

NORTH AMERICAN AGREEMENT ON
ENVIRONMENTAL COOPERATION
(NAAEC)

COMMISSION FOR
ENVIRONMENTAL COOPERATION

FILE No.

CENTRE QUÉBÉCOIS DU DROIT DE
L'ENVIRONNEMENT

and

NATURE QUÉBEC

Submitting parties

and

THE GOVERNMENT OF CANADA

Party concerned

**Submission under Article 14 of the NAAEC
regarding
the Government of Canada's and the Government of Québec's failure
to effectively enforce
Québec's *Mining Act, Regulation respecting mineral substances other than petroleum,
natural gas and brine, and Sustainable Development Act***

Submitted by:

Centre québécois du droit de l'environnement
Me Michel Bélanger, LL.B., LL.M.
Anna-Léa Scollan, LL.B.
Julie-Anne Pariseau, LL.B.
286 St-Paul Street West, Montréal, QC, Canada, H2Y 2A3
mbelanger@lauzonbelanger.com

and

Nature Québec
Charles-Antoine Drolet, biologist
Christian Simard, Executive Director
870 de Salaberry Street, Suite 207, Québec City, QC, Canada, G1R 2T9
conservons@naturequebec.org

3 September 2009

A. SUBMITTING PARTIES

1. The submitting parties are the Québec Centre for Environmental Law (*Centre québécois du droit de l'environnement*—CQDE) and Nature Québec.
2. The CQDE is a nongovernmental organization based in Québec, Canada incorporated as a nonprofit organization under the *Companies Act* since 9 August 1989.
3. The CQDE's mission is to promote environmentally responsible legal measures and practices. In the collective interest, it fosters the development of environmental management methods that place citizen-based actions at the heart of mechanisms to protect our environment.
4. The CQDE takes part in governmental consultations on various legislative and regulatory reforms and is actively involved in changing Québec's environmental law, having produced over 40 legal memoranda and analyses for parliamentary commissions, the Senate and concerned departments.
5. When appropriate, the CQDE takes action before the courts to promote the development of progressive jurisprudence in areas touching on environmental law.
6. Nature Québec, formerly the Québec Nature Conservation Union (*Union québécoise pour la conservation de la nature*—UQCN), is an organization based in Québec, Canada and incorporated as a nonprofit organization under the *Companies Act* since 1 June 1981.
7. This organization unites people and organizations working to protect the environment and promote sustainable development.
8. Nature Québec works to preserve the diversity of species and ecosystems. Since its beginnings, the organization has pursued the objectives of the World Conservation Strategy of the International Union for Conservation of Nature (IUCN).
9. Nature Québec takes active part in public debates and demands a public review prior to the approval of any governmental project, policy or program that could negatively affect the environment.
10. Nature Québec seeks to work with governments, municipalities and businesses in order to improve natural resource management legislation and methods.
11. Nature Québec is also an active member and one of the spokespersons of the Québec mining industry watchdog coalition "Pour que le Québec ait meilleure mine !" This coalition was founded in the spring of 2008 and is made up of about a dozen organizations. Its goal is to re-examine the framework and development of Québec's mining sector. The coalition also seeks to promote better mining exploration and exploitation practices from a social and environmental perspective.

B. PARTY CONCERNED BY THE SUBMISSION

12. The submission concerns the Government of Canada's failure to effectively enforce the mining management legislation described below, which falls under the jurisdiction of its province of Québec.
13. The Government of Canada is bound by the practices and failures committed by the government of its province of Québec with respect to matters under its jurisdiction related to enforcement of the *North American Agreement on Environmental Cooperation (NAAEC)*, in accordance with the declaration issued by the Government of Canada in Appendix 41 (para. 1) of the Agreement. Moreover, in order to give effect to the goals of the Agreement and implement its provisions:
 - a. The Québec parliament approved the *North American Agreement on Environmental Cooperation (NAAEC)* through section 2 of the *Act respecting the implementation of international trade agreements* (L.Q. 1996, c. 6, becoming R.S.Q. c. M-35.2), adopted by the Québec National Assembly on 12 June 1996, given Royal Assent on 13 June 1996, and coming into force on 10 July 1996, by order in council no. 840-96 of 3 July 1996 (1996) 128 *G.O. II* 4103. Moreover, section 8 of this same Act confirms that the clauses of the NAAEC relating to *enforcement matters* apply to the government of Québec.
 - b. On 2 December 1996, the government of Québec signed the *Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation*, section 2 of which stipulates that the signatories are bound by their obligations under the NAAEC, in accordance with their respective jurisdictions; and Articles 5 (para. 3), 7, 8, and 9 explicitly set out that the clauses of the NAAEC relating to enforcement matters (*Submissions* of Article 14, *Consultation and Resolution of Disputes* procedure) apply to the signatory governments.

