PART 2 - MITIGATING THREATS

Interim Protection Measures

There are many challenges that come with creating IPCAs in Ontario, such as an unclear legal framework, lack of acceptance by the provincial government, absence of ethical space for Indigenous traditions, and a history of exclusion of Indigenous knowledge and priorities from conservation. It also takes a significant amount of time to formulate, establish and secure an IPCA.

This chapter explores the interim measures communities may pursue in order to protect the health of their lands and community, in response to external threats such as resource extraction projects. These suggestions are not exhaustive, vary in degree of complexity and may require a Nation to seek independent legal advice. This part of the toolkit sets out a number of options to consider when seeking to alleviate impacts to lands, air and water pending more permanent forms of protection.

1. Restricting Lands from Mineral Exploration and Development under the Mining Act

There are two mechanisms through which lands can be withdrawn from mineral exploration and mining: first, by application to the Minister of Energy, Northern Development, Mines* (MNDM) under the Mining Act and secondly, at the request of the Ministry of Natural Resources under the Public Lands Act.[i]

Ontario's *Mining Act* sets out a number of discretionary tools that allows the Minister of MNDM to constrain or prohibit mineral exploration and development activities in a specified area.

The Minster can:

(1) Order the withdrawal from prospecting, mining claim registration, sale and lease any lands, mining rights or surface rights where those lands and rights remain the property of the Crown pursuant to section 35

(2) Order the withdrawal of lands, with a surface area of 25 hectares or less, to minimize or avoid disruption to "sites of Aboriginal cultural significance" caused by new mineral exploration and development activities

(3) Restrict a claim holder's rights to use certain portions of their surface or mining claims pursuant to subsection 51(4)[111]
(4) Issue a "Notice of Caution" on the Mining Lands Administration System

These are discretionary decisions which must accord with the purposes of the Act, its regulations and policies.[112] Further, in response to Aboriginal rights and title settlement negotiations, a "notice of caution" may be placed on the Mining Lands Administration System, to notify prospective land users of heightened consultation and accommodation obligations and, that mineral exploration and development maybe uncertain on these lands. Each of these mechanisms are detailed in turn below.

* ***Clarification to readers:*** *In June 2021, the Ministry of Energy, Northern Development and Mines was merged with the Ministry of Natural Resources, forming the Ministry of Energy, Northern Development, Mines, Natural Resources and Forestry (MNDMNRF). As each former ministry now operates as a department within one ministry, for clarity, references to the two departments (ie. Northern Development and Mines, NDM; and Natural Resources and Forests, NRF) are used throughout.*

(a) Withdrawal Orders – Generally

Section 35(1) of the *Mining Act* permits the Minister by order to "withdraw from prospecting, mining claim registration, sale and lease any lands, mining rights or surface rights that are the property of the Crown." These lands, mining rights or surface rights remain withdrawn unless reopened by the Minister. **In other words, a withdrawal order does not affect pre-existing mining rights and tenure such as mining claims, mining leases or licenses of occupation.[113] However, there are precedents of the Crown buying out pre-existing mining rights in order to withdraw those lands when it is in the public interest, for example in order to resolve a conflict with a First Nation.**

According to the MNDM's procedure *Withdrawal and reopening of surface and / or mining rights*, a request to withdraw public lands under the *Mining Act* is made by a field office to the Deputy Mining Recorder. Prior to requesting a withdrawal order, the MNRF field office must do the following:

1. Identify the disposition requirement or MNRF program interest to be protected;
2. Consider whether it is necessary to withdraw the surface rights, the mining rights, or both, for the affected lands; and
3. Liaise with the NDM Resident Geologist, unless timing is critical and liaising would cause an unacceptable delay, threatening the viability of the program interest.

Once it has been decided that a withdrawal order will be requested, the MNRF field office will forward a request to the Deputy Mining Recorder, signed by the MNRF Supervisor. This request must include the following:

1. A completed and signed Request for Withdrawal or Reopening Order form;
2. The corresponding mapping shapefile; and
3. Compliance with any additional instructions and/or requirements provided by NDM.

In making a withdrawal request, the Ministry requires the area of land to be withdrawn to be kept to a minimum. Should an order withdrawing lands be issued, a copy of the order is to be provided to the Mining Recorder so that the online mining lands administration system can be updated.[114]

If granted, withdrawal orders are posted online by mining division on the Mining Lands Administration System website.[115] Orders as current as 2021 show the size of lands to be withdrawn range in size from 64 - 295 hectares and all order indicate the "area is withdrawn while the Ministry determines the status of the lands." Each order, signed by a provincial Mining Recorder, is accompanied by a corresponding map.

When making a decision whether to order the withdrawal of lands under section 35 of the *Mining Act*, the Minister can consider any factors that they consider appropriate, such as those listed in section 35(2)(a) including:

- Whether the lands, mining rights or surface rights are required for developing or operating public highways, renewable energy projects or power transmission lines or for another use that would benefit the public
- Whether the order would be consistent with any prescribed land use designation that may be made with respect to the Far North, and
- Whether the lands meet the prescribed criteria as a site of Aboriginal cultural significance[116]

In deciding whether the lands meet the prescribed criteria as a site of Aboriginal cultural significance, the last of the factors listed above, a regulation of the *Mining Act*, *O Reg 45/11* sets out that 'sites of Aboriginal cultural significance' must be considered where the land is[117]:

- 25 hectares or less

- Is strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons, including because of its traditional use by that community, according to Aboriginal traditions, observances, customs or beliefs
- Is in a fixed location, subject to clear geographic description or delineation on a map, and
- Its identification is supported by the community, as evidenced by appropriate documentation.

