

Mining Sustainability – First Nations Land Issues & Potential Impacts on the Mining Industry

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Abstract

In Canada, mining projects have proceeded for over a century with varied consideration of the First Nations treaty rights and land stewardship issues. Increased assertion of treaty rights and traditional land use rights by First Nations can profoundly impact on how the mining industry will explore, develop and close out mineral resources found on these lands. The mining industry will need to consider aboriginal needs, beliefs, and way of life as part of its business planning. The mining industry's temporary use of the land conflicts with the long-term land stewardship viewpoint of the aboriginals. The concept of mining sustainability and its application to First Nation lands will have to be embraced by the mining community to maintain good relations and possibly access to these lands. Working cooperatively will provide benefits for both First Nations and the mining industry. This paper will discuss how the mining industry could potentially be affected by increasingly strong assertion of treaty rights and land stewardship concerns and how changes in mining practices could provide the sustainability needed for both First Nations and the industry; in general this paper references Ontario experience.

Keywords: First Nations, Treaty Rights, Mining Sustainability, Mine Permitting, Mine Closure

Introduction

Mining has become a highly technological industry that is rising to meet the environmental challenges of today. However, despite the progress the industry has made, it is still haunted by poor historic environmental and social practices. The mining industry is now finding it more challenging to maintain its social license to operate. This phenomenon is global in scope and it involves nations, cities and communities. In Canada, one such community is the First Nations with its desires for self-governance, affirmation of its treaty rights and concerns about land stewardship.

In addition, future settlement of an individual First Nations' land usage issues may, depending on the terms of the settlement and the amenability of the affected First Nation, create a new partner to the mining industry. This new partner is likely to have a radically different viewpoint on land stewardship from the stakeholders of the past (i.e. governments and government agencies). This new

partner may seek and expect new conditions that will require careful consideration by the mining industry. In response to this growing challenge, the mining industry is moving towards the concept of sustainable mining.

While the term appears to be an oxymoron, sustainable mining is meant to allow for the development of mineral resources without precluding future land uses. It is built on the basic principles of economic, environmental and social performance. These principles include:

- excellent mining practices,
- the use of technology to continuously improve operations,
- the reduction of costs to improve or maintain the long-term viability of each mine,
- the consideration and inclusion of other stakeholders' and communities' concerns and beliefs,

- the sharing of benefits with stakeholders and communities,
- and in the investment of resources to support and enhance the long-term growth of the stakeholders or communities, particularly those directly affected by the operations.

First Nations Self-Assertion

First Nations land claims have been in progress for several years now with the federal and provincial governments. In Canada, these land claims are sometimes founded on and may be limited in scope by the terms of signed treaties, depending on the state of treaties in each province, e.g., BC has only one treaty in place whereas much of Ontario is subject to treaties.

In the province of Ontario, the principal treaties related to mineral endeavors include the Robinson-Superior and Robinson-Huron Treaties of 1850, Treaty No.3 of 1873 and Treaty No. 9 of 1905 (INAC, 2001).

There is deeply held conviction amongst aboriginal communities that the intent of their forefathers and signatories to the treaties are not reflected in the strict interpretation that the province places on the wording. First Nations are now pressing to have the terms contained within these agreements respected and affirmed in a manner that more fully reflects their point of view.

Several cases exist where individual First Nations bands have resorted to the court system when the interpretation of their perceived treaty rights were rejected by provincial or federal authorities. However, there has not yet been a case brought forward that contests the provincial interpretation that mineral rights were ceded to the Crown by treaty.

For instance, the “political treaty organizations”, e.g., the Nishnabe–Aski Nation (NAN) and the Grand Council of Treaty 3 in Ontario, continue to negotiate self-governance for their constituent First Nations. Some aboriginal leaders contend that self-governance would give the First Nations equal power to the federal government, providing them with the means to make their own future

with or without the rest of Canada; such a vision includes a right of veto over potential resource development projects.

Canada has entered negotiations on this topic from a very different point of view, namely that, while federal jurisdiction in some limited areas may be delegated to First Nations, all arrangements will be constrained by over-riding federal authority and the primacy of the Canadian Constitution.

There is a belief amongst some aboriginal leaders and a few economists that the transfer of large tracts of land back to the First Nations will result in considerable economic benefits. It is by no means certain, however, that provincial governments would concur with this. It is perhaps more likely that, through land use planning processes, First Nations will acquire much greater input into proposals to develop resources on treaty lands, such that their beliefs and objectives will be reflected in and perhaps become constraints on development.

