# WORKSHOP PROCEEDINGS

# Legal and Institutional Barriers to Collaboration Relating to Orphaned and Abandoned Mines (OAMs)

***Ottawa, Ontario***
***February 24-25, 2003***

*Prepared for the:*
National Orphaned/Abandoned Mines Advisory Committee

*of the*
National Orphaned/Abandoned Mines Initiative (NOAMI)

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## ABSTRACT

This report captures proceedings of the Workshop on Legal and Institutional Barriers to Collaboration Relating to Orphaned/Abandoned Mines (OAMs). The workshop was held on February 24th and 25th, 2003 in Ottawa, Ontario. The contents of these Proceedings include an introduction and background information to the Workshop, summaries of the detailed contextual presentations that set the stage for improving collaboration among the government departments and stakeholders, and highlights of the substantive discussion and path forward for addressing the barriers to collaboration and preferred options that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines.

## APERÇU

Le présent rapport fait état des discussions qui se sont déroulées dans le cadre de l'Atelier sur les obstacles juridiques et institutionnels à la collaboration touchant les mines orphelines et abandonnées (MOA), qui s'est déroulé à Ottawa, en Ontario, les 24 et 25 février 2003. Il comprend une introduction et une mise en contexte, un sommaire des présentations contextuelles détaillées qui ouvrent la voie à une plus grande collaboration entre les ministères et les intervenants, les faits saillants de la discussion substantielle et de l'itinéraire à suivre pour surmonter les obstacles à la collaboration et envisager les options qui sauraient le mieux permettre aux tiers de collaborer au nettoyage et de gérer les responsabilités liées aux mines orphelines et abandonnées.

## SUMMARY

Orphaned or abandoned mines are those mines for which the owner cannot be found, or for which the owner is financially unable or unwilling to carry out clean-up. Many pose environmental, health, safety, and economic problems to communities, the mining industry, and governments. In 2001, federal, provincial and territorial Mines Ministers asked that a National Orphaned/Abandoned Mines Advisory Committee be struck to study various issues and initiatives concerning the development and implementation of remediation programs across Canada. The Committee sponsored the Workshop on Legal and Institutional Barriers to Collaboration Relating to Orphaned/Abandoned Mines (OAMs), held on February 24th and 25th in Ottawa, Canada. The workshop was a forum for information sharing and dialogue on improving collaboration relating to OAMs among federal, provincial, territorial and municipal governments, aboriginal organizations, the mining sector and mining industry associations, and environmental and labour groups. All participants recognized that policy and legal issues surrounding third party liability and OAMs need to be examined and overcome in a cooperative and transparent manner in order to deal more effectively with the OAM legacy.

The workshop objectives were:

- To identify, better understand and assess the legal and institutional barriers, along with the preferred options that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines; and

- To develop recommendations and guiding principles for consideration by the National Orphaned/Abandoned Mines Advisory Committee and possible transmittal to Federal, Provincial and Territorial governments.

The workshop, attended by more than 60 people, began with welcoming remarks from the Chair of the OAM Advisory Committee. The remainder of Day 1 included a number of information sharing presentations, each followed by an intensive plenary discussion:

- Overview of the legal and institutional barriers to collaboration;
- Review of Pennsylvania's *Environmental Good Samaritan Act* and related initiatives;
- Review of the U.S. Federal *Abandoned Hardrock Mines Reclamation Act of 2002* and related initiatives;
- A presentation on Abandoned Mines in the North;
- A review of the OMA/OMNDM Initiative; and,
- Site-Specific Experiences from several Canadian Jurisdictions.

Day 2 of the Workshop consisted of panel presentations (panelists were affiliated with each of the government and stakeholder interests attending the workshop) and a plenary discussion, as well as breakout group discussions and reports to plenary, on the priority barriers to collaboration and recommendations/guiding principles to overcome these barriers.

Several core themes and consequent participant support emerged throughout the course of the workshop. Many participants felt strongly about the need for a coordinated Good Samaritan legislation/policy framework at the federal and provincial levels to encourage volunteer activity and remove associated liabilities (volunteer indemnification). Many participants considered that success in addressing OAMs requires clearly articulated core principles, including the polluter pays, precaution and prevention, sustainability, and scientifically defensible, practical and consistent performance standards for OAMs. While there are many good ideas with regard to approaches to volunteerism, it is critical to think through how and where these ideas apply.

Many participants felt that it is important to: recognize the existence/raise the profile of OAMs (in the political/legislative and public landscape); acknowledge that OAMs have to be dealt with and that help is needed; categorize and prioritize sites (e.g., simple vs complex); conduct critical analyses of existing legislation and procedures to establish an approach to facilitate enabling processes; and/or develop a mechanism to guide OAM reclamation and facilitate cooperation. The need for a realistic policy and legislative framework that recognizes the responsibilities and rights of all players, including the public, and establishes common objectives was acknowledged. The process must be inclusive, transparent, multi-stakeholder and holistic. There were varying opinions on the need for *new* legislation – some felt that existing legislation could be used in creative ways to overcome barriers, while others saw the need to amend existing legislation or create new dedicated legislation.

Participants generally agreed on the need for better site-specific information, particularly to assess public health, safety, environmental and social impacts, and to develop baseline standards.

Improved cooperation, collaboration, communication, transparency, efficiency and simplification were perceived as crucial elements in any OAM efforts. A clearly articulated, inclusive role for stakeholders and the public, and in particular, affected communities, was considered important for many participants. Lack of funding was acknowledged as one of the most serious and fundamental stumbling blocks.

Many participants recognized the need to refine and accelerate the permit process (alleviate fiscal and temporal time constraints) to maximize the scarce dollars that go into remediation. Many felt that the current assessment and review processes could be more cost and time efficient. Building trust (across sectors and especially with affected communities) may be one way of increasing coordinated innovative solutions while at the same time reducing assessment and permitting costs. The need for common sense was also highlighted constantly – do what makes sense, getting as much done as possible with the limited resources available, but without compromising environmental and human health and safety. It was also recognized that while in many cases time-consuming and resource intensive procedural requirements do create better projects, complex or lengthy procedural requirements can at times hinder effective completion of projects (e.g.: projects that run out of money at the end of the fiscal year).

Related to this previous issue is the broader obstacle of the difference in policy and procedures between the different levels of government. A core set of principles that everyone can agree on needs to be established in the Good Samaritan legislation (recognizing that there may still be regional issues that must be dealt with), or a common set of standards that all players can work towards.

It was recognized that the optimism displayed by participants in the workshop was encouraging – while those involved in the issue may have different ideas, they are all generally moving in the same direction. It was also noted that workshop participants have demonstrated that they recognize and respect each other's values, which goes a long way in achieving success.

It was noted that there needs to be more trust amongst stakeholders working in the field, and, perhaps, more risk-taking. Trust among stakeholders can be built, in part by providing for non-compliance registries, community involvement, and the development of a consistent, comprehensive framework for action. Trust is important, but must be earned, which requires a holistic view of the entire mining process, especially the often forgotten but critical social context – affected communities must be considered and included in a meaningful way.

The point was raised that if progress is to be made, all levels of government have to be adequately staffed and properly resourced to provide the research, planning, expertise, contracting, monitoring and oversight needed to address issues properly. Planning initiatives and consequent human and financial resource commitments must take into account that many projects will require lengthy timeframes to complete (5 to 10 years). A comprehensive new piece of legislation will not be effectively enforced if departments are faced with a serious lack of resources. The answer may be putting resources back into existing legislation, instead of creating new legislation.

The need for clear definitions was raised for terms such as OAM, volunteer, reclamation, and remediation (e.g.: decide what is meant by reclamation or remediation and design a mechanism to define these terms on a site-specific basis). There is a need to develop consistent and coordinated procedures/standards to categorize different sites and to categorize different types of volunteers.

It was noted that there was a need for regulators to adjust their perspective to differentiate between more typical workload of approving projects for commercial gain versus projects for the common good, where commercial gain is not a factor.

One participant summed up the key issues addressed at the workshop in three words: prevention, investment and standards. The importance of precedents was also noted, which would clearly demonstrate what is achievable, what are the benefits of action, and the costs of inaction.

The Vice President, Technical Affairs for the Mining Association of Canada closed the workshop by noting that the National Orphaned/Abandoned Mines Advisory Committee will distil the results from the workshop and develop recommendations and a path forward. Recommendations will be submitted to Mines Ministers in September and participants will be kept apprised of initiatives as they

evolve. In closing, it was noted that the work of the NOAMAC is gaining prominence and credibility steadily, both in Canada and abroad, as a unique multi-stakeholder initiative constructively and effectively addressing orphaned and abandoned mines. By continuing to work on this issue in an open, creative and collaborative way, all stakeholders can demonstrate their commitment and resolve to finding solutions that will benefit the environment, civil society, governments and the mining industry in the short and long term.

## SOMMAIRE

Une mine est dite orpheline ou abandonnée lorsqu'il est impossible d'en trouver le propriétaire ou lorsque son propriétaire refuse d'en nettoyer le site ou est financièrement incapable de le faire. Bon nombre posent des problèmes pour les collectivités, l'industrie minière et les gouvernements dans les domaines de l'environnement, de la santé, de la sécurité et de l'économie. En 2001, les ministres canadiens des Mines ont recommandé de mettre sur pied un comité national de consultation sur les mines orphelines ou abandonnées, dont le mandat consisterait à étudier les questions et initiatives liées à l'élaboration et à la mise en œuvre de programmes de restauration dans toutes les régions du Canada. Le Comité a parrainé la tenue à Ottawa, les 24 et 25 février, de l'Atelier sur les obstacles juridiques et institutionnels à la collaboration touchant les mines orphelines et abandonnées (MOA). Il s'agissait d'une tribune où l'on a pu échanger de l'information et dialoguer sur les moyens d'accroître la collaboration concernant les MOA entre les gouvernements fédéral, provinciaux et territoriaux, les municipalités, les organismes autochtones, les associations du secteur minier, de l'industrie minière, ainsi que des groupes environnementaux et de travailleurs. Tous les participants ont reconnu la nécessité d'examiner les questions de politiques et les questions juridiques liées à l'obligation des tiers et aux MOA afin de les régler dans un esprit de collaboration et de transparence pour s'occuper de l'héritage des MOA de manière plus efficace.

L'atelier poursuivait les objectifs suivants :

- cerner, mieux comprendre et évaluer les obstacles juridiques et institutionnels ainsi que les options à privilégier devant permettre aux tiers de collaborer au nettoyage et de gérer les responsabilités liées aux mines orphelines et abandonnées;

- formuler des recommandations et des principes directeurs à soumettre à la considération du Comité national de consultation sur les mines orphelines ou abandonnées et à communiquer éventuellement aux gouvernements fédéral, provinciaux et territoriaux.

Réunissant plus de 60 participants, l'atelier a débuté par le mot de bienvenue du président du Comité de consultation sur les MOA. Le reste du jour 1 fut notamment consacré à des présentations axées sur l'échange d'information, chacune suivie d'une intensive séance de discussion plénière :

- Aperçu des obstacles juridiques et institutionnels à la collaboration;
- Examen de l'*Environmental Good Samaritan Act* de la Pennsylvanie et des initiatives connexes;
- Examen de la loi fédérale américaine *Abandoned Hardrock Mines Reclamation Act of 2002* et des initiatives connexes;
- Présentation sur les mines abandonnées du Nord;
- Examen de l'Initiative AMO/MDNMO (OMA/OMNDM);
- Expériences de plusieurs juridictions canadiennes liées à des sites particuliers.

Le jour 2 a donné lieu à des présentations de type table ronde (dont les participants se trouvaient affiliés à chacun des intérêts des gouvernements et des parties intéressées représentés à l'atelier), à une séance de discussion plénière ainsi qu'à des discussions en petits groupes chargés de présenter en séance plénière le fruit de leurs délibérations sur les obstacles à la collaboration à surmonter en priorité ainsi que des recommandations ou principes directeurs devant permettre de les surmonter.

L'atelier a permis de dégager plusieurs thèmes principaux et d'alimenter l'intérêt des participants. Bon nombre d'entre eux ont vigoureusement exprimé la nécessité de mettre en place au palier fédéral et provincial un cadre législatif concerté du type « loi du bon samaritain » pour encourager l'activité volontaire et éliminer les responsabilités associées (indemnisation des volontaires). Pour plusieurs participants, l'efficacité de l'action ciblée sur les MOA passe d'abord par l'énoncé de principes fondamentaux bien définis, ce qui comprend les principes du « pollueur-payeur », de la précaution/prévention, de la durabilité, et des normes de rendement scientifiquement défendables, pratiques et uniformes pour les MOA. Les bonnes idées pour aborder le volontariat foisonnent, mais il faut prendre le temps de bien définir les modalités d'intervention et leurs modalités de mise en œuvre.

Bon nombre de participants ont reconnu l'importance de ce qui suit : reconnaître l'existence des MOA et les faire mieux connaître (au moyen de politiques, de mesures législatives et de la sensibilisation du public); reconnaître que les MOA doivent être prises en charge et que cela ne se fera pas sans aide; catégoriser et prioriser les sites (allant de la simplicité à la complexité de l'intervention nécessaire); effectuer des analyses critiques de la législation et des procédures existantes en vue de définir une approche pour faciliter les processus habilitants; élaborer un mécanisme pour guider la restauration des MOA et faciliter la coopération. On a également cerné le besoin d'une politique réaliste et d'un cadre de législation qui reconnaît les responsabilités et les droits de tous les intervenants, y compris le public, et qui établit des objectifs communs. Le processus doit être inclusif, transparent, global et multipartite. Les opinions furent partagées quant à la nécessité d'une législation *nouvelle* – certains étant d'avis que la législation actuelle pourrait être exploitée de façon créatrice pour surmonter les obstacles, d'autres percevant la nécessité de modifier la législation actuelle ou de définir une nouvelle législation ciblée sur la question.

Les participants ont généralement reconnu la nécessité de disposer d'une information plus étoffée sur les sites, particulièrement en matière d'évaluation des répercussions sur la santé et la sécurité

publiques, sur l'environnement et les aspects sociaux, sans oublier l'importance de définir des normes de référence.