(b) Withdrawal Orders for 'Sites of Aboriginal Cultural Significance'

In addition to the general withdrawal order provisions noted above, a withdrawal order can also be sought to minimize or avoid disruption to "sites of Aboriginal cultural significance" caused by new mineral exploration and development activities *if* the site is 25 hectares or less. Should they exceed 25 hectares, the lands are considered through the general withdrawal process, noted above.[118]

According to the *Sites of Aboriginal Cultural Significance – Withdrawals and Surface Rights Restrictions* policy, the aim of such withdrawals is to "ensure that lands identified by Aboriginal communities as sites that might meet the prescribed criteria as a site of Aboriginal cultural significance are given due consideration in order to avoid or minimize disputes with Aboriginal communities and to help build relationships between communities, MNDM[NRF] and industry proponents."[119]

For a withdrawal on the basis of a 'site of Aboriginal cultural significance,' applications should be accompanied by a Band Council Resolution or Community Council Resolution demonstrating the community's support and awareness of the withdrawal request.

(c) Surface Rights Restrictions

Section 51(4) of the *Mining Act* permits the Minister by order to "impose restrictions on a mining claim holder's right to the use of portions of the surface rights of a mining claim if, (a) the portions of the surface rights are on lands that meet the prescribed criteria as sites of Aboriginal cultural significance; or (b) any of the prescribed circumstances apply."

Surface rights restrictions include restricting a claim holder's rights to use certain portions of the surface of his or her mining claim. Section 51(4) orders to restrict surface

rights arise following notification of a claim being staked and recorded as part of the early exploration consultation processes.[120]

Section 1 of the *Mining Act* defines "surface rights" as "every right in land other than the mining rights." Generally, surface and subsurface (ie. mineral) rights to land are held separately, with the Crown holding subsurface rights, even where those surface rights might be privately held or occupied for farms or residential dwellings.[121]

There is also a hierarchy among surface and subsurface rights, wherein subsurface rights holders are conferred priority to claim use of the surface over the subsequent rights of others', with the exception of the right to sand, peat and gravel.[122] Section 50(2) of the *Mining Act* sets out the right of a mining claim holder to use the surface, to enter and use the part or parts of the surface of land that are "necessary" for the purpose of prospecting and development of the mines, minerals and mining rights "therein" - meaning, the claims themselves.

As noted above, withdrawal orders do not affect pre-existing mining rights and tenure such as mining claims, lease and licences.[123] Thus, if an area has not been withdrawn prior to a claim being staked, the Ministry will "encourage dialogue between communities and industry proponents, in an effort to address outstanding concerns that a community may have" and as a "last resort," consider the imposition of a surface rights restriction.[124]

There is no application process for a surface rights restriction, and they are only to be used in exceptional circumstances, when an agreement or voluntary measures to mitigate concerns cannot be reached.[125] Despite the lack of formal application process, the Ministry typically requires documentation from a community similar to that provided for a withdrawal on the basis of a 'site of Aboriginal cultural significance,' discussed above. Like withdrawals, the Ministry states surface rights restriction should be applied to the smallest area of land necessary to address the concern regarding the significance of the site.[126]

Should a surface rights restriction be proposed, the claim holder is given notice and has 30 days to provide comments.[127] Should the claim holder object or challenge the veracity of the identified site, the Ministry may seek further information from the community. Should a surface rights restriction be imposed, a withdrawal order is filed the approved surface rights restrictions noted in the online mining lands administration system.

While there is no caselaw pertaining to the restriction of surface rights in the context of sites of 'Aboriginal cultural significance,' the court's decision in *2274659 Ontario Inc. v. Canada Chrome Corporation* provides helpful clarification on surface rights restrictions as set out in section 50 and 51 of the *Mining Act*.[128] The Court of Appeal held that the surface rights of the holder are limited to the parts necessary for prospecting, exploration and mining "therein" – that is, in the claims themselves, not claims at a distant location.[129] The court also held that the underlying purpose of subsection 50(2) of the *Mining Act* was to encourage multiple uses of surface rights on mining lands and as a result, the principle requires consideration of the possibility of accommodation of more than one use.[130] The court found the public interest in multiple uses of Crown lands "was a given" and each party bears the evidentiary onus to establish if multiple uses of surface rights were possible.

At issue in *2274659 Ontario Inc. v. Canada Chrome Corporation*, was an easement 2274659 Ontario Inc. (a subsidiary of Cliffs Natural Resources Inc). sought over 108 unpatented mining claims held by Canada Chrome Corp. 2274659 Ontario Inc sought to build a road over these claims, which had been staked in a linear fashion, to accord with Canada Chrome Corp.'s aim of building a railway. To obtain the right to build on those claims, 2274659 Ontario Inc. applied to the Minister of Natural Resources under s. 21 of the *Public Lands Act*, for a disposition of the surface rights over portions of the appellant's claims. It also sought an easement over Crown lands to permit it to build the road. When the consent of the mining claim holder was refused by Canada Chrome Corp., the application was referred to the Mining and Lands Commissioner (presently, the Ontario Land Tribunal) for an order pursuant to s. 51(2) of the *Mining Act* dispensing with consent. According to this provision, if the holder of an unpatented mining claim does not consent to such a disposition, the consent of the unpatented mining claim holder may be dispensed with after a reference to and hearing by the Mining and Lands Tribunal (also now the Ontario Land Tribunal).

The court found that the Canada Chrome Corp.'s proposed railway was not to be used to extract minerals from the claims themselves but rather, to permit the development of a mineral deposit farther away from the location of the claims, and thus it was not a surface right for which could claim a priority under section 51(1) of the *Mining Act*.

(d) Land Notices - Notice of Cautions

A Notice of Caution is a form of land notice that can accompany a "cell claim." This is a tool available to MNDM that is short of a withdrawal, but can serve to discourage staking by proactively disclosing risks to companies who choose to stake in this area.

As defined in the *Mining Act*, a "cell claim" is a "mining claim, other than a boundary claim, relating to all of the land included in one or more cells on the provincial grid."[131] In cell areas where one or more First Nations have asserted Aboriginal rights or title or in cell areas where the claims are subject to ongoing litigation, a Notice of Caution may be issued.

