

## Legal & Institutional Barriers to Collaboration: Abandoned Mines

Presentation to the Workshop on  
Legal & Institutional Barriers to Collaboration  
Ottawa – February 24, 2003

By  
Joseph F. Castrilli  
Barrister & Solicitor  
Toronto, Ontario

1



## Introduction

- ◆ Orphaned/abandoned mines pose environmental, health, safety, & economic problems to communities, the mining industry, & governments in Canada
- ◆ Mines Ministers Advisory Committee in 2001 asked Task Group to address legal & institutional barriers & solutions to problem
- ◆ Presentation summarizes work done


2



## Scope of Presentation

- ◆ Background to abandoned mines problem
- ◆ Approaches to volunteer abatement
- ◆ Review of legal & legislative requirements
- ◆ Key findings regarding:
  - Legislative & institutional barriers
  - Liability disincentives
  - Collaborative opportunities
- ◆ Conclusions & recommendations


3



## Background to Abandoned Mines Problem

- ◆ Definitions
- ◆ Impacts
- ◆ Examples
- ◆ Issues

4



## Background to Abandoned Mines Problem: Definitions

- ◆ Orphaned/abandoned mines
- ◆ Abatement, remediation, & reclamation
- ◆ Volunteer


5



## Background: Definitions – Orphaned/Abandoned Mines

- ◆ Closed mines where ownership has reverted to Crown because owner:
  - Gone out of business; or
  - Cannot be found
- ◆ Owner has ceased/suspended mining without abating, remediating, reclaiming site

6



## Background: Definitions – Abate, Remediate, Reclaim

- ◆ Abate – reduce direct pollutant discharge/overland runoff from abandoned mine land to bodies of water
- ◆ Remediate – decontaminate soil, sediment, groundwater & remove/treat waste, tailings, & leached materials
- ◆ Reclaim – return abandoned mine lands to productive land use & reduce safety hazards

7



## Background: Definitions - Volunteer

- ◆ Individual, corporation, or organization who receives neither fees, wages, nor salary and who at no other cost or charge provides services, equipment, materials, or assistance to abate, remediate, or reclaim an abandoned mine for which volunteer has no prior responsibility
- ◆ Precedent: Penn. Environmental Good Samaritan Act; N.S. Volunteer Services Act


8



## Background to Abandoned Mines Problem: Impacts

- ◆ Loss of productive land
- ◆ Pollution of surface and groundwater
- ◆ Contamination of soils & sediments
- ◆ Harm to fish, wildlife, & vegetation
- ◆ Air pollution from dust or toxic gases
- ◆ Public safety hazards
- ◆ Economic, social costs to communities, government, & industry


9



## Background to Abandoned Mines Problem: Examples

- ◆ International
- ◆ Domestic


10



## Background: Examples - International

- ◆ United Kingdom – acid drainage from abandoned mines contaminating streams
- ◆ West Africa – abandoned pits/shafts posing public safety risks
- ◆ Australia – mercury contamination of coastal areas from 1860s abandoned mines
- ◆ United States – some abandoned mines declared “Superfund” sites


11



## Background: Examples - Domestic

- ◆ NGO survey in 2000 identified 10,000 abandoned mines across Canada
- ◆ CESD in 2002 found that hundreds of thousands of tons of highly toxic chemicals exist at abandoned mines in northern Canada & will cost taxpayers at least \$1/2 billion to cleanup


12



## Background to Abandoned Mines Problem: Issues

- ◆ Key issues in solving abandoned mines problem are financial & legal – UNEP 2001
- ◆ Legal responses in some jurisdictions consider volunteer abatement, etc. & whether discharges from such activity should be subject to different standard
- ◆ Legislative barriers, liability disincentives, & collaborative opportunities to volunteer abatement subject of this report


13



## Approaches to Volunteer Abatement

- ◆ Report considered four approaches to volunteer abatement, remediation, & reclamation of orphaned or abandoned mines:
  - “Good Samaritan” or indemnification law
  - Permit blocking
  - Allocative vs. joint & several liability; &
  - Non-compliance registries