Tous efforts déployés à l'égard des MOA supposent nécessairement une amélioration sur les plans de la coopération, de la collaboration, de la communication, de la transparence, de l'efficacité et de la simplification. Un bon nombre ont également estimé important de définir un rôle inclusif et clairement énoncé pour les parties intéressées et le public, et plus particulièrement pour les collectivités visées. Le manque de fonds n'a pas manqué d'être désigné comme l'un des obstacles les plus criants et les plus fondamentaux.

Un bon nombre de participants ont cerné la nécessité d'améliorer et d'accélérer le processus d'émission des permis (en allégeant les contraintes fiscales et les contraintes de temps) pour tirer le meilleur parti possible de la faible quantité de dollars investis dans la restauration. De l'avis de plusieurs, les processus d'évaluation et d'examen gagneraient à faire épargner davantage temps et argent. Édifier une relation de confiance (entre les secteurs et plus particulièrement avec les collectivités visées) aurait certes pour effet d'améliorer la coordination de solutions innovatrices tout en abaissant les coûts de l'évaluation et de l'octroi des permis. On a constamment évoqué la nécessité de faire preuve de bon sens – de faire ce qui est judicieux, d'obtenir le plus possible des ressources limitées dont on dispose, sans sacrifier la protection de la santé et de la sécurité des gens et de l'environnement. Il a été par ailleurs reconnu que si, dans bien des cas, les modalités d'application exigeant beaucoup de temps et de ressources se traduisent en bout de ligne par la création de meilleurs projets, il n'en demeure pas moins que des modalités d'application longues et complexes ont parfois pour effet de compromettre l'achèvement des projets (lorsque les fonds arrivent à épuisement, par exemple, avant la fin de l'exercice financier).

À cette question précédente se raccorde un obstacle de plus grande envergure, soit celui de la différence qu'il y a, en termes de politiques et procédures, entre les différents ordres de gouvernement. Il faut définir dans la législation du type « bon samaritain » un ensemble de principes fondamentaux sur lesquels tomber tous d'accord (sans perdre de vue qu'il restera toujours des cas régionaux à régler), ou un ensemble commun de normes que les parties intéressées s'entendent pour respecter.

L'optimisme dégagé par les participants a eu l'effet d'un stimulant – les plus directement concernés ont peut-être des idées différentes, mais tous empruntent généralement la même direction. Les participants, a-t-on pu également observer, ont démontré qu'ils respectent mutuellement leurs valeurs, ce qui, à la longue, ne peut que favoriser le succès.

On a également souligné que les parties intéressées qui interviennent sur le terrain doivent se faire d'avantage confiance et, peut-être, prendre plus de risques. La confiance entre les intervenants peut s'édifier, d'une part, en établissant des registres de non-conformité, en obtenant la participation des collectivités et en définissant un cadre d'action global et conséquent. La confiance est essentielle, mais encore faut-il la gagner, ce qui suppose une vue d'ensemble du processus d'extraction tout

entier, et particulièrement de l'important contexte social que l'on oublie bien souvent – les collectivités touchées doivent être prises en compte et intégrées d'une façon qui compte.

On a fait observer que si l'on veut enregistrer des progrès, il faudra que tous les ordres de gouvernement disposent du personnel et des ressources nécessaires pour fins de recherche, de planification, d'expertise, de passation des marchés, de surveillance et de supervision si l'on veut régler les questions comme il se doit. Les projets de planification et les engagements qui en découlent sur le plan des ressources humaines et financières doivent prendre en compte qu'il faudra mettre passablement de temps (de 5 à 10 ans) pour achever bon nombre de projets. Une nouvelle législation d'ensemble ne pourra être mise en application de façon efficace si les ministères doivent composer avec de sérieuses lacunes en ressources. Plutôt que de créer une nouvelle législation, la solution pourrait peut-être consister à conserver la législation actuelle et à fournir les ressources.

N'y a-t-il pas lieu de clarifier les définitions de termes tels que MOA, volontaire, remise en état et restauration (p. ex. qu'entend-on par remise en état ou restauration, et conception d'un mécanisme pour définir ces termes en fonction de chaque site). Il faut définir des procédures/normes uniformes et coordonnées pour catégoriser les différents sites et pour catégoriser les différents types de volontaires.

On fait observer que les organismes de réglementation devraient revoir leur optique afin d'établir une distinction entre une charge de travail plus typique comme celle d'approuver des projets destinés à rapporter un bénéfice commercial par rapport à des projets qui visent le bien commun, et pour lesquels le bénéfice commercial n'est pas un facteur.

Un participant a résumé en trois mots les questions essentielles abordées par l'assemblée : prévention, investissement et normes. L'importance que revêtent les précédents a été également soulignée, car on peut ainsi déterminer clairement ce qui est réalisable, quels bénéfices peuvent être obtenus par une intervention et ce qu'il en coûtera de ne pas intervenir.

La vice-présidente aux Affaires techniques de l'Association minière du Canada a clôturé l'atelier en disant que le Comité national de consultation sur les mines orphelines ou abandonnées fera la synthèse des délibérations de l'atelier, formulera des recommandations et tracera une voie à suivre. Les recommandations seront présentées aux ministres des Mines en septembre et les participants seront tenus au courant de l'évolution des événements. Enfin, les travaux du CNCMOA revêtent de plus en plus d'importance et gagnent en crédibilité, tant au Canada qu'à l'étranger, en tant qu'initiative multipartite d'examen constructif et efficace du dossier des mines orphelines et abandonnées. Continuer à aborder ce dossier dans un contexte d'ouverture, de collaboration et de créativité permet à tous les intervenants de concrétiser leur engagement et leur détermination à trouver des solutions qui s'avéreront profitables pour l'environnement, la société, les gouvernements et l'industrie minière à court comme à long terme.

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# 1 INTRODUCTION

The Workshop on Legal and Institutional Barriers to Collaboration Relating to Orphaned/Abandoned Mines (OAMs) was held on February 24th and 25th in Ottawa, Ontario. The workshop was a forum for information sharing and dialogue on improving collaboration relating to OAMs among a wide range of communities of interest, including federal, provincial, territorial and municipal governments, aboriginal organizations, the mining sector and mining industry associations, and environmental and labour groups. All participants recognize that policy and legal issues surrounding third party liability and OAMs need to be examined and overcome in a cooperative and transparent manner in order to deal more effectively with the OAM legacy.

The workshop provided an opportunity for more than 60 participants to identify and discuss the legal and institutional barriers to collaboration relating to OAMs, and establish recommendations and guiding principles for consideration by the National Orphaned/Abandoned Mines Advisory Committee.

# 2 BACKGROUND AND WORKSHOP OVERVIEW

## 2.1 BACKGROUND

Orphaned or abandoned mines are those mines for which the owner cannot be found, or for which the owner is financially unable or unwilling to carry out clean-up. Many pose environmental, health, safety, and economic problems to communities, the mining industry, and governments in many countries, including Canada. The National Orphaned/Abandoned Mines Initiative (NOAMI) has been developed to address the legacy of orphaned/abandoned mines and the associated environmental liability, human health concerns and financial costs.

In 1999 and 2000, a number of stakeholders put forth requests to the Mines Ministers to establish a joint industry-government working group, assisted by other stakeholders, to review the issue of abandoned mines. The Ministers supported this initiative and requested that a multi-stakeholder workshop be organized to identify key issues and priorities.

The Workshop on Abandoned Mines, held June 2001 in Winnipeg, reviewed the issues for orphaned/abandoned mine sites and identified processes to move forward. Mines Ministers asked that a National Orphaned/Abandoned Mines Advisory Committee be struck to study various issues and initiatives concerning the development and implementation of remediation programs across Canada. One task of the Committee was to evaluate, in Canada, the US, and other countries, legal

and institutional barriers to collaboration and to identify mechanisms for third party collaboration.[1] Joseph Castrilli, Barrister and Solicitor, developed a background paper outlining legal and institutional barriers and identifying legal mechanisms for third party collaboration. The Committee also agreed to sponsor a workshop to provide participants with an opportunity to identify common challenges and share ideas/solutions across the sectors that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines without assuming all liabilities. These include legislative and institutional barriers, liability disincentives, and collaborative opportunities with respect to remedial action on orphaned/abandoned minesites on a voluntary or limited basis.

### 2.2 OBJECTIVES OF THE WORKSHOP

The workshop objectives were:

- To identify, better understand and assess the legal and institutional barriers, along with the preferred options that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines; and

- To develop recommendations and guiding principles for consideration by the National Orphaned Abandoned Mines Advisory Committee and possible transmittal to Federal, Provincial and Territorial governments.

### 2.3 STRUCTURE OF THE WORKSHOP AND REPORT

The National Orphaned/Abandoned Mines Advisory Committee sponsored the workshop. More than 60 people attended; participants included representatives of aboriginal organizations and environmental groups, the mining sector, mining industry associations, and federal, provincial and territorial governments.

This report represents the output of the workshop. Sections 1 and 2 include a brief introduction, background information on the issues, objectives and structure of the workshop, and summary of welcoming remarks. Section 3 provides a detailed overview of the presentations and related discussions that occurred on Day 1. Section 4 captures the panel presentations and plenary discussions that occurred on Day 2, reviews the ensuing breakout sessions, and summarizes the key points expressed in the final roundtable. Section 5 summarized the closing remarks. Appendix A provides the list of workshop participants. Appendix B duplicates the workshop agenda. Appendix C is a glossary of legal terms relevant to this workshop. Most presenters used "Power Point" presentations. These presentations are duplicated as Appendix D of these Proceedings, and are attached as a separate file.

[1] The Committee established four Task Groups to deal with work identified at the conference: Inventory Task Group; Community Involvement/Participation Task Group; Legislative Approaches/Barriers to Collaboration Task Group; and Funding Models Task Group.

Day 1 of the workshop began with welcoming remarks from Christine Kaszycki, the Chair of the OAM Advisory Committee and the Assistant Deputy Minister, Manitoba Industry, Trade and Mines. The remainder of Day 1 comprised a number of information sharing presentations:

- Overview of the legal and institutional barriers to collaboration (Joseph Castrilli, Barrister and Solicitor)
- Review of Pennsylvania's *Environmental Good Samaritan Act* and related initiatives from the Pennsylvania Department of Environmental Protection (Scott Jones)
- Review of the U.S. Federal *Abandoned Hardrock Mines Reclamation Act of 2002* and related initiatives from the Mineral Policy Centre (Alan Septoff)
- A presentation on Abandoned Mines in the North from the Office of the Commissioner of the Environment and Sustainable Development (CESD) (Richard Arseneault)
- A review of the OMA/OMNDM Initiative by the OMA/Barrick Gold Corp. (John Martschuk)
- Liability, Legislative and Institutional Barriers and Opportunities for Collaboration: Setting the Stage (Joseph Castrilli, Barrister and Solicitor)
- Site-Specific Experiences in Canadian Jurisdictions:
    - Experiences from the Manitoba Government (Christine Kaszycki and Edwin Yee)
    - Experiences from the Mining Sector (Wayne Fraser, HBMS)
    - Experiences from the Ontario Ministry of the Environment (Kenneth Jull, Beard Winter Barristers and Solicitors)
    - Experiences from the North (Robert Lauer, INAC)

Day 2 of the Workshop consisted of panel presentations and a plenary discussion, as well as breakout group discussions and reports to plenary, on the priority barriers to collaboration and recommendations/guiding principles to overcome these barriers. Elizabeth Gardiner of the Mining Association of Canada concluded the workshop with next steps and closing remarks.

The Workshop was planned and organized through the Workshop Organizing Team (WOT) whose members included:

**Dr. W.R. (Dick) Cowan**, Director of Mine Rehabilitation (Ontario Ministry of Northern Development and Mines)
**W. Wayne Fraser**, Director, Environment and Communications (Hudson Bay Mining and Smelting Co. Limited)
**Paulette Fréchette**, Mailing List Coordinator (Five Winds International)
**Elizabeth Gardiner**, Vice President, Technical Affairs (The Mining Association of Canada)
**Charlene Hogan**, Environmental Scientist, Special Projects and MEND3 (Mining and Mineral Sciences Laboratories, CANMET, NRCAN)
**Brennain Lloyd** (Northwatch)
**Barbara Mossop**, P.Eng. MBA, Manager of Engineering and Environmental Services (Ontario Mining Association)
**Fred Privett,** Manager, Socio-Economic Benefits **(**Mineral Resources Directorate, Indian and Northern Affairs)

**Hajo Versteeg**, Facilitator (Environmental Law & Policy Advisor)
**Edwin J. Yee**, Senior Consultant, Toxic Chemicals (Manitoba Conservation)

Hajo Versteeg provided facilitation services for the workshop. Karla Heath of Stratos Inc. provided recorder services.

### 2.4 WELCOMING REMARKS

**Presenter:** Christine Kaszycki, Chair, OAM Advisory Committee and Assistant Deputy Minister, Manitoba Industry, Trade and Mines

Christine Kaszycki welcomed participants to the workshop. To set the context for the workshop, she provided an overview of the National Orphaned/Abandoned Mines Initiative (NOAMI) from its inception in 1999 to its current status, and outlined the objectives of the Barriers to Collaboration Task Group, which are based on recommendations regarding ownership and liability from the Winnipeg workshop held in 2001:

- Shared responsibility and stewardship where ownership cannot be established.
- Evaluate options for attribution of liability:
    - Allocative versus joint and several
    - Good Samaritan legislation
- Implement the polluter pays principle
- Evaluate regulatory measures to eliminate future abandonments:
    - Permit-blocking
    - Non-compliance registries

The major goal of this workshop was identified as determining specific recommendations for dealing with barriers to collaboration to bring to this year's Mines Ministers annual general meeting to be held in Halifax in September.

## 3 DAY 1: PRESENTATIONS

### 3.1 OVERVIEW OF THE LEGAL AND INSTITUTIONAL BARRIERS TO COLLABORATION

**Presenter:** Joseph Castrilli, Barrister and Solicitor

This presentation summarized the Report on Legal and Institutional Barriers, Liability Disincentives, and Collaborative Opportunities with respect to volunteer cleanup of abandoned mines in Canada, prepared by Mr. Castrilli for the Barriers to Collaboration Task Group in July 2002. He examined existing legislative requirements in Canada, selected other North American jurisdictions, and other countries on:

1. Regulatory or institutional barriers;
2. Liability disincentives; and
3. Collaborative opportunities

regarding voluntary abatement, remediation, and reclamation of orphaned/abandoned mine lands.