A Notice of Caution will appear on the Mining Lands Administration System and are listed alongside other withdrawal notices, here. As the MNDM advises in the Notice of Caution for the Northern Lake Superior Region:

> Future exploration, development and related activities in this area may be subject to heightened Crown consultation and accommodation obligations.
>
> Before you register a mining claim on this cell or expend funds in connection with potential mineral exploration activities, you are encouraged to obtain independent legal advice regarding any possible effect this litigation may have on your potential rights under the Mining Act and your commercial interests.[132]

Case Study:
Kitchenuhmaykoosib Inninuwug (KI) Land Withdrawal

In 2006, the Kitchenuhmaykoosib Inninuwug (KI) First Nation's battle against Ontario to have the province and mining project proponents respect KI's jurisdiction and traditional territory gained national prominence. Since then, KI has managed to protect 23,000 km2 of land from mining exploration.

KI is a remote First Nation community of roughly 1300 people located on the shores of Big Trout Lake and on the margins of the Hudson Bay lowlands, and a part of the Treaty 9 adhesion. KI began facing struggles when their sacred lands and spiritual sites "...were being staked and drilled in an extensive Canadian mining boom fueled by recent finds of diamonds and record high prices for gold, platinum, uranium, base metals and nickel."[133] Due to Ontario's "free entry" legislative framework, Crown lands are open for mineral exploration unless specifically withdrawn.[134]

Following the trilogy of decisions at the Supreme Court of Canada (SCC) - the *Haida Nation* and *Taku River Tlingit* decisions in 2004, and the *Mikisew Cree* decision in 2005 - "consultation" became a recognized duty based on the honor of the Crown.[135] Accordingly, consultation required the Crown to consult with Indigenous communities or nations when the Crown had real or constructive knowledge of the potential existence of an Aboriginal or Treaty right or interest, and contemplates conduct that might adversely affect it. As legal scholars remarked at the time, "The duty required consultation with the affected Aboriginal people that went beyond simply talking to substantially addressing Aboriginal concerns by adopting appropriate accommodation measures."[136]

According to a piece written by David Peerla, the political advisor to KI, titled "*No Means No: The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty*," KI was empowered by the legal victories of the SCC trilogy and "angered by the glacial pace of change in the Ontario government's consultation approach and worried by the rapid influx of mining "intruders" on their lands".[137]

In October 2005, five First Nations in Treaty 9 including KI "declared mining exploration moratoriums affecting 5 million hectares of land in Ontario's Far North."[138] KI had previously declared a moratorium on mining exploration, park creation and all other Ontario land dispositions in 2000.

Despite the moratorium, in 2006, Platinex Inc. - a junior exploration company in Ontario that had set up a drilling camp on KI's traditional territory and in the headwaters of Big Trout Lake- launched a case against KI seeking injunctive relief from disruption by KI community members.[139] Although KI had advised Platinex of the moratorium which would remain in place until proper consultation leading to consent had occured, "Platinex made public its mining application on the TSX Venture Exchange and represented that the KI First Nation had "verbally consented" to low impact exploration."[140]

In February 2006, the Chief and Council of the KI First Nation wrote to Platinex that members of their community were committed to stopping exploratory drilling in the area, and many had gone to the drilling camp to protest.[141] Platinex and KI First Nation then both sought injunctive relief, with Platinex filing an injunction to seek a permanent court order preventing any interference from KI with the drilling program as well as $10 billion in monetary damages.[142]

In June 2006, KI also brought a constitutional challenge against Ontario's *Mining Act*, claiming that the Act failed to prioritize Aboriginal and Treaty rights.[143] The Ontario Superior Court of Justice held that Platinex had known since 2001 that the KI was not consenting to further exploration, and that the actions of Platinex were "disrespectful" of the First Nation's interests.[144] Ultimately, on July 27, 2006, KI succeeded in having an interim injunction granted and Platinex lost its bid to begin the drilling project.[145]

In its decision, the Court emphasized that the loss of traditional lands could constitute irreparable harm and that no amount of money could compensate for this loss.[146] The Court ordered that Platinex be enjoined from engaging in exploration in the area for five months, conditional upon KI creating a "consultation committee" to meet with Platinex and the provincial Crown with the objective of developing an agreement with Platinex.[147]

With no resolution resulting from the consultation, and Ontario being added as a party to the injunction in 2007, the Court imposed the consultation protocol and memorandum of understanding agreements and ordered that Platinex could access their property beginning on June 1, 2007.[148]

In 2007, then Chief Donny Morris and five councilors, including grandmother Cecilia Begg, were jailed for contempt of court by defying the injunction to cease obstructing Platinex's explorations.[i] This led to a national outpouring of social movement support for KI, protests, a peaceful occupation of the Queens Park lawn, and dozens of national media stories. In May 2008, the "KI 6" appealed to the Court of Appeal, and were released after serving half the initial sentence of six months in jail.[150] In June 2008, Ontario agreed to revise the *Mining Act* and begin law reform consultations.[151]

After continuously being denied access to KI territory, Platinex resorted to the litigation process it initiated with Ontario in May 2008. Following three more years of disputes, in December 2009, MNDM announced that an agreement had been finalized between the province and Platinex to settle the litigation against Ontario and KI.[152] This agreement included a $5 million payment to Platinex upon the release of its mining claims in the KI traditional territory and the guarantee of a royalty of 2.5% of any future resource revenues from those lands.[153]

However, KI's fight to protect their traditional territory continued. In 2009, God's Lake Resources Inc (GLR), another junior exploration company, acquired permits to explore areas of promising gold-bearing ground near Sherman Lake in KI territory.

GLR commenced exploration in the summer of 2011, following which KI issued an eviction notice. At this time, KI and allies began mobilizing to further stop exploration activities.[154]

To ward off a protest planned for the Prospectors and Developers Association Conference (PDAC) in Toronto, among other factors, then MNDM Minister Rick Bartelucci announced in March 2012 that 23,000 km of KI traditional lands would be withdrawn from mineral exploration. [155] Shortly after, Ontario announced it would pay $3.5 million to GLR for surrendering its mining lease and claims. [156]

The hard-won success of KI in ultimately having the Minister issue a withdrawal order, was accompanied by the reform of the *Mining Act* in 2009, which sought to increase consultation with Indigenous groups and communities. Effective November 1, 2012, the amended *Mining Act* requires consultation with First Nations to occur before obtaining mining exploration permits .[157]

It is important to note that while the courts ordered KI to allow mining exploration by Platinex, and even jailed KI leaders, the First Nation was able to win very significant victories through the strength and perseverance of their people, effective alliance building, media outreach, public demonstrations, political pressure, and on the ground land defence.