C. THE LEGISLATION WITH WHICH THE CONCERNED PARTY IS CHARGED WITH FAILING TO EFFECTIVELY ENFORCE

14. The submission is filed pursuant to Article 14 of the *North American Agreement on Environmental Cooperation (NAAEC)*. It alleges that the government of Québec has failed to effectively enforce the following laws:
 - a. The *Mining Act*, R.S.Q. c. M-13.1, (hereafter called the "Act"), specifically sections 221, 222, 232.1, 232.2, 232.3, 232.4, 232.5, and 251, concerning the requirements to submit activity reports, land restoration, and the powers of inspection of the department of natural resources and wildlife (*ministère des Ressources naturelles et de la Faune*—hereafter called the "MRNF"). The relevant excerpts of the *Mining Act* are enclosed herein as Appendix 1.
 - b. The *Regulation respecting mineral substances other than petroleum, natural gas and brine*, R.Q. c. M-13.1, r.2, (hereafter called the "Regulation"), specifically, sections 108, 109, 110, 111, 112, 113, 114, and 115 concerning financial guarantees for carrying out the rehabilitation and restoration work

under articles 232.1 and following of the *Mining Act*. The relevant excerpts of the *Regulation respecting mineral substances other than petroleum, natural gas and brine* are enclosed herein as Appendix 2.

- c. The *Sustainable Development Act* R.S.Q. c.D-8.1.1, specifically section 6 concerning the principles of environmental protection, economic efficiency, access to knowledge, and polluter pays. The text of the *Sustainable Development Act* is enclosed herein as Appendix 3.

15. There are 24 active mines in Québec, along with 13 primary deposits.¹ Québec is ranked second in Canada (among both provinces and territories) in terms of mining sector investment, which totaled 429,893 thousand dollars in 2007.²

16. However, as indicated in the report examined below, poor State management of the province's mining resources has had disastrous consequences, particularly from an environmental standpoint, but also at the economic and social levels.

D. REPORT OF THE AUDITOR GENERAL OF QUEBEC ON GOVERNMENT INTERVENTIONS IN THE MINING SECTOR

17. On 1 April 2009, the Auditor General of Québec delivered his conclusions on government interventions in the mining sector. More specifically, the report examined the MRNF's management of the mining sector.

18. The broad outlines of the report highlight not only the fact that in most cases this management does not comply with legislation, but also that the Québec State poorly manages the natural resources with which it is entrusted, gains almost no exploitation royalties for these resources, and ends up with environmental and financial liabilities amounting to several hundred million dollars.

i. Management of information

19. One of the primary failures noted by the Auditor General in his report is a serious deficiency in information management. As noted by the Auditor General:

If the [MRNF] wishes to be in a position to advise the government on how best to orient mining sector development in the coming decades, it must be in a position to track the history of the situation, make a diagnosis, and anticipate the principle issues.³

20. Sections 221 and 222 of the Act stipulate the requirement for operators to submit preliminary reports and activity reports to the MRNF annually. These reports contain crucial information, in particular for monitoring rehabilitation and restoration plans and on the state of financial guarantees.

21. Moreover, section 251 of the Act confers powers on authorized inspectors allowing them, notably, to:

¹ Report of the Auditor General of Quebec to the National Assembly for 2008–2009, Volume II, Chapter 2: Government interventions in the mining sector [the "Report"], pp 2–36

² Report, para. 2.11 on p. 2-8.

³ Report, para. 2.44 on p. 2-16

2) examine and make copies of the books, registers, plans, accounts, records and any other documents related to that activity;

3) require any information or document relating to the activities governed by this Act and the regulations[.]