14



## Approaches to Volunteer Abatement: Good Samaritan Law

- ◆ Good Samaritan law – allows volunteer cleanup of orphaned mines in return for protection from liability for post-cleanup discharges as long as :
  - Post-cleanup not worse than pre-cleanup discharges; &
  - Volunteer was not responsible for creating original problem


15



## Approaches to Volunteer Abatement: Permit Blocking

- ◆ Permit blocking – refusal of regulatory authority to issue permit where applicant, or any person owning or controlling applicant, is currently in violation of applicable law - U.S.SMCRA; Kentucky law
- ◆ If holder of mineral lease not in compliance with Act, Minister may refuse to issue new mineral lease – Manitoba Mines & Minerals Act, s. 103(2)

16



## Approaches to Volunteer Abatement: Liability

- ◆ Allocative vs joint & several liability:
  - Allocative liability – obligation to provide compensation on the basis of level of contribution to problem
  - Joint & several liability – obligation to provide 100% of compensation on each person found liable for any portion of the problem

17



## Review of Legal Requirements

- ◆ Canada
- ◆ United States
- ◆ United Kingdom
- ◆ Australia

18



## Review of Legal Requirements: Canada - Federal

- ◆ Federal environmental laws examined:
  - Natural resource management laws of northern Canada (e.g. Yukon Waters Act)
  - Environmental regulatory laws (FA; CEPA)
  - Environmental management laws (e.g. CEAA)
  - Liability protections under bankruptcy & insolvency law (BIA)
  - Uranium mining laws (NSCA)

19



## Review of Legal Requirements: Canada - Provincial

- ◆ Provincial law examined:
  - Common law regime
  - Civil law regime
  - Environmental statutes
  - Mining statutes
  - General statutes on liability of “volunteers”

20



## Review of Legal Requirements: Common Law

- ◆ In the absence of statutory authority the following common law causes of action could provide basis for lawsuit against volunteer cleanup of abandoned mines:
  - Negligence
  - Trespass to land & trespass to persons (battery)
  - Private & public nuisance
  - Riparian rights
  - Strict liability

21



## Review of Legal Requirements: Provincial Environmental Laws

- ◆ Unless modified, following measures could apply to volunteer abatement activity:
  - Pollution prohibitions, offences, penalties
  - General permit, approval, licence authority
  - Cleanup orders
  - Variance authority from approvals & orders
  - Liability for spills, hazardous wastes, contaminated lands
  - Regulation-making authority

22



## Review of Legal Requirements: United States

- ◆ Federal laws examined:
  - Surface mining law
  - Clean water law
  - Hazardous waste laws
  - Congressional bills
- ◆ State Laws examined:
  - Good Samaritan law
  - Permit blocking law

23



## Key Findings

- ◆ Legislative & institutional barriers
- ◆ Liability disincentives
- ◆ Collaborative opportunities

24



## Key Findings: Legislative & Institutional Barriers – Federal I

- ◆ Licensing requirements under natural resource management laws – northern Canada – prohibit licence conditions from allowing waste to be deposited that violate regulations under federal laws
- ◆ Regulations under Fisheries Act applicable to metal mines – uncertainty as to whether also applicable to volunteer cleanup of abandoned mines

25



## Key Findings: Legislative & Institutional Barriers – Federal II

- ◆ Regulations &/or pollution prevention plans under CEPA - future application to releases of arsenic, cadmium, nickel from volunteer abandoned mine cleanups
- ◆ EA requirements could apply to volunteer abatement as a result of CEAA Law List triggers (e.g. Fisheries Act, or SARA)
- ◆ Uranium mine abandonment licence regs. may apply to volunteers (NSCA)

26



## Key Findings: Legis. & Inst. Barriers – Prov. Env. Laws

- ◆ Approval, licence, permit, plan & regulation requirements regarding discharge of contaminants likely would apply to volunteer cleanups as well & hold such activities to same standards as new or active mining operations

27



## Key Findings: Legis. & Inst. Barriers – Prov. Mining Laws I

- ◆ Statutory focus on “closed” mines where viable owner remains responsible for cleanup, rather than on orphaned/abandoned mines
- ◆ Narrow/inappropriate definition of, or approach to, “abandoned” mines not assist volunteers (e.g. defined to mean mine where permit obligations met; should define as site where requirements not met)

