



# Comment

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## ***Ontario's Mining Act Modernization Fails to Pass Muster on Duty to Consult***

While Ontario's mining sector booms, the provincial government continues to struggle to develop a coherent and legally sound legislative regime that meets its constitutional responsibilities to Aboriginal peoples.

In the wake of Wahgoshig First Nation's successful injunction against Solid Gold Resources, Ontario's Ministry of Northern Development and Mines is touring the province trumpeting new *Mining Act* regulations that, according to Ontario, will clarify and bolster the fulfillment of the Crown's duty to consult Aboriginal peoples. Rather than alleviate tension between First Nations and mining companies, the proposed regulations risk increasing disagreements to the detriment of both.

This is because the proposed regulations contradict fundamental principles of the duty to consult. The regulations would codify the current state of affairs in Ontario: the province delegates consultation to mining companies, leaving it to play mainly a supervisory and final adjudicative role to determine whether the company adequately consulted with affected First Nations.

This approach falls short of what the law requires. The substantive aspects of the duty to consult cannot be delegated—they must be fulfilled by the Crown. Furthermore, First Nations have a right to directly engage with decision-makers who have the power to substantially address Aboriginal concerns and interests.

Ontario's proposed new *Mining Act* regulations would deny First Nations these basic entitlements that flow from their constitutional rights. They will force First Nations to deal solely with mining companies, many of whom lack either the interest or capacity to address Aboriginal concerns.

Ontario could address this issue by publicly confirming that mining-company consultation is not intended to substitute for direct consultation between Ontario and First Nations. Ontario should further confirm it will enter into direct government-to-government consultation with First Nations with the intention of substantially addressing their concerns and interests including revenue-sharing and shared decision-making. Unfortunately, to date Ontario has consistently refused to make these commitments.

As long as Ontario continues to delegate its constitutional obligations to mining companies there is little prospect that its *Mining Act* modernization efforts will create greater legal certainty in Ontario's mining sector.

A handwritten signature in black ink, appearing to read "Bruce Stadfeld McIvor".

Dr. Bruce Stadfeld McIvor  
Lawyer & Historian