2. Disposition of Lands under the Public Lands Act

The MNRF can also request MNDM to withdraw lands from claim registration if MNRF program interests, require public lands to be protected from disposition under the *Mining Act*.[158] "Disposition" according to the MNRF's *Application review and land disposition process policy* means the "granting of property (e.g. freehold or leasehold title) or personal rights (e.g. land use permit) to public lands, as defined and described in this policy and its accompanying procedure."[159]

If an application is received for disposition of public lands under the *Public Lands Act* (PLA), and those lands are not situated on a pre-existing registered mining claim, the MNRF provides it is unnecessary to withdraw the lands from mining claim registration as applications under the *PLA* take automatic priority over any subsequent registration of a mining claim with respect to the surface rights.[160] The MNRF is also obliged to inform the Mining Recorder for the pending disposition as soon as possible.

3. Forest Management Planning

Forest Management Planning ("FMP") occurs in areas that are designated as "General Use" under the *Public Lands Act* and which are part of the Area of Undertaking (see **Images 4** and **6** below). Ontario, with the exception of the Far North, Southern Ontario, and existing Crown Protected Areas, is divided into geographic planning areas for forestry, known as forest management units ("FMU").[161]

Generally, these are areas where the province has chosen to allow extensive industrial logging. The FMP process is generally dominated by industrial logging interests and is focused on the outcome of providing large wood supplies to industrial wood products mills through industrial logging. As illustrated in **Image 4,** below, each forest management unit is subject to an FMP which outlines the unit's management objectives over a ten-year period.

The FMP planning process is overseen by the Ministry of Northern Development, Mines, Natural Resources, and Forestry (MDMNRF). According to the *Crown Forest Sustainability Act*, each FMP is to have regard for plant life, animal life, water, soil, air, and social and economic values. Each FMP also contains a long-term management direction ("LTMD") that is meant to balance objectives related to forest diversity, socio-economics, forest cover, and silviculture.

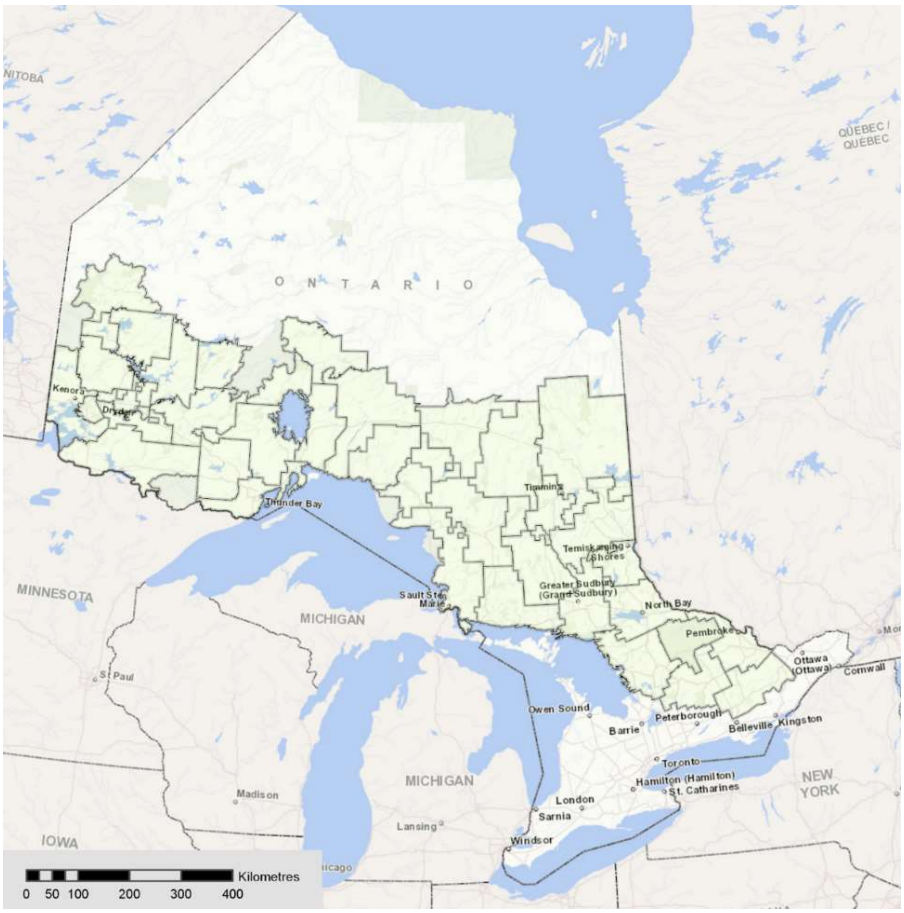

Image 4. Map of Forest Management Units in Ontario[162]

An FMP is prepared by a plan author, who is a Registered Professional Forester, that works for the licence holder of the FMU. The licence holder is normally a regional forest products company, but in rare instances it is the Crown. The plan author works with the assistance of an interdisciplinary planning team and Local Citizens' Committee ("LCC"). An FMP is approved when the MNRF Regional Director is "satisfied that the plan provides for the sustainability of the forest, and that all identified concerns have been addressed."[163]

There are five formal public consultation opportunities/stages in the preparation and approval of the FMP as follows:

1) Invitation to participate.
2) Review of the long-term management direction
3) Review of proposed operations.
4) Review of draft Forest Management Plan.
5) Inspection of approved Forest Management Plan.

At each of these stages, the public including First Nations are invited to comment. In making comments, strategic management zones, AOCs and values requiring protection, described above, could be set out and requests documented. At each stage a First Nation or person may also request issue resolution. First Nations have a right to develop a "custom consultation plan" with the NRF if they want to be consulted through a different process.

Despite what may appear as a detailed and prescriptive review, the FMP process very rarely leads to short or long-term measures that are consistent with common IPCA goals such as prohibiting industrial logging on a significantly sized area, or promoting small scale deeply sustainable, community-led, high value added forest products. Those IPCA outcomes usually require changing Crown Land Use Designations (see below).

