The Mining Law Review

Sixth Edition

Editor
Erik Richer La Flèche

The LawReviews

Stikeman Elliott

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PREFACE

I am pleased to have participated in the preparation of the sixth edition of *The Mining Law Review*. The Review is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 18 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes four country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

Much of the mining sector is emerging from a lengthy down-cycle. The world economy is expanding, albeit at a deliberate pace. Demand for minerals is generally sustained and prices are climbing. Exploration in many parts of the world, and in Canada in particular, has rebounded.

The mining industry's hard work over the past few years is finally paying off. Tight cost controls combined with economic growth have improved profitability and investors have noticed. Price earning ratios are favourable and suggest that investors anticipate increased profits in the future. This improved state of affairs encourages corporate growth, whether via new projects or acquisitions.

All of this portends to increased activity for mining lawyers, something that the mining bar has not seen in some time.

As you consult this book you will find more on topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche
Stikeman Elliott LLP
Montreal
October 2017

Part I

Mining Law

Chapter 4

CANADA

Erik Richer La Flèche, David Massé and Jennifer Honeyman[1]

I OVERVIEW

Canada is a constitutional monarchy with a Westminster-style parliamentary democracy. Canada is also a federal state in which legislative authority is constitutionally divided between the federal government of Canada and the provincial governments of Canada's 10 provinces. The federal government and the provinces are sovereign within their respective spheres of competence. Canada also has three sparsely populated northern territories, but they do not enjoy independent constitutional status and derive their powers from Canada's federal government. Legislative powers, including those regarding certain mining matters, may be transferred by the federal government to its territories through a process known as 'devolution'. The devolution process as to mining matters is complete in connection with Yukon and the Northwest Territories, and continues in connection with Nunavut. The provinces delegate certain powers to cities and other municipalities, effectively creating a third level of government.

i Division of powers

The constitutional division of powers in Canada is complex, but as a general rule the federal government has jurisdiction over matters of national and international importance, while the provinces have jurisdiction over matters of local importance. For example, the federal government has authority over trade and commerce, while the provinces have authority over property law, land use and planning and contract law.

ii Legal systems

Two distinct legal systems exist in Canada. With the exception of Quebec, the provinces and the territories are common law jurisdictions that follow the Anglo-American tradition. In the largely French-speaking province of Quebec, private law, including property and contract law, is civil and conceptually similar to that of France and other continental European countries.

iii Mining

Generally stated, the governments of Canada, the provinces and the territories are favourably disposed to mining and provide a comparatively stable and well-developed legal framework for mining.

1 Erik Richer La Flèche, David Massé and Jennifer Honeyman are partners at Stikeman Elliott LLP.

II LEGAL FRAMEWORK

Jurisdiction over mining in Canada is shared between the federal government of Canada and the provincial governments of the 10 provinces.

Except for uranium, each province has exclusive power over mineral exploration, development, conservation and management within its territory irrespective of who is the owner of the land or minerals. For example, on federal lands situated within a province, while federal law continues to apply to such lands, it is provincial law that applies to the exploration and development of minerals.

The governments of Canada and the provinces share jurisdiction over a number of areas, including the environment and taxation.

Finally, the federal government of Canada has exclusive jurisdiction over some matters that indirectly affect mining, such as foreign investment and export controls. The federal government also has exclusive power over mineral exploration, development, conservation and management within the three territories, although much of this power has been devolved to the territorial administrations.

Laws directly relating to mining deal with property and land-use planning, mining rights, the regulation of mining activities, taxation and the environment.

The governments of Canada, the provinces and the territories have each enacted laws relating to mining, effectively creating multiple distinct regimes. While little conscious effort has been made at standardisation, these regimes have many common features and as a result provide a relatively consistent legal approach to mining.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title (ownership)

In Canada, lands and minerals that have not been sold or otherwise granted are owned, subject to aboriginal title, by the Crown (i.e., the federal or provincial governments acting in the name of Her Majesty the Queen).

Until the early twentieth century, governments in Canada when granting land to private parties would often also grant the ownership of minerals under such lands. Governments have stopped this practice and have since retained the ownership of minerals. The only exception is the grant of minerals made in recent decades as part of some aboriginal land claim settlements.

This means in practice that, except in the limited instances of private ownership resulting from land grants or aboriginal ownership resulting from recent land claim settlements:

a each province owns the minerals located within its territory provided that such minerals are not otherwise owned by the government of Canada; and

b Canada owns all minerals under federal lands located in the 10 provinces and three territories, as well as offshore.

ii Surface and mining rights

In those instances where land ownership does not confer ownership of the underlying minerals (the vast majority of cases), one person may hold surface rights (e.g., ownership of land) while another may hold mining rights (e.g., the right to prospect, explore or carry out extractive and processing activities).