22. Despite these powers, which are vital to the effective management of mining resources, the Auditor General notes that:

56 percent of the 25 files analyzed did not include an inspection report. Moreover, in the reports we examined, the most recent inspection sometimes dated back over two years previous. On the other hand, we saw one file where eight inspections had been carried out over a two-and-a-half-year period, though we saw no evidence justifying this number.⁴

23. Notwithstanding these powers, the Auditor General noted that the documentation of mining site files made by the MRNF had serious flaws, such as a lack of justification and supporting documents for certain decisions, key pieces of evidence that were missing, or departmental actions not recorded in the documents.⁵

24. The Auditor General noted the importance of keeping mining site files up to date:

Given the relatively limited number of mining sites in operation and, at the same time, the significant economic, social and environmental impact they have in certain regions, we would expect to find a full and structured file for each one. Such a file is vital in order to determine, in a timely fashion, how the mine's activities compare to the plans made for rehabilitation and restoration, the state of its deposits, the nature of its ties to the community, its history of regulatory compliance, the state of its financial guarantees, etc.⁶

ii. The rehabilitation plan

25. The responsibility for restoring a mining site falls to the company operating it. This requirement is set out in section 231.1 of the Act and must be carried out based on a MRNF-approved plan. The plan is approved after consultation with the department of sustainable development, environment and parks (*ministère du Développement durable, de l'Environnement et des Parcs*—hereafter called the “MDDEP”) – section 232.5 of the Act.

26. Section 232.2 of the Act stipulates that the plan must be submitted to the MDDEP for approval before operations commence.

27. According to the conclusions of the Auditor General, the MRNF has no internal mechanism by which it can determine and monitor the start of a company's mining operations.⁷ By not ensuring it has such vital information, the MRNF is therefore not in a position to coordinate the reception of plans within the time limits set out in the Act.

⁴ Report, para. 2.88 on p. 2-25

⁵ Report, para. 2.101 on p. 2-27

⁶ Report, para. 2.99 on p. 2-27

⁷ Report, para. 2.66 on p. 2-20

28. The Auditor General noted the following failures in the 25 records he examined:
- a. 2 companies had commenced operations before having submitted a plan;
 - b. 9 companies had not taken into account the required time to review the plan;
 - c. in these 11 files, the stipulated deadlines for tabling or reviewing the plan had not been met, and no fine had been levied;⁸
 - d. In 10 files, the plan was approved despite a MDDEP notice that was inconclusive, unfavorable or that specified conditions, or in the absence of such a notice.⁹

29. In one of the files, the Auditor General even noted several omissions and inexplicable contradictions:

One analysis concluded that the plan was unacceptable while another arrived at different conclusions several months later and without a trace of any changes either to the plan or the file. The plan was finally approved without further explanation of the two different conclusions. In another case, the professional mentioned three times over a period of three years that the plan was unacceptable. The plan was nevertheless subsequently approved after an inspection noted that the site had been abandoned. Previously, the mine had been in operation for six years without a plan having been approved.¹⁰

[Our underlining]

30. Finally, the times for approving plans are unacceptably long, with the Auditor General calculating that the average time between tabling a plan and its approval is three years.¹¹

iii. Financial guarantees

31. In order to ensure that the responsibility to restore the mining site stipulated in section 232.1 of the Act is indeed charged to the operator, section 232.4 of the Act requires the operator to provide a financial guarantee, so that the government does not have to pay any eventual costs associated with the abandonment of a mining site. This guarantee must be described in the rehabilitation plan, and the amount is specified in section 111 of the Regulation.
32. Sections 112 and 113 of the Regulation lay out a payment schedule that provides for incremental payments based on the mine's operational life. These increments depend on the description of the guarantee, which must be included in the rehabilitation plan.
33. Moreover, the guarantee payments depend on MRNF approval of the rehabilitation plan. Under section 112 of the Regulation, payments are to start *only after* approval. Hence, unreasonable delays in approval, as well as failures to even table a plan, to

⁸ Report, para. 2.66 on p. 2-20

⁹ Report, para. 2.70 on p. 2-21

¹⁰ Report, para. 2.67 on p. 2-21

¹¹ Report, para. 2.70 on p. 2-21

which we referred in the previous section, can lead to disastrous consequences in the financial management of these files.

