PUBLIC MEETING ON HUMAN RIGHTS IN THE CANADIAN MINING SECTOR

University of Ottawa, November 21, 2009, FTX 147

Sponsored by the Environmental Law Group, The Human Rights Research and Education Centre, the Faculty of Law – Common Law Section and the IUCN Academy of Environmental Law with the support of the University of Ottawa and the Social Sciences and Humanities Research Council

INTRODUCTION

In November 2006, the Canadian government completed a series of National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries. The roundtables Advisory Group, composed of members from the private sector, academia and NGOs produced a consensus report released in March 2007. The report recommended to the Canadian government the adoption of a comprehensive CSR framework including voluntary standards, reporting guidelines and an accountability mechanism. In March 2009, the Canadian government released its response, rejecting the bulk of the Advisory Group's recommendations and leaving unsettled the question of CSR norms for Canadian companies operating outside Canada.

Such debates about the conduct of Canadian mining corporations overseas are often premised on the notion that Canadian practices "at home" are in compliance with Canada's international human rights (including environmental human rights) obligations. A workshop was held the day before – on November 20th – to bring together a small group of experts in mining law, environmental law, indigenous peoples' rights, international human rights, corporate social responsibility, and community managed natural resource development to identify and critically assess the extent to which Canada's domestic multi-jurisdictional mining and environmental statutes are consistent with its international human rights obligations. This Public Meeting was designed to provide an opportunity for members of interested civil society groups, representatives from government departments, students, and members of the public to discuss these findings with the Workshop participants. Videos of the Workshop and the Public Meeting are available online.

The public meeting was structured around four key questions:

1. How can mining legislation achieve reconciliation between aboriginal Canadians and the rest of Canada?

2. Participatory rights in the mining process: What should they be and when (in the mining process) should they "kick in"?

3. Environmental human rights in the Canadian mining regime: Should there be an environmental "bottom line"? (*i.e.* should projects that cause specified environmental harms simply be prohibited?)

4. Uranium mining: should Ontario follow the BC lead and institute a moratorium?

Questions 1 and 2 were discussed in the first half of the meeting and questions 3 and 4 in the second half. Participants were divided into several small groups, and each group discussed one of the two questions. After the small group discussions, all of the participants reconvened and each group shared its findings. This was followed by a general discussion.

The following report summarizes the issues, insights, and recommendations that were elicited during discussions. It should be noted that these recommendations were not put to a vote and should not necessarily be considered to represent the view of all participants. It should also be noted that the summary does not necessarily follow the chronological order of meeting. Rather its structure is based on topic of discussion.

Joseph Castrilli – Ontario Mining Act

Joseph Castrilli provided the meeting participants with some background information about the Ontario Mining Act.

History

The province of Ontario has had mining legislation since 1873. Historically, the purpose was to facilitate exploitation of natural resources.

In 1906, Ontario introduced the free entry system which was intended to increase settlement and mining in "frontier lands". Free entry meant four things:

- the right of prospectors to enter crown owned lands and explore for minerals
- the right to acquire mineral exploration rights by staking or claiming
- the right to exploit in a claim area
- the right to obtain a mining lease

This system has been the source of land use conflicts, and particularly in more recent times.

New Act

The new *Ontario Mining Act* was introduced in October 2009. The regulations for this Act are to be developed in 2010.

The provision of the new Act, which sets out the purpose of the legislation, recognizes for the first time aboriginal rights.

The *Act* amends the former mining legislation with respect to prospecting, staking, exploration, disputes between surface and landowners, and consultation with aboriginal communities. However, the core characteristics of the free entry system remain intact. Thus, while some exploration will require consultation with aboriginal communities the content of this requirement of consultation has yet to be worked out in the regulations. The amendments create a new dispute resolution process for aboriginal communities. In addition, in Southern Ontario, the Act removes lands for which there is a surface rights holder and the mineral rights are held by the Crown, are deemed to be removed from prospecting, staking, sale and lease. In Northern Ontario such lands may be withdrawn by Ministerial order. In both cases, however, pre-existing rights are not affected and applications can be made to reopen such lands. Overall, the transparency of, and public participation in, the various stages of the mining process have been somewhat improved but not to the extent expected in legislation that largely has remained unchanged for a century. Aboriginal communities will still confront mining operations where there are no obligatory joint decision-making, profit sharing or consent processes.

Professor Lynda Collins

Professor Collins provided meeting participants with a general overview of what was discussed in the workshop on the previous day.

The purpose of the workshop was to measure and assess Canada's domestic performance in human rights against its obligations under international law. The rights at issue are traditional human rights (civil and political rights, and economic, social and cultural rights), as well as and less traditional human rights (such as environmental human rights). All of these rights have been impacted in Canada; for example, when consultation happens too late (See Workshop Report for a full summary of the proceedings).

