rules surrounding resource extraction in the province, which began in 2009.

The Act makes a host of changes to the *Mining Act* and the *Aggregate Resources Act.* With respect to the *Mining Act,* the main change is the introduction of a new electronic mining lands administration system. This system will include electronic claims staking, which will replace the current system of ground and paper staking. The Act also amends the *Aggregate Resources Act* in ways that generally create greater duties and potential liabilities for extractors of aggregates (such as sand, gravel, clay and bedrock) and greater powers for the Government of Ontario with respect to aggregates extraction.

Changes to the *Mining Act*

Background: Ontario's overhaul of the *Mining Act*

The changes to the *Mining Act* are contained in Schedule 2 of the Act. These changes represent Phase III of the Government of Ontario's "Modernizing the *Mining Act*" process, which set out to modernize mining legislation that, until 2009, had not seen a major update in over a century.

Phase I of the overhaul took effect in 2011. Broadly, Phase I increased the rights of private landowners. It required notice of staking to be provided to landowners by the prospector and gave the Minister of Northern Development and Mines, who oversees the *Mining Act,* the power to order certain areas closed to staking.

Phase II was implemented in 2012 and 2013. Among other things, it introduced a new requirement to obtain exploration plans or exploration permits to engage in early-stage mineral exploration, a mandatory *Mining Act* awareness program and Aboriginal consultation requirements.

While these changes have been controversial, most would agree that they have greatly altered the considerations companies must take into account when undertaking a mining project. At one level, the changes are the product of extensive stakeholder consultations and seek to strike a careful balance between the rights of companies, the rights of landowners, and Aboriginal and treaty rights. Yet many have noted that the new rules can create additional expense, delay and uncertainty for mining projects, with a disproportionate impact on junior miners.

Schedule 2 of the Act replaces and minorly alters the *Mining Amendment Act, 2015,* which died on the order paper with the prorogation of the Ontario legislature in September 2016. While the Act received royal assent on May 10, 2017 (the day after passage), Schedule 2 will come into force at a future date that is yet to be determined.

Introduction of electronic staking

The main new change to the *Mining Act* that will be implemented under Schedule 2 will be the introduction in Ontario of an electronic mining lands administration system. The new system will be used for purposes that include prospectors' licenses, exploration plans and exploration permits. Perhaps most notably, though, the system will move Ontario to online registration for mining claims.

Currently, claims must be staked using either physical stakes in the ground (Northern Ontario) or on paper maps (Southern Ontario). The new system will require that claimants register a claim electronically on a provincial grid. The grid will be made up of 5.2 million cells ranging from 17.7 hectares in Northern Ontario to 24 hectares in Southern Ontario.

Transition and conversion of legacy claims to electronic claims

To facilitate the transition to electronic claims staking, there will be a 90-day staking hiatus and transition period, which the Ministry proposes to begin November 1, 2017. During this period, certain activities will be prohibited, including staking of mining claims and transfers of mining claims.

The Act will also require that all existing claims be converted into electronic claims registered in the mining claims registry. The Act contains detailed rules for this process. The first step in the process requires recorders—provincial employees appointed by the Minister under section 6 of the *Mining Act*—to make final determinations as to the location of a legacy claim and delineate them on the provincial grid using the "best available information," including information used to file the legacy claim and information gathered by way of inspections, GPS georeferencing data, surveys, or other means of verifying claim boundaries. The powers of recorders include the ability to decide or settle disputes with respect to legacy claims and the power to adjust the boundaries of legacy claims. The Act specifically prohibits an appeal from these determinations. It also provides, in essence, that the Crown has no liability with respect to any actions in the conversion process and that nothing done or not done with respect to the conversion process will constitute an expropriation.

On a future date to be selected by the Minister, all legacy claims delineated on the provincial grid will become either cell claims for entire cells on the provincial grid or, where two or more legacy claims (or parts of claims) held by different claim holders convert and are located in the same cell, boundary claims for portions of the cells. The Ministry has not yet made it clear when it expects conversion to occur.

Once conversion occurs, the version of the legacy claim recorded on the provincial grid will be the legally recognized claim, regardless of where the claim was physically staked or staked on the Ministry's maps. Where two or more legacy claims occupy a cell and those legacy claims are held by different claim holders, any legacy claim to a part of the cell will be converted to a separate boundary claim for the corresponding part of the boundary cell. Where all legacy claims in a boundary cell are held by the same claim holder, they will be merged into a single cell claim for the entire cell, though the claim holder can also opt to have each portion of the cell registered as a separate boundary claim.