28



## Key Findings: Legis. & Inst. Barriers – Prov. Mining Laws II

- ◆ Requirements to obtain (1) approval before operation may commence at abandoned mine & (2) consent before abandoning mine may be either barrier or opportunity for volunteers:
  - A potential barrier if compliance expected that of ordinary mine
  - An opportunity if special cleanup role of volunteer recognized


29



## Key Findings: Legis. & Inst. Barriers – Prov. Mining Laws III

- ◆ Absence of specific statutory authority for encouraging volunteers a barrier because:
  - Governments have filled gap with ad hoc cleanup activity paid for with public funds
  - While such efforts of value, ad hoc approaches detract from need to establish a legal framework for encouragement and protection of responsible volunteer activity


30



## Key Findings: Liability Disincentives – Federal I

- ◆ Quasi-criminal liability - violation of waste deposit licensing prohibitions in natural resource management laws in northern Canada
- ◆ Quasi-criminal liability - violation of Fisheries Act requirements (1) works that result in harmful alteration of fish habitat; (2) deposit of deleterious substances into waters frequented by fish

31



## Key Findings: Liability Disincentives – Federal II

- ◆ Joint & several civil liability to Crown & to fishermen for deposit of deleterious substances contrary to Fisheries Act that require cleanup or cause income loss
- ◆ Administrative & quasi-criminal liability of officers, directors, & agents of (volunteer) corporations for violation of CEPA regulations or pollution prevention plans
- ◆ Civil & administrative EA liability - CEAA


32



### Key Findings: Liability Disincentives – Prov. Env. Law I

- ◆ Quasi-criminal liability – violation of prohibitions, approvals, permits, licences, plans, & regulations under prov. env. laws
- ◆ Administrative liability – imposed on “responsible persons” to prevent, abate, etc. environmental damage due to owning, occupying, or having charge, management, or control of a contaminant source also may attach to volunteers

33



### Key Findings: Liability Disincentives – Prov. Env. Law ii

- ◆ Civil &/or administrative absolute, retroactive, joint & several liability on responsible persons for contaminated sites also may apply to volunteers (some provinces may reform scope of liability)
- ◆ Civil liability of responsible persons under environmental rights & spills legislation & common law for injunctive, monetary, or other relief also may apply to volunteers


34



### Key Findings: Liability Disincentives – Prov. Min. Laws

- ◆ Quasi-criminal, civil, & administrative liability for failing to comply with legislative & regulatory requirements pertaining to leases or other entitlements under provincial mining laws also may apply to volunteers

35



### Key Findings: Collaborative Opportunities - Federal

- ◆ Exempting from personal liability under environmental law a trustee in bankruptcy or receiver if the harm occurred before the appointment, or if after the appointment, liability attaches only if there was gross negligence or wilful misconduct (BIA)
- ◆ Above categories of persons too narrow to include volunteers, but principle from BIA a potential precedent for other federal laws

36



## Key Findings: Collaborative Opportunities – Prov. Env. Law I

- ◆ Partial exemption from liability for historic mine site contamination for those seeking to remine such sites –will not be considered a “responsible person” required to remediate:
  - If indemnification provided under Financial Indemnification Act (B.C.); or
  - Person acquired site mining rights & activities not made existing contamination worse (B.C.)

37



## Key Findings: Collaborative Opportunities – Prov. Env. Law II

- ◆ Variance authority – an “escape valve” from generally applicable environmental requirements (e.g. approvals, regulations)
- ◆ Exemptions for secured creditors, etc. from being “responsible persons” required to cleanup – potential precedent that could be extended to abandoned mine volunteers
- ◆ Orphaned contaminated site rehabilitation agreements – also precedent for volunteers

38



## Key Findings: Collaborative Opportunities – Prov. Env. Law III

- ◆ Limitations of liability of responsible persons through apportionment, allocation, minor contributor, other measures – precedents for better treatment of volunteers
- ◆ Orphan site designations, contaminated site registries, non-compliance reports – precedents for registry of abandoned mine sites & their status to facilitate cleanups