Land Usage

An elder of the Eabametoong First Nation in northern Ontario has eloquently stated his view of the nature of the relationship of the Nishnabe people to the land. He explained that the Creator created the land and the people as a part of it; rather than the land being owned communally by the people, as Europeans sometimes characterize the relationship, the land in a very real sense owned the people. When Europeans brought the process of treaty making to the Nishnabe, it took the land but neglected to take it all - it did not take the people.

In Canada there are reserve lands and non-reserve lands on which traditional activities are undertaken. Reserve lands, held in trust for the band by the federal government, are outside of provincial jurisdiction with regard to mineral development activities. Non-reserve lands can include provincial Crown lands. Traditional use is protected on non-reserve lands. In addition non-reserve lands may be subject to treaties which include specific treaty rights.

Outside reserve lands, Treaty and Aboriginal rights are protected by the *Constitution Act 1982* under Section 35. The traditional area of a specific band is the area within which members of the band conduct traditional activities such as trapping, hunting and fishing. As bands have divided and formed new communities, which may have gained reserve status, and as individuals or families have moved from one band to another, the extent of a traditional area may have changed and areas of overlap may have developed; an overlap is simply an area where people from more than one community conduct traditional activities. Furthermore, as a result of changes in natural conditions, including for example weather cycles, the movement of game or forest fire, the boundaries of a traditional area may change.

Over time, many communities have developed a series of informal to semi-formal understandings with neighbouring bands as to who will utilize which areas. The boundaries that emerge from this process do not, however, have the tightly defined limits, typical of the European tradition. Thus, it is possible in some areas to determine which band or bands a company should talk to only by asking the communities in the area; on occasion the answers are far from what might have been expected.

Aboriginal Objectives

Aboriginal people have varied objectives regarding the use of their traditional lands, varying from almost total preservation to controlled development and stewardship. Their beliefs, their past experiences, their needs and their aspirations will determine the degree of development they are willing to co-exist with.

Companies wanting to explore for minerals, or develop and operate mining operations on traditional lands, may encounter the expectation that they will have to enter into contractual agreements with affected First Nations. The nature of such agreements will vary from band to band depending on the specific objectives of each. Several examples on the typical content of these agreements exist (NRCan, 2002). These agreements may contain clauses regarding preferential hiring of aboriginals, often with a defined percentage. For example, at Placer Dome's Musselwhite Mine in Ontario, the goal in

the original agreement (1992) was 25% of employees from the signatory communities and affiliates. This target has been raised to 30% in a new agreement signed in 2001; for several years, the mine has been at about 20-27% aboriginal employees from the signatory and affiliate communities. Other specific conditions can include the preferential award of contracts to aboriginal companies, the training of aboriginals in trade skills, community development projects, company sponsorship of various community programs and wealth sharing.

Examples of "wealth sharing" can include up front cash payments, financial considerations tied to production, and potentially, joint ownership as in the case of the Red Dog Mine in Alaska (Teck Cominco, 2002). In Ontario, Musselwhite Mine is the only project that provides revenue sharing. There is also a stone quarry in northwest Ontario that pays a per tonne levy to FN communities that under specific conditions it would otherwise pay to Ministry of Natural Resources under the *Aggregate Resources Act* (Ontario, 2002). Generally, aboriginal leaders wish to see the Province guarantee the flow of such direct benefits to First Nations through sharing of royalties or taxes, rather than face what they would characterize as the uncertainty of revenue sharing through corporate "good will".

Implications for the Industry

Many aboriginals have a view of the mining industry that does not reflect the practices that have been standard in the industry for about a generation. Like many other people, they have been subjected to media and special interest groups campaigns that report the environmental damage, real and potential, from mining activities. Therefore, they tend to see mining as a destructive activity that damages and scars the land in perpetuity. Perhaps more importantly, they often find it difficult to understand the extreme levels of financial risk associated with mineral exploration.

For many people of aboriginal ancestry, it seems to fly in the face of reason that a company would spend tens, and occasionally hundreds, of thousands of dollars to come to a remote part of Canada to look for something that in all likelihood is not there. It is vastly harder to believe that an

advanced exploration project costing tens of millions of dollars is still a high-risk gamble. In short, exploration is almost universally taken to mean that a mine is imminent. The immediate reaction is negative because this development is about to occur when no one has talked to the community and its representatives about the impact on their treaty rights, their livelihoods or what is referred to as “our land”. At present, there is no regulatory requirement for explorationists working in Ontario to consult with First Nations about their plans or intents until they reach the advanced exploration stage, though the government encourages it. Combine this situation with the transient nature of mineral exploration programs and the practitioners thereof - which is in stark contrast to the rootedness of the aboriginal people—it becomes understandable that discussions of the sustainable nature of mining are far from common in First Nations communities.