DISCUSSION IN GROUPS – FIRST ROUND

1. How can mining legislation achieve reconciliation between aboriginal Canadians and the rest of Canada?

Some of the issues identified:

- it may not be possible to create reconciliation through legislation. One reason for this is that historical imbalances need to be addressed in order to achieve reconciliation.
- There is an institutional imbalance between the mining industry and other people with interests in land.
- There is inequality in land use planning, in that mining companies have the power to drive the agenda rather than communities (aboriginal and non-aboriginal).
- Challenges arise because of overlap between federal and provincial jurisdiction.

Recommendations:

- Aboriginal peoples should be given equal say in the drafting of new mining regulations in Ontario, including regulations that might shape dispute resolution mechanisms.
- In the Ontario *Mining Act*, there should be recognition of aboriginal conceptions of land, perhaps in the definition section. This might facilitate addressing aboriginal concerns because it would affect the interpretation of the *Act* itself.
- The legislation should require:
    - greater accountability of decision makers,
    - free, prior, informed consent of aboriginal peoples, and
    - that domestic legislation be linked with international instruments [such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)]
- Environmental groups should be given better standing rights.
- Aboriginal groups should be given priority in the staking process, like a first right of refusal.
- Mining operations should be subject to environmental assessments (EAs).

2. Participatory rights in the mining process: What should they be and when (in the mining process) should they "kick in"?

Insights:

- A distinctive issue in the mining sector is that it involves a range of activities at different stages, each of which might reasonably engage participation.
- There is an overlap between federal and provincial environmental assessments and different requirements.
- There is corporate discontinuity in the mining sector because those active in the mining stage will not necessarily be the same entities who are involved in subsequent stages.
- There are regional variations of land use planning in Ontario.
- The nature of consultations can be problematic:
    - The content of information available in the process is sometimes lacking in quality and quantity
    - There are often questions of who represents whom.
    - There should be some sort of accountability for the way that participation/consultation contributes to the outcome.
- One perspective to keep in mind is that mining sometimes occurs in areas where the natural balance has already been disturbed and communities are dependent on industry.
- Opportunities for participation exist outside the framework of mining legislation, specifically in the investment of money through pension funds and the like.

Recommendations:

- The public should be able to intervene at earlier stages of the mining process; this is not possible under the present legislation.

    - The public are usually brought in once industry and government have decided on how to proceed.
- The preambles of the *Act* should be changed to encourage aboriginal and public participation, particularly of aboriginal communities.
- Mining proponents should provide information to the public.
- Mining proponents should provide funds for independent advice to assist the public's participation in consultation.
- There should be province-wide best practice standards for land use planning, rather than a patchwork of regional standards.

Once all of the groups had presented, Joseph Castrilli summarized some of the recommendations and also briefly discussed the way that environmental assessment (*EAs*) *are conducted for mining operations in Ontario.*

Recommendations:

- The *Environmental Bill of Rights* should be applied to approvals issued under the mining act (with respect to third party appeals and notice and comment provisions)
- Individual EA requirements should be applied to mining activities, and
- There is a need for more provincial funding in order to help the public participate in these processes (such as intervenor funding).

EAs for mining in Ontario:

- While the Ontario *Mining Act* was being amended, there was discussion in the Legislature about having EAs applied to each mine individually.
- An individual assessment is different than the class assessment approach which only involves one full assessment for the industry in a region, followed by very "thin" version of that assessment being applied to every new project.
- Class assessments are normally done in the province, but Mr. Castrilli suggested that these are not successful and the best way to evaluate a project is by a full-blown EA.

OPEN FLOOR DISCUSSION

The following observations and recommendations were made by a variety of participants.

One participant was of the view that there is too much focus on process. This acts as an impediment to meaningful debate and it brings in a certain *class* of people that have the ability to participate in those processes.

The same participant also suggested that the consultation system fails at the stage of developing legislation.

- There needs to be a broad level public discussion about the principles and values at issue, and how these are translated into legislation.
- Without such a discussion, the public consultations will be meaningless; consultation under flawed legislation is meaningless.

- For example, the purpose section of the *Mining Act* currently establishes the perimeters for public consultation by saying that the purpose "is to encourage prospecting, staking and exploration for the development of mineral resources." Consultation will therefore be about how to do this rather than *whether* to do this. The *Act* needs to recognize more of a social and ecological context in its purpose before meaningful debates can occur.

A similar problem has been identified specifically with respect to the consultation of aboriginal communities. The Crown usually has a vision on how to proceed in these cases and then goes to the community, and asks how it can be accomplished together. Professor Christie has used the following helpful analogy: it is like the government breaking into your house, sitting down, and asking your opinion about how to use your living room.

