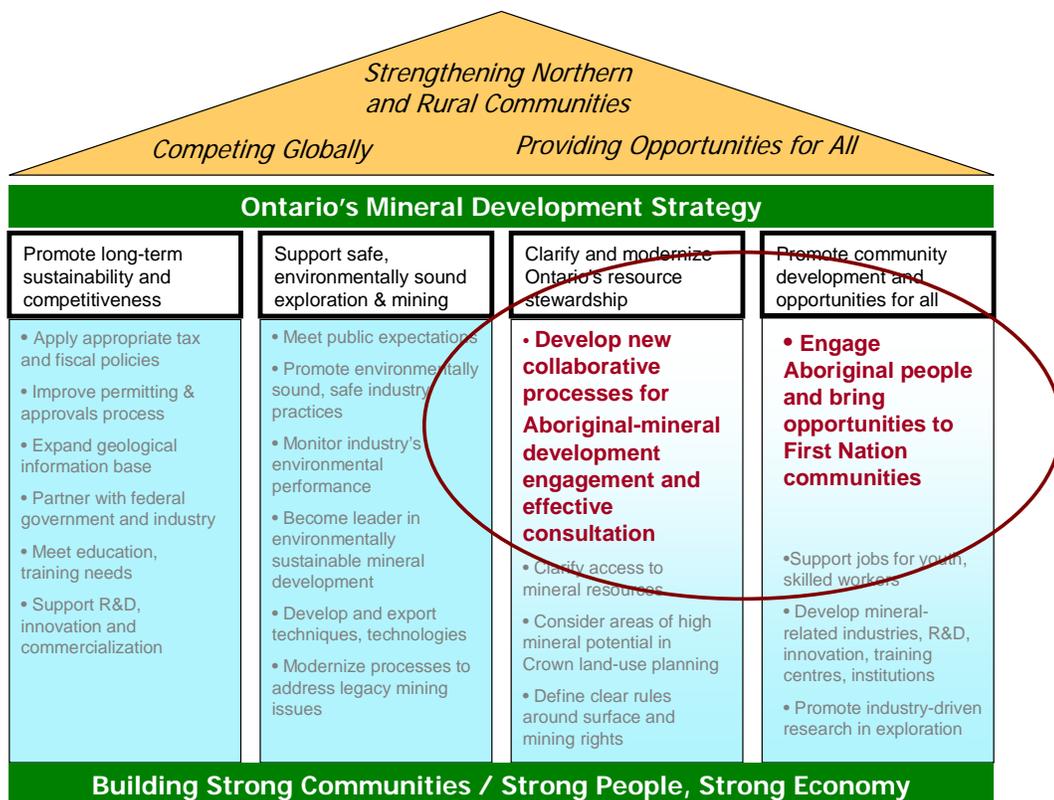


# Toward Developing An Aboriginal Consultation Approach for Mineral Sector Activities



**A Discussion Paper  
Winter 2007**



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# Context

## Determining How Best to Approach Consultations

The Ministry of Northern Development and Mines invites your input and advice as we work toward the development of effective Aboriginal consultation guidelines for mineral sector activities in Ontario. Your assistance will help us ensure that mineral sector activities occur in a manner consistent with Ontario's consultation obligations related to Aboriginal and treaty rights. It will also support the promotion of positive mineral sector relations with Aboriginal communities.

In this first phase, we are inviting your input on how we should approach our consultations. This discussion paper focuses on three main areas:

1. Principles, procedures and any changes required for a mutually acceptable approach to consultation
2. How to better clarify the role of government, industry and Aboriginal communities in the consultation process and
3. Other changes or proposals that should be considered.

Please join us in our work toward effective consultation guidelines by:

- Reviewing and commenting on this discussion paper, either electronically or by mail
- Contacting us to learn how you can contribute your expertise and interest at one of our workshops
- Submitting your name to participate in one of our working groups.