That said, in the context of provincial forest management planning practices, there are two limited means which can potentially aid in the temporary safeguarding of areas with significant ecological or cultural value:

1. Identifying a site as an **Area of Concern**
2. Seeking a **Strategic Management Zone**

While both mechanisms are reviewed below, it is critical to note that they are both ineffective at providing ecosystem or watershed-level protection and at best, provide piecemeal and temporary safeguarding of smaller areas of land.

Strategic Management Zones

Early in the forest management planning process, it is possible to identify Strategic Management Zones (SMZ). While these are most often ecologically driven, such as "Caribou emphasis areas", this tool can be used in rare circumstances to define large areas of an FMU that will not be subject to harvest, or other forest management activities, for the duration of the Forest Management Plan. There are precedents for this being done as an interim protection measure in the context of conflict over logging with First Nations, or in the context of an unresolved land claim, in Ontario. However, **SMZs are rare, and generally require the First Nation to develop significant leverage through legal or social movement work.**

Areas of Concern

In accordance with the provincial Forest Management Planning Manual, FMPs can contain 'operational prescriptions and conditions,' such as operational prescriptions for Areas of Concern (AOC).

An **Area of Concern** is:

> A defined geographic area associated with an identified value that may be affected by forest management activities. Identified values are known natural, cultural or First Nation or Métis resource attributes or uses of land, including all lakes and streams, which must be considered in forest management planning.[164]

A **value**, according is defined as:

> A term used to describe known natural, cultural or First Nation or Métis resource attribute or use of land, including all lakes and streams, which must be considered in forest management planning.[165]

The public and Indigenous communities can identify AOCs so that values can be potentially accommodated. Values may be identifiable as a 'point' (ie. a raptor nest or bat hibernaculum) or a 'polygon' (ie. a stand within the forest, or a stream). The type of values that could be identified are also far ranging and could include tourism, heritage, recreational, visual aesthetics, ecological features (ie. old growth forests), Indigenous and Metis values. AOCs are marked on an FMP's operational planning maps unless the disclosure of the value would be detrimental to its protection (i.e. disclosure of a location of endangered turtles or a sacred site).

The aim of an operational prescription for an AOC is to prevent, minimize, or mitigate adverse effects of forestry operations on the value(s) identified within the AOC.[166] AOCs may include reserves of land where there are prohibitions on operations and documentation regarding AOC's and accompanying operational prescriptions and conditions are to be set out in the FMP. The operational prescription for the AOC is to be implemented in the actual location of the value.

It should be noted, however, that AOCs are generally small in nature, such as a 100m buffer around the nest or den of a species of concern, and are only applied to known values. For example, there is no proactive duty within the law for an area to be searched for archaeological sites or wolverine dens before it is logged. The MRNF will

only have an AOC applied if they are marked on a map in advance, or if they happen to be found in the course of forestry operations. As such, AOCs are not an effective tool for protecting areas at the landscape or ecosystem level, and cannot be relied on to protect point values that are not previously documented.

If new values arise during the 10-year span of the FMP and operational prescriptions already exist, there is the potential to request an amendment to the plan. Requests can be made by any person, in written to their MNRF district manager. The amendment request must contain:

1) a brief description of the need for, and nature of, the proposed amendment;
2) the rationale for the proposed amendment and a discussion of its significance; and
3) if new operations are proposed:
    a) a brief description of the proposed operations, and a description of the previously approved operations in the FMP or contingency plan that will be changed by the proposed amendment; and
    b) an outline of the applicable planning requirements for the proposed operations, including any public consultation and First Nation and Métis community involvement and consultation, based on the planning requirements for similar operations in a FMP.[167]

The amendment request is then considered by the MNRF district manager and the local citizens' committee for the designated forest management unit.[168]
Comment Opportunities

4. Amendments to Crown Land Use Designations

Crown land use designations in Ontario, with the exception of the Far North, are documented in the *Crown Land Use Policy Atlas.*[169] Crown land planning is conducted pursuant to the *Public Lands Act*. Crown land planning assigns designations to specific areas of land and establishes permitted uses.[170]

As reviewed in more detail above in the Introduction – *Public Lands Act* section, there are six primary Crown land use designations:

- Recommended Provincial Park
- Recommended Conservation Reserve
- Forest Reserve

- Provincial Wildlife Area
- Enhanced Management Area (five categories)
- General Use Area