In such cases, the rights and interests of the holder of the surface rights may conflict with those of the holder of the mining rights. Mining legislation in each province or territory, as supplemented by the relevant property law, deals with such conflicts.

As a general rule, the exercise of mining rights may not materially interfere with the use and enjoyment of surface rights. When they do interfere, the surface rights holder must be adequately compensated. In those instances where financial compensation is not an adequate remedy and the surface rights holder is a private party, most Canadian jurisdictions provide for the holder of the mining rights to acquire the surface rights.

Mining rights in Canada fall into two broad categories, namely 'claims' or exploration licences, and mining leases. A claim or exploration licence grants its holder the exclusive right for a limited period to carry out exploration work within a designated area. Exploration work may include overburden removal, exploratory drilling and test ore extraction and milling. A mining lease allows its holder to carry out extractive and processing activities on a commercial scale.

There are two systems for acquiring mining rights in Canada, the 'free-entry' system and the 'Crown discretion' system. The former is the prevalent system and is in force in all provinces and territories with the exception of Alberta, Nova Scotia and Prince Edward Island, which use the Crown discretion system.

Under the free-entry system, persons interested in carrying out exploration work may designate or 'claim' on a first come, first served basis those areas where they wish to carry out the work. Such designation will be recognised provided that certain formalities are met and, most importantly, provided that the area is not already subject to another person's similar claim or exploration permit, or is otherwise off limits to mining (e.g., the area is located within a national park). A claim also entitles its holder to the right to obtain a mining lease. Such right is not subject to governmental discretion if all of the conditions precedent to issuance have been met.

Under the Crown discretion system, persons interested in carrying out exploration work must apply to the authorities for the requisite authorisation and the authorities have discretion (within limits) to approve or decline the application. Although generally a free-entry jurisdiction, in Quebec authorities have the discretion to refuse applications for sand and gravel mining leases for reasons of public interest.

iii Additional permits and licences

Various permits and licences are required at every stage of the mining cycle, and are too numerous to comprehensively list here. However, they include:

a prospecting permits or licences required in most provinces prior to commencing prospecting work; and

b environmental permits and licences, as well as surface rights permits and licences necessary to carry out exploration work (particularly if such work is accompanied by extensive surface disturbance) or extractive and processing activities under mining leases.

iv Closure and remediation of mining projects

Most provinces require a closure and rehabilitation plan to be filed prior to commencing mining activities, including in some cases prior to commencing exploration work. Financial guarantees are also required to cover all or a substantial part of the plan's costs. In addition, annual reporting and periodic plan updates may be required.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The federal government and the provinces each have jurisdiction over environmental matters. The provinces have the broader jurisdiction by virtue of their general constitutional power to legislate over mineral exploration, development, conservation and management. The federal jurisdiction covers discrete matters falling within federal powers, including matters relating to navigable waters, fisheries, migratory birds, species at risk and the transportation of dangerous goods. Some provinces have entered into agreements with the federal government to provide for environmental cooperation in an attempt to avoid unnecessary duplications, delays and costs.

The regulatory regimes of the governments of Canada and the provinces are broadly similar and comprise environmental assessment and review procedures to evaluate the environmental, economic, social and cultural impacts of new mining projects, including their infrastructure, prohibitions on releases into the environment (air, water and soil), licence and permit requirements, spill-reporting and clean-up requirements, environmental emergency preparedness, ministerial powers to issue orders and statutory offences.

Environmental assessment legislation, depending on the size and scope of the project proposed, can require the proponent to produce an environmental impact statement describing the project, analysing the project's likely effects on the environment, suggesting mitigating measures where mitigation is possible and describing residual adverse effects where it is not. Projects that could have significant adverse environmental impacts are usually submitted to an administrative agency for a structured review that may lead to the issuance of guidelines or general or specific directions. Major projects are also generally subject to public review by an independent board or panel, which may produce recommendations or a final decision.

