



## Funding Options

Presentation # 2 to the NOAMI Workshop  
Assessing Liabilities & Funding Options

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## Orphaned/Abandoned Mines: The Funding Problem

◆ Presentation # 1 summarized the OAM funding problem as follows:

- Orphaned sites: no person available to impose liability/responsibility upon for cleanup
- Abandoned sites: person exists but is without financial ability to pay for cleanup
- Effect: responsibility will devolve to government to solve/pay for cleanup problem
- Needed: a comprehensive legal/financial response


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## OAM: Role of Laws Requiring Financial Assurance/Security

- ◆ Sound laws on financial security imposed on existing mining operators may prevent some/all current mining operations from becoming OAMs in future
- ◆ Sound laws on financial security may have some/little/no effect on sites that are already OAM

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## OAM: Role of Historical Insurance Policies

- ◆ Insurance coverage at mine sites may/may not be provided by a Comprehensive General Liability Insurance Policy (CGLI) containing a pollution exclusion clause
- ◆ Where clause not exist insurer may be liable up to limits of coverage
- ◆ Where clause does exist likely a bar to recovery against insurer

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## OAM: Role of Historical Insurance Policies (cont.)

- ◆ CGLI pollution exclusion clause (e.g.):
  - “This Policy shall not apply to claims arising out of:...discharge, disposal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter where located or how contained, or into any water-course, drainage or sewage system.”

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## OAM: Role of Other Types of Insurance Policies

- ◆ Modern insurance coverage (environmental liability insurance) explicitly covers, not excludes, environmental liability
- ◆ Problems with ELI for insured:
  - High deductible
  - High premium
  - Narrow focused coverage (which can be broadened but at a cost for insured)


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## OAM: Role of Other Types of Insurance Policies (cont.)

- ◆ Problems with ELI for insurer:
  - More pollution coverage expands, greater the potential payout (i.e. greater insurer's potential liability expands)

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## OAM: Funding Options - Conclusions

- ◆ CGLI may/may not be avenue for recovery against some insurers of sites that became OAMs
- ◆ ELI may address problems (up to limits of coverage) in preventing future OAMs
- ◆ Separate & comprehensive legal/financial regime still appears necessary for existing OAMs

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**The Polluter Pays Principle: A Primer  
Presented to the NOAMI Workshop  
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**Sierra Legal Defence Fund**

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**Sierra Legal Defence Fund: A History**

**1892**

- **Sierra Club** founded in the United States (that's not us)

**1971**

- **Sierra Club Legal Defence Fund** established in the United States (that's not us either; today they call themselves **Earthjustice**)

**1989**

- **Sierra Club of Canada** opens its office in Ottawa (nope, that's Elizabeth May)

**1990**

- **Sierra Legal Defence Fund** founded in Vancouver, Canada (yep, that's us)

**1996**

- **Sierra Legal Defence Fund** comes to Toronto (that's us too)

**Introduction**

**Points To Be Covered**

- Incorporation of the Principle in Canadian Law: How Have Courts Treated Government Decisions Utilizing it?
- How Broad Can Governments be in Seeking Damages for Harm to Public Resources?
- Is a Legal Duty Evolving that Requires the Crown to Seek Damages for or Otherwise Address Pollution Issues?

**Polluter Pays: Roots**

*Rio Declaration on Environment and Development* (1992) contains oft-cited iteration of the polluter pays principle:

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

**Polluter Pays: Where There's a Will There's a Way**

**Case Law**

- Generally, Courts have made it very clear that environmental legislation is to be interpreted in a flexible manner and that governments have broad discretions under environmental legislation to manage public resources and to address pollution
- Reason for this being that it is impossible to enumerate all the circumstances in which an environmental regulatory regime may be applicable

ex. *R. v. Hydro Quebec* and *Ontario v. Canadian Pacific* cases

**Polluter Pays: Where There's a Will There's a Way**

***Imperial Oil Ltd. v. Attorney General of Quebec***

- Ministerial Order issued under Quebec's *Environmental Quality Act* requiring Imperial to prepare remediation plan challenged on the basis that the Minister was not an impartial decision maker
- In upholding the Minister's order the Court discussed polluter pays as one of the organizing principles of the Act:  
"To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities."