Orphaned or abandoned mine sites are generally defined as closed mines whose ownership has reverted to the Crown, either because the owner has gone out of business, or because no owner can be found. They also are described as mine sites where the owner has ceased or indefinitely suspended advanced exploration, mining, or mine production without rehabilitating the site. Throughout his presentation Mr. Castrilli noted that the problem requires both financial and legal solutions.

In general, there is no existing or proposed federal or provincial legislation in Canada regarding the subject of Good Samaritan legislation. Some existing law implicitly, though not explicitly, may have the same effect as permit blocking. There is some law, policy, and practice in existence regarding noncompliance registries and allocative versus joint and several liability. In comparison, there appear to be many more legislative measures at the federal and state level in the United States explicitly addressing several of these subjects. National legislation in the United Kingdom and state legislation in Australia is comparatively in its infancy in addressing these matters.

Generally, in regard to regulatory or institutional barriers, federal, provincial and territorial environmental and mining laws in Canada contain a number of permit, regulation, and other requirements that likely would have to be complied with by those voluntarily undertaking abandoned mine abatement, remediation, and reclamation. Existing exemption or variance authority under a number of these laws may be available to accommodate such activities, though the generality of the statutory language under many laws reviewed makes this difficult to predict with certainty.

In regard to liability disincentives, federal and provincial law in Canada contains a variety of judge-made and statutory authorities that could impose quasi-criminal, civil, or administrative liability on those undertaking abandoned mine land abatement, remediation, and reclamation activities. There also are some statutory authorities, such as secured creditor and related exemptions, that might serve as precedents for exempting from liability those who volunteer to abate, remediate, and reclaim abandoned mine lands.

In regard to collaborative opportunities, a number of voluntary assessments and abandoned mine land cleanups have been completed, or are on-going, by provincial governments in Canada. These initiatives have been undertaken without legislative reform. Other collaborative opportunities include variance authority, precedents arising from secured creditor exemptions, and related approaches.

Overall, however, the current legislative and regulatory regime in Canada is at best a patch-work, at worst indifferent to the problem. Legislators have not turned their attention to orphaned/abandoned

mines to produce a principled and comprehensive solution to the problem. Both the Parliament of Canada and provincial and territorial legislatures will have to speak directly to the problem.

A short list of possible components or options for a federal and provincial legislative/regulatory approach to facilitating voluntary abandoned mine land abatement, remediation, and reclamation include:

- Amend existing or enact new law that encourages volunteers to abate, remediate, and reclaim abandoned mine lands,
- Exempt volunteers from being "responsible persons" under contaminated site, water pollution, or related laws as a result of carrying out "good samaritan" remediation,
- Establish an abandoned mine reclamation "good samaritan" permit program, which would require permittees to specify reclamation plans and meet certain standards for cleanup, ensure public participation, and environment ministry oversight of cleanups,
- Require remining operators to implement strategies that control pollutant releases and ensure that pollutant discharges during remining activities are less than the pollutant levels released from the abandoned site prior to remining,
- Create exemptions from remediation liability at "historic mine sites", and
- Adopt certain collaborative opportunities under federal and provincial environmental and mining laws noted above (e.g. variance authority, secured creditor exemption precedents, etc.).

**Discussion**

There was substantial discussion around the definition of "volunteer". The question was asked whether mining companies interested in remining a site are considered volunteers under pertinent Pennsylvania and Nova Scotia legislation, and whether they *should* be defined as volunteers if their intention is to make money. The Good Samaritan concept arises from a non-profit view, so a true volunteer is a person who is not looking to make money. This is not to say that a regime could not be developed that would go beyond volunteerism and deal with those who *are* looking to make a profit (perhaps hold them to a different standard than a true volunteer). It was also clarified that the statutory provisions of the *Fisheries Act* do apply to volunteers, but there is uncertainty how the new Metal Mining Effluent Regulations apply to volunteers.

There was also considerable discussion around whether the definition of volunteer includes government. While a government agency could be considered an organization in the context of the definition, it is not explicit with respect to government. Political subdivisions and government agencies are covered as volunteers under Good Samaritan law in Pennsylvania.

Contaminated sites exist in more than just the mining industry, and amending all existing contaminated sites laws to incorporate the volunteer concept could be a very time consuming process. Since both provincial and federal laws could apply to volunteers, it would be necessary to review

laws at both levels of government, and it may be necessary to change laws at both levels because of overlapping jurisdictions. In terms of actually amending the law, it is possible to write one law that amends all others that apply to the subject, which would be a shorter process than amending each law individually. The Uniform Law Conference of Canada, which creates uniform legislation provincially and federally, could help in this area.

There was also some discussion around the effort to establish the "before and after picture" at a site, which is necessary to ensure that cleanup activities actually improve site conditions. [Stakeholders need to be able to identify the existing and required position on a continuum from not making it worse to making it better. This requires a good understanding of conditions before, during and (when applicable) after cleanup activities.] Who pays for these assessments and over what time period is a consideration in the broader question of who pays for the entire cleanup/remediation.

There was also concern regarding "grandfathering", whereby a statute comes into place at a given time and only applies back to certain date (site predates the law). Many OAMs in Canada predate environmental legislation, but if Parliament and provincial legislatures decide to deal with abandoned mines, "grandfathering" will not be an issue because the sites do not have owners.

One individual, commenting on Slide 26 of Mr. Castrilli's presentation, noted that uranium mines abandonment license regulation do apply to volunteers. It was also noted that the Deloro mine was exempted from the provincial, but not the federal Environmental Assessment process. The federal government through the offices of the Canadian Nuclear Safety Commission (CNSC) has only recently commenced a screening level environmental assessment. While this information is available on the CEAA registry, it should also be placed on the CNSC Web site.

### 3.2 REVIEW OF PENNSYLVANIA'S *ENVIRONMENTAL GOOD SAMARITAN ACT* AND RELATED INITIATIVES

**Presenter:** Scott Jones, Hydrogeologist, Greensburg District Mining Office, Pennsylvania Department of Environmental Protection

After several hundred years of unregulated mining and gas and oil drilling, Pennsylvania is now faced with reclaiming thousands of hectares of abandoned mine lands, orphaned gas wells and over 3200 kilometres of degraded streams. The *Environmental Good Samaritan Act* (EGSA) encourages improvement of land and water by limiting the liability which could arise as a result of voluntary reclamation of abandoned mine lands (AML) and abatement of water pollution. Landowners and groups who volunteer land, material or labour at no charge or at cost can be eligible for protection under the EGSA. The EGSA does not prevent a person from being sued but allows the DEP to provide the defendant an "affirmative defense". Proposed modifications to the EGSA include expanding the Act to include abandoned industrial sites, creating a "general permit" to streamline permitting requirements and consideration for a national-based EGSA.

Other initiatives that Pennsylvania has employed to limit liability include "discharge liability limits (DLL)" [Sub-Chapter F of the Commonwealth's regulations] and the Government-Financed Construction Contract (GFCC) programs. Both of these programs deal more with the mining industry but have resulted in significant reclamation of AML and vast improvements in the quality of Pennsylvania's receiving streams. The DLL are based on State and Federal Law that considers pre-existing discharges as a separate discharge category and therefore are not subject to the usual present-day effluent limits. The DLL are derived from a calculated 'water quality baseline'. In essence, as long as the operator does not degrade the discharge beyond baseline (there is an expectation that he will improve the discharge), the operator will not be held responsible for permanently treating the discharge. Furthermore, the more reclamation the operator proposes—the less stringent the baseline limits are set. A study of over 230 pre-existing discharges (later affected by remining/reclamation efforts) shows that most of the discharges have undergone significant reductions in pollutant loadings.

The State's AML program was amended in 1999 to allow limited removal of coal during AML reclamation. Reclamation contracts are used rather than the standard mining permit system. Through a contract, the operator is not subject to the usual barrier provisions, pre-existing discharge liability, or long-term bond requirements. The GFCC sites are usually two to five hectares in size. The operator is required to complete reclamation of the entire site prior to bond release. To date, over 600 hectares of AML have been reclaimed.

**Discussion**

Following this presentation, the question was asked whether project applicants are required to do any consultation with public/Aboriginal groups. It was explained that, with regard to public notification, the department either advertises all details of a project in the newspaper several times over a several week period and directs all concerns to the DEP (Department of Environmental Protection) office, or contacts all downstream and adjacent landowners by certified letter. This is consistent with other requirements under environmental legislation in Pennsylvania.

Another question raised was whether there have been any lawsuits under federal acts, or whether the federal government has taken any action with regard to these reclamations. So far, the program has had the full support of the federal government, and there have been no lawsuits. It was also clarified that while the federal government is made aware of the program and how it proceeds, final federal approval for projects is not required.

Further clarification of the Government-Financed Construction Contract (GFCC) programs was requested. It was explained that GFCC is a misnomer – no government funds are expended in this program. Instead, the funding is similar to a regular surface mining application. While federal surface mining law does include some funding for abandoned mines, the state only receives a small portion. There is no relationship between the GFCC program and Good Samaritan law.

The presenter was asked to clarify "public notice" in the context of the presentation – even though the state agency is responsible for public notice, the presentation asserted that an applicant can lose their liability exemption if written or public notice of the proposed project is not provided to all landowners. It was clarified that the public notice provided by the department is based on information provided by the applicant (i.e.: the list of landowners, project details, etc.). It is the applicant's responsibility, not the department's, to ensure this information is compete and accurate. The same notice provisions apply to remining. The presenter noted later in the Workshop that there are two additional avenues that the Department employs to provide "public notice". First, the Department publishes a "notice of receipt" of the application in the Commonwealth's weekly list of legal notices called the 'Commonwealth Bulletin'. Also, the Department informs the local municipality that an application has been received—and includes the location where the public can review a copy of the application. There was some discussion around possible courses of action where people oppose a project. Adjacent landowners who do not understand or have concerns regarding a project can contact the DEP for further explanation. In the vast majority of cases, concerns are alleviated when landowners better understand the project. Overall, there is a great deal of support and very little adverse concern regarding reclamation projects. Additional points raised by Mr. Jones during the discussion included:

- Reclamation in lieu of penalties is available in appropriate circumstances—instead of paying a civil penalty for a past mining violation, an operator may 'partner' with the PADEP and offer to reclaim adjacent OAMs as long as the cost of reclamation matches or exceeds the cost of the civil penalty;
- Partial treatment, while not ideal, is considered acceptable in appropriate circumstances, and particularly where the alternative is to do nothing; and,
- Volunteer may apply for a grant [under several State and Federal programs] to cover costs at the same time as they apply for liability protection.

### 3.3 REVIEW OF THE U.S. FEDERAL *ABANDONED HARDROCK MINES RECLAMATION ACT OF 2002* AND RELATED INITIATIVES

**Presenter:** Alan Septoff, Research and Information Systems Director, Mineral Policy Centre

The Mineral Policy Center is a non-profit environmental advocacy group dedicated to protecting communities and the environment from the impacts of (mostly) metal mining. The root of the OAM problem in the U.S. was identified as the 1872 Mining Law, which is still in effect today and does not mention environmental protection and has no provisions for mine reclamation. There were no federal environmental mining regulations that governed mine reclamation until 1980, and these "new" rules are weak.

The problem is expansive – it is estimated that there are 500,000+ abandoned mines in the U.S., and more than half of the abandoned hardrock mines are in the west. The problem is also expensive – estimates indicate that it will cost from $32 to $72 billion to clean up these sites, if not more, and the problem continues to grow with mines still being abandoned today. There is no federal program in

the U.S. dedicated to abandoned hardrock mine reclamation, and what does exist is a "grab bag" of federal and state programs that are not solely focused on hardrock mine reclamation.

While everyone agrees that OAMs are a problem, there are legal/liability barriers, financial barriers, and political barriers to reclamation. A potential solution to these barriers is the proposed Udall Abandoned Mine Bill, which establishes a reclamation fee on most hardrock mining,[2] and provides a liability waiver under the federal Clean Water Act for most government Good Samaritans.[3] Remining is not strictly prohibited under the Udall bill, but remining revenues must go to cleanup or a reclamation fund that will address other sites.

Prospects for the Udall Bill are uncertain. Industry is trying to eliminate the fee, and environmental groups are not entirely on board with the liability waiver, but the Bill does represent unprecedented, consistent, prolonged interest by all stakeholders.

**Discussion**

Clarification was requested regarding the coverage of the liability waver. The waiver would cover all mines that were claimed under the 1872 Mining Law, which includes almost all mines west of the 100$^{th}$ meridian.

It was pointed out that the presentation focused on water discharge, and limiting liability for water pollution. It was asked whether the discussion could extend to adverse health impacts that exist at abandoned minesites. However, the Udall Bill does not deal explicitly with human health impacts.

The presentation offered impressions of industry and environmental group on the Udall Bill – the presenter was asked to discuss the government's impressions. In Colorado where this initiative arose, there is definite support for the Udall Bill or something like it, and there is general acknowledgement outside Colorado that the issue needs to be addressed. Colorado representatives in Congress are split (democratic and republic), but if the Colorado delegation can agree on something it will have the political legs to move through Congress. However, given the environmental history of the present federal government, it could go either way.

In reference to the US EPA and effluent standards based on best available technology (BAT), as well as previous discussions with Scott Jones (Pennsylvania DEP) that indicate that less stringent standards would be acceptable in certain situations, it was asked whether (a) there is any consideration of standards and level of standards in the Udall Bill, and (b) what is the role of BAT in

[2] The fee structure is based on the industry-endorsed Nevada tax (per-mine fee). Each mine is examined to determine the net proceeds, which are divided by gross proceeds. If ratio is higher (mine is more efficient) mine will end up paying higher percentage of net proceeds, up to 5%. Unprofitable mines pay nothing, and mines that have gross proceeds less than $500,000 year also pay nothing.

[3] Government can contract with a private party (i.e.: industry), who will also be covered by the Good Samaritan legislation. However, it does not cover the federal government doing work on federal land.

Pennsylvania. With regard to the latter question, under the active surface mining program, companies fall under the *Surface Mining Control and Reclamation Act* (SMACRA ) and would be required to treat to BAT (current standards). However, under other programs, the state, in working with the EPA and the federal government, has been able to say that preexisting discharges fall into a different category. As long as the entity is conducting the reclamation using best management practices approved by the department, the operator who has physically affected the preexisting discharges does not have to meet official BAT, but has to meet some "lower level" of treatment. With regard to standards in the Udall Bill, the Bill would amend the *Clean Water Act* and establish new standards for Good Samaritans. Clean up would occur to the maximum extent practical, which would be outlined in the permit application, approved by EPA administration or another delegate and be subject to full public notice and comment before permit approval (site by site).