Contact us for more information by email at [herbert.shields@ontario.ca](mailto:herbert.shields@ontario.ca), telephone at (416) 327-0650 or facsimile at (416) 327-0634. You may also write to us at:

An Aboriginal Consultation Approach for Mineral Sector Activities  
Room 5630, Whitney Block  
99 Wellesley St. West  
Toronto, ON M7A 1C3

## **The Crown's Duty to Consult**

Existing treaty and Aboriginal rights received constitutional protection in 1982. Since then, the Supreme Court of Canada has made a series of decisions that have provided clarity and direction for the Crown's understanding of its duties with regard to these constitutionally protected rights.

In its New Approach to Aboriginal Affairs, the Ontario government has committed itself to meeting its constitutional obligations, and to moving to implement effective consultation processes. It has issued, for discussion and input, its Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights, and has called on individual ministries to use the guidelines when developing specific consultation processes within their mandates.

The Ministry of Northern Development and Mines (MNDM) is committed to meeting its constitutionally mandated duty to consult with Aboriginal communities and to ensuring that activities within its purview occur in a manner that is consistent with the Crown's obligations concerning Aboriginal and treaty rights.

As outlined in Ontario's Mineral Development Strategy, we are initiating discussions on mining-related consultation guidelines, with the goal of developing improved consultation approaches that work for all of us – Aboriginal peoples, Ontario and the minerals industry.

Our discussions with Aboriginal communities, Aboriginal groups and mineral sector stakeholders will also help shape our vision for the future of Ontario's dynamic mining industry, and address our aspirations for the well-being of communities across this province.

Ongoing discussions form a key part of Ontario's Mineral Development Strategy, which is itself an integral part of our Northern Prosperity Plan that seeks to enhance our global competitiveness in minerals, strengthen the North and its communities, and provide opportunities for all.

## **Ontario's Mineral Development Strategy**

Ontario's Mineral Development Strategy is based on a vision that reaffirms our position as a leading mining jurisdiction, while committing us to sound management, effective stewardship and responsible development of the province's mineral resources.

By clarifying and modernizing our stewardship of Ontario's mineral resources, the strategy will foster stronger partnerships, attract new investment and generate jobs for the future. It promotes a climate of collaboration and involvement, and will optimize resource benefit opportunities for all and minimize unnecessary conflicts.

To that end, MNDM – with input from Aboriginal peoples, mineral sector and other stakeholders – is continuing to develop and implement effective consultation processes, including consultation guidelines, for mineral-related activities, consistent with government-wide draft guidelines.

In addition, we are proposing an Aboriginal engagement process that will provide guidance on how to promote Aboriginal opportunities and suggest how we can best support future government initiatives to enable Aboriginal people to share fairly in the benefits of natural resource development.

To provide a strong foundation for these discussions, we are also focusing on three important areas of our own operations:

- Better sharing of information with Aboriginal communities and the minerals industry
- Clearer internal processes that will make our administration of the Mining Act consistent and transparent for all concerned
- Working collaboratively with industry stakeholders and Aboriginal communities to build positive working relations.

Immediate actions to achieve those objectives include:

- Implementing more and better ways of providing information that is important to Aboriginal communities
- Asking industry to provide timely information to Aboriginal communities, and providing them with guidance on how to do that, and
- Working with Aboriginal communities to increase our understanding of their traditional-use areas and special sites.

# **A Commitment to Consultation**

Ontario is committed to meeting the province's duty to consult with Aboriginal peoples.

In June 2006, the Ontario Secretariat for Aboriginal Affairs released Ontario's Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal and Treaty Rights.

In areas related to the Mining Act, the Ontario government wants to work with Aboriginal communities, Aboriginal groups and industry representatives to develop a range of tailored consultation approaches that provide clarity and direction on when and how to consult with Aboriginal communities on mineral sector activities.

This discussion paper is one of the tools MNDM is using to seek comments, concerns and ideas to help us collaboratively develop Aboriginal consultation guidelines for mineral sector activities.

When they are developed, the guidelines will promote timely and effective Aboriginal consultation processes aimed at ensuring that mineral sector activities have no adverse impacts on Aboriginal and treaty rights, or, if adverse impacts are unavoidable, that they are mitigated.

The guidelines will also:

- Clarify when and how MNDM will lead consultations
- Provide clear direction on when and how MNDM will delegate procedural aspects to industry.