Part of the problem with consultations is that communities do not have the option of vetoing a project. Even if a community does not want to prevent the project from going ahead, having the option to say "no" changes the tenor of consultations.

There is a need to look to good examples from around the world to change principles in our legislation. The situation in Nova Scotia was cited as an example where citizens are being consulted in roundtable processes about what amendments they want to see to their mining legislation.

One participant voiced concern that the mining process, and legislation that is inadequately amended, has the potential to harm or set back reconciliation efforts between aboriginal and non-aboriginal communities in Canada. This is especially true where mining companies make promises to non-aboriginal communities before obtaining consent from aboriginal communities.

Finally it was suggested by Professor Collins that only truly non-derogable law is "natural law" (ecological law), so we should try to align human made law with ecological law. Most non-derogable human made law is entrenched in a constitution. Therefore, we should enshrine natural laws in the constitution.

In response to this, at least one participant noted that we should take a step back from law, because it limits who can be involved in the discussion.

DISCUSSION IN GROUPS – SECOND ROUND

3. Environmental human rights in the Canadian mining regime: Should there be an environmental "bottom line"? (*i.e.* should projects that cause specified environmental harms simply be prohibited?)

The unstated consensus during the discussion was that there should be an environmental bottom line. The bulk of the discussions focused on recommendations for how the bottom

line would be identified and measured. The recommendations are organized here by theme.

Recommendations:

- There should be public involvement in the determination of environmental bottom lines:
    - There should be public input into determining whether there is a bottom-line and how deep of a threshold there should be. It is particularly important to have input from the public affected by the impacts.
    - There needs to be public debate and outreach so that a discussion and decisions on higher level principles can be made before the more specific issues are dealt with.

- There needs to be increased industry responsibility:
    - There should be an obligation on mining companies to make the public aware of what is going on and the public needs to be educated about what tools they have to participate in mining decision-making.
    - Funding for assessments should come from mining companies.

- Assessments of mining operations must be more comprehensive and focused on the long term:
    - Every aspect of mining impacts should be assessed: social, cultural, financial, and environmental.
    - "Full cost accounting" principles need to be used when assessing mining activities.
        - This approach values ecological services, like clean water.
        - It should be assessed before a mine is started, to decide whether it should go ahead in the first place (based on social, cultural, environmental, financial, and other considerations).
    - There is a need to take the welfare of future generations into account
        - The assessment should include of an examination of the proposed duration of the mine and its benefits and this should be weighed against the ecological impacts of the mine, including the ecological services that may be permanently destroyed.

- The option of saying "no" to mining must be left open to a community and environmental assessments should include alternatives to mining altogether.

- There should be an increased role for environmental bills of rights:
    - The Ontario *Environmental Bill of Rights* should apply to mining projects in the province.
    - There is a need for a federal environmental bill of rights and such a Bill of Rights should include the four principles of the "Natural Step" (including the precautionary principle).

- The long term viability of mining industry should be protected:

  - The mining sector needs to be responsible for meeting the highest human rights and environmental standards, but the sector must be kept healthy in order to meet these responsibilities.
  - If there is going to be any room for the industry to continue, there should be an independent entity tasked with assessing the repercussions that the industry will have on the environment and human rights.

- Public policy needs to be reframed:
  - Public policy (especially human rights policy) and commercial and trade policy need to be aligned.
  - Human rights should form the basis for all policies, environmental and otherwise.
  - The focus should be on the synergistic effects of manufactured chemicals and their impacts on our lives.

- There is a need to establish concrete environmental bottom lines. For example, no natural water bodies should ever be used for mine waste disposal. Canadian mining legislation could include a bottom line similar to that which has been suggested in the US. The draft bill which will reform the US *Mining Act* includes a clause that requires a mining company to show that the geology of the site and the available technology is such that, ten years post-closure, the mine site will no longer need upkeep. If the company cannot meet this requirement, the mine cannot be opened.

4. Uranium mining: should Ontario follow the BC lead and institute a moratorium?

Reasons for concerns about uranium mining:

- There are long term risks of uranium mining. The wastes from such mining have the potential to last for tens of thousands of years and there are no systems in place to safely manage those wastes over a long period of time.
- There are risks associated with the actual mining. An epidemiological study from Germany found that mining uranium causes lung cancer in miners. In addition, and among other things, there is a risk of contamination with radioactive waste of nearby areas, especially water systems.
- The uses of uranium need to be considered. It is used for the generation of nuclear power, but also for nuclear weapons and depleted uranium is used to fortify conventional ordinance. There has been contamination of conflict zones like Iraq and Afghanistan with depleted uranium.

Moratorium:

- There should be a moratorium on mining uranium in order to provide an opportunity to stop and rethink what the uranium is being used for. Questions that must be asked, include:
  - To whom is the uranium exported?
  - For what uses is it exported?
  - What is it used for in Canada?