A participant asked for more information on the experiences of other extractive industries in setting up funding mechanisms. The Clean Streams Initiative, which has substantial money, has been used to clean up streams, and mines of various types. Superfund is running out of money, and the Bush administration will probably not renew it.

Another participant asked for clarification on what constitutes a minesite, and whether the Udall Bill required all remining revenues to go to cleanup, which does not provide an incentive for mining companies to remine and subsequently remediate. It is not clear what constitutes a minesite under the Udall Bill. With regard to the remining question, the Bill does establish an intentional disincentive by requiring that all remining revenues go onto remediation. The Udall Bill was developed in cooperation with Mineral Policy Centre, who is not interested in facilitating mining. It is the opinion of the MPC that most abandoned hardrock mines, if they were remined, might open the door to new open pit surface mines, and the cure might be worse that the problem.

### 3.4 ABANDONED MINES IN THE NORTH

**Presenter:** Richard Arseneault, Director, Office of the Commissioner of the Environment and Sustainable Development

This presentation provided context on the roles and responsibilities of the Office of the Auditor General (OAG) and Office of the Commissioner of the Environment and Sustainable Development (CESD), as well as a review of Chapter 3 of the 2002 CESD report on abandoned mines in the North.

The OAG scrutinizes how well federal departments and agencies manage programs and services, and bases their audits on well-established "value-for-money" audit methodology. The OAG itself is also audited, both by internal and external auditors. The CESD audits the federal government's activities to respond to environmental and sustainable development (SD) issues that are important to Canadians. The CESD holds the federal government accountable to achieve the goals outlined in its Sustainable Development Strategies (SDSs), and is the guardian of the Environmental Petitions Process.

Chapter 3 of the 2002 CESD report deals with abandoned mines in the North, which the federal government has inherited from the private sector. Hundreds of thousands of tons of highly toxic chemicals are found at these sites, some of which represent a serious threat to human health and the environment and will require perpetual care. Indian and Northern Affairs Canada (INAC) is mandated to manage these problems on behalf of the federal government. In their report, the CESD identified capacity and policy gaps at INAC that are causing delays in dealing with the problem of abandoned mines. This year alone, the CESD reports that INAC will spend $26 million to stop contaminants from escaping these sites. Most of this work is in care and maintenance as opposed to remediation, which represents a "band-aid" approach to the problem. It is possible that money from other programs, such as education and health, had to be redirected in order to make up this $26 million.

INAC conservatively estimates that long-term solutions will cost Canadian taxpayers at least $555 million. "Permanent" solutions are not being implemented because INAC does not have the necessary funds. INAC has laid out options to deal with the problems, and continues discussions with central agencies. At the time of the CESD audit, the government had no funding strategy in place to support the recent efforts of INAC. Application of the "polluter pays principle" is impossible in the case of bankrupt mining companies, which highlights the need to collect sufficient financial security while the companies are still in operation. While INAC has legal and contractual tools in place to collect financial security from companies, which is working for the new northern mines, it may not work for older northern mines still in operation.

INAC must take measures to ensure that abandoned mines in the North do not represent a threat to human health and the environment, and must take measures to ensure that currently operating and future mines do not become an additional financial burden to Canadians. The CESD points out that while good work is being done in this area, action on the ground is slow. The recent federal budget dedicated $175 million over two years to federally owned contaminated sites.

**Discussion**

A participant asked whether the CESD/OAG conducts compliance audits on INAC to determine whether they have done their duty to consult with Aboriginal communities. The audit did look at compliance in the context of inspections. It was also asked whether the CESD/OAG has the power to sanction or compel compliance where it is lacking. If the CESD/OAG uncovers a major situation that must be addressed immediately (cannot wait for the report to be written), they will bring the problem to senior departmental management, but they do not have the power to impose their views. Their report goes to Parliament, and Parliament can enforce actions.

A participant questioned whether, in their "value-for-dollar" audit, the CESD made recommendations about how INAC can move from care and maintenance to lasting solutions. The CESD has not looked at these options. It is up to the department to do what they can with the money they have.

One of the recommendations in the CESD report was that INAC would report publicly on results of inspection and enforcement. A participant mentioned that INAC, when questioned about this, said that it is not their policy to publicize reports containing non-compliance information. INAC has made a commitment to accept the recommendations in the CESD report, and the CESD will follow up on the results of their audit.

### 3.5 A REVIEW OF THE ONTARIO MINING ASSOCIATION/ONTARIO MINISTRY OF NORTHERN DEVELOPMENT AND MINES INITIATIVE

**Presenter:** John Martschuk, Director, Ontario Mining Association, and Director, Environment, Barrick Gold Corporation

In April 2000, the OMA Board passed a resolution to contact the OMNDM to see how the OMA, and member companies, could be of assistance to help the government deal with historical abandoned mine problems. The OMA wrote to OMNDM expressing this resolution, and in May the OMNDM Minister responded favourably to the proposal and suggested several options. In July 2001, OMA requested the Minister to participate in funding a partnership to rehabilitate abandoned mines, and in August the Deputy Minister agreed to provide funding for such a partnership. The OMA/OMNDM will established a Joint Advisory Committee (JAC) on Abandoned Mines. Much effort has been spent subsequently overcoming various issues/barriers related to the proposed agreement, and the OMA has also initiated discussions to obtain funding from the federal government as a potential third partner.

The purpose of the OMA/OMNDM initiative is to develop a protocol/agreement whereby OMA and OMNDM can work together to deal with historical abandoned mine problems. Such activities can enhance the rate of rehabilitation of abandoned mine hazards in Ontario, and comprise an investment in image with respect to improving negative perspectives of the mining industry within the sustainable development equation. The focus is to get results on the ground, to start small, gain success and then move on to bigger issues. A demonstration project will bring many issues to the forefront, allow them to be ironed out, and hopefully result in better success with subsequent projects.

In the partnership, the OMNDM retains full ownership and responsibility for the sites, and the OMA will not work on lands where they or their members might benefit. Projects must also be meaningful from an environmental or public safety perspective, and OMA members should be rehabilitating any inactive sites that they currently own.

It was concluded that the JAC would initially propose to work only on abandoned mines located entirely on Crown land to simplify administration and permitting barriers, and clarify existing and future liability (e.g.: liability 100% Crown owned at time of project initiation). OMNDM will administer all funds that will be provided by OMA, OMNDM and any other party. With regard to financial issues, OMA members initially suggested that contributions could be in the form of cash, on-site services or technical expertise, and financial contributions would be tax deductible as “gifts to

the Crown" (subject to tax ruling by CCRA and OMOF). It has been concluded that donations of cash will be easier to address than donations of in-kind goods and services.

OMA, gifting members or associates wish to be indemnified from any liabilities that might flow from projects funded through this agreement, and OMNDM concurs with this intent. Since projects will be restricted to hazards owned by the Crown or on Crown land where existing liability is 100% Crown owned, OMNDM (Crown) will indemnify gifters and participants on the advisory committee from third party liabilities provided that the gifter/advisor has not acted in bad faith, wilful misconduct, gross negligence or fraud. Indemnity can include indemnification from legal liability from other jurisdictions (e.g.: potential for charges pursuant to the *Fisheries Act*).

To be fully engaged in this project, OMA representatives believe that intellectual involvement in co-funded projects is necessary, but such engagement appears to be limited in scope by (a) taxation ruling – gifters cannot have control over the use of a gift; (b) indemnification – level of involvement must not affect indemnification issue; and (c) ownership.

At the time of this workshop it appears that most legal and institutional barriers to reaching agreement have been overcome. Thus it is hoped that completion of an agreement is imminent.

**Discussion**

There was discussion around public involvement in this process. Assuming that the MOU between the OMA and OMNDM is signed, the participatory process should start soon with discussing "where the rubber hits the road" – no projects will go forward without consultation with concerned stakeholders, including Aboriginal groups. The point was raised that once the agreement is signed, there may be little opportunity for other interested parties to influence content of the MOU, specifically with regard to decision making and the direction of various initiatives. Given the fact that this initiative is being talked about as a model to be used elsewhere, there was serious concern with the lack of public involvement to date, and it was asked whether OMNDM would consider making the MOU available to public for comment as a draft before it is signed.

A participant also asked how much money has been put into the project by OMNDM and when, and who else was included in the process. It was clarified that while the participation of the OMNDM is formally expressed in a letter, they have not yet invested any money because there have not been any projects. In terms of who was involved in the process, the participant specifically asked for clarification on OMA representation. The OMA only represents its members, which does not reflect the entire mining industry in Ontario. It was recognized that to be ultimately successful, the initiative should engage the entire mining industry, whether they are OMA members or not.

While there was general recognition of the need for wider participation, it was pointed out that the goal of the initiative was to make progress, to get beyond discussions and see results on the ground. It was not the group's intention to exclude anybody.

### 3.6 LIABILITY, LEGISLATIVE AND INSTITUTIONAL BARRIERS AND OPPORTUNITIES FOR COLLABORATION: SETTING THE STAGE

**Presenter:** Joseph Castrilli, Barrister and Solicitor

This presentation revisited the issues with respect to legislative and institutional barriers and liability disincentives discussed during the morning session

A legislative/institutional barrier to volunteer abatement may be a requirement under a statute/regulation that imposes an obligation on volunteers to do, not do, or to obtain something if they want to proceed (i.e.: a licence, permit, approval, or standard that applies generally to the regulated industry). A key question is whether the volunteer should meet the same or different requirements as the rest of the regulated industry? Some examples of legislative/institutional barriers are listed below:

FEDERAL

- Licensing requirements under natural resource management laws in northern Canada
- Regulations under the *Fisheries Act*
- Pollution prevention plans under *CEPA*
- EA requirements under *CEAA*
- Uranium mining licensing requirements to abandon sites under *NSCA*

PROVINCIAL

- Requirements for obtaining and complying with:
    - Approvals
    - Licences
    - Permits
    - Plans
    - Regulations
    - Environmental assessment obligations (under limited circumstances)

A liability disincentive to volunteer abatement may arise from the breach of common law (judge-made law) or legislative or regulatory provisions and may result in the imposition of fines, monetary compensation obligations, obligations to do or refrain from doing something, or, in extreme circumstances, imprisonment.

**Discussion**

Germane to this discussion is *who* is experiencing the barriers – Provincial crown? Federal crown? Provincial industry association? Interest associations? This depends on the definition of volunteer, which is a policy matter in dispute that needs to be discussed and resolved. Depending on the situation, it is important to identify the entities creating the barriers and which groups are adversely affected by the barriers. Once that distinction is made, it is easier to determine where collaboration

might be possible. In response to a question about the expectation that reliance on the common law may not be the most efficient way to promote reform, Mr. Castrilli agreed and added that statutory reform offered the best opportunity for dealing with these issues.

## 3.7 SITE-SPECIFIC EXPERIENCES IN CANADIAN JURISDICTIONS:

### *3.7.1 Experiences from the Manitoba Government*

**Presenter:** Christine Kaszycki, Chair, OAM Advisory Committee and ADM, Manitoba Industry, Trade and Mines
Edwin Yee, Senior Consultant, Toxic Chemical, Manitoba Conservation

Manitoba mining legislation has a complex history, a variable liability framework, and no specific context for OAMs, all of which have resulted in confusion and an ad hoc approach to dealing with OAMs. Manitoba also faces unique interjurisdictional challenges to collaboration in sharing a mine across the Manitoba-Saskatchewan border.

The *Contaminated Sites Remediation Act* (CSRA) was proclaimed in May 1997 to address contaminated sites in Manitoba. Although the intention was not to apply the CSRA to mine sites, through regulation, the CSRA can apply to specific mine sites. The CSRA is founded on 13 guiding principles established by the Canadian Council of Ministers of the Environment (CCME). The most significant principles for our purposes include: polluter pays; fairness; openness, accessibility and participation; beneficiary pays; and sustainable development. These principles should be considered when developing the appropriate regulatory tools to address the issues of legislative barriers and liability.

Experience in applying the CSRA to contaminated sites in Manitoba has been positive in overcoming some of the liability issues relating to site investigation and to some extent addressing liability apportionment. Under the CSRA, the owner or occupier and not necessarily the polluter is allocated the responsibility of site investigation. This investigation determines if the site may pose a risk to human health or the environment and would require some remediation. Parties generally do not wish to undertake any investigation of contaminated sites due to the potential liability implications. The CSRA provides for an agreement between government and other parties to investigate a site with any terms, conditions or requirements that are necessary or required to determine the existence, nature or extent of the contamination of the site. The CSRA includes an apportionment process to apportion liability based on the CCME Guiding Principles. Although there has been limited experience in applying this process, a number of potential responsible parties have voluntarily cooperated in the remediation of contaminated sites in Manitoba on the basis of this process. The CSRA provides for voluntary allocation (agreement between the responsible parties), mediated allocation (a mediator is appointed to assist responsible parties in reaching an agreement), and direct allocation (apportionment by a commission). Joint and several liability has not been incorporated in the CSRA as it was the consensus of Manitoba's stakeholders that it would hinder rather than assist in the management of

contaminated sites. Factors for consideration in allocating responsibility for remediation have also been incorporated into the CSRA.

The CSRA is a risk-based approach to managing contaminated sites in Manitoba. The definitions for "contaminated sites", "impacted" and "remediation" reflect the risk-based approach and the principles of sustainable development.

### *3.7.2 Experiences from the Mining Sector*

**Presenter:** Wayne Fraser, Director, Environment and Communications (Hudson Bay Mining and Smelting Co. Limited)

Hudson Bay Mining and Smelting Co. Limited (HBMS) has been in operation for 75 years, and has decommissioned 15 mine sites. They plan with closure in mind, which makes it easier to deal with closure efficiently and effectively.

HBMS's experience with OAMs has been varied. They have worked on abandoned minesites that they did not own, and have been prepared to accept cleanup liability for sites that others have assumed they owned because of the site's proximity to HBMS property. Today, there are OAMs that HBMS knows need to be addressed immediately and would like to help clean up, but there is no way to do so without accepting *legal* liability. They also do not want to risk the probability of significant legal action because of their cooperation with government. HBMS feels that they should be able to work on OAMs to reduce safety, environment and human health hazards and improve aesthetics without having to accept liability. As an industry and as part of society, they would like to find a way to correct the legacy of OAMs, and feel that elimination of legislative and regulatory barriers would aid in this correction.

