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Ontario's New Far North Act Promotes Collaboration Between First Nations and Resource Companies

by Patrick Gervais and Daniel Horovitz
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Patrick H. Gervais is a member of the Ontario and New York state bars, and of Blaney McMurtry's corporate commercial practice group.

Patrick may be reached directly at 416.597.4891 or pgervais@blaney.com

Daniel I. Horovitz holds a JD-MBA from the University of Western Ontario, is an articling student with Blaney McMurtry, and is scheduled to be called to the bar this year.

Daniel may be reached directly at 416.597.7221 ext.4445 or dhorovitz@blaney.com

Blaney McMurtry has a long-standing record of effective counsel in matters involving Canada's First Nations. In the following article, Patrick Gervais and Daniel Horovitz discuss Ontario's new Far North Act, its implications for First Nations and resource developers, and concerns going forward.

On October 25, 2010, Ontario's *Far North Act* (the *FNA* or the "Act") received royal assent. Once proclaimed, the *FNA* will become the cornerstone of the province's plan to protect the character and environmental integrity of more than 225,000 sq. km of Ontario land while providing for sustainable economic development.

The most significant effects of the new law will be felt by the First Nations communities populating the Far North and by the mining, forestry, power generation and other resource sector companies with interests in the region.

The "Far North," as the *FNA* defines it, lies east of the Manitoba border, south of the Hudson Bay, west of the Quebec Border and south to a series of provincial parks and management units designated under Ontario's *Crown Forest Sustainability Act, 1994*. It constitutes 42 per cent of Ontario's land mass and, at present, is not subject to any specific development review. It contains 34 communities, including Moosonee, Pickle Lake and Peawanuk, and 32 First Nations, with a total population of 24,000.

The *FNA* is the result of a 2008 provincial government initiative to protect the Far North through the use of land planning. The March 2010 Throne Speech launched the Ontario Government's five-year "Open Ontario Plan," which included a commitment to protect half the Northern Boreal Forest and capitalize on the chromite deposit discovered in a swampy area 500 km northeast of Thunder Bay, known as the Ring of Fire. (Chromite is used in the production of stainless steel and other alloys.)

The *FNA* applies to undeveloped public land in the area. It does not apply to any land that is part of a reserve. Nor does it apply to federal land, municipal land or, in the words of the Act, any land that is "not public."

Prior to the Legislative Assembly's passage of the *FNA*, the Ministry of Natural Resources (MNR) held outreach discussions with Far North municipalities and First Nations communities on a process for ensuring that any land development would be done in a manner that recognized and affirmed the existing rights of First Nations.

As a result, a number of planned areas in the region have been identified and the ministry estimates that 90 per cent of the First Nations communities intending to develop these areas, which are in their vicinities but off their own reserves, will do so under the *FNA*.

The New Development Regime

The *FNA* provides a method of land planning that demands consultation between resource developers and the First Nations. The Act, which does not specify what kind of consulting must be conducted, provides for a significant role for First Nations.

Under the Act, in the opening stages of any land development planning process, the ministry must work with any interested band leader from a reserve in the Far North to create terms of reference aimed at guiding the development process. (The terms of reference are a preliminary statement about the objectives and goals of a project, including a preliminary delineation of roles and responsibilities). This first step seeks to establish a "community-based" land use plan that brings together the communities in the area and the developers, and helps them forge a common vision and co-ordinate their efforts.

The next stages of the planning process underscore the importance of developing terms of reference suitable to both band leaders and the province. The Act stipulates that any "community-based" land use plan, founded on jointly-created terms of reference, will be of no force and effect unless it is approved by both the government and the council of each of the First Nations bands involved in creating the terms of reference. This requirement provides an equal level of approval between the government and the First Nations. From the ministry's perspective, it provides the First Nations communities with real power and real control over the land in question.

For the government and private companies with interests in the region, the need to collaborate with the First Nations on effective terms of reference and a land use plan should be at the forefront of any project, which is what the *FNA* encourages.

In addition to requiring joint approval for any community-based land use plans, the *FNA* also prohibits a number of large-scale development projects unless they include an approved community-based land use plan. Such projects include opening a mine, engaging in oil and gas exploration or production, and constructing or expanding any wind- or water-powered electrical generation facilities. An exemption is available for some of these enumerated projects, but even without a formal plan the approval of the First Nations is still required before development can begin.

Concerns Over Future Development in the North

The *FNA* is not without critics or concerns. For example, many First Nations leaders are concerned that the provincial government's say is equal to that of local leaders. From their perspective, land use plans may be a good idea but they should be developed completely internally by the First Nations.

At the opposite end of the spectrum are businesspersons equally concerned with the level of government "red tape" that the bill imposes. They insist that this Act represents an unnecessary roadblock to economic advancement in the region, created by a government located in Southern Ontario that does not understand development challenges in the Far North. These critics believe that the bill will turn the Far North into one giant provincial "superpark," and bring to a standstill crucial development projects.

For example, for each proposal under the *FNA*: a) each First Nation community interested in a project may express that interest to the MNR, requiring that b) a joint body be created to develop terms

of reference, and c) those terms of reference must be approved by both the government and the First Nations. All of this needs to be completed before any party can think about negotiating a contract for the development of the land in question. If nothing else, land development in the Far North may become a lengthy undertaking.

Finally, there is a subtler concern that the definition of First Nations in the *FNA* extends beyond those bands living in the Far North. In other words, a large group of people may have a significant amount of influence over decisions made regarding the development of lands to which they have no true connections but in which they declare an interest (perhaps rooted in some historic claim). Economic development may be negatively affected to the detriment of the area's communities.

Moving Forward

Concerns aside, the *FNA* is about to be proclaimed the law in Ontario and, as of this writing, a number of First Nations communities have already begun engaging the process. Perhaps the most effective way to ensure that ministry-based, bureaucratic intrusion is minimal is for the region's First Nations communities to work with resource companies in developing land use plans. An encouraging suggestion is that the Ministry may be more inclined to approve a land use plan that is jointly drafted by a First Nations community and the private sector. A good plan should be focused in its objective and clear in its language, and obtaining legal advice will be critical in ensuring that First Nation rights are defended, economic interests are advanced and environmental protection is assured. ■