- Do we need to mine only a small amount?
- What are the alternatives to uranium? Can we develop other technologies that produce non-carbon emitting energy
- If we refuse to accept uranium mining, does that mean that we have to refuse to rely on nuclear power?

Other suggestions:

- The debates about what uranium is being used for, whether it should be mined, and what will happen to nuclear waste should be undertaken together.
- The analysis of nuclear energy changes significantly if an intergenerational perspective is taken: there may be an immediate environmental benefit to using nuclear rather than fossil fuel energy, but when the effects in later generations need to be considered, including the long-term impact of nuclear waste.

OPEN FLOOR DISCUSSION

There should be a federal equivalent to the Environmental Commissioner's office; the Auditor General's office only critiques application of policy rather than the policy itself.

The social impact and environmental assessment instruments need to be improved because they are the central assessment instruments and key to the system working well. This can be accomplished through legislation and regulations. Current assessments never determine that a project cannot go ahead because the impacts outweigh the benefits. In addition, the risks are often underestimated, which results in a conclusion that the project is possible if certain measures are taken.

One participant noted that there are many more exploration operations going on in Canada than there are mines. There are approximately 10,000 exploratory operations that take place for every mine that is developed. Exploratory activities have a very significant impact and should not be overlooked. For example, exploratory drilling for uranium can affect the flow of water in aquifers and wells, and can contaminate water.

Another participant stated that if capitalism is a given, then we need to mobilize capitalism's resources to work for us in creating the changes that are needed. We need to develop a policy of "sustainable prosperity". We can also harness market mechanisms to assist in the regulation of mining impacts. For example, it may be possible to develop socially responsible mutual funds which have strong screens for environmental and human rights abuses. The criteria for such funds could be developed within a regulatory framework.

<u>Full cost accounting</u>

Full cost accounting should also include "life-cycle accounting", especially with respect to the costs for dealing with mine tailings. One participant referred to an article that had looked at this question and found that if the life cycle costs of using a lake for mine

tailings were assessed against alternatives, the alternatives were more cost effective in the long run. Thus, environmentally benign alternatives were less expensive over the long term because they required less care and monitoring. If legislation is in place requiring companies to do these calculations, it will become apparent that it is cheaper for them to operate in a more environmentally friendly manner.

Professor Collins asked for input on why full cost and life cycle accounting was not currently being used. The answers focused on the following:

- It is not clear on how costs can be assigned for environmental liabilities. Who establishes the value of the product?
- The costing of environmental impacts will change whole industries.
- It is not clear whether the public is willing to pay the price. The public needs to be made aware of the cost to tax payers for abandoned mines and public clean-up they require. A 2002 Auditor General report states that the federal government paid $3.5 Billion to deal with abandoned mines in northern Canada. This bill then is footed by taxpayers.

One participant drew a link between full cost accounting and co-management as a process. In northern Canada, there are co-management provisions built into the constitutional framework about how co-management occurs, how permitting occurs, how resource extraction is subject to a co-management regime. Everything is subject to a co-management regime, which sets out environmental values and full costing requirements explicitly in the legislation.

Another participant underlined the need to look at money flows. For example, in Ontario, the amount of money raised by mining activities in the province is vastly outweighed by the value of stock, and the income from trading, on the TSX of mining companies registered in Ontario that operate outside of the province.

It was stated that when analyzing any environmental problem, one has to take a holistic approach in analyzing human and ecological systems.

Another participant suggested that the debate about uranium mining in Canada should be linked to the energy policy debate in Canada:

- There should be a discussion of the whole fuel chain.
- There has been some rejection in Canada of nuclear power and the associated problem of storing nuclear waste, and impact on communities. In response, Canada created the Nuclear Waste Management Organization.
- The mandate of commission was very narrow. It did not discuss whether nuclear waste should continue to be created.
- The issue of nuclear waste, nuclear energy, and uranium mining should all be discussed together. For example, if Canada develops capacity to store nuclear waste, there will be an incentive to create the waste. Or, if there is a glut of uranium, it will encourage more nuclear energy.

Moratorium on uranium mining

One participant brought up the example of uranium mining in Sharbot Lake:

- The uranium in that area was much less concentrated/rich than in Saskatchewan deposits. The problem with a ban on mining uranium is that, if other minerals found in the same area where the uranium is located are mined, it would result in more uranium making it to tailings ponds as waste from the mining of other minerals. Therefore, focusing on one particular issue can raise complications.

Canada is very rich in uranium, and there is a large demand for uranium. This creates a dilemma for Canada. The question therefore should be: If a total ban is not possible, how are the impacts to be mitigated and communities protected? One would need more stringent regulation and monitoring to ensure that such mining does not cause environmental and social damage.