**Discussion on Previous Two Presentations**

There was discussion around the mechanism required to allow mining companies to participate in OAM cleanup. They may be willing to accept responsibility to *fix* a site, but not the responsibility for the site in its entirety. Orphaned mines that have not been officially abandoned by the company and are therefore not on Crown land represent a unique situation. Under the law, if the site is not on Crown land and the company has its rights in good standing, there may be no condition onsite that would give the Crown the authority to issue a directive.

Mining companies could be hired as contractors to fix the problem, and the nature of contractor work is such that the contractor does not have to accept legal liability for the entire site. While this option may not solve the OAM problem, some work to improve OAMs is better than no work at all. There was discussion around whether a letter of contract actually does save a third party from liability. In a contract, the job is scoped precisely, and a contractor works within that scope and, as long as the job is performed correctly, is not responsible for anything else. This option presumes that the government has the ability to enter the property and thereby issue the contract to do the work, or the

company that owns the site has the money to pay a contractor to fix the problem. More often than not, the government does not have the authority to enter the site and commission the work, and the company who owns the property does not have the money to fix the problem.

There was also some discussion around the *coverage* of standards. A participant shared an experience with drinking water standards, whereby two communities (a non-aboriginal township and a First Nations reserve) were both being impacted by contaminants from a mine, but under federal standards only the non-aboriginal township was eligible to receive a drinking water treatment plant. The point was made that some people may be subjected to lower standards than others, so standards are not necessarily the best approach.

It was recognized that there is a larger issue that needs to be discussed, which is the extent of the role of the individual. One participant noted that individuals cannot fix the bigger problem. The main volunteers should be federal and provincial government (on federal Crown and provincial Crown land, respectively). Government needs to take the lead because they are the only ones who can afford to do so, and industry and NGOs can pitch in.

In response to a question, Mr. Yee noted that the CSRA does not apply to a site that is subject to the provisions of the Mines and Minerals Act. Mr. Yee also noted that it was his understanding that the *Mines and Minerals Act* applies only to operating mines.

### *3.7.3 Experiences from the Ontario Ministry of the Environment: Remediation of Contaminated Sites and Due Diligence – The Deloro Decision*

**Presenter:** Kenneth Jull, Beard Winter Barristers and Solicitors

The scope of responsibility for a contaminated "orphan" site was recently the subject of a detailed decision by Justice Celynne Dorval, of the Ontario Court of Justice, released on June 27, 2001, regarding the Deloro mine. Justice Dorval found that the Ministry of the Environment ("MOE") was not guilty of privately laid charges under the *Ontario Water Resources Act* ("OWRA") and the *Fisheries Act.* This case has significant implications for the remediation of contaminated land in the Province of Ontario.

The decision of Dorval, J. addresses the following issues:

- When a remediator assumes management and control over contaminated property, it is immediately potentially subject to prosecution;
- The status of the remediator on the property is a factor in assessing due diligence;
- The defendant must show that it exercised due diligence during the period set out in the charge document, and evidence of the defendant's actions prior to that period are only relevant to a proper understanding of the efforts during the charge period;

- Due diligence for complex contaminated sites requires a detailed and planned approach that proceeds in accordance with industry standards;
- The average time frame to remediate contaminated sites is 10-12 years, and more complex sites may require more than 20 years to remediate;
- The government's decision regarding the disbursement of public funds is not subject to judicial review, and
- Financial context may provide background in assessing due diligence.

## I. ROLE OF REMEDIATOR OF LAST RESORT

The decision strikes a balance between competing considerations in defining the role of a remediator of last resort. Justice Dorval set a high standard, designed to further environmental protection; remediators are immediately subject to prosecution upon exercising control:

> The objective of [Ontario's] *Environmental Protection Act* (E.P.A)., the O.W.R.A. and the *Fisheries Act* are similar; to protect bodies of water for both human and animal uses… .
>
> In my view the prosecution pursuant to any of these acts is not precluded by the obligations imposed on the defendant by the E.P.A. The acts are protective of the environment. The E.P.A. provides for Director's Orders to be issued and enforced. When a citizen or a corporation does not abide by the director's orders, the MOE enforces them and the citizen or corporation is liable to prosecution under all three acts. When the defendant assumes management and control over an abandoned property (or over a property still operated by an owner unwilling to act) it does so in order to protect the environment from further deterioration by the refusal to remediate. It is must act accordingly. To limit the applicability of the OWRA and *Fisheries Act* to new contamination or further contamination would essentially permit the entity who is intervening to ignore the historical problem as long as it did not add to the pollution. The remediator of last resort would have been given the authority to intervene, would be in control of the property yet could choose to act precisely in the same manner as the owner. In my view that is not an interpretation that is consistent with the common objective of the legislation.
>
> Section 2 of the OWRA and section 3(2) of the *Fisheries Act* expressly set out that the acts bind the Crown. The intention of the legislation is quite clear. The intervening entity must proceed with the remediation of the property with due diligence. The entity is

> indeed immediately subject to prosecution for permitting discharges, which were not caused by it. The citizen who discharges a cup or even a teaspoon of contaminant without knowing its impact would be equally subject to prosecution. The status of the intervening party on the property, however, is a factor in assessing due diligence. The intervening party who is diligent would therefore not be successfully prosecuted.
>
> This interpretation is consistent with the objective of the Acts. [emphasis added]

In the absence of specific legislation exempting an entity, the above ruling potentially widens the scope of liability for both governmental entities and private remediators. Upon assumption of management and control, due diligence systems must be put into place immediately, which may ultimately be challenged in a Court. This triggers the applicability of the due diligence defence which may lead to more litigation, as private informants may argue that the remediation is not being done as fast or in as comprehensive a manner as they would like.

After the decision in Deloro, a remediator is liable to be charged for any of its activities immediately upon taking control of a property which continues to discharge contaminants. This appears to be the situation, regardless of any ownership issues.

It is some comfort that the Court comments that an intervening party who is diligent would not be successfully prosecuted. Yet, the facts in the Deloro case demonstrate the practical problem with this new approach. The remediator may have to spend substantial funds on legal and expert resources to prove that it has acted with due diligence, the onus of which is on it. Justice Dorval's comments imply that a prosecutor will exercise judgment and not proceed with a case unless there is merit. Again, the experience at Deloro raises concerns. A report from a leading expert, stating that the MOE had exercised diligence in accordance with North American standards, was served on the prosecution before the case commenced; yet the case went forward. It is submitted that the difficulty in relying upon due diligence is the amorphous nature of the standard, which incorporates notions of reasonableness. Unlike the standard of proof beyond a reasonable doubt, reasonable people may have widely divergent views as to whether a given site is being operated with due diligence.

A concern arising from the above is whether or not the decision may cause a "chill" on remediation. Potential remediators may be deterred by the threat of quasi-criminal charges, separate and apart from any agreements negotiated with the MOE, such as lender liability agreements (such agreements pertain to civil liability and cannot in any event restrict private parties from proceeding by way of private informations).

The comments by the Court concerning private remediators are strictly obiter, as the case did not deal with private remediators. A literal reading of the reference to the treatment of a private citizen

suggests that private remediators are on the same footing as a government remediator. The passage cited above refers to the immediate liability of an intervening entity to prosecution in the absence of due diligence, and is followed by a reference to the citizen who discharges even a teaspoon of contaminant as being "equally subject to prosecution". No doubt, the existence of a lender liability agreement would be taken very seriously by the Attorney General in its decision as to whether or not it will intervene.

## II. COSTS

Section 62 of *Fisheries Act*: Fishery (General) Regulation (SOR/93-53)

(1) *Where an information is laid by a person in circumstances other than those referred to in section 60 or 61 relating to an offence under the Act, the payment of the proceeds of any penalty imposed arising from a conviction for the offence shall be made*

*(a) one half to the person; and*

(b) *one half to the Minister or, where all of the expenses incurred in the prosecution of the offence are paid by a provincial government, to that provincial government.*

*(2) Where an information is laid by a person in circumstances other than those referred to in section 60 or 61 relating to an offence under the Act, the payment of any proceeds of the sale of any forfeited articles arising from a conviction for the offence shall be made, net of any expenses incurred in connection with the custody and sale of the forfeited articles,*

*(a) one half to the person; and*

*(b) one half to the Minister or, where all of the expenses incurred in the prosecution of the offence are paid by a provincial government, to that provincial government.*

Costs article:

Kenneth Jull, "Costs, the Charter and Regulatory Offences: The Price of Fairness", (2002) 81 The Canadian Bar Review 646-676.

**Discussion**

A number of questions were asked regarding the number of private prosecutions under the *Fisheries Act* in a year, how many are not stayed by the Crown, and the magnitude of the fines. There are no statistics available to accurately answer these questions. Sierra Legal Defense and the MOE charged the City of Kingston a few years ago, and the fine was $150,000. Sierra Legal Defense also charged the City of Hamilton, and the fine was $450,000. It was recognized that litigation is time consuming and can take important resources away from remediation and reclamation.

In the case of Deloro, some participants were concerned why the appropriate law(s) were not enforced in the first place, and how the situation escalated into a very serious problem before anybody acted. A big issue is how to enforce laws so the sites are cleaned up *before* they reach a Deloro magnitude, which is difficult when very few laws actually apply to OAMs.

The Deloro case demonstrates that "due diligence" is not enough to protect a volunteer from being forced to assume liability and responsibility for a site, and from having legal action taken against them. What is needed is an alternate dispute mechanism that is not as time consuming and costly as litigation. The key advice provided was to get an objective legal and scientific objective opinion *before* acting, and thus having a basis on which actions can be defended. Some participants were more approving of the legal process, because it is effective in putting a stop to the bad situations.

### *3.7.4 Experiences from the North*

**Presenter:** Robert Lauer, Chief, Financial Analysis and Royalties Administration, Indian and Northern Affairs

Abandoned mines are, by definition, sites where the environmental liabilities exceed the value of the mineral resource remaining in the ground. These sites can be divided into two categories, those with no mineral resources of any value and those where there are mineral resources of value, but this value is less than the environmental liabilities attached to the site. This presentation looked at the experience of INAC in dealing with this latter category of abandoned mine, specifically with the Faro mine in Yukon and the Giant mine in Yellowknife, NWT.

When the Giant mine was abandoned to the Crown in December 1999, INAC entered into an agreement with Miramar Mining Corporation, which owned the Con mine in Yellowknife, whereby a subsidiary of Miramar purchased the Giant mine, reopened it and shipped the mined ore to the Con mill. The Crown limited Miramar's environmental liabilities with respect to the existing state of the mine to the assets of the Giant mine and Miramar agreed to make contributions to a reclamation trust on the basis of the profits from mining Giant. This trust would be used to offset the environmental liabilities falling to the Crown at the end of the mine life.

When the Faro mine in Yukon was put into receivership in 1998, INAC and the Yukon government entered into negotiations with Cominco Ltd. towards a similar type of arrangement. Under this proposed arrangement, the property would have been conveyed to a company owned by a trust. Care and maintenance would be managed by Cominco and funded by INAC. Cominco would have had the option to bring the property back into production at its expense. Profits would have been divided between Cominco, a reclamation fund, and the repayment of the funds advanced by governments during care and maintenance. Cominco would have been a contractor to the trust company and its liability would have been limited to its own operations. An agreement was not concluded because of diminishing metal price expectations and deteriorating conditions at the site.

These cases demonstrate that legal barriers to cooperation between the Crown and the private sector in this type of situation can be overcome using the existing legal mechanisms such as indemnification, corporate limited liability and insolvency legislation.

**Discussion**

The question was asked whether companies also have to prepare closure plans only for their part of the mining, or an overall closure plan, and how the reclamation trust fits into these plans. Miramar posted a bond that would cover their environmental impact. The roles in terms of reclamation planning were negotiated: Miramar was responsible for planning surface reclamation, and the Crown planned the underground arsenic trioxide remediation. It was asked whether there has been any legal analysis of this type of arrangement to measure the impact with some of the trade agreements (i.e.: whether the agreement would be seen as a government subsidy). Justice lawyers have looked at the agreements in this context, and have concluded that such arrangement would not be subject to any kind of trade action.

It was asked if there is any way to determine how much a mining company such as Miramar has actually contributed to the Reclamation Security Trust beyond the initial $455 million. Contributions were made in the order of tens of millions of dollars, mostly by the sale of equipment. Only the first year of the program has been audited thus far, and Miramar lost money in their first year of operating Giantco. Next year INAC will audit the second and third years of agreement and will know more at that point how much will be contributed.

This type of agreement focuses on mines that, once you reduce the liabilities, you have a viable operation. It is assumed that the solution to mines with no remining potential is simply cash.

# 4 DAY 2: PANEL PRESENTATIONS AND BREAKOUT GROUPS

## 4.1 PANEL PRESENTATIONS AND PLENARY DISCUSSION

Panel members were asked to discuss what they thought were the two – three priority barriers to collaboration, and provide recommendations/guiding principles to remedy/overcome these barriers and promote collaboration and partnership opportunities.

**Patrick Finlay, Chief, Mineral and Metals Division, Environment Canada**

Patrick identified a number of barriers to and opportunities for collaboration. He suggested a need for an overall policy framework for dealing with OAMs; the lack of comprehensive standards for cleanup; the need for standards of performance for OAMs; potential conflicts of interest as a result of the different roles within some agencies; the lack of committed funding (both provincial and federal); and lack of recognized and transparent due processes.

He proposed a national policy framework for OAMs, and suggested that the NOAMI Advisory Committee could be a useful vehicle for developing such a policy. The policy would incorporate the polluter pays principle, appropriate financial surety instruments, reference to decommissioning/close-out standards, could draw on good case studies that demonstrate best practices from both technical and community involvement points of view, and could outline the possible roles of different agencies and stakeholders. He indicated that Environment Canada was planning to develop comprehensive environmental codes of practice for mining, and these could include close-out standards, as part of the mine life-cycle scope of the planned code.

**Robert Lauer, Chief, Financial Analysis and Royalties Administration, Indian and Northern Affairs**

Speaking from a Northern perspective, Robert remarked that he is not convinced that any change in legislation is needed to deal with the issue – wholesale change to legislation is not the best use of departmental resources, and amending statutes or developing new regulations is also a resource intensive process. Robert reiterated that barriers can be overcome with creative use of existing legal mechanisms, and a multi-disciplinary approach used by INAC.

