

MNDM POLICY – DISPUTE RESOLUTION AT EARLY EXPLORATION

The following is operational policy describing MNDM’s approach to implementation of the dispute resolution process established pursuant to s. 170.1 of the Mining Act and O.Reg. 308/12 as it pertains to permits at early exploration.

I. Introduction

The *Mining Act*, and its associated regulations and implementation policies provide a framework for consultation with Aboriginal communities whose treaty or Aboriginal rights have the potential to be adversely affected by mineral exploration and development activities. That framework includes express provision for the appointment of an independent third party, at the discretion of the Minister, to facilitate the consultation process and help to resolve disputes that may arise.

This policy provides further detail and explanation of MNDM’s approach to dispute resolution pursuant to section 170.1 of the *Mining Act* and O.Reg. 308/12 (Exploration Plans and Exploration Permits).

Dispute resolution processes at this stage are intended to facilitate consultation among the participants to that process - the ministry, early exploration proponents (“proponents”) and Aboriginal communities - consistent with the requirements and principles expressed in the regulation and MNDM’s *Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration* (“*Consultation and Arrangements*”). Issues will not be referred to a third party as an appeal or for arbitration or decision-making but, rather, to facilitate the dialogue already underway and possibly mediate issues, with the objective of resolving those issues, where that intervention may assist the consultation process and MNDM’s ultimate decision on whether or not to issue a permit.

II. General Principles and Requirements

Where an issue is referred to a third party pursuant to s. 170.1, that referral will be made during the consultation process that is required after an application for an exploration permit has been submitted and prior to a decision being made with regard to that application. Where an issue has been referred, the time required to process an exploration permit application will typically need to be extended which will result in a temporary hold being placed on the application to allow time for the facilitation to occur.

The third party will report to the Minister with regard to his or her facilitation and that report will form a part of the MNDM's record of consultation which is one of the considerations informing the Director of Exploration in making a decision whether or not to issue an exploration permit.

In facilitating a consultation process, the third party will have regard to the requirements of the *Mining Act* and regulations and, in particular, to MNDM's *Policy: Consultation and Arrangements*. That Policy provides details of MNDM's expectations of the parties - MNDM, proponents, and Aboriginal communities - in project specific consultation processes and provides a framework for the consideration of arrangements in MNDM's decision-making process.

Ideally, parties will come to mutually agreeable solutions to address concerns that have been raised about proposed early exploration activities and their potential to adversely affect Aboriginal and treaty rights. MNDM's *Policy: Consultation and Arrangements* strongly encourages proponents and Aboriginal communities to make voluntary commitments with regard to ongoing consultation and mitigation measures and to reflect those in formal arrangements. Mitigation measures can also be reflected in terms and conditions attached to an exploration permit where MNDM is of the opinion that these are necessary in order to address adverse effects.

Accordingly, referral to a third party during the permit application process will generally be with a view to assisting the proponent and Aboriginal community to arrive at agreement on appropriate mitigation measures to address potential adverse effects to Aboriginal or treaty rights or, failing such agreement, to inform MNDM as it considers whether or not to issue an exploration permit and what terms and conditions should attach to a permit, if any.

III. Referral to a Third Party Facilitator

There is no "application" process to request the appointment of a third party. Decisions to refer a consultation process to a third party are intended to be a last resort after other efforts have been exhausted and will be made on recommendation of the MNDM Mineral Exploration and Development Consultant involved with the file after considering:

- the nature of the issues outstanding between the parties;
- the efforts made to date to provide information and consider concerns raised;
- the efforts made by MNDM staff to facilitate the consultation process; and
- whether the proponent and Aboriginal community(ies) agree to have the process referred to a third party, recognizing they must bear their own costs of the third party process.

MNDM will not compel parties to participate with a third party and a referral to a third party is not a prerequisite to MNDM making a decision. MNDM will proceed to make decisions with regard to permit applications on the basis of the consultation efforts and record before it, whether that includes a third party process or not.

To be referred to a third party, the nature of the issues outstanding must fall within the regulatory authority of MNDM and within the mandate of issues the MNDM considers in making a decision on a permit application. Specifically, issues that may be referred to a third party for further facilitation might include:

- resolution of appropriate mitigation measures in relation to concerns raised about specific exploration activities, for example:
 - appropriate setbacks from active harvesting sites related to a right to hunt or fish or trap;
 - necessary rehabilitation of flora related to traditional gathering practices;
 - appropriate seasonal and other timing restrictions related to rights to hunt, fish, trap, gather;
- facilitation of arrangements consistent with MNDM's *Policy: Consultation and Arrangement* where efforts have been made and could be resolved in the short timeframes provided.

In turn, there are issues that are beyond the mandate of MNDM to facilitate or resolve in considering whether or not to issue an exploration permit and which will not be referred to a third party for facilitation, including:

- concerns about activities beyond the regulatory authority of MNDM;
- jurisdictional assertions;
- assertions relating to resource benefits sharing generally;
- assertions with regard to historic grievances rather than the specific project proposed;
- determination of the nature and scope of treaty or Aboriginal rights;
- disputes amongst and between Aboriginal communities;
- disputes about specific quantum or benefits sought by Aboriginal communities beyond the parameters discussed in MNDM's *Policy: Consultation and Arrangements*.

IV. Qualifications of the Third Party

MNDM will refer issues to a third party as selected by the Minister or, where all parties (proponent, Aboriginal community(ies) and MNDM) agree, to a third party chosen by the parties.

In confirming the appointment of the third party, whether as selected by the Minister or by agreement of the parties, MNDM will have regard to the following skills and knowledge:

- knowledge of the legal framework with regard to Aboriginal peoples and the protections provided by section 35 of the *Constitution Act, 1982*;
- experience with cross-cultural facilitation and mediation process;
- knowledge of the *Mining Act*, regulations, and implementation policies, particularly this policy and *Policy: Consultation and Arrangements*;
- basic knowledge of mineral exploration and development activities and best practices, particularly at the early stages of exploration as covered by an exploration permit;
- the ability to work to the regulated timeframes.

V. The Process

Pursuant to O.Reg. 308/12 , the third party must report to the Minister within 30 days of the referral of the consultation process, including recommendations, if any. The Minister is not bound by any recommendations made and, ultimately, the decision whether or not to issue an exploration permit remains at MNDM's discretion pursuant to section 78.3 of the *Mining Act*.

MNDM expects a report within 30 days of referral recognizing that consultation will have been ongoing and that issues referred to a third party will be quite narrow and focussed. On referral to a third party, MNDM would provide any consultation record compiled to date and some description of the issues being referred. Thirty days provides the third party with time to review that record, and to contact the parties – the Aboriginal community(ies), the proponent, and MNDM - for any further information he or she may require. At the third party's discretion, but within the scale and maximum costs payable as determined by the Minister and within the regulated timeframe, the third party may suggest and facilitate all party conferences to discuss and facilitate the outstanding issues.

In reporting to the Minister, the third party is expected to summarize the process undertaken by the third party addressing:

- the nature of any agreement the parties may have reached to resolve the issues referred to the third party;
- summary of the issue(s) that remain outstanding, if any;
- the positions of the proponent and Aboriginal community(ies) on the outstanding issue(s);
- at the third party's discretion, a neutral evaluation of those positions and, in his or her subjective assessment, the reasons agreement could not be reached;
- recommendations as to possible compromises/mitigation measures that could address any outstanding issues and be reflected in terms and conditions of an exploration permit, if any.

Reports provided to the Minister will be copied to all participants in the facilitation process and will form a part of MNDM's record of consultation leading to a decision whether or not to issue an exploration permit.