## Seeking Input on Mineral Sector Guidelines

Ontario needs a mineral sector consultation approach that will work for us all – Aboriginal communities, the mining industry and Ontario. To achieve that, we are prepared to consider a range of approaches, including possible changes in policy and practices, as well as to the Mining Act and its regulations.

We also seek advice on how best we can:

- Ensure that Aboriginal people are able to participate fully in the benefits of mineral sector activities near their communities
- Support community efforts to plan and undertake Traditional Ecological Knowledge (TEK) mapping program
- Ensure effective and efficient consultation processes
- Deal with unresolved Aboriginal-mining related issues
- Address capacity issues for both First Nations and the mining industry.

During 2006 and 2007, MNDM will implement a multi-pronged engagement approach that includes the following:

1. **Ministerial and technical meetings** with Aboriginal communities and leaders to seek their advice and commitment to the process.
2. **Ministerial and technical meetings** with key mining sector stakeholders to seek their advice and commitment to the process.
3. Through this **Discussion Paper**, an invitation to provide input and advice on:
  - Principles, procedures and any changes required for a mutually acceptable approach to consultation
  - How to better clarify the role of government, industry and Aboriginal communities in the consultation process and
  - Other changes or proposals that should be considered.
4. Establishment of a limited number of **pilot projects** with interested communities, to explore important issues such as an enhanced MNDM process to minimize or eliminate the impact of mining related activities on sites of cultural and spiritual significance.

5. Establishment of **working groups and technical committees** to provide in-depth advice on key matters, for example:

**Joint Government/Aboriginal/Mineral Sector Relationship-Building Working Group**

- How to support relationship-building processes
- Develop options to ensure that Aboriginal people and communities share fairly in the benefits associated with mineral sector activities
- Whether and how to establish more effective conflict resolution processes.

**Joint Government/Aboriginal/Mineral Sector Implementation Committee**

- Provide advice on implementation of proposed approaches:
  - To provide improved opportunities to meet the Crown’s consultation obligations
  - To provide clear direction on when and how MNDM will delegate aspects of project consultation to industry.

If you are interested in volunteering to participate on any of these working groups, please contact us at [herbert.shields@ontario.ca](mailto:herbert.shields@ontario.ca) or (416) 327-0650.

**Aboriginal Capacity Development Working Group**

- Whether and how to support community efforts to undertake traditional use studies, including TEK mapping
- Establish a process to develop criteria and standards for addressing sites of cultural and spiritual significance
- Develop cost effective models to provide communities with access to technical expertise to participate in consultations related to mineral sector activity.

**Mineral Sector Capacity Development Working Group**

- What type of support does industry need to implement its responsibilities around consultation and to promote positive relations with Aboriginal communities?

6. Distribution and posting on MNDM’s website of a **regular newsletter** to update Aboriginal communities, Aboriginal groups and industry stakeholders on progress and events.

# Possible Approaches

Recent Supreme Court decisions confirm the importance of all parties engaging in the consultation process and trying to reach some mutually satisfactory solutions. To be effective, true consultation requires reciprocal, constructive engagement that is focused on reconciling differences.

The development of consultation guidelines will provide consistent direction on how consultation should occur in relation to specific mineral sector activities. It is important to establish consultation principles to direct the development of the guidelines and future consultation processes.

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## ■ What principles, procedures and changes are required for a mutually acceptable approach to consultation?

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The following Proposed Principles are suggested as a means to generate discussion.

### **Proposed Principles for Developing Approaches**

1. Aboriginal consultation guidelines for mineral sector activities will support a consultation process aimed at building positive relations, reconciling differences and avoiding confrontation.
2. Consultations must be conducted in good faith and openness.
3. Consultation should be conducted with the objective of avoiding adverse impacts on asserted or established Aboriginal or treaty rights. Where avoidance is not possible, consultation will be conducted with the goal of mitigating such impacts.
4. The guidelines will reflect the needs of the potentially affected Aboriginal community and industry in Ontario.
5. Although Aboriginal communities have a right to be consulted in relation to Aboriginal or treaty rights that may be adversely affected by a government action, they generally have no veto over the Crown's decisions.
6. Aboriginal communities, mineral sector proponents and MNDM have a necessary yet distinct participatory role in the consultation process.
7. All parties are expected to provide relevant information, allowing adequate time for review by other parties.
8. The type, scope and content of a "duty to consult" consultation process will depend on such factors as the extent of potential adverse effects, the nature of the activities involved and the strength of the claim to an asserted Aboriginal or treaty right.