Given the magnitude of the OAM problem in the North, Robert said that the only real solution is taxpayers' money – only the government can provide the *amount* of money required to deal with the issues. Multi-year funding is required to (a) deal with ongoing care and maintenance and (b) to plan remediation in a sensible and systematic fashion. Without the assurance and reliability of multi-year funding, remediators are driven to "band-aid" solutions.

Robert also discussed process costs as a barrier to reclamation – what he categorized as "simple and straightforward" applications, such as applying for a new water license, can end up costing millions (i.e.: the case of Faro, where renewing the water license through the current environmental assessment process will cost $2 million). "Dragged out" processes and high process costs eat up finite resources, and reflect a fundamental lack of trust among participants, which Robert noted may actually be the biggest barrier to proceeding with cleanup efficiently.

Robert's key questions were: *How do we structure a process for dealing with OAMs that is not adversarial and does not consume huge amounts of time and money? How do we deal with process costs? How do we get groups to the same table, and get them to trust one another?*

**Glen Nolan, Chief, Missanabie Cree First Nation**

As an Aboriginal representative and a resident of a northern mining area, Glen pointed out that current efforts with regard to OAMs are missing the social element. For the most part, those involved in OAMs do not *live* in the affected areas, do not have to deal first-hand with the impacts of OAMs, and as a result their efforts lack the necessary social context and content. The isolation of the social element limits the effectiveness of the work and the comprehensive improvements that the people in

these areas deserve. Glen commented that the purpose of remediation action must go beyond just stopping pollution to making the areas *safe* for communities.

Another barrier that Glen recognized is the First Nation's distrust of the Mining Act – it is a legislative problem that has continued to foster mistrust. A third barrier is the lack of funding – there is simply not enough money to do the work that needs to be done to effectively deal with the problem.

Based on these identified barriers, Glen provided three recommendations. First, baseline studies are critically important in setting appropriately high standards for fixing the problem, as well as achieving an understanding against which to gauge and assess current and future activities to ensure that the problem is not being made worse. Second, studies on OAMs should include a wider scope of issues and embrace social matters so that the concerns of people who live in these areas and use the natural resources are considered. Lastly, Glen recommended that the bar be raised on fixing problems, making things better instead of just not making them any worse.

Glen pointed out that, for Aboriginal groups, damage to the land seriously restricts their access to and use of resources, largely due to safety concerns. While communities in the north will always be burdened by the processes of yesterday and today, much can and should be done to lessen the impacts.

*In the plenary discussion following the panel presentations, Glen was asked to elaborate how he feels knowing that Aboriginal communities are at risk, yet people are afraid to take action to help them because of legal liability issues. Glen responded that it frightens him that there is a population at risk that the government is not willing to help. There needs to be more effort from the federal government to step in when the provincial or municipal government will not. At the same time, examples of federal neglect should not absolve the provincial government from taking action.*

**John Schisler, Saskatchewan Environment**

*John explained that while, in his opinion, the largest barrier is the liability issue, it had already been well discussed in previous discussions and he would thus focus on other issues.*

John commented that there needs to be both federal and provincial legislative changes, and disagreed with the creative use of existing legal mechanisms to overcome barriers, which he viewed as "working around things to make them work". Another issue that John identified was overlap and duplication – for example, the provinces have an environmental system and regulatory rules, and superimposed over those are the federal rules and processes. While some overlap is necessary, there is the potential for harmonization and streamlining. John also identified environmental assessment processes as a barrier, which he characterized as expensive and intrusive. He noted that EA processes should have been established to review concepts and ensure regulatory steps, laws, and processes are in place to regulate these projects. With regard to funding, John stated that the federal government has funding responsibility in many OAMs, especially uranium mines in Saskatchewan.

**Maxine Wiber, VP Reclamation, BHP Billiton**

Maxine identified three barriers and recommendations for each. The first barrier was the lack of clear mechanisms for dealing with OAMs. Her recommendation was to develop a comprehensive framework to address various circumstances (i.e.: simple versus complex sites) that includes federal and provincial collaboration, Good Samaritan laws, indemnification for volunteers, limited liability, adapting insolvency laws, site-based environmental standards, and creative business solutions.

The second barrier was the government's limited ability to act in light of the complexity of the problem, jurisdictional differences, and scarcity of resources. Her recommendations were to apply laws to prevent future problems, provide funds and resources for five to ten year planning for specific projects, provide incentives for small scale cleanup and develop synergies with industry, First Nations and communities, and, for large complex sites, provide incentives for partnerships.

The third barrier was the need for better site information, namely on public safety, health and environment, and social impacts, to sort and set priorities and design appropriate plans. Her recommendation was to categorize OAMs as small, relatively straightforward sites or large, complex sites, and manage accordingly. Small sites have greater potential for collaborative projects because the issues are less complex and perhaps more manageable. Complex sites do not lend themselves well to collaboration in the same way as the smaller less complex sites, but do provide great foundations for progressive work and partnerships. When dealing with complex sites it is important to remember that the problem took many years to create and cannot be solved overnight.

*In the plenary discussion following the panel presentations, Maxine was asked to clarify the point that greater collaboration is possible on small sites. Maxine explained that if working on a small site, the problem, safety risks and hazards, and solution are more likely to be straightforward and easily identifiable. These types of situations lend themselves to collaboration (i.e.: with community and Aboriginal groups, environmental organizations, etc.) better than larger and more complex sites.*

**Brennain Lloyd, CEN and Northwatch**

Brennain discussed the importance of context in understanding and acting on OAM issues, that is, a context which includes more than 10,000 abandoned mines, various jurisdictions and a variety of approaches and concerns. For example, all stakeholders must be "on the same page" and check their assumptions with one another in order to engage in concerted action. Understanding the context, both on and offsite, is important in developing appropriate plans and strategies. This context must include social, environmental, and economic concerns of all players (i.e.: First Nations, public, industry, government, etc.). For example, the economic context must go beyond the effects on government and industry, and also deal with economic impacts on local people, such as lost opportunities.

Brennain identified three key "elements of the cure". The first element was the right principles – she stressed the importance of keeping the CCME principles close at hand, and emphasized the

importance of other principles such as polluter pays and sustainable development. The second element was clarity regarding the players and their roles. She identified three categories of players: [potential] volunteers, industry, and government. Volunteers include watershed groups, community organizations, First Nations communities, environmental groups, service clubs, etc, and should be eligible to receive technical assistance from government. It is important to be realistic about the role and effectiveness of volunteers – while a useful group, volunteers cannot take remedial action very far due to a lack of resources. The key role of industry players was identified as prevention, and also in funding the delivery of services and operational support. As with industry players, the key role of government was identified as prevention. Government should also have an oversight role, provide technical expertise and institutional support (including inventories and long-term monitoring, development and enforcement of appropriate standards, etc). In order to be effective and efficient, governments must also address serious staff deficits. The third "element of the cure" was practical strategies and approaches, including good site evaluation/assessment/baseline studies; good regulatory oversight; technically and environmentally sound remediation plans; clear and consistent standards; a clear public role; good review and monitoring; enforcement; action on inappropriate outcomes; open accounting; and funding. As an overarching theme, Brennain closed with what she termed "a brief theological dissertation", retelling the story of the Good Samaritan, in response to the support for :Good Samaritan" legislation expressed by other participants. In particular Brennain stressed the importance of perpetual care which is inherent in the story of the Good Samaritan.

As a point of interest, Brennain clarified that most Canadian ENGOs are not opposed to remining. However, remining does not mean that a different set of standards is put in place for these operations. Environment and human health still have to be protected to the same degree as with currently operating sites.

**ADDITIONAL PLENARY DISCUSSIONS**

From an industry point of view, it was made clear that the Good Samaritan legislation is absolutely necessary. The industry is not concerned whether or not they are included in the volunteer definition, but need to be covered by the Good Samaritan legislation.

The question was raised regarding how long it takes to develop baselines. Those who responded were unsure of the exact costs, and noted that they would vary based on site-specific circumstances and the availability of datasets. Baseline studies were identified as time and resource intensive, but a vital part of the remediation process that should be accounted for in the funding model. Other organizations, such as the US EPA and the CCME, have established frameworks for human health and ecological reviews, respectively, which can be drawn from in designing baseline studies and risk assessments. It is important to include First Nations and other communities at risk in risk assessments in order to understand all of the possible risk paths.

The point was also raised that closure standards for currently operating sites should be the same for OAMs. Another participant noted that it is a challenge to articulate standards to a bottom line or

recommended practice that is useful at the site level. A third participant commented that nobody wants standards to be compromised, but when faced with limits in time and money and the desire to do as much good as possible, high standards might not be met, and a "lower" standard for OAMs might be more appropriate. It was suggested that standards for OAMs not be referred to as "lower" than those for operating mines, but instead as "interim standards".

## 4.2 BREAKOUT GROUPS

The five breakout groups were asked to establish three to five priority barriers to collaboration, and determine recommendations/guiding principles to remedy/overcome these barriers and promote collaboration and partnership opportunities.

*Breakout group presentations are listed in the order in which they occurred.*

### *4.2.1 Breakout Group 3*

Breakout group 3 identified four priority barriers to collaboration, and solutions for each:

| BARRIERS | SOLUTIONS |
|---|---|
| Duplication of agencies | • Lead agency (single point of contact)<br>• Governments must determine the owner of the problems<br>• Regulations need to be harmonized |
| Legislation has liability disincentives | • Governments need to review and amend legislation<br>• Could amend each legislation or combine the changes into new Good Samaritan legislation<br>• Needs to be work done on definitions for OAMs, volunteers, etc.<br>• Need incentive-based legislation |
| Process disincentives | • Need to recognize that OAM are different than operating mines and may require different process and standards<br>• Review federal and provincial environmental assessment legislation |
| Funding (no legislation dedicated to secure funding or tax incentives) | • Another task group is dealing with this issue. |

**PLENARY WITH BREAKOUT GROUP 3**

There was some discussion around the purpose of and need for reviewing environmental legislation and assessment processes. BOG 3 explained that the existing system of environmental assessment (EA) and regulation is designed to regulate projects of economic benefit to the proponent. Mine reclamation projects undertaken by the government have a different purpose, and existing regulatory and assessment processes are not tailored for those projects. However, it was pointed out that a number of different environmental assessment regimes are in place (i.e.: there is a great deal of variety built into the federal EA process, depending on which class of EA is being considered). It is important to be mindful of this variety, and comments about EA and EA reform need to be made within that context, rather than assuming that every EA is burdensome. It was also noted that EA

might be the only opportunity for someone living in an affected community to find out about and influence the project. For small projects, EA at the federal level is not an impediment – there is already an exclusion list, and many small projects are exempt from EA or handled very quickly. Larger projects are more contentious, and the EA project is important in raising awareness and allowing for community involvement. BOG 3 reiterated that the intention is not to remove EA and eliminate stakeholder involvement, but to recognize that OAM projects are different, and to take a look at how they are reviewed and regulated so that the processes are reflective of these differences.

The point was raised that a distinction needs to be made between charitable work and work done for other purposes – the type of work must be an underlying theme in, and will affect the outcome of, these types of discussions. BOG 3 clarified that they were looking at collaborative work, where somebody is helping the government clean up, not somebody cleaning up their own site.

### *4.2.2 Breakout Group 1*

Breakout Group 1 identified a number of barriers to collaboration, as well as a list of recommendations (*please note that due to the order in which barriers and recommendations were presented, the list of recommendations does not correspond directly to the list of barriers*):

| **BARRIERS** | **RECOMMENDATIONS** |
|---|---|
| Administrative process (very complex, no formal standardized process, ad hoc and complicated) | Dedicated legislation and associated resources as an enabler of action |
| Lack of trust as to incentives, objectives | Process for regulatory harmonization |
| Lack of resources from government perspective | Fed govt is a certain partner |
| Lack of political incentives and will (from higher levels) | Public process to develop regulatory framework |
| Indifference within and between levels of govt (jurisdictional differences, offloading of responsibility) | Reconciliation between roles and responsibilities between all players |
| Uneven resources on engagement level and site specific work | Adoption of CCME guidelines and principles |
| Differing priorities between different parties (no criteria for differentiating on site specific level, no criteria for setting priorities) | Use of environmental risk assessment |
| Lack of consultation (jurisdictional barriers) | USEPA models and methods |
| Narrow focus of discussion – needs to be more holistic, more feedback and linkages | Sites themselves must be improved – not just a containment issue (driving policy objective) |
| Overlapping multiplicity of partners | Standard that respects local and site specific conditions |
| No OAM regulation – federal or provincial | Dedicated simplified process for engagement |
| Secondary policy priority (not high on radar) | Recognizing when work has been done |
| Institutional /organization inertia | Principle of acceptance of responsibility – stewardship ethic |
| No comprehensive inventory of sites | Creative solutions and incentives for willing volunteers to do work |
| No clear commitments or leadership | Articulation of **total** costs |

| | |
|---|---|
| Inadequate reporting of info | More money for sites and human resource capacity to deliver it |
| Seen as a cost rather than an investment | Public awareness |
| No precedent on which to base further action | |
| Better government endorsement of private volunteer work | |

BOG 1 hopes to see a stakeholder process to establish dedicated legislation, and, by 2005, a workplan and regulatory framework in terms of how this might go forward.

**PLENARY WITH BREAKOUT GROUP 1**

In terms of what should be done first, BOG 1 discussed the need for an umbrella, regulatory framework that would need to be developed before some of the more detailed issues could be addressed. A participant asked whether BOG 1 was referring to a distinct regulatory framework for dealing with OAMs, that is, a specific regulatory process distinct from other provincial/territorial/federal legislation. BOG 1 replied in the affirmative, and discussed the value in capturing all components of other regulations as they are specific to mines but, at this time, are not necessarily presented in the context of OAMs, into new, dedicated OAM legislation that recognizes jurisdictional differences and gaps and could be adopted across jurisdictions (no predetermined decision was made on what this legislation would contain). Another participant commented that dedicated OAM legislation would be one way of working around the issue of having to go through three legislative jurisdictions to have something approved.