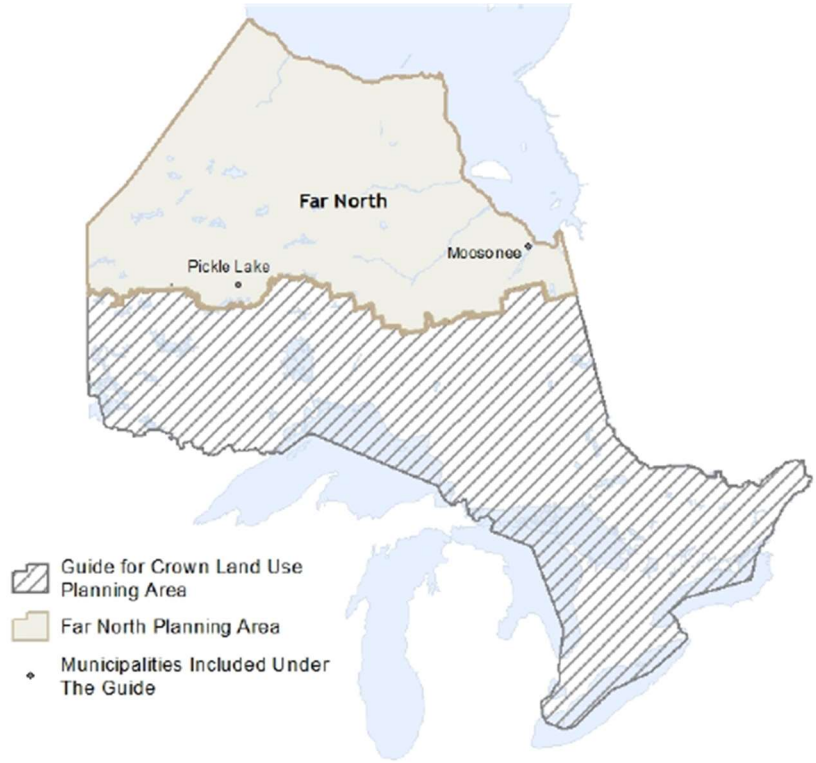

Image 5. Crown Land Use Planning Areas

Table 2 above also reviewed each of the land use designations and permitted activities. In summary, recall that the 'Recommended Provincial Park' and 'Recommended Conservation Reserve' designations generally prohibit extractive industries like mining and forestry; Forest Reserves while also restrictive, are a historic land designation no longer in use; Enhanced Management Areas do not have prescribed permitted uses but are often accompanied by policies set out in fish and wildlife regulations (ie. hunting and fishing); and General Use Areas are the most expansive land use type in the province – where all kinds of industry, including logging, mining, damming, nuclear waste storage, etc. are permitted.

For most of Ontario outside of the Far North and Southern Ontario (known as the Area of Undertaking, see **Image 6** below), the province completed a land use planning process called Lands For Life from 1997 - 1999. This led to a modest increase in the protected area network in Ontario with a goal of reaching 12% of the land base, while cementing

the designation of other 88% of the Area of Undertaking as General Use and open to industry.

While conventional conservation NGOs, industry, and municipalities were extensively involved, most First Nations were largely overlooked. **Ontario continues to use the land use designations made during this process and has not shown a political interest in entertaining changes to these designations. This is a currently a major barrier to Crown recognition of IPCAs in this part of Ontario.**

In the Far North part of Ontario, the *Far North Act* provides a mechanism for First Nations to engage in a land use planning process with Ontario, where both parties must agree on land use designations and where new protected areas can be identified. This provides more flexibility in setting land use designations and in defining First Nation priority areas as protected from industry. There is also a mechanism for First Nations to request a withdrawal of unencumbered lands within large planning areas from mining activity during land use planning processes. While some First Nations have made use of the *Far North Act*, many have pointed out that it was imposed on First Nations by the Crown, does not recognize First Nations jurisdiction, and the Minister retains final discretion.

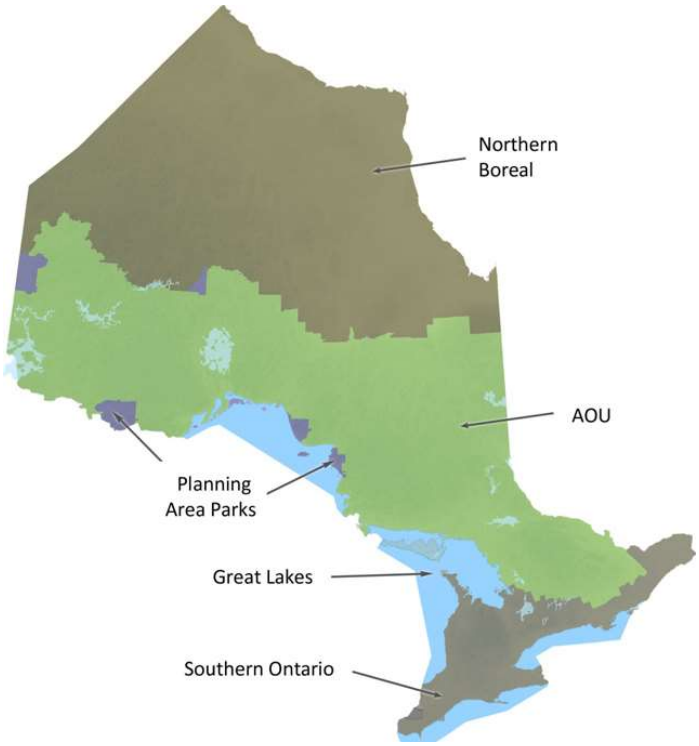

Image 6. Map of 'Area of the Undertaking' setting out where forestry practices can occur in Ontario (Source: online)

Requesting a Change to Land Use Designation

Within the Crown land use planning area (see **Image 5** above), members of the public or an Indigenous nation can trigger an amendment to area-specific land use designations. However, as noted above, securing a change in land use designation is very difficult due to a current lack of political will. That said, requests for a land use designation change can be made in writing to the appropriate MNRF office and must include:

- a brief description of the proposed amendment, including a location with map;
- any partners in the amendment proposal;
- the rationale for the amendment; and
- a discussion of the amendment's significance and implications.[171]

The amendment request is then subject to an initial screening considering whether the proposal is consistent with broader government policy, and if the issues raised fall within the scope of Crown land use planning area are urgent and have a high degree of public interest.[172]

In setting out the policy reasons favouring a change, for instance to a Recommended Protected Park or Recommended Conservation Reserve for the purposes of establishing an IPCA, see this toolkit's resource in Part 4 which illustrates a number of commitments and comments made by the provincial government in support of protecting lands and the environment. These can be helpful in framing your complaint and the rationale for government intervention.

If a decision is made to proceed with the request, the requester will be notified and then, the MNRF becomes the "custodian" of the amendment and responsible for the final decision. In making a decision on the proposed land use amendments, the government is required to consult with Indigenous communities.[173]

According to the government's Crown land use planning guide, a need for interim protection may arise especially where there are proposals for Recommended Provincial Park or Recommended Conservation Reserve. Accordingly, these land use designations may be relied upon to temporarily prohibit activities that could limit future land uses (ie. forestry, road construction, aggregate extraction), while the land use amendment request is undergoing review.[174]

5. Land Cautions

A caution is a legal mechanism that allows parties' interest in land to register an encumbrance on title. The registration of a caution on title can serve two overarching purposes: cautions provide of one's interest in a property and can prevent the registered owner from dealing with the property subject to the caution for a limited period. A caution is a helpful short-term mechanism to give notice of an interest in a property, while harmful for a seller because the property cannot be conveyed unless the caution is removed.