***Do you have any comments these Proposed Principles?***

# Roles and Responsibilities

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- **How can we better clarify the role of government, industry and Aboriginal communities in the consultation process for mining related activities?**
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## **Ministry of Northern Development and Mines**

- MNDM has a responsibility for fulfilling the Crown's duty to consult on issues relating to mining and mineral exploration.
- At key stages in the mining sequence MNDM will consult directly with Aboriginal communities.
  - When appropriate, MNDM will have discussions with the affected Aboriginal community to determine the process to be used to consult with the community.
- Consultation process will vary but will likely include the following:
  - MNDM and project proponent to provide information on proposed project or pending MNDM decision
  - Obtain information on potentially impacted rights
  - Listen to concerns raised by Aboriginal community
  - Working with the project proponent and the Aboriginal community attempt to minimize impacts on rights, and where appropriate, provide accommodation
  - Advise the Aboriginal community and project proponent in writing of the outcome of the consultation.
- Where MNDM has delegated any consultation requirements to the project proponent, it will monitor to ensure effectiveness.

A working group with Aboriginal, government and industry members will provide input toward finalizing the Guiding Principles and Roles and Responsibilities.

## **Project Proponent**

- Provide the Aboriginal community, including the chief and band council, with sufficient information to ensure that they are reasonably informed of proposed activities; document the issues and concerns raised by the community and identify whether and how concerns were addressed; and share documentation with MNDM.

## **Aboriginal Community**

- If Aboriginal and treaty rights may be impacted by the proposed activities, identify the affected right and how it will be impacted
- Respond to proposals from MNDM and the project proponent to meet these identified concerns and attempt to reach a mutually satisfactory solution.

# Proposed Broad Consultation Approach

## 1. General Consultation and Relationship Building

MNDM will implement general consultation and relationship-building processes with Aboriginal communities and organizations that are not related to a specific mineral development proposal. Examples of this type of activity include:

- Working with communities to support their efforts to undertake traditional use studies, including Traditional Ecological Knowledge (TEK) mapping
- Establishing a process to develop criteria and standards for withdrawing key traditional value sites from staking
- Initiating community sessions to share general information on the mining sector
- Implementing processes/initiatives that build positive Aboriginal and mineral sector relationships (e.g. improved communications, minimize impacts on traditional uses, increase benefits, support capacity development)
- On a case-by-case basis, negotiating consultation protocols with an interested community or tribal council.

MNDM will establish working groups to provide direction on whether and how to implement these activities.

## 2. Project-Specific Consultation

MNDM will implement project -specific consultations that help meet the Crown's duty to consult obligations and clarify when and how a project proponent would be required to engage with Aboriginal people and, where possible, resolve issues.

Should a neutral dispute resolution process be established? If yes, what are your ideas on an effective process?

A technical committee with government, aboriginal and industry representatives will be established to review and develop options for project-specific consultation throughout the mining sequence. In addition, interim advice on developing positive working relations with Aboriginal communities will be distributed to the industry.

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### ■ Should we consider any other changes or proposals?

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MNDM may also consider proposing Mining Act amendments that would enable more effective regulatory authority with respect to Aboriginal consultation by putting in place legal instruments to better address duty-to-consult obligations, including additional provisions that provide for consultation.

## How to Participate

Please join us in the development of an Aboriginal consultation approach for mineral sector activities by:

- Reviewing and commenting on this discussion paper, either electronically or by mail
- Contacting us to learn how you can contribute your expertise and interest at one of our workshops
- Submitting your name or designate to participate in one of our working groups

Contact us for more information by email at [herbert.shields@ontario.ca](mailto:herbert.shields@ontario.ca), telephone at (416) 327-0650 or facsimile at (416) 327-0634.

You may also write to us at:

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## Next Steps

In coming months, the Ministry of Northern Development and Mines will be talking and engaging with Aboriginal communities, Aboriginal groups, mineral sector stakeholders and others through such mechanisms as this discussion paper, workshops and working groups.