However, some participants were not convinced that dedicated legislation is the appropriate approach, and argued that other mechanisms might be quicker (i.e.: having the department write a letter of indemnification for volunteers). The point was also raised that legislation does not always give certainty – *current* legislation is not even communicated. BOG 1 clarified that their presentation did not use the word certainty, indemnification, harmony (in terms of harmonizing existing legislation), or any downgrading of standards. The key idea was that, when developing new legislation, it is important to take all existing legislation into account

Another participant voiced that from a government perspective, in the absence of law there is the absence of the will to do things – if there is nothing to *apply* there is nothing to do. With law comes the power to get this accomplished, such as defining OAMs and setting up inventories and action plans, etc.

### *4.2.3 Breakout Group 2*

Breakout group 2 identified four barriers to collaboration, as well as seven recommendations. They established that money is an underlying theme in all barriers.

| BARRIERS | RECOMMENDATIONS |
|---|---|
| Permit requirements are too complex | Simplify the permitting process |
| Time frame from idea stage to action stage is too long | Speed the process along, but not to the detriment of environment or people |
| Lack of property classification and unknown cleanup requirements (nothing that puts these properties in context) | Inventory/assessment of all A/O properties, and sliding scale of potential impacts (environmental, social, financial, safety) |
| Federal versus provincial standards/legislation – uncertain or changing or different | Develop Good Samaritan process that deals with who can participate and to what extent, and deal with issues such as workman's compensation/human safety, federal and provincial issues, etc. |
| | Clarification of "volunteer" (community groups, government, industry, other) |
| | Site specific interim remediation standards: each area dealt with has specific standards that have to be met so the process is consistent across the country |
| | Include all affected communities in the process |

**PLENARY WITH BREAKOUT GROUP 2**

BOG 2 clarified their assumptions that "volunteers" do not include those involved in remining, and any interim standards would apply only to volunteer activity.

BOG 2 was asked to clarify what is meant by "simplified permitting processes". BOG 2 explained that they were referring to streamlining the permitting process so that a person/organization/group etc. can get *one* permit for the work that needs to be done, instead of having to get a number of permits from different places. Requirements would not change, but the permitting process would be made more efficient. The concern was raised that, while speeding up the permitting process may be easy for smaller projects, the complex sites need to have a more detailed permitting process that allows for community involvement. BOG 2 recognized this as a good point, and suggested that perhaps the permitting process can be tied into the sliding scale of impact (i.e.: sites with more serious impact have bigger permitting process). BOG 2 further explained that they are recommending the Good Samaritan legislative approach, with two to three levels of Good Samaritan permits, recognizing that large complex projects will not be undertaken under the Good Samaritan Act.

### *4.2.4 Breakout Group 4*

Breakout group 4 identified an opportunity, an objective, an action, and two recommendations with regard to barriers to collaboration. BOG 4 stated that no solution is feasible without appropriate funding.

| | |
|---|---|
| **OPPORTUNITY** | There is no existing legislation in Canada specifically addressing OAMs. |
| **OBJECTIVE** | A legislative framework for cleanup of OAMs (based on critical analysis). |
| **ACTION** | Develop a policy framework to facilitate the objective. Incorporate liability and efficiency issues with respect to industry, governments, civil society and First Nations/Aboriginal people. |
| **RECOMMENDATION 1** | Take immediate steps to develop a policy framework to address the liability and efficiency issues. |
| **RECOMMENDATION 2** | Initial critical analysis of existing legislation that impacts current actions taken to remediate. |

**PLENARY ON BREAKOUT GROUP 4**

One participant, who did not agree that legislation is necessarily the right approach, felt that while it is good to do analysis, BOG 4 had already decided that the endpoint should be a legislative framework. In light of this decision, the participant questioned the purpose of the analysis. BOG 4 replied that the term "legislative framework" was used to intentionally broaden *beyond* the idea of developing new legislation.

### *4.2.5 Breakout Group 5*

Breakout group 5 identified three actions that would reduce the barriers to collaboration:

| **ACTION** | **Enabling legislation** | **Differentiation between sites to take advantage of opportunities** | **Regulatory certainty (examine existing legislation/regulations, normalize the processes (ad hoc and legislative).** |
|---|---|---|---|
| **WHO?** | Joint federal/provincial approach (options: Mines Ministers, CCME) | Task force under Mines Ministers | Task group |
| **WHAT?** | Develop principles and a model suitable for discussion as a basis for legislation | Develop common criteria to differentiate between those that are simple/ straightforward level of effort vs complex long term | Achieve cooperation between all levels of govt (consensus) |
| **WHEN?** | ASAP | ASAP | |
| **CONSIDERATIONS?** | Who will be covered (as Good Samaritans)? What activities will be covered? US model in Canadian context might be a starting point. | We need chewable chunks to make progress, seize opportunities where they exist | Do existing processes, which focus on commercial activity, work for OAMs? Task group to review legal regulations that "limit" progress of reclamation. |

One participant reiterated that bounds have to be placed on Good Samaritan legislation. This legislation should only apply to charitable and donated goods and services, not on commercial or profit making purposes.

BOG 5 clarified their third action (achieving regulatory certainty) by explaining that since most existing environmental legislation for operational mine sites is "command and control", there is a need to promote opportunities for volunteers by reviewing existing command and control legislation and determining, in the volunteer context, what impediments it causes.

In their presentation, BOG 5 differentiated between the "uglies" and the "megauglies" – a participant asked whether the "megauglies" are so costly to clean up that BOG 5 expects there would be no incentive at all for volunteers to become involved. BOG 5 explained that helping with the "megauglies" is probably not something volunteers could even consider because they are complex, long-term, national issues with huge financial costs and environmental liability potential. It may be possible for volunteers to participate in a smaller project within the larger remediation project, but the science, complex nature, need for consultation, etc. of large complex sites mean that they do not lend themselves well to volunteer work.

In response, another participant noted that while smaller sites might be less complex, they still have other kinds of dangers and require detailed plans. Unless the resources are available to assess and plan, it is difficult to know how to "plug" volunteers into the right activity. Unless this plan can be developed and someone put in charge of it who can direct the volunteers, this type of participation does not work out well. In term of regulatory certainty, there seems to be the assumption that the regulatory process is just a "bunch of hoops to jump through"; this is not the case, since there is no way of being sure what the outcome of the process will be. BOG 5 explained that they are not trying to presume an outcome, but are concerned about the intention behind the process – there needs to be certainty around what people expect out of the process and why they are using it in the first place.

### 4.3 ROUNDTABLE SUMMARY

Participants were asked to identify what they felt were the two or three major issues that emerged throughout the course of the workshop. Many participants felt strongly about the need for coordinated Good Samaritan legislation/policy framework at the federal and provincial levels to encourage volunteer activity and remove the associated liability (volunteer indemnification). The concern was expressed that there is a desire among some to exclude industry from the Good Samaritan legislation. The concern was also expressed that while there are many good ideas with regard to approaches to volunteerism, it is critical to think through how and where these ideas apply.

Some participants felt that it is important to: recognize the existence/raise the profile of OAMs (in political/legislative landscape); acknowledge that OAMs have to be dealt with and that help is needed; categorize and prioritize sites; conduct critical analyses of existing legislation and procedures to establish an approach to facilitate enabling processes; and/or develop a mechanism to guide OAM reclamation and facilitate cooperation. The need for a realistic policy and legislative framework that

recognizes the responsibilities and rights of all players and establishes common objectives was acknowledged. The process must be inclusive, multi-stakeholder and holistic. There were varying opinions on the need for *new* legislation – some felt that existing legislation could be used in creative ways to overcome barriers, while others saw the need to amend existing legislation or create new dedicated legislation. On the legal front, a participant pointed out the importance of recognizing the problem of OAMs as a matter of law, and establishing a comprehensive legal response.

Improved cooperation, collaboration, communication, transparency, efficiency and simplification were perceived as crucial elements in any OAM efforts. Lack of funding was acknowledged as one of the most serious and fundamental stumbling blocks.

Other participants recognized the need to refine and accelerate the permit process (alleviate fiscal and temporal time constraints) to maximize the scarce dollars that go into remediation. Many felt that the current assessment and review processes could be more cost and time efficient. Building trust (across sectors and especially with affected communities) may be one way of increasing coordinated innovative solutions while at the same time reducing assessment and permitting costs. The need for common sense was also highlighted constantly – do what makes sense, getting as much done as possible with the limited resources available, but without compromising environmental and human health and safety. It was also recognized that while in many cases processes do create better projects, it might not be possible to get through the process in time (i.e.: projects at the end of the fiscal year).

Related to this previous issue is the broader obstacle of the difference in policy and procedures between the different levels of government. A core set of principles that everyone can agree on needs to be established in the Good Samaritan legislation (recognizing that there may still be regional issues that must be dealt with), or a common set of standards that all players can work towards.

A participant indicated that the optimism displayed by participants in the workshop was encouraging – while those involved in the issue may have different ideas, they are all generally moving in the same direction, and there is optimism on going forward in a meaningful way. Another participant noted that those in the room have demonstrated that they recognize and respect each other's values, which goes a long way in achieving progress.

One participant noted that there needs to be more trust amongst stakeholders working in the field, as well as perhaps more risk-taking. Another participant commented that trust between stakeholders requires non-compliance registries, community involvement, design of cleanup, monitoring, etc., which demonstrates the need for a comprehensive framework. Another participant remarked that while trust is important, it must be earned, which requires a holistic view of the entire mining process, especially the often forgotten but critical social context – affected communities must be considered and included in a meaningful way.

The point was raised that if progress is to be made, the government has to be adequately staffed to get the research, planning, oversight, etc. that they need. A fancy piece of legislation will not be

effectively enforced if departments are faced with a serious lack of resources. The answer may be putting resources back into existing legislation, instead of creating legislation anew.

The need for clear definitions was raised for terms such as OAM, volunteer, reclamation, and remediation (i.e.: decide what is meant by reclamation or remediation and design a mechanism to define these terms on a site-specific basis). There is a need to develop consistent and coordinated procedures/standards to categorize different sites and to categorize different types of volunteers.

One participant noted the need for regulators to adjust their perspective to differentiate between more typical workload of approving projects for commercial gain versus projects for the common good, where commercial gain is not a factor.

One participant summed up the key issues in three words: prevention, investment and standards. The importance of precedents was also noted, which would clearly demonstrate what is achievable, what are the benefits, and the costs of inaction.

## 5 CLOSING REMARKS:

Elizabeth Gardiner, Vice President, Technical Affairs for the Mining Association of Canada, closed the workshop by thanking all participants, and especially the presenters, for their hard work and tremendous efforts. She also thanked all those responsible for putting together an impressive workshop agenda in a relatively short time, and for ensuring that the workshop ran smoothly. The workshop Proceedings will be sent out in three or four weeks to all participants for comment, in order to ensure accuracy. Following this, Final Proceedings will be prepared and distributed. The National Orphaned/Abandoned Mines Advisory Committee will distil the results from the workshop and develop recommendations and a path forward. Recommendations will be submitted to Mines Ministers in September and participants will be kept apprised of initiatives as they evolve.

Elizabeth noted that the work of the NOAMAC is gaining prominence steadily, both here in Canada and abroad, as a unique multi-stakeholder initiative relating to orphaned and abandoned mines. By continuing to work on this issue in an open, creative and collaborative way, all stakeholders can demonstrate their commitment and resolve to finding solutions that will benefit the environment and civil society in the short and long term.

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## APPENDIX B: FINAL WORKSHOP AGENDA

# WORKSHOP ON LEGAL AND INSTITUTIONAL BARRIERS TO COLLABORATION RELATING TO ORPHANED/ABANDONED MINES (OAMs)

**Sponsor:** National Orphaned/Abandoned Mines Advisory Committee

**Time:** 24-25 February 2003 (Monday, Tuesday)

**Place:** North American Ballroom
Embassy West Hotel and Conference Centre
1400 Carling Ave
Ottawa Ontario
1-800-267-8696 or 613-729-4331(local)
www.embassywesthotel.com

**Participants:** 50 to 60 individuals from federal, provincial, territorial and municipal governments, aboriginal organizations, the mining sector, environmental and labour groups. These individuals have knowledge of, or are affected by policy and legal issues surrounding third party liability and orphaned/abandoned minesites (OAMs).

***Objectives:***

- *to identify, better understand and assess the legal and institutional barriers, along with the preferred options that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines; and,*
- *to develop recommendations and guiding principles for consideration by the National Orphaned Abandoned Mines Advisory Committee and possible transmittal to Federal, Provincial and Territorial governments.*

***Anticipated Output:***

- *Report of Workshop Proceedings capturing information presented, substantive discussion, comments and issues, recommendations, guiding principles and "next steps" for consideration by the National Orphaned and Abandoned Mines Advisory Committee.*

***Workshop Context:***

Orphaned or abandoned mines are those mines for which the owner cannot be found, or for which the owner is financially unable or unwilling to carry out clean-up. They pose environmental, health, safety, and economic problems to communities, the mining industry, and governments in many countries including Canada. In September 2001, Federal, Provincial and Territorial Mines Ministers asked that a National Orphaned/Abandoned Mines Advisory Committee be struck to study various issues and initiatives concerning the development and the implementation of remediation programs across Canada. One task of the Committee was to evaluate, in Canada, the US, and other countries, legal and institutional barriers to collaboration and to identify mechanisms for third party collaboration. A background paper was developed by Joseph Castrilli, Barrister and Solicitor, outlining legal and institutional barriers and identifying legal mechanisms for third party collaboration. The Committee also agreed to sponsor this workshop to provide participants with an opportunity to identify common challenges and share ideas/solutions across the sectors for that would allow third parties to collaborate on clean-up and manage liabilities related to orphaned/abandoned mines without assuming all liabilities. These include legislative and institutional barriers, liability disincentives, and collaborative opportunities with respect to remedial action on orphaned/abandoned minesites on a voluntary or limited basis. Note that the Committee has established a separate Task Force to examine funding approaches with respect to the remediation of OAMs.