34. Furthermore, the Auditor General's report noted several significant problems in keeping track of guarantee payments.

The guarantee payments have not always corresponded to the calendar established by the MRNF, with the delays occasionally exceeding two years. In some cases, the payments had just simply not been made. For example, in two files, we found repeated, unsuccessful, demands for immediate payment of the entire amount of the guarantee by the MRNF. According to the data available for these two files, at the time of our audit, the total unpaid guarantee represented roughly \$4.4 million.¹²

[Our underlining]

35. It would appear that failures to pay guarantees were also noted in 10 other files.¹³ Because payment of these amounts were not made during the period of the mines' operation, it is likely that they will be charged to the community if ever a mine closes prematurely or goes bankrupt.
36. Finally, some of these failures are due not only to poor management by the MRNF, but rather to non-compliance with requirements set out under sections 112 and 113 of the Regulation. In seven of the cases examined, this poor enforcement of the Regulation resulted in the postponement of \$16 million in payments by the companies examined.¹⁴
37. These tremendous amounts are added to the restoration costs already born by the State, the result of mining exploration or operation sites abandoned by their owners. These costs were estimated at \$264 million on 31 March 2008.¹⁵ It is thus imperative that the government of Québec make use of and enforce compliance with all available measures so that the resources belonging to the citizens it represents are protected not at their own expense but at the expense of those who profit from them.

iv. Public participation – information requirements

38. In his report, the Auditor General deplored the fact that the MRNF stopped making information about the mining industry public. Not only is such information necessary for the people of Québec to understand the benefits and impacts of the sector, it is also vital for regions that are economically dependant on mining operations.¹⁶
39. The Auditor General's report also recommended that the MRNF:

clearly determine the information needed to acquire and maintain the knowledge concerning the mining sector; develop tools making it possible to collect management information that is precise, up-to-date and likely to be incorporated in the decision-making process; make the

¹² Report, para. 2.79 on p. 2-23

¹³ Report, paras. 2.80 to 2.83, on pp 2-23, 2-24

¹⁴ Report, paras. 2.81-2.82, on pp 2-23, 2-24

¹⁵ Report, para. 2.61 on p. 2-19

¹⁶ Report, para. 2.48 on p. 2-17

information available in order to facilitate, among other things, the participation of interested individuals in the decision-making process and their involvement.¹⁷

40. Indeed, the *Sustainable Development Act*—which under section 3 applies to the MRNF—states in section 6 among its principles the participation and commitment of citizens and access to knowledge. These principles are also part of the government’s sustainable development strategy.¹⁸

F. CONCLUSION

41. For all of these reasons, the submitting parties respectfully request the Commission for Environmental Cooperation to develop a factual record on the Government of Canada’s failure to enforce its legislation concerning the effective management of mines operating in the province of Québec, laws which fall under the jurisdiction of the Québec government.

42. A thorough study of the facts put forward in the submission would allow the Commission for Environmental Cooperation to shed light on the government’s practices and numerous failures in the mining sector. Moreover, such an investigation by the Commission would be in keeping with the objectives of the *North American Agreement on Environmental Cooperation (NAAEC)*, as stated in Article 1 of the Agreement, in particular:

(a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;

(b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;[...]

(g) enhance compliance with, and enforcement of, environmental laws and regulations;

(h) promote transparency and public participation in the development of environmental laws, regulations and policies;

(i) promote economically efficient and effective environmental measures.

43. A more detailed examination of the facts would, notably, allow the Commission for Environmental Cooperation (CEC) and the Parties to the *North American Agreement on Environmental Cooperation (NAAEC)* to confirm the many failures of the government departments responsible for the mining sector.

44. The environmental laws cited herein do not stipulate any private remedy that would ensure their effective enforcement, and no other remedies are currently being sought.

¹⁷ Report, para. 2.51 on p. 2-17

¹⁸ Government Sustainable Development Strategy 2008–2013, Direction 1, p. 23

Respectfully submitted,

Montréal, 3 September 2009.

Michel Bélanger, LL.B., LL.M., attorney and administrator, CQDE

Anna-Léa Scollan, L.L.B., Vice-president, CQDE

Julie-Anne Pariseau, L.L.B., Secretary, CQDE

Charles-Antoine Drolet, biologist, Nature Québec

Christian Simard, Executive Director, Nature Québec