The ministry will establish the working groups, composed of MNDM, Aboriginal community and mineral sector representatives, early in 2007. These groups are expected to meet several times over the following months, with locations to be determined.

In addition, the Minister will invite Aboriginal leaders and mineral sector stakeholders to meet with him, seeking advice, input and commitment to the process.

The ministry will keep participants apprised of the status of these activities and other events through a newsletter that will be distributed to First Nations, Aboriginal groups and industry stakeholders.

Once input and advice has been received, the ministry will continue to work with Aboriginal communities and groups, mineral sector stakeholders and others to develop guidelines and recommendations.

# Appendix – Mineral Sector Overview

## Mineral Exploration and Development – The Modern Context

### Economic Contribution

Products made from minerals are vital to the world's modern way of life. Computers, cars, household appliances and electrical wiring are just a few everyday products made from minerals. World-wide demand for these types of products has increased dramatically in recent years, and promises to rise even faster and farther in coming years.

Ontario is well-positioned to benefit from this growing demand.

For more than a century, Ontario has been one of the world's leading mineral producers. In 2005, Ontario's 42 producing mines generated more than \$5 billion dollars in mineral extraction. In an average year, mining companies will spend more than \$2 billion in salaries/ wages and goods and services, with over 75 per cent of that being spent in Ontario.

Ontario's mining sector directly employs 15,000 people in one of the best paid industrial careers. At more than \$1,100 a week, average mining earnings are 50 per cent higher than the average Ontario industrial wage.

According to the 2001 Statistics Canada Census, Aboriginal employment in the mining industry accounted for 5.3 per cent of the total mining labour force (excluding oil and gas), making mining the largest industrial employer of Aboriginal people in Canada. Since 1996, the mining sector has seen an increase of over 21 per cent of its Aboriginal work force.

Through the increasing use of Impact Benefits Agreements or Participation Agreements, Aboriginal people are realizing significantly more benefits from the development of mineral resources. In Ontario, such agreements are in place for the Musslewhite mine, north of Pickle Lake, and the DeBeers Victor diamond mine, west of Attawapiskat on the James Bay coast.

In Ontario's Mineral Development Strategy, the Ontario government commits to establishing an Aboriginal - mining sector process that will provide us with recommendations on how to increase Aboriginal communities' share of jobs, business opportunities and other benefits associated with mining related activities.

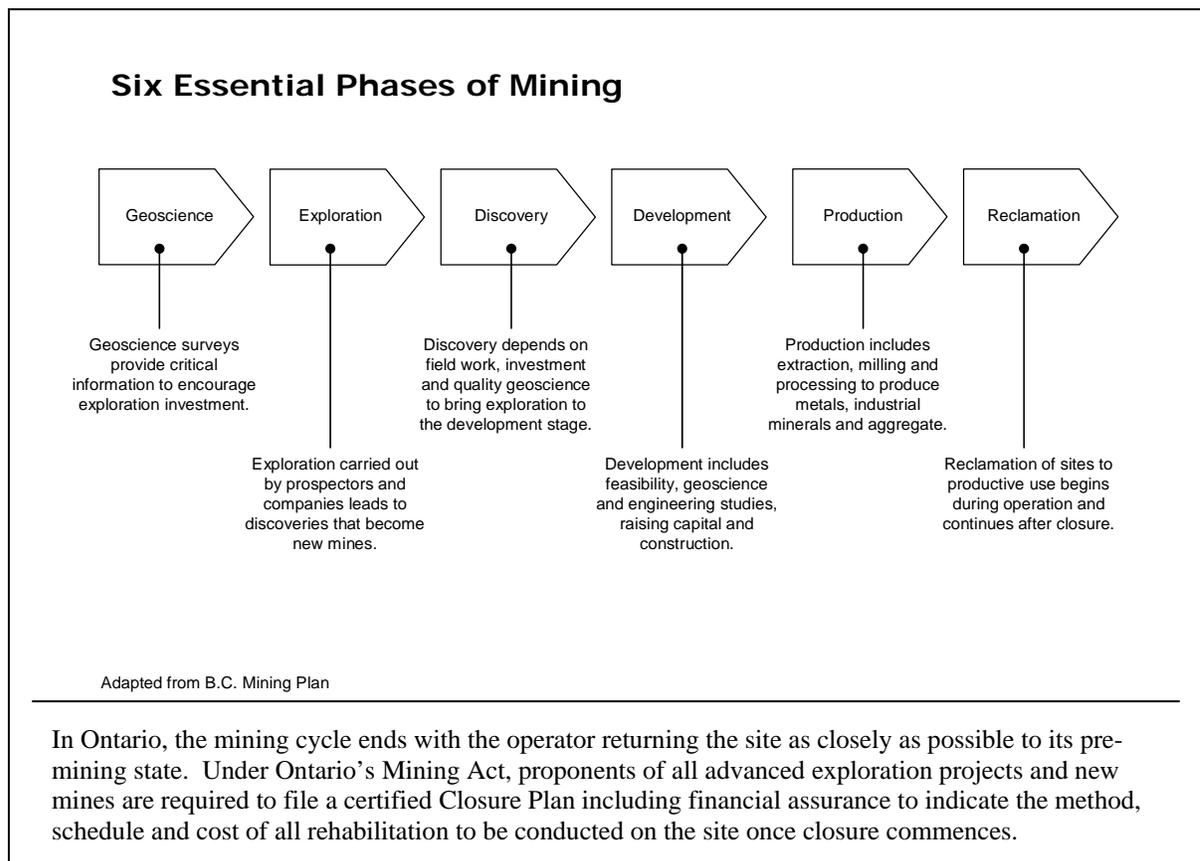
**What are your views on how we can achieve this goal?**

