



# MiningWatch Canada

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### **Submission to the House of Commons Standing Committee on Environment and Sustainable Development regarding Bill C-469, *An Act to establish a Canadian Environmental Bill of Rights***

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I'd like to thank you for this opportunity to share our observations on Bill C-469, *An Act to establish a Canadian Environmental Bill of Rights*. Since the invitation came very recently we have not had a chance to prepare a more detailed written brief, or to submit it in advance.

This Bill touches several aspects of our work and if enacted would greatly improve environmental governance at the federal level. MiningWatch Canada is a pan-Canadian coalition of environmental, Aboriginal, social justice, and labour organizations that researches and advocates for responsible mining practices and policies in Canada and by Canadian companies abroad. We work directly with communities affected by all phases of mining activities, from prospecting and exploration to closed and abandoned mines, supporting their efforts to make regulatory measures and planning processes useful and accountable. We also do research and policy analysis and advocate for improvements in Canada's legislative and regulatory framework to support sustainable development and environmental justice. This Bill clearly supports this objective, providing tools that we would have found useful in several instances.

I am a biologist by training, not a lawyer (though I do know some very good lawyers) and MiningWatch does not do legal work. We rely on the expertise and experience of organizations like Ecojustice, who have provided us with superlative representation in the two lawsuits we have undertaken in our eleven year existence. I will therefore defer to the expert commentary of others when it comes to the technical details of this bill and possible improvements and amendments to it, specifically endorsing Professor Boyd's submission and comments among others.

In general terms, this Bill addresses weaknesses in how existing legislation deals with fundamental aspects of environmental governance: access to information, enforcement of existing laws, and participation in decision-making.

Access to information is critical to all of the other areas covered by this Bill. Without information it is impossible to know what environmental conditions may be changing as a result of what activities, how they are supposed to be regulated, and who is supposed to be responsible. Federal authorities should maintain the most complete information they can and should make as much of it as possible as accessible as possible, in the most timely and accessible manner. This is not currently the case. We have been told by federal agencies, for instance, that they do not need to provide us with information since we can get it through access to information. Not only is this an abuse of the access to information system, apparently already overloaded in light of its reported diminished responsiveness, but it also represents an irresponsible delay in providing that information.

MiningWatch and Great Lakes United had to undertake legal action to address the federal government's refusal to enforce existing legislation and regulations that require the mining industry to report data on the millions of tonnes of toxic materials that are dumped into waste rock and tailings management areas. We won the case, thanks to able representation by Ecojustice lawyers but also in recognition of the absurdity of the situation. Prior to taking court action we had already engaged with government and industry through years of multi-stakeholder consultations and debates convened by the federal authorities. Despite our efforts to insist the law be applied equally to the mining industry, federal bureaucrats consistently failed to apply the requirements of the National Pollutant Release Inventory under the Canadian Environmental Protection Act in the face of determined resistance by the mining industry.

Why is this information important, given that the releases in question have to do with the dumping or stockpiling of contaminated material within an operating licenced mine site? First, "operating" is a key word: mines do not operate forever, and tailings dumps that are actively monitored and managed now will eventually become a public liability. We need to know what's there. Secondly, spills and accidents do happen, and whether they are small or massive, appropriate contingency plans need to be in place and securely funded. We cannot evaluate the adequacy of those plans without knowing what's there.

This example is important for several reasons. It illustrates the fact when existing laws are not enforced legal action remains citizens' and watchdog groups' last resort. This is incredibly time-consuming and costly in terms of organizational resources if not in cash outlay, not only for the plaintiffs but also for the government. By the same token, it illustrates the need for a more specific legal cause of action, such as this Bill would provide. If this Bill had been law it is possible that we could have gone to court and resolved this situation sooner, or more likely – and more desirable – that the clear potential for legal action would have prompted compliance on the part of Environment Canada without us having to actually go to court.

Public participation in decision-making is also important, whether from a sustainable development and democratic governance perspective or a purely technocratic perspective.

Environmental decisions should not be made without public involvement on principle. Sound environmental decisions **cannot** be made without public involvement, especially in view of the progressively diminished budgets and capacities for scientific and technical work within departments, which are also increasingly trying to keep their work focused on their jurisdiction and mandate. The external factors and complex considerations involved in sound environmental decision-making cannot come solely from government or private proponents. In addition to improving the final decision, ensuring effective public involvement also improves the public acceptance of decisions, minimising the likelihood of a public backlash. For better or worse, it seems that people tend to accept decisions that they were involved in even if their interests or input are not well represented in the outcomes.

This is why public participation is a cornerstone of environmental assessment, at least in theory. And yet even after the Canadian Environmental Assessment Act (CEAA) was revised in 2003 to make public involvement mandatory in comprehensive studies, and to expand and clarify the opportunities for public involvement in screenings, the federal government still resisted. One extreme case was the proposed Red Chris copper-gold mine in northern BC, which at 30,000 tonnes per day milling capacity was clearly over the 3000 tonne per day threshold of the Comprehensive Study List. MiningWatch was preparing to intervene in the federal environmental assessment process when we were informed that the Department of Fisheries had decided that the mine itself was not part of the assessment, just the tailings dump that would destroy fish habitat. (The proposed mine would turn the headwaters of three creeks in northwestern BC into a tailings dump, destroying fish habitat and risking contamination of the Stikine watershed.) Since tailings impoundments are not on the Comprehensive Study List, the assessment would proceed as a screening, but public participation was not deemed appropriate for the screening either. To make a long story short, we contacted Ecojustice, they agreed this seemed wrong, and we eventually won the case in the Supreme Court of Canada earlier this year. The ruling cemented the role of the public in decision making under CEAA.

This situation lasted barely three months before the government used the Budget Implementation Act to amend the CEAA to give the Minister of the Environment or his designate the power to make discretionary decisions on the scope of a proposed project, replicating precisely the conditions that the Supreme Court had rejected. It is important to note that the Supreme Court had rejected this discretion on the basis of the logical and consistent functioning of the environmental assessment process, not just the letter of the law. We now no longer have a guarantee of a public role in the environmental assessment process. This bill would provide a strong measure of remedy.

MiningWatch strongly supports the stated purpose of the bill, to extend to every Canadian resident the right to a clean, healthy, ecologically balanced environment and the right and the tools to hold the government accountable to enforce the laws. This bill clearly serves the public interest, specifically in the areas that MiningWatch works in: access to environmental information, enforcement of environmental protection laws and regulations, and the protection of public participation in environmental decision-making. To quote Winston Churchill, "Give us the tools, and we will finish the job."