Yet, both mineral exploration and mineral development have a great deal to offer aboriginal communities. As exploration companies learn the lessons of sustainability from the mining companies, it should become increasingly possible for aboriginal people to take up these activities because they meet the sustainability goals that many First Nations espouse.

Mining companies wanting to explore for and develop mines on traditional use areas will likely face several constraints that they have not faced in the past. Depending on the needs, beliefs, and goals of a given band, it may oppose or support mining on some or all of its traditional territory. One band may be agreeable to exploration and development on its traditional territory while an adjacent band may not; this will be particularly problematic when a project straddles the boundaries, or sits in the overlap, of the traditional territories of two such communities. Mining companies will have to be aware of the political and social climates in each community they are dealing with; this will continue to be problematic for science oriented cultures like the exploration and mining communities.

The reception accorded an exploration company that has approached a band will be influenced by several factors. Previous dealings with mining companies will definitely influence the

negotiation process. In addition, negotiations will tend to take longer than expected because of the consensual nature of the aboriginal decision-making processes. Mining company representatives will have to be sensitive to the aboriginals’ beliefs and objectives if they want to be successful in their negotiations. First Nations have a culture based on verbal and graphical communication and will often use stories to address an issue, making communication more challenging. Getting to know the community, its elected leadership and the members — usually the elders — that have influence, will require patience, time and money, particularly if there is no track record established.

Certain mining activities may be agreeable to the community while others may not. Exploration and development may not be agreed to in specific areas or at particular times. Such areas could include sacred grounds, burial sites and other spiritual sites: these off-limit sites will have to be respected regardless of potential mineral finds. Problematic times for conducting certain activities generally are associated with hunting seasons; this issue can frequently be mitigated through project scheduling.

Restraints may be sought on how mineral deposits are developed, particularly in the area of mining method selection. Mining methods that tend to disturb surfaces (e.g., open pit mining, sublevel caving, or block caving), or create a potential for future subsidence (e.g. shrinkage or open stoping near surface) may meet greater resistance, and so require greater efforts to educate the community and to accommodate concerns. Surface mining, typically the lowest cost method for a shallow deposit, may not be considered acceptable unless more extensive remediation and reclamation work is performed at closure, probably more work than might be normally required by legislation and regulation. Backfilling of all underground workings, regardless of stability, may be required to alleviate long-term concerns and secure agreement.

Particularly problematic will be the issue of waste management as it tends to be very visible and generally a long-term concern. Waste water

control, storage and discharge (or even zero discharge) will be a critical issue to be resolved. Waste rock stockpiles, tailing basins and acid-rock drainage issues will have to be dealt with in a manner that meets the objectives and constraints set by the band. Waste rock and tailings may have to be re-located within the mine workings.

Reclamation work, particularly revegetation and reforestation of lands and restoration of natural ecosystems impacted or damaged by mining activities will have to be done. The degree of reclamation work and how its success will be judged will have to be carefully spelled out for the mutual understanding and protection of all stakeholders. In many instances, First Nations will desire direct input into rehabilitation planning and participation in environmental monitoring. In addition, long-term First Nation concerns may result in requests for specific financial guarantees, beyond that required by government, in the form of bonds posted to the band.

The above constraints may increase the mining costs and reduce the overall profitability of the deposit however, doing so represents an investment in good will and in future projects, which ultimately forms part of the sustainable mining principles.

Land Claim Status in Ontario

There have been approximately 100 land claims or other land related matters filed by First Nations in Ontario. Twenty seven of these claims are considered settled in one way or another, 6 have reached agreements in principle, 21 are under active negotiation, and 46 are under review to decide on whether or not the Province can even negotiate with the claimants (ONAS, 2002). In 1996, The Ontario Native Affairs Secretariat (ONAS) released an Aboriginal Policy Framework on how the Crown would deal with aboriginal issues. ONAS's aboriginal goals focus primarily on economic development and the promotion of self-reliance.

Ontario's policy is to continue land claim negotiations that have a high probability of successful resolution. On the matter of self-governance, Ontario believes that the federal government is responsible to take the lead.

Ontario will continue to assess and protect provincial interests while respecting existing aboriginal and treaty rights.

Conclusions

The mining industry is facing new challenges on First Nations' treaty lands. However, by implementing the concept of sustainable mining, the industry can adapt to and form strong community relationships that will benefit both the industry and the local First Nations. These strong relationships will help the mining industry weather future changes.

Disclaimer

Though written in part by employees of the Ontario Government, the views expressed in interpretations and impressions presented in this paper are personal and do not necessarily reflect the position of the Ontario Government.

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