Health and safety issues are addressed through occupational health and safety legislation as well as specific legislation for certain types of mining (e.g., coal or uranium mining). Directors and officers have a duty to take all reasonable care to ensure that the corporation complies with applicable health and safety laws, and can be held personally liable.

ii Environmental compliance

Directors and officers may be held personally liable for the environmental consequences of a corporation's activities, particularly where the director is an inside director (that is, an officer or employee of the corporation or a major shareholder). Secured lenders who take no action to control or realise on security are generally not liable for their borrower's environmental failures.

iii Third-party rights

The Constitution Act 1982 recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, which include the First Nations (Indian), Inuit and Metis people of Canada. In furtherance of such recognition and affirmation, Canadian courts have imposed on the federal and provincial governments a general duty to consult any aboriginal group whose aboriginal and treaty rights may be affected by a governmental decision, including the grant of permits or licences relating to mining activity. The duty to consult 'arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it'.

Aboriginal rights are communally held rights to use lands and resources in a manner consistent with ancestral uses of such lands and resources. These rights may not be sold or otherwise alienated by the aboriginal group to any person other than the federal government. Aboriginal rights confer exclusive use of the land and resources with respect to the traditional uses. For example, if an aboriginal group has an aboriginal right to hunt on certain land, then it has an exclusive right to continue to do so on such land. Aboriginal title confers an exclusive right to control the land, subject to certain qualifications, including an inability to alienate the land, except to the Crown, or to develop or misuse the land 'in a way that would substantially deprive future generations of the benefit of the land'.

Courts have determined that the federal and provincial governments can infringe on aboriginal rights but there must be a compelling reason to do so, and a mine may be a sufficiently compelling reason. However, before a government infringes on an aboriginal right it must consult with the affected aboriginal group and, through such consultation, mitigate any negative impact. The duty to consult is proportionate to the strength of the case supporting aboriginal right or title, and may be satisfied if there has been a reasonable and good-faith effort made to consult and reach agreement. The courts have made it clear, however, that the duty to consult does not impose an obligation to reach agreement. No party has a veto and both parties must act in good faith.

Although the duty to consult is imposed only on governments, it is now normal behaviour for a mine proponent to be a participant in the process. In some cases (e.g., Alberta through its land management and resource development consultation policy and guidelines), the private party is required to directly interact with the relevant aboriginal group, but in most cases the private party will want to be involved in order to mitigate the risk of a legal challenge by an aboriginal group and the adverse effect that such a challenge could have on a project. Certain provinces, including Ontario and Quebec, have implemented amendments to mining legislation that either incorporate the duty to consult in mining legislation, or specifically recognise that the mining legislation is to be interpreted in a manner compatible with the duty to consult aboriginal groups.

The best mitigant to any challenge by an aboriginal group is the impact benefit agreement. This agreement is negotiated between an aboriginal group and a mine proponent. It is a private contract, which typically provides that, in exchange for support for the project, access to the mine site and local knowledge (among other things), the mine proponent will, for example, employ and train members of the community, hire local subcontractors, fund education and vocational training, pay compensation, open its capital to community investment and follow certain environmental practices. The impact benefit agreement is typically preceded by a pre-development agreement, which essentially governs the period prior to construction and commercial production. In light of a recent Supreme Court of Canada decision regarding aboriginal title, obtaining the consent or agreement of affected aboriginal groups through private agreements is now more important than ever.

In 2014, aboriginal title over specific areas of land was confirmed by the Supreme Court of Canada for the first time. While confirming that the duty to consult and accommodate prior to aboriginal title being established is a spectrum depending on the strength of the claim and the seriousness of the potential infringement, the court concluded that, once an aboriginal group's title to land has been established, anyone seeking to use the land must obtain the consent of the aboriginal group. If such consent is not obtained, the government can only encroach on aboriginal title in narrow circumstances. The government must be able to demonstrate that: (1) it has fulfilled its duty to consult with the affected aboriginal group

and, through such consultation, mitigate any negative impact; (2) there is a compelling and substantial objective; and (3) the use is consistent with the Crown's fiduciary obligation to the aboriginal group. Accordingly, in areas where First Nations have established aboriginal title, the consent of relevant First Nations will generally be required and obtaining such consent is advisable for mining operations located in areas in respect of which aboriginal title is claimed although not yet established.

iv Additional considerations

Exceptionally, the federal government has extensive jurisdiction over the mining of uranium. The source of the federal government's power is its constitutional power to make laws for Canada's 'peace, order and good government'. An independent federal regulatory agency, the Canadian Nuclear Safety Commission (CNSC), regulates the use of nuclear energy and materials, and implements Canada's non-proliferation obligations. CNSC licences are required for each phase in the life cycle of a uranium mine: site preparation and construction, operations, decommissioning and abandonment. The licensing process is comprehensive, and no licence will be issued unless the CNSC is satisfied that the mine proponent is able to protect health, safety, security and the environment, and to satisfy Canada's international non-proliferation obligations.