### Polluter Pays: Where There's a Will There's a Way

"The procedure which authorizes the Minister to issue an order against whoever is responsible for the pollution ... represents one of the most important enforcement tools available in Quebec's environmental legislation. The adaptation of such a procedure appeared of singular importance in the search for a solution to soil contamination problems. ... Section 31.42 allows for the use of a broad discretion in pursuit of that objective."

- Court held that the Minister did not have to be impartial to issue the remediation order but rather, had to provide Imperial notice of the intention to make the order, receive and review any representations and information submitted and give reasons for the decision once it was made.

### Polluter Pays: Where There's a Will There's a Way

#### **Key Finding of Court in *Imperial*:**

"...The only interests the Minister was representing were the public interest in protecting the environment and the interest of the State, which is responsible for preserving the environment. In the circumstances of this case, it would be difficult to separate those interests. In exercising his discretion, the Minister could properly consider a solution that might save some public money. Accordingly, he applied one of the organizing principles of the *Environment Quality Act*, the polluter-pay principle. ..."

### Polluter Pays: Where There's a Will There's a Way

#### **Legislation**

In *Imperial*, while discussing Quebec's *Environmental Quality Act*, the Supreme Court noted that the following legislation in other jurisdictions enshrine the polluter pays principle:

- *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33
- *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7
- *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42
- *Waste Management Act*, R.S.B.C. 1996, c. 482, ss. 26.5(1), 27(1), 27.1, 28.2, 28.5
- *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3)
- *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116
- *Environmental Management and Protection Act*, 2002, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46

### Polluter Pays: Where There's a Will There's a Way

#### **Legislation Continued**

- *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a)
- *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1)
- *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91
- *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90
- *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII
- *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21
- *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16

### Polluter Pays: Where There's a Will There's a Way

#### ***B.C. Hydro and Power Auth. v. B.C. (Environmental Appeal Board)***

- Supreme Court affirmed the reasons of the dissenting judge of the B.C. Court of Appeal holding that a corporate restructuring process did not absolve B.C. Hydro from liability for clean-up costs under the *Waste Management Act* as a previous owner of contaminated lands

### Polluter Pays: Where There's NO Will There's a Way

#### ***B.C. v. Canadian Forest Products ("Canfor")***

- Action for damages brought by B.C. Crown for forest fire negligently caused by forestry company
- Damages sought at SCC for both harvestable and protected trees destroyed by fire
- Case essentially turned on fact that B.C. did not frame its Court pleading from the very start for the claim to the protected forest – Court rejected that portion of the claim to damages as a result
- Damages awarded for the harvestable trees but not for those that were set aside for protection

## Polluter Pays: Where There's NO Will There's a Way

### **Canfor Continued**

- Interesting principles discussed in Court's decision:
  - Crown not limited to claim damages to a public resource as an owner would be; can also claim damages for loss of public benefits residing in the natural resource damaged
  - Court suggested that there are public rights in the environment that reside in the Crown
  - Court left it for another day as to whether Crown could be compelled to seek damages, address environmentally damaging behaviour or remedy damage to the environment
  - Indicated that it may not be sufficient for the Crown to do nothing in certain situations but left it for another day for those situations to arise and for case law to develop

## Where Do Things Stand Today

### **Boiling it Down – Four Points to Take Away With You**

1. Legislative regimes aimed at addressing pollution will be afforded a broad interpretation by Courts if challenged
2. Decisions to remedy contamination will likely be upheld if the decision maker meets procedural requirements at common law and those set out specifically under legislation
3. Crown not limited to claim damages to a public resource as an owner would be; can also claim damages for loss of public benefits residing in the natural resource damaged
4. The notion that the Crown is trustee of the environment for the public and that failure to act in any given situation is legally challengeable will likely develop further in Canadian law – i.e. governments must turn their attention to how environmentally degrading activities will be addressed



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## RISK FINANCING for MINE CLOSURE LIABILITIES

NOAMI Workshop  
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and Funding Options  
Nov 2 and 3, 2005



## Environmental Risk Financing Case Study - Iron Mountain Mine

### The Risk

- Mined since late 19<sup>th</sup> century, ceased 1963
- Federal gov't constructed dam & WTP
- Acid drainage to Sacramento River
- Largest source of toxic metals in USA
- Source of most acidic mine drainage
- EPA declared Superfund Site - 1984
- Cleanup costs could approach \$1 billion