There are two means of seeking a caution under the *Land Titles Act*; first, under section 71 which is in the context of an agreement of purchase sale and second, section 128 wherein any party with a 'proprietary interest' can register a caution on title. As section 128 cautions are open to anyone with a 'proprietary interest' and not limited to agreements of purchase and sale, they are more relevant in the circumstance and thus are the only type of land caution reviewed in this section.

The *Land Titles Act* provides parties with proprietary interests the ability to register cautions on property.[175] However, such cautions are time limited, cannot be renewed, and will cease to have effect 60 days after the date of registration. Some examples of proprietary interests recognizes in jurisprudence include:

- The interest of a beneficiary under a trust agreement where the beneficiary claims to be entitled to and to have called for a transfer of lands or charge to him/her from the trustee;
- The interest of an optionee under an option to purchase when the optionee has exercised the option;
- An interest that may be protected by way of a caution pursuant to any *Act* of Ontario or Canada.[176]

An application to register a caution accompanied by an affidavit in support of the application are provided to the local Land Registrar office and if approved, are uploaded to the Land Registry.[177] The validity of the registration of the caution depends on whether the cautioner has an interest in the registered land.[178]

Historically, land cautions did not naturally expire after a period of 60 days and in the case study highlighted below, they were utilized by Temagami First Nation to prevent logging, mining and the sale of land. Given that cautions now cease to have effect within 60 days, the courts have remarked that they are "nothing more than notice to

the public of a claim to an interest in land. A caution provides an opportunity for the parties to deal with their differences."[179]

Case Study: Temagami First Nation Land Caution

A historical land caution from 1973 was utilized by Temagami First Nation as a way of asserting a claim to 4,000 square miles of land that they claimed as "n'Daki Menan", their traditional homeland.[180] Temagami First Nation registered land cautions against tracts of Crown land in their traditional land use area.

Unlike today's land cautions which are time-limited to 60 days, the land caution in this case remained in place throughout much of the 1970s and 1980s and it effectively prevented all types of development on Crown land, such as mining, logging, and the sale of land. This was an important part of protecting Temagami's famous old growth red and white pine forests and First Nation's sacred sites.

In 1995, the land caution was lifted when the Supreme Court of Canada found Temagami First Nation's right to the land had been extinguished by the Robinson-Huron Treaty of 1850.[181]

However, the court ordered Canada to enter into land claims negotiations with the Temagami First Nation and a large piece of land around Lake Temagami was set aside as potential future settlement lands which have largely had interim protection from industry and sale. The land claim has yet to be settled.

6. Certificate of Pending Litigation

A certificate of pending litigation ("CPL") is another method to protect unregistered interests in land. Section 103(1) of the *Courts of Justice Act* entitles anyone who has a commenced a proceeding, where an interest in land is in question, to obtain a CPL and have it registered against the title.

While CPL's do not create an interest in land, they serve as notice to non-parties of the claim asserted and to developers, may indicate a riskier environment for investment. Courts have held the effects of a CPL can include:

- As an injunction, preventing the owner from exercising 'incidents of ownership,' as prospective purchasers or lessees will not undertake to assess the merits of a pending lawsuit or predict on the basis of incomplete information how a Court at some future date is likely to assess the plaintiff's claim on the basis of evidence then available.
- As a grant to the person filing the certificate, an exclusive option to acquire the land as they alone need not be concerned with their own claim.
- A kind of preventative execution, ensuring that the owner continues to own the land so that it is available to satisfy any judgment in an action.[182]

There is a two-step test to obtain a CPL. The first step requires there be sufficient evidence to establish a reasonable claim to an interest in the land, that could succeed at trial. The threshold for demonstrating a triable issue is low. The second prong of the test requires consideration of the equities between the parities, and the appropriateness of granting the order.[183]

Interests in land have been found in situations including where there was an:

- Oral acceptance of a signed written offer to purchase[184]
- Alleged breach of fiduciary duty giving rise to equitable interest in land; entirely possible that order for restitution would be granted at trial[185]
- Action to set aside a fraudulent conveyance.[186]

The court has broad discretion to discharge a CPL including any ground 'considered just.'[187] On a motion to discharge a CPL, the onus is on the moving party to demonstrate there was no triable issue (ie. no reasonable claim to an interest in the land claimed). Equitable factors the court has considered in discharging a CPL include whether or not

the land is unique, bearing in mind that in a sense any parcel of land has some special value to the owner and the intent of the parties in acquiring the land.[188]

7. Interim Measures based on Indigenous Right to Self-Determination

Currently, there are no IPCAs in Ontario recognized by the provincial government. However, as the IPCA case studies in the introductory Protected Areas section above highlights, many First Nations in Ontario have declared – whether through declarations or moratorium statements – that their territory is protected pursuant to their inherent law, and industrial activities, like forestry and mining are prohibited.

Thus, in reviewing the range of Crown-law based interim measures which can considered, First Nations can and have also use their inherent right to self governance to:

- issue moratoriums or declarations protecting lands and water
- pass a Band Council Resolution upholding these statements
- issue eviction notices

In many instances these efforts have been effective, when backed up by legal, grassroots, and social media action by the First Nation. These efforts are also tangible ways Indigenous nations can demonstrate to the Crown, their community's support for the assertion of an IPCA.

[109] *Mining Act*, RSO 1990, c M 14, s 35 [*Mining Act*]; *Public Lands Act,* RSO 1990, c P 43 [*Public Lands Act*]

[110] Government of Ontario, MNDM POLICY: *Sites of Aboriginal Cultural Significance-Withdrawals and Surface Rights Restrictions*, p 2 [Aboriginal Culture Site Policy]

[111] *Mining Act*, s 35

[112] Including: *O Reg 45/11 General* and the *Sites of Aboriginal Cultural Significance – Withdrawals and Surface Rights Restrictions* policy.

[113] *Ibid,* s 35(3)

[114] 35(4.1) and (4.2)

[115] http://www.geologyontario.mndm.gov.on.ca/mines/lands/withreop/default_e.html

[116] *Mining Act, supra* note 109, s 35(2)(a)

[117] *O Reg 45/11*: GENERAL s9(10), s 9.10

[118] O Reg 45/11 General, s 9.10

[119] Aboriginal Culture Site Policy, *supra* note 110*,* at II.