Federal legislation requires mining companies (among others) to publicly disclose, on an annual basis, certain payments to governments, both domestic and international, including aboriginal entities. Reportable payments include taxes (other than consumption taxes and personal income taxes), royalties, fees, production entitlements and infrastructure improvement payments that exceed the amount prescribed by regulation or, if no amount is prescribed, C$100,000. The legislation applies to any mining company that: (1) is listed on a Canadian stock exchange; or (2) has a place of business, does business or has assets in Canada and meets two of the three thresholds relating to assets, revenue and number of employees. In Quebec there is similar legislation at the provincial level, although with a domestic focus.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Mining operations and mineral processing within Canada are subject to comprehensive legal regimes designed to protect health, safety and the environment. These regimes have numerous permitting, licensing and continuous compliance requirements. While increased processing of minerals in Canada is a stated objective of most governments in Canada, governments have rarely imposed secondary or tertiary processing obligations on mine operators.

ii Sale, import and export of extracted or processed minerals

The government of Canada has the constitutional power to regulate international trade and commerce. Canada favours international trade, including in natural resources, and is reluctant to impede the free flow of goods. While Canada has an import and export control regime in place, anchored by the Export and Permits Act, this regime serves primarily to satisfy Canada's international obligations and interests, including nuclear non-proliferation and sanctions imposed by the United Nations.

iii Foreign investment

The Investment Canada Act

The direct acquisition of control of a Canadian mining business by a WTO investor that is not a state-owned enterprise (SOE) would be reviewable under the Investment Canada Act (ICA) if the enterprise value of the investment is above a certain threshold. In June 2017, this threshold was set at C$1 billion. Starting in 2019, the threshold will be adjusted annually according to a formula based on the change in Canada's nominal gross domestic product. As part of the implementation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the threshold for review is expected to be increased to C$1.5 billion in enterprise value for non-state owned enterprises from CETA and other trade agreement investors.

The review threshold for the direct acquisition of control of a Canadian business by a WTO SOE is based on the book value of the assets of the target (C$379 million in 2017). The thresholds for direct and indirect acquisitions where neither the investor nor the persons who control the vendor are from WTO countries are also based on the book value of the target's assets but are considerably lower (C$5 million and C$50 million, respectively). Indirect acquisitions of control of a mining business by or from WTO investors are exempt from review.

The relevant test for approval under the ICA is whether the acquisition is of 'net benefit to Canada', taking into account a number of factors, including the impact on employment, capital expenditures, technological development and the level of resource processing in Canada. The approval of the Industry Minister under the ICA is often conditional upon the foreign investor's entering into binding undertakings with the federal government of Canada (usually in force for three to five years) in which the investor commits to maintaining one or more of Canadian head office operations, production levels, participation of Canadians in management, employment levels, research and development expenditures and capital expenditures with respect to the Canadian business. Uranium mining is subject to special rules. The basic policy of the government of Canada is to ensure a minimum level of Canadian ownership of 51 per cent in uranium mining, although lower levels of Canadian ownership are acceptable if there is *de facto* Canadian control or no Canadian partners can be found.

Reviewable investments by SOEs are subject to guidelines that essentially require the SOE investor to have a commercial orientation and to meet Canadian-equivalent corporate governance standards.

Of particular significance in the natural resources sector is the fact that the ICA may apply to a target business that does not have a strong connection to Canada. For example, if the target business is a mining company with a head office in Canada that generates all of its revenue outside Canada, its acquisition may still be considered an acquisition of a 'Canadian business' subject to ICA notification or review.

In addition to the foregoing investment review, the ICA provides for a 'national security' review process for the establishment of a new business, the acquisition of control of a Canadian business (irrespective of the value of its assets), a minority (non-controlling) investment in a Canadian business and, in addition, the acquisition of an entity with some Canadian operations. If the Minister of Industry has reasonable grounds to believe such establishment, acquisition or investment may be 'injurious to national security', the Federal Cabinet has broad remedial powers, including ordering that the investment not be implemented, requiring the investor to provide undertakings, and compelling divestiture of a completed transaction.

The ICA regulations

The ICA regulations do not specifically identify business sectors or activities that raise national security concerns, nor do they identify factors to be considered by the government in assessing whether an investment may be injurious to national security. This is further complicated by the broad application a national security review may have, catching not just large transactions, but also smaller transactions that fall below the monetary threshold for general review, minority investments that do not constitute an acquisition of control and transactions where the target may not have a significant Canadian presence.