39



## Key Findings: Collaborative Opportunities – Prov. Min. Laws

- ◆ Variance authority – similar to that noted above under environmental laws, but such authority under mining laws too narrow to apply to volunteers
- ◆ Ad hoc government abandoned mine cleanups – a potential barrier, as noted above, but also valuable in establishing cooperative efforts in identifying sites, problems, & solutions


40



## Key Findings: Collaborative Oppts. – Prov. General Law

- ◆ Several provinces (e.g. Nova Scotia; PEI) provide for general liability protection of “volunteers” in non-environmental contexts
- ◆ Where real property endangered, volunteer not liable for damage resulting to property caused by volunteer unless grossly negligent


41



## Conclusions I

- ◆ Orphaned/abandoned mine problem requires financial & legal solutions
- ◆ Legal responses in some jurisdictions consider volunteer abatement & whether discharges from such activity should be subject to different standard
- ◆ Report focused on this issue


42



## Conclusions II

- ◆ Generally no existing or proposed federal/provincial environmental law in Canada re “good samaritan” protection
- ◆ Some legislative developments may be analogous to or precedents for such laws
- ◆ Some existing law/practice may have same effect as permit blocking
- ◆ Some law, policy, practice developing re changes in liability tests & use of registries


43



## Conclusions III

- ◆ Legislative & institutional barriers - federal & provincial law contains permit, regulation & other requirements that volunteers would have to meet
- ◆ Existing exemption or variance authority may be available in some instances, though not necessarily on a consistent or certain basis for volunteers


44



## Conclusions IV

- ◆ Liability disincentives – variety of judge-made & statutory authorities that could impose quasi-criminal, civil, or administrative liability on volunteers
- ◆ Exceptions limited – (1) recent B.C. amendments from historic mine site reclamation, (2) secured creditor exemption (possible precedent for volunteers)


45



## Conclusions V

- ◆ Collaborative opportunities:
  - Orphaned mine assessments/cleanups occurring
  - Variance authority available
  - Secured creditor & volunteer service law exemptions (precedents for volunteers)
- ◆ Overall – legislative situation in Canada a patch-work response or silent on problem
- ◆ Legislative reform appears warranted if volunteers to be encouraged


46



## Recommendations I

- ◆ Amend existing/enact new law to encourage volunteers by:
  - Setting out protections afforded
  - Identifying who eligible for protection
  - Identifying types of projects covered
  - Listing exceptions to immunity from liability
  - Precedent – Pennsylvania

47



## Recommendations II

- ◆ Exempt volunteers from being “responsible persons” under environmental laws when carry out “good samaritan” remediation if:
  - Prior to remediation, volunteer not “responsible person” for site;
  - Government approves work; but not if
  - Contamination caused/made worse by work done negligently, grossly negligently, or by wilful misconduct – Precedent: Various laws

48



### Recommendations III

- ◆ Establish abandoned mine reclamation “Good Samaritan” permit program requiring reclamation plans, cleanup standards, public role, & government oversight of cleanup
- ◆ Only “orphaned” sites eligible for permit
- ◆ Waive environmental liability if not make water quality worse
- ◆ Require compliance with all other env. laws
- ◆ Precedent – U.S. Congressional Bills

49



### Recommendations IV

- ◆ Require remining operators to ensure pollutant discharges less than levels released by abandoned site before remining
- ◆ Site-specific pollution abatement plan to reduce pollution from pre-existing levels
- ◆ Require best management practices
- ◆ Certain pre-existing pollutant levels not to be made worse by remining
- ◆ Precedent – USEPA rules: Clean Water Act

50



### Recommendations V

- ◆ Exempt persons from remediation liability for “historic mine sites” if:
  - Indemnification provided to person for site as matter of law
  - Person acquired mining rights at site & activities not make pre-existing contamination worse
  - Precedent – British Columbia
- ◆ Adopt measures noted in slides 36, 38-41

51



### Recommendations VI

- ◆ Consider above recommendations in conjunction with other measures outside scope of this report:
  - Abandoned mine funds
  - More effective security deposits
- ◆ These other measures appear integral to development of comprehensive response to abandoned mine problem in Canada – CESD 2002

52