[120] *Ibid,* p 8

[121] Joan Kuyek, *Unearthing injustice: how to protect your community from the mining industry* (2019) Toronto: Between the Lines, p 17

[122] *Mining Act, supra* note 109, s 51(1)

[123] *Ibid,* s 35(3)

[124] *Ibid*

[125] Aboriginal Culture Site Policy, *supra* note 110, p 8

[126] *Ibid,* p 4

[127] *Ibid,* p 9

[128] 2274659 Ontario Inc. v. Canada Chrome Corp., 2014 ONSC 4446 (Div. Ct.) [*Canada Chrome*]

[129] *Canada Chrome, supra* note , para 60

[130] *Ibid,* paras 49, 94

[131] *Mining Act*, *supra* note 109, s 1

[132] Government of Ontario, MNDM, *Land Notices: Northern Lake Superior Region, Notice of Caution* (16 Dec 2020)

[133] Julius Strauss, *Stakes are high as miners and natives square off*, Globe and Mail (Canada), February 2006

[134] David Peerla, *No Means No: The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty,* December 15, 2012 [No Means No].

[135] *Ibid,* p 1

[136] Christie, Gordon, *Developing Case Law: The Future of Consultation and Accommodation*, University of British Columbia Law Review 39, March: 139-184 (2006)

[137] No Means No, *supra* note 134, at 1

[138] *Ibid*

[139] *Ibid*

[140] Scott Kerwin, *Analysis of Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation case,* Miningwatch Canada, (2006) [Kerwin]

[141] *Ibid*

[142] No Means No, *supra* note 134, p 2

[143] Miningwatch Canada, *Ontario Attacks Aboriginal and Treaty Rights in Kitchenuhmaykoosib Inninuwug (KI) Litigation* (Jan 2007)

[144] Kerwin, *supra* note 140

[145] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CarswellOnt 4758, [2006] OJ No 3140 [Platinex v KI]; see also *No Means No, supra* note 134, p 2

[146] Platinex v KI, supra note 145, at para 79; see also Kerwin, *supra* note 140.

[147] *Ibid,* para 138.

[148] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 3553, [2007] OJ No 2214 [Platinex v KI 2007].

[149] No Means No, *supra* note 134, p 3

[150] Miningwatch Canada, *KI Achieves Protection for 23,000 Square Kilometres; Ontario Makes Another Multi-million Dollar Buy-out* (June 2012) [MiningWatch].

[151] *Ibid*.

[152] No Means No, p 5

[153] Government of Ontario, *Ontario Resolves Litigation Dispute Over Big Trout Lake Property,* December 2009

[154] Anderson, *Mining and Aboriginal Rights in Ontario,* York University

[155] Cecilia Jamasmie, *Ontario pays God's Lake Resources $3.5 million for surrendering mining lease,* March 2012

[156] MiningWatch, *supra* note 150

[157] McInnes Cooper, L*egal Update: The Duty to Consult – Important Lessons from Canada's Mining Sector*, March 2013

[158] Government of Ontario, "*Withdrawal and reopening of surface and/or mining rights - procedure*" [Lands Withdrawal]

[159] Government of Ontario, "*Application review and land disposition process policy*"

[160] *Ibid*

[161] Government of Ontario, "*Management Units and Forest Management Plan Renewal Schedules*" [Forest Management Plan]

[162] Government of Ontario, "*How to get involved in forest management"* (2021)

[163] Ministry of Natural Resources, "*Help Shape the Future of Our Forests*" (2012), p 2

[164] Government of Ontario, "*Forest Management Planning Manual"* (May 2020), p A-53

[165] *Ibid*, Glossary-22

[166] *Ibid,* A-54

[167] *Ibid* C-6

[168] *Ibid*

[169] Government of Ontario, "*Crown Land Use Policy Atlas*" (2021)

[170] Government of Ontario, *"Crown land planning"* (2021)

[171] Government of Ontario "*Guide for Crown land use planning"*, s 5.2

[172] *Ibid*

[173] *Ibid*

[174] *Ibid*, s 10.0

[175] For section 128 land cautions, *see* form, online: https://files.ontario.ca/application_to_register_caution_under_subsections_128_1_and_2_of_the_land_titles_act.pdf

[176] Service Ontario, "*2000-2 Cautions under Section 71 and 128 Land Titles Act"* (2000)

[177] For application, see https://www.ontario.ca/land-registration/application-register-caution-under-subsections-128-1-and-2-land-titles-act

[178] *Pereira v. Quatsch*, 2013 ONSC 1158, para 22

[179] Dong v. Liu, 2008 CanLII 8609 (ON SC), para 66

[180] Ministry of Aboriginal Affairs, "*About the Temagami Land Claim*" Archive (2012)

[181] *Ontario (Attorney General) v. Bear Island Foundation,* [1991] 2 SCR 570

[182] *Queen's Court Developments Ltd v Duquette*, [1989] OJ No 3039, para 15

[183] *Lo Faso v. Ferracuti*, [2012] OJ No 1460, 18 RPR (5th) 250 (Ont SCJ)

[184] *Petrela v. Denney*, [1989] OJ No 1234, 38 CPC (2d) 107 (Ont HCJ); *Paquette v. Smith*, [1989] OJ No 1234, 70 OR (2d) 449 (Ont HCJ)

[185] *Davidson v. Hyundai Auto Canada Inc.*, [1987] OJ No 2622, 59 OR (2d) 789 (Ont Master)

[186] *Bank of Montreal v. Ewing*, [1982] OJ No 3120, 35 OR (2d) 225 (Ont Div Ct); *Keeton v. Cain*, [1986] OJ No 2978, 57 OR (2d) 380, 14 CPC (2d) 150 (Ont SC)

[187] *Courts of Justice Act,* RSO 1990, c C43, s 103(6)

[188] *572383 Ontario Inc. v. Dhunna*, [1987] OJ No 1073, 24 CPC (2d) 287 (Ont Master).