## Case Study - Iron Mountain Mine

### The Responsible Party

- Stauffer Chemical acquired mine in late 60's
- AstraZeneca acquired Stauffer. Aventis is successor, now responsible party (PRP)
- Aventis structured "environmental risk financing"
- EPA provided Full/Final Release
- A funding source: historical insurance policies



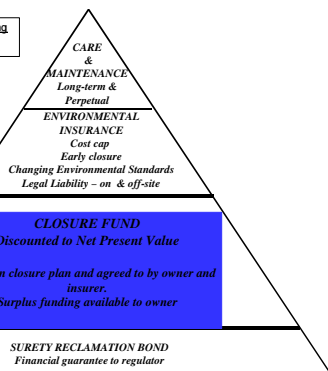
## Case Study - Iron Mountain Mine

### Risk Financing program

- Premium \$144 Million, paid at inception
- Policy offers:
  - "Cost Cap" cover in excess of \$5 M/yr estimated clean up cost (WTP)
  - "Commutation Fund" for future site costs
- Contractor to operate WTP - 30 years
- fund will grow to \$514 M after 30 years to pay for future site costs, in perpetuity



Environmental Risk Financing  
Program For Mine Closure



## Environmental Risk Financing

### Key Issues

- Agreement on Mine Closure Plan
- Qualified remediation contractor
- Highly-rated financial counterparties
- Transparent cost structure
- Profit-sharing, performance incentives
- Industry initiative, broad stakeholder support



## Benefits

- Remediation costs are capped
- Funds are guaranteed
- Enhanced financial assurance:
  - Cover for unexpected, catastrophic events
  - Cover for third-party legal liability
  - Cover for timing risk or early closure
- Risk is managed - qualified remediation firms, independent oversight, performance incentives
- Model for active mines - liabilities funded from current mine revenues



## Applications for Orphaned/Abandoned Mines

- ✓ **Transfer Site & Liabilities** to a responsible, qualified third party
  - a remediation contractor
  - a Special Purpose Entity (SPE)
  - an operator with business plan (salvage, re-start)

### Other Applications

- ✓ Restructurings, sale and re-start
- ✓ Replace financial guarantee to regulator
- ✓ Support fixed-price EPCM closure projects
- ✓ New projects



## Recovering Environmental Costs A Funding Source

- Historical liability policies do not contain absolute pollution exclusions
- "Occurrence" policies in effect during period of "damage" will respond
- Damage occurs when pollutant enters site
- Court precedents have favoured the policyholder
- Negotiated, compromise settlement process recommended over litigation



## Historical Liability Cover

- Covered "damages" include remediation & other response costs to prevent off-site
- "Owned property" exclusion does not apply to costs incurred to prevent off-site damages
- "Occurrence" trigger is continuous
- Pollution exclusion, except for "sudden & accidental" does not bar losses "neither expected nor intended"
- Absolute pollution exclusion in current liability policies



## Mining Insurance Assets

Many examples of successful recoveries  
Litigation sets damaging precedents for insurers most favour policyholders

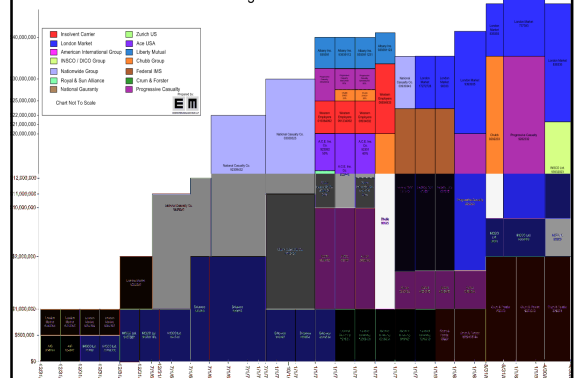
U.S. P&C industry reserves - \$31 billion

- Settlements allow insurers to release reserves
- Fully documented claims ensure reinsurance recoveries

- Insurance Asset is eroding
  - Insurer & reinsurer insolvency
  - Policy evidence
  - Proof of damages



NewCo, Inc.  
Insurance Program Overview 1959 - 1986



[Questions ?](#)

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## Funding Models: A Government Perspective

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Liabilities and Funding Options  
Nov. 3, 2005