Costs and benefits of the move to electronic administration

In the longer run, this process will have many benefits for mining companies. It is expected to reduce administrative costs, decrease staking disputes and minimize disruption to private landowners. It will also bring Ontario into line with other provinces that already use electronic staking, including British Columbia, Newfoundland and Labrador, Nova Scotia, New Brunswick and Saskatchewan. Accordingly, it will help increase Ontario's competitiveness as a destination for mining investment.

In the shorter run, however, holders of claims will have to be vigilant and proactive to ensure that their interests are protected throughout the conversion process, especially given the limited avenues for redress once decisions are made. The Ministry has strongly encouraged claim holders to consider georeferencing their claims and to review them against their position in CLAIMaps. The Ministry has produced a conversion guide for claim holders.

Changes to the *Aggregate Resources Act*

The changes to the *Aggregate Resources Act* are contained in Schedule 1 of the Act. In Ontario, the *Aggregate Resources Act* governs the extraction of aggregates. It is overseen by the Minister of Natural Resources. The Act introduces several changes to this regime, though unlike the changes to the *Mining Act,* the changes to the *Aggregate Resources Act* are not a revival of a previous bill that died on the order paper. The changes amend the *Aggregate Resources Act* to create greater duties for extractors of aggregates in ways that are broadly in line with the changes to the *Mining Act* since 2009. With certain exceptions, the changes to the *Aggregate Resources Act* came into force with royal assent on May 10, 2017.[1] Some of the most notable changes are as follows, though many of the details remain to be shaded in by forthcoming regulations.

New licensing conditions

One broad set of changes concerns the requirements around licensing. The Act removes the current requirements relating to applications for licenses and permits from the *Aggregate Resources Act.* Instead, the Minister is given new regulation-making powers relating to the preparation of, and the documentation to be included in, applications, including whether to provide a site plan.

The Minister is also given enhanced powers to amend licences and new powers to compel the preparation of a site plan. The Minister may now, at any time, add a condition to a licence, rescind or vary a condition of a licence, or amend a licence in any other way, or require a licensee to amend the site plan or to submit a new site plan. However, there is increased flexibility for the holders of aggregate permits, who will now be allowed to make minor amendments to a site plan prescribed by regulation without Ministerial approval.

Restriction of areas open to aggregates extraction

In addition, there are several changes that may, in practice, restrict the areas that are open to aggregates extraction. The Act will give the Minister the power to designate, based on public interest considerations, areas of Crown land, or areas of land where the aggregate or topsoil is the property of the Crown, as areas where no removal of aggregate will be allowed. It also requires the Minister, in exercising any power under the *Aggregate Resources Act* relating to licences or permits that has the potential to adversely affect established or credibly asserted Aboriginal or treaty rights, to consider whether adequate Aboriginal consultation has been carried out.

New enforcement powers and penalties

The Act introduces new enforcement powers and more drastic penalties for non-compliance. On the one hand, the Act takes steps to encourage voluntary compliance. An inspector who finds that any provisions of the *Aggregate Resources Act* or the regulations are being contravened may provide the person who he or she believes to be responsible for the contravention with a written report setting out a list of the provisions that have been or are being contravened and suggesting actions or measures the person could take to remedy the contraventions.

On the other hand, it significantly hikes penalties for non-compliance. Under the previous version of the *Aggregate Resources Act,* every person who committed an offence under the *Aggregate Resources Act* was liable on conviction to a fine of not less than $500 and not more than $30,000 for each day on which the offence occurs or continues. The Act increases these penalties so that everyone who commits an offence is liable on conviction to a fine of not more than $1,000,000 and an additional fine of not more than $100,000 for each day or part of a day on which the offence occurs or continues.

Requirement for rehabilitation reports

While the *Aggregate Resources Act* already required every licensee or permittee to undertake progressive rehabilitation and final rehabilitation of the site of a pit or quarry, the Act will now require them to submit reports on these rehabilitation activities.

What it means for aggregates extractors

Overall, aggregates extractors in Ontario will now need to factor in a process for getting projects off the ground that in many cases will be more onerous and provide less certainty. They will also need to be aware of the increased importance of community and Aboriginal consultation in the process, as well as the sharply increased liabilities for failure to comply with the *Aggregate Resources Act.*

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Footnote

[1] The sections that are not yet in force, and are pending proclamation into force on a day to be named by the Lieutenant Governor, are the following: subsections 1 (1), (2), (3) and (5), 6 (1) and 7 (3), sections 8, 9, 12, 13 and 17, subsections 18 (1) and 21 (1), section 25, subsections 28 (2) and (3), sections 30, 31 and 33, subsections 36 (1) and (2), section 44, subsections 52 (1), (4), (5) and (6), and section 53.

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