Moreover, there is no formal pre-clearance mechanism. Despite this, for transactions that are notifiable or reviewable under the general investment process, early filing of a notification or application for review will trigger a 45-day period during which the Minister is required to issue a notice of review or possible review. In the absence of receiving such notice, foreign investors can assume that no national security review will occur. However, in the case of a minority (non-control) investment, the national security regulations provide that the Canadian government has until 45 days after the closing of the transaction to advise that the investment may be subject to a national security review. This means that the government is not required to provide guidance prior to closing, raising the possibility of a divestiture order in the event a national security concern is identified.

The government has signalled that the purpose of the national security mechanism is to 'ensure that Canada's sovereignty is not threatened' and that it should not be 'mistaken as a form of protectionism'. There are good reasons, including Canada's desire to attract foreign investment and not to provoke restrictions on Canadian investment abroad, to believe that national security will not be expansively interpreted. Nevertheless, foreign investors will no doubt be monitoring future investments with interest.

The Competition Act

The Competition Act (Canada) provides for the pre-notification of larger transactions, namely acquisitions where the following thresholds are exceeded:

a the 'size of the parties' threshold, where the parties to the transaction, together with their respective affiliates, have assets in Canada, or gross revenues from sales in, from or into Canada, the book value of which exceeds C$400 million;

b the 'size of the transaction' threshold, where the book value of the assets in Canada being acquired, or the gross annual revenue from sales in or from such assets, exceeds C$88 million; and

c shareholding thresholds in respect of the acquisition of voting shares in a corporation or of interests in non-corporate entities.

The parties to a notifiable transaction must make a statutory filing and wait for the required statutory waiting period prior to closing (unless an advanced ruling certificate or waiver is received). For transactions that raise potentially significant competition concerns, the Competition Bureau may, within 30 days of receiving the parties' statutory filing, issue a 'second request' for additional information. Issuing a second request has the effect of extending the statutory waiting period until 30 days after the parties have provided all the information specified and have certified compliance with the second request; however, for transactions that do not raise material competition concerns, the Competition Bureau will continue to provide comfort to merging parties either in the form of an advance ruling certificate or a 'no-action' letter along with a waiver of the pre-notification filing. In such

situations, the parties may choose to not make a statutory filing but instead to file only a 'competitive impact brief' explaining the competitive impact of the transaction, in which they would seek an advance ruling certificate or a 'no-action' letter.

VI CHARGES

i Royalties

All provinces and territories (with the exception of Prince Edward Island) impose mining taxes or royalties. However, there are significant differences among the provinces and territories. The differences include the calculation methodology, the applicable rate or rates and the minerals subject to the mining taxes. There are few mining taxes or royalties based solely on production or extraction. Most mining taxes or royalties are calculated on a net smelter return, net mine profit or some other net mine proceeds basis where some but not all costs (e.g., financing expenses) are taken into account. Mining taxes and royalties are most often deductible for income tax calculation purposes.

ii Taxes

The federal and provincial governments levy income tax. Residents of Canada are subject to income tax on their worldwide income. Subject to treaty relief, non-residents of Canada are subject to withholding tax on Canadian-sourced passive income (e.g., interest, dividends), and income tax on Canadian-sourced business income and capital gains. Income is determined each year on an accrual basis. Provincial corporate income tax is calculated in a manner similar to federal income tax (with some province-specific variations), but at lower rates that vary from 10 to 16 per cent depending on the province.

Mining exploration is fraught with risk and mining production is capital-intensive. To compensate for this, the Canadian tax system has adopted a number of measures designed to provide tax relief and encourage mining activity, including:

a favourable deduction of Canadian exploration expenses and Canadian development expenses;
b accelerated depreciation for certain types of tangible property;
c tax credits for certain intangible property expenses;
d 20-year operating loss carry-forward period;
e indefinite carry-forward for capital losses; and
f flow-through share mechanisms that allow corporations to pass along exploration and development expenses deductions to their shareholders.

iii Other fees

In addition to administrative fees levied pursuant to mining legislation, mining activities in Canada are generally subject to the same taxes applicable to other businesses. These will include federal and provincial payroll taxes, custom duties on the importation of machinery, equipment and ores and concentrates, land transfer taxes, the federal goods and service and provincial sales taxes, and regional and municipal property taxes.

VII OUTLOOK AND TRENDS

Canada is a stable democracy with a well-established rule of law and good infrastructure. It is