# Environmental and Safety Measures

## Environmental Protection

Ontario's environmental measures for all mining and mine-related activities are among the highest in the world. Using modern technologies and rigorous impact monitoring, specialists can significantly reduce the impacts of a mine on the environment.

Several provincial ministries, federal departments and agencies work with industry and communities to ensure environmental standards are met. In order to minimize or prevent any negative environmental effects during mine development, both federal and provincial laws require some form of environmental assessment process be conducted before mining projects proceed.



During the operation of a mine, the government and mining companies undertake an extensive monitoring program to identify any changes to baseline environmental conditions. If changes are found, the company can respond immediately to prevent any long-term damage. Aboriginal representatives from affected communities often participate in or conduct these monitoring programs or studies.

In Ontario, mine owners must submit a mine closure and reclamation plan to MNDM prior to developing a mine or undertaking major exploration work. This plan details how the company will close the mine site and return the surrounding land, as closely as possible, to its pre-mining state. The company is also required to put up money or security (for example, a deposit or bond) to make sure the reclamation is completed, including shutdown, closure and post-closure. The financial assurance may be a few million dollars for a small mine or over \$100 million for a large mine.

## **Worker Safety**

Canada is a world leader in protecting the health and safety of mine workers. Within Canada, Ontario's mining industry has the best safety record of all mining jurisdictions. Mining is one of Ontario's safest heavy industries and has achieved a lower frequency of reportable injuries than many other sectors including forestry, construction, transportation and general industries.

## Mineral Exploration is a High-Risk Investment

The success rate for early exploration is extremely low. Of all the mineral prospects worked on by prospectors, fewer than one in 10,000 will actually become a mine. In part, success in finding a potential mine reflects the quality of concepts and technology used to guide and conduct mineral exploration. The success of the chosen technical approach to exploration is, therefore, strongly influenced by the range of different ideas and approaches focused on a geographic area, over a long period of time, by many different prospectors and exploration companies.