## Funding Models: A Government Perspective

- General Observations
- Experiences with specific models
- Tool kit approach

## General Observations

- Case studies highlighted the unique circumstances or pre-conditions that led to specific funding approaches;
- Liability issues are a key determinant in funding arrangements;
- Administrative process can be burdensome and reduce program effectiveness;
- Predicting or estimating remediation costs is a risky business and inaccuracy often negatively impacts program delivery and credibility;
- Accrual based accounting can provide funding opportunities in support of debt reduction mandate;
- However, inability to adequately assess or account for inherent risk may actually serve to increase debt

## Some Examples

- Direct government funding by appropriation;
- Partnerships
- Production Levy
- Dedicated Revenue Stream

## Direct Government Funding

- Application: all sites where the Crown has accepted liability;  
Instrument: direct application to TB or through budget process;  
Administration: rigid  
Legislative requirements: none  
Challenges:
- accurately assessing liability;
  - budgets are annualized, subject to TB and cabinet approval, restricting effective timeframe for deployment;
  - no or limited carry-over provisions;
  - funding susceptible to change in government priorities;
- Opportunities:
- Accrual based accounting
  - Funding meets a debt reduction priority
  - May reduce the risk of competing priorities

## Partnerships I Private/Public or Public/Public

- Application: Site specific where there is a shared liability;  
Examples include large complicated sites such as Giant (F/T); Lynn Lake (Private/Public); McIntyre/Hollinger (Private/Public)  
Instrument: cooperation agreement that sets terms and conditions;  
Administration: can be flexible  
Legislative requirements: none  
Challenges:
- negotiating agreements;
  - indemnification;
- Opportunities:
- Benefit from expertise and in kind contributions
  - May result in more holistic approaches to site remediation

## Partnerships II Private/Public

- Application:** collective approach to remediating sites with crown liability, typically small to medium scale projects;
- Instrument:** cooperation agreements, in kind contributions require indemnification provisions;
- Administration:** can be flexible
- Legislative requirements:** Good Samaritan Legislation for most effective application
- Challenges:**
- Inability to provide indemnification has resulted in cumbersome administrative framework, where direct financial contributions are made to government and government then undertakes all project management;
  - Limits opportunity to benefit from in-kind contributions
- Opportunities:**
- Benefit from expertise and in kind contributions

## Production Levy

Manitoba Pits and Quarries Rehabilitation Program

- Application:** all sites both private and crown held;
- Instrument:** \$.10/tonne rehab levy on all aggregate production;
- Administration:** funds deposited into Aggregate Rehab. Account  
Program administered by province  
Province assumes all liability
- Legislative requirements:** Program and levy enabled in legislation
- Considerations:**
- Displaces a previous program where operators were required to file rehabilitation plans and performance bonds;
  - There was general recognition that the former approach did not support remediation of old sites;
  - Many small sites on private land, with private mineral interests;
  - Operators now only pay rehab levy and there is no rehabilitation plan or performance bonding requirement
  - Requirement to maintain a minimum balance in the fund to offset liability for current operations
  - Primary risk is public safety, limited environmental or health risk;
  - Large number of low cost projects

## Dedicated Revenue Stream

Manitoba Mining Community Reserve

- Application:**
- Fund does not apply to mine site rehabilitation;
  - used to support mining communities dealing with transitional issues related to mine openings or closings
  - Also used to support exploration incentive programs to proactively mitigate closure risks.
- Instrument:** 3% of mining tax revenue directed to MCRF annually (since 1972)
- Administration:**
- Special purpose account outside of general revenue account;
  - Expenditures do not impact government bottom line
- Legislative requirements:** Enabled within Mining Tax Act
- Considerations:**
- Variable revenue stream related to mine profitability
  - Available funding may be unpredictable
  - Only contributors are those companies in a taxable position
  - Similar types of arrangements could potentially be adopted for OAM site remediation
  - Need to assess revenue requirements against expenditure requirements for this type of activity
  - Most likely applicable to small to medium sites with minimal environmental/health risk
  - Could provide a vehicle for receiving direct industry contributions as per partnership discussion.

## Conclusion

- There are currently a variety of funding approaches being used by governments to address remediation or that could be adapted to address remediation;
- Should we consider developing a tool kit for governments to assist policy makers in determining best approaches for their specific needs and the unique circumstances of individual mine sites.