# Draft Agenda: LIBC Workshop

| TIME | TOPIC | LEAD |
|---|---|---|
| | DAY 1 | |
| 8:15 | Registration Desk Open<br>(Coffee and juices available) | |
| 9:00 | Call to Order, Introductions | Hajo Versteeg (Facilitator) |
| 9:10 | Welcoming Remarks and Workshop Objectives | Christine Kaszycki<br>Chair, Orphaned/Abandoned Mines Advisory Committee; ADM, Manitoba Industry, Trade & Mines |
| 9:20 | Overview of Legal and Institutional Barriers to Collaboration<br>Presentation – 40 min<br>Plenary Discussion – 20 min | Joseph Castrilli<br>Barrister & Solicitor |
| 10:20 | Break | |
| 10:30 | Pennsylvania's *Environmental Good Samaritan Act* and Related Initiatives<br><br>Presentation - 25 min<br>Plenary Discussion -20 min | Mr. Scott Jones<br>Hydrogeologist with the Greensburg District Mining Office; Pennsylvania Dept of Environmental Protection.<br>For information see:<br>http://www.dep.state.pa.us/dep/deputate/minres/reclaimpa/reclaimpahome.htm<br>A copy of the EGS Act can be found at:<br>http://www.dep.state.pa.us/eps/docs/cab200149b1126000/fldr2002aea3947001/doc2002aee5111002/Act68of1999.pdf |
| 11:15 | The U.S. Federal *Abandoned Hardrock Mines Reclamation Act of 2002* and Related Initiatives<br><br>Presentation - 25 min<br>Plenary Discussion -20 min | Alan Septoff, Research and Information Systems Director, Mineral Policy Center, Washington D.C.:<br>For information see:<br>http://www.mineralpolicy.org |
| 12:00 | Lunch (Provided) | |
| 1:00 | Abandoned Mines in the North<br><br>Presentation - 20 min<br>Plenary Discussion - 10 min | Richard Arseneault, Director, Office of Sustainable Development Studies:<br>See http://www.oag-bvg.gc.ca/ for the 2002 Report of the Commissioner for the Environment and Sustainable Development (cf Chap 3 on Abandoned Mines) |

| TIME | TOPIC | LEAD |
|---|---|---|
| 1:30 | The OMA/OMNDM Initiative: A Case Study in Addressing Legal and Institutional Barriers to Collaboration on OAMs in Ontario<br><br>This Case Study will examine several "on the ground issues" that this initiative is grappling with, including issues relating to ownership, the definition of "site", "special purpose accounts", indemnification, gifts to the Crown, tax credits and responsibility for fund administration.<br><br>Presentation - 30 min<br>Plenary Discussion - 20 min: facilitator will solicit similar & additional "real life" experiences from participants. | John Martschuk, Director, Ontario Mining Association; and, Director, Environment, Barrick Gold Corp |
| 2:20 | Liability, Legislative and Institutional Barriers and Opportunities for Collaboration | |
| | Setting the Stage:<br>Presentation – 20 Min<br>Plenary Discussion – 15 Min | Joseph Castrilli |
| | Site Specific Experiences in Canadian Jurisdictions | |
| | Presentation #1: Experiences from a Mining Sector Representative<br>Plenary Discussion – 15 Min | Wayne Fraser from Hudson Bay Mining & Smelting Co; and Christine Kaszycki and Edwin Yee from the Manitoba govt. |
| 3:30 | Break | |
| | Presentation # 2: Experiences from an Ontario Ministry of the Environment representative<br>Presentation – 20 Min<br>Plenary Discussion – 10 Min | Ken Jull, a lawyer who has done extensive work on the Deloro site for ON MoE |
| | Presentation # 3: Experiences from the North<br>Presentation – 15 Min<br>Plenary Discussion – 10 Min | Robert Lauer, INAC |
| | Plenary Discussion, including Collaborative/ Partnership opportunities, Lessons learned | Led by Hajo Versteeg |
| 5:10 | Summary of the Day | Hajo Versteeg |
| 5:15 | Workshop Adjourned | |
| 5:16 to 6:30 | Informal Reception<br>(Dinner is on your own) | All |

| TIME | TOPIC | LEAD |
|---|---|---|
| | DAY 2 | |
| 8:45 | Call to Order/ Review of Workshop Process | Hajo Versteeg |
| 9:00 | Panel Presentations and Plenary Discussion:<br><br>Panel Members from: Environment Canada (Patrick Finlay); Indian and Northern Affairs (Robert Lauer); Saskatchewan Environment (John Schisler), an Aboriginal organization (Glenn Nolan), the Canadian Environmental Network, and the Mining Sector. *Panel members are not necessarily representing the views of the organizations with which they are affiliated.*<br><br>Each panel member has 10 minutes and has been asked to consider the following to help set the stage for the Breakout Group discussions:<br>What do you think are the 2-3 priority barriers to collaboration;<br>What recommendations/guiding principles would you make to remedy/overcome these barriers and promote collaboration and partnership opportunities<br><br>Panel presenter: 10 min each<br>Plenary Discussion following all of the presentations – 20 min. | |
| 10:20 | Break and Report to Breakout Groups (BOGs) | |
| 10:30 | BOG 1, 2 and 3: Focus on Legislative and Institutional Barriers<br>What are the 3-5 priority legislative and institutional barriers to collaboration;<br>What recommendations/guiding principles would you make to remedy/ overcome these barriers and promote collaboration/partnership opportunities<br><br>BOG 4, 5 and 6: Focus on Liability Barriers<br>What are the 3-5 priority liability barriers to collaboration;<br>What recommendations/guiding principles would you make to remedy/ overcome these barriers and promote collaboration/ partnership opportunities | |
| 12:00 | Lunch (provided) | |
| 1:00 | Breakout Reports to Plenary:<br>BOGs report to plenary: 10 min Plenary reporting from each BOG plus 5 min plenary discussion following each report | |
| 2:45 | Summary of Recommendations and Guiding Principles to present to National Orphaned/Abandoned Mines Advisory Committee | Hajo Versteeg |
| 3:15 | Next Steps and Closing Remarks | Elizabeth Gardiner<br>VP, Technical Affairs, MAC |

| | | |
|---|---|---|
| 3:30 | Workshop Adjourns | |
| 3:45 – 4:30 | *TBC: National Orphaned/Abandoned Mines Advisory Committee meeting to debrief and discuss recommendations and next steps* | |

**Participants should not book travel arrangements prior to 5:00 p.m.**

(*National Orphaned/Abandoned Mines Advisory Committee members should not book travel arrangements prior to 18:00)*

## APPENDIX C: GLOSSARY OF LEGAL TERMS

### GLOSSARY OF TERMS FOR THE WORKSHOP ON LEGAL AND INSTITUTIONAL BARRIERS TO COLLABORATION RELATING TO ORPHANED/ABANDONED MINES IN CANADA

Prepared By

Joseph F. Castrilli

**Accused** - the person charged with committing an **environmental offence** who is prosecuted in the **criminal** (or in Ontario the provincial offences) courts

**Administrative Liability** - the law authorized by an environmental **statute/legislation** to be administered or imposed by a federal or provincial ministry or department of government for violation of the statute (or regulation, approval, etc. issued under that statute). Administrative liability may take the form of an order (requiring the person named in the order to undertake certain work at that person's expense) or penalty (payment of money). These orders and penalties often may be appealed to administrative tribunals (e.g. British Columbia Environmental Appeal Board; Ontario Environmental Review Tribunal) and may be confirmed, varied, or rejected by these bodies, subject to any further appeals to the courts on legal questions or to Cabinet on questions of fact. The resulting confirmed order or penalty constitutes a liability for the person(s) named in the document issuing the order or penalty

**Cause of Action** - the combination of facts that gives the right to a legal remedy in a civil lawsuit (not a criminal proceeding). Examples of **common law** causes of action include: **negligence, private nuisance, public nuisance, riparian rights, trespass, strict liability (or the rule in Rylands v. Fletcher)**

**Civil Law** - in Canada relates to the law of Quebec and in particular the Quebec Civil Code, a body of law derived initially from Roman Law and the Napoleonic Code. Civil law concepts such as "abuse of rights" are analogous to those found in the **common law** regarding potential **causes of action** between private parties for **tort damage**

**Civil Liability** - an adverse finding from a court in a civil lawsuit may result in an order from the court for the **defendant** (the person sued) to pay the **plaintiff** (the person suing) damages (i.e. money), or to do, or refrain from doing, certain things to pay for, mitigate, or prevent environmental harm. Civil liability can arise under the **civil law** or the **common law**

**Common Law** - As distinguished from Roman Law (or **Civil Law**), the common law comprises the body of principles and **causes of action** developed from the decisions of courts going back to the ancient unwritten law of England. For our purposes, judge-made law, or law made by the courts not by provincial legislatures or the Parliament of Canada

**Criminal Offence -** primarily offences established under the *Criminal Code of Canada* ("true crimes") but also some pieces of environmental **legislation** that require the prosecutor in a criminal proceeding before a court to prove beyond a reasonable doubt (e.g. 99% certainty) that the **accused** (1) committed the act that is the subject matter of the offence, and (2) had the requisite mental intent to commit the act (i.e. intended to do the act, was reckless, or wilfully blind to the consequences of performing the act)

**Criminal** or **Quasi-criminal (regulatory) liability** - an adverse finding (conviction) from a criminal or provincial offences court that may result in an order from the court for the **accused** to be punished by fine or imprisonment for commission of an **environmental offence**

**Damage** - a matter that must be proved in most **tort causes of action** (except for **riparian rights** and **trespass**). In order to initiate a lawsuit for environmental harm, the **plaintiff** (person alleging harm) must have suffered some type of damage such as personal injury or damage to property. Damage (e.g. adverse effect) also is an element to be proved in many **environmental offences** established by provincial legislatures or the Parliament of Canada under environmental **legislation**

**Defendant** - person in a civil lawsuit that is sued by the **plaintiff** and alleged by the **plaintiff** to be the cause/source of harm to the **plaintiff**

**Due Diligence** - ongoing procedures in the operation of a business to ensure that environmental **damage** is not occurring. Where due diligence is shown it acts as a defence to **strict liability environmental offences**

**Environmental Offences** - offences based on the occurrence of environmental harm that are established by provincial legislatures or the Parliament of Canada in **legislation** and that are regarded as **criminal, quasi-criminal,** or **regulatory** wrongs punishable by fine or imprisonment in the courts

**Gross Negligence** - conduct amounting to an intentional failure to perform a duty in reckless disregard of the consequences to life, health, or property of another; or such a marked departure from the standards by which responsible and competent people in such a situation govern themselves in relation to the rights of others as to justify the presumption of willfulness

**Legal** - conforming to, required, permitted, or not forbidden by, law. In this context, mainly refers to requirements or obligations normally decided by the courts (but also can apply to what is set down by provincial legislatures or the Parliament of Canada in **legislation** or by ministries or departments of government in **regulation**s or approvals issued under the authority of legislation)

**Legislation (Statute)** - law created by a provincial legislature (e.g. British Columbia *Waste Management Act*) or the Parliament of Canada (e.g. *Fisheries Act*)

**Liability -** obligation to pay compensation (or a fine), or undertake certain tasks to redress environmental **damage**, that may be imposed by a court or ministry or department of government on a person found in violation of **administrative**, **civil**, or **criminal** (**quasi-criminal/regulatory**) requirements arising from **civil law** or **common law** principles, **legislation**, **regulations**, orders, approvals, etc.

**Negligence** - a **cause of action** in **tort**. Negligence is conduct that breaches or falls below a standard of reasonable care owed to a person harmed by the conduct. (A fuller description of the law of negligence is contained in the Final Report, pages 17-18)

**Plaintiff** - person in a civil lawsuit who is suing and alleging harm caused by the **defendant**

**Private Nuisance** - a **cause of action** in **tort**. Private Nuisance is the unreasonable interference with the use or enjoyment of land. (A fuller description of the law of private nuisance is contained in the Final Report, pages 17-18)

**Public Nuisance** - a **cause of action** in **tort**. Public Nuisance is interference with, damage to, or obstruction of, a public right such as polluting a waterway. (A fuller description of the law of public nuisance is contained in the Final Report, pages 17-18)

**Quasi-criminal (regulatory) offence** - an offence established under environmental **legislation** (or a **regulation**) that only requires the prosecutor in a proceeding before (e.g. in Ontario a provincial offences court judge) to prove beyond a reasonable doubt that the **accused** committed the act with which he/she/it is charged. No mental intent need be proved. See also **environmental offence**

**Regulation (or regulatory)** - a rule promulgated by a ministry or department of government under the authority of a **statute** having the force of law that establishes requirements or restrictions on or with respect to the conduct of the regulated community, the violation of which may be prosecuted as an **environmental offence**

**Riparian Rights** - a **cause of action** in **tort**. Riparian Rights refers to the rights of a land owner or occupier bordering a lake, river, or stream. (A fuller description of the law of riparian rights is contained in the Final Report, pages 17-18)

**Rule in Rylands v. Fletcher** - a **cause of action** in **tort**. Often treated as synonymous with **strict liability** the **rule in Rylands v. Fletcher** is satisfied where (1) the **defendant** has brought onto its land (2) something that is not naturally there (3) that is likely to cause **damage** if it escapes (4) that does escape (5) and causes damage. In that circumstance, **negligence** does not need to be proven by the **plaintiff**. (A fuller description of the rule in Rylands v. Fletcher is contained in the Final Report, pages 17-18)

**Statute -** see **Legislation**

**Strict Liability** - In the context of a civil lawsuit, often treated as synonymous with, or at least very similar to, the **rule in Rylands v. Fletcher** and, therefore, a **cause of action** in **tort**. (A fuller description of the law of strict liability is contained in the Final Report, pages 17-18). In the context of **environmental offences** that are prosecuted before a provincial offences court, strict liability requires only proof beyond a reasonable doubt (e.g. 99% certainty) that the accused has committed an offence (i.e. the act with which charged). No mental intent need be shown by the prosecutor to obtain a conviction as is normally required in respect of **criminal** offences. Under a strict liability offence, once the prosecutor proves the act has been committed beyond a reasonable doubt, the burden shifts to the **accused** to demonstrate on a balance of probabilities (e.g. 50.1% certainty) that it was **duly diligent** (i.e. that the **accused** took all reasonable steps in the circumstances to avoid commission of the offence).

**Tort** - (derived from Latin) a private or civil wrong or injury that gives rise to a **common law cause of action**. An example of a tort is **trespass**

**Trespass to Land** - a **cause of action** in **tort.** Intentional, direct invasion of real property for which actual **damage** does not need to be shown. (A fuller description of the law of trespass to land is contained in the Final Report, pages 17-18)

**Wilful Misconduct** - failure to exercise ordinary care to prevent injury to life, health, or property of another that is known to be or reasonably expected to be within the range of a dangerous act being done

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## APPENDIX D: PRESENTATIONS