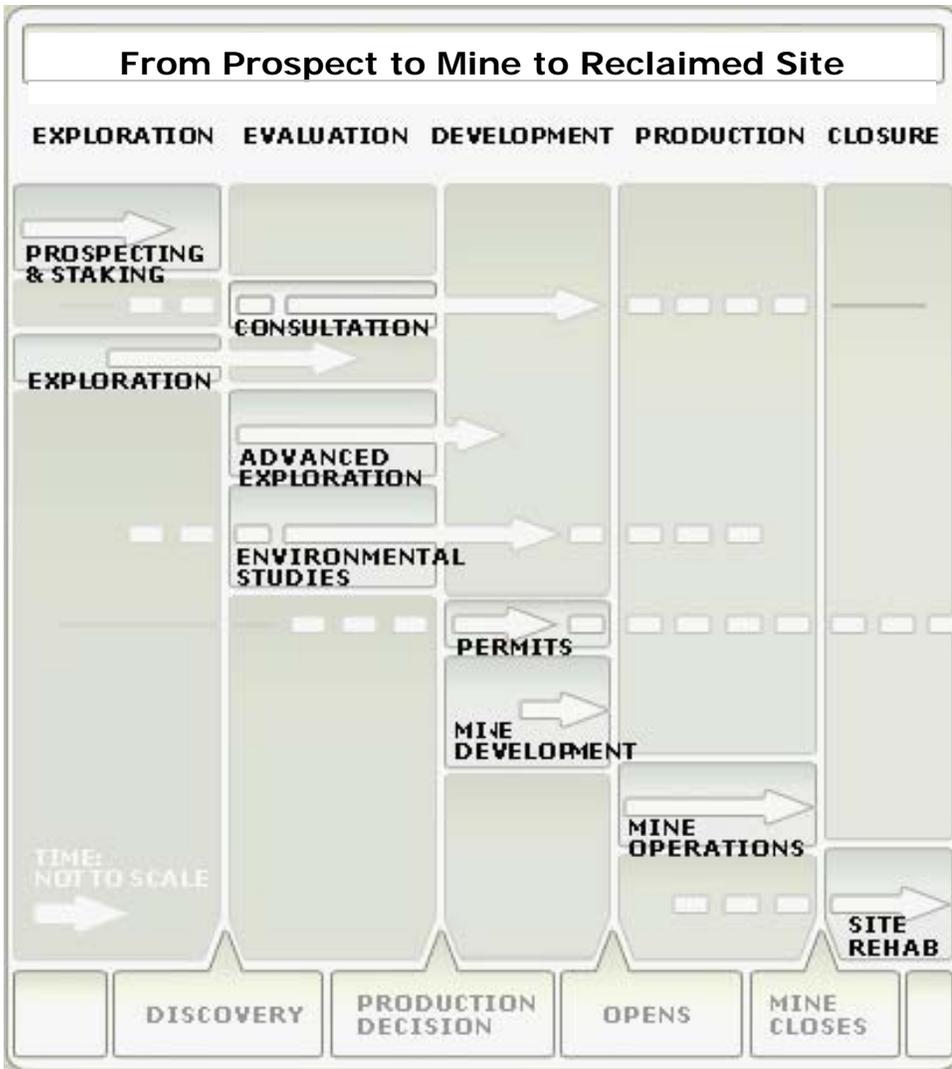
Mineral exploration is also a costly venture. Companies will spend about \$200 million in exploration activity to identify a mine site, and up to \$1 billion more to construct a mine.

Given the high risks, costs and globally competitive nature of mineral exploration, the mining sector looks for security of mineral tenure (secure right to explore and develop minerals) through all stages of exploration and mine development. This need is reflected in the “free entry” system which currently forms the basis for mining laws in almost all jurisdictions across North America and Australia.

The free entry system was introduced into Canada more than 150 years ago to provide a measure of certainty regarding security of rights to mining claims and leases, and access to mining lands. It should be noted, however, that several Aboriginal communities have expressed concern that the free entry system is inconsistent with their constitutionally protected Aboriginal and treaty rights and the Crown’s duty to consult.

Key features of this approach include:

- The right of a licensed prospector to enter most lands containing Crown-owned minerals in order to undertake mineral exploration
- The right of the prospector to acquire the exclusive rights to prospect a parcel of land by staking and recording a claim
- The exclusive right of the claim holder to carry out further exploration and development within the claim area
- The right of the claim holder to obtain a mining lease, which gives the holder a legal right to the Crown-owned minerals on the site and is required to undertake mineral production
- The mining lease does **not**, however, provide the right to bring a mine into production, because mine development authorization requires a wide range of legislative approvals, public engagement, Aboriginal consultation, environmental reviews, socio-economic studies and so on.



A working group will be established to provide advice on implementing changes to support the requirement for more effective Aboriginal consultation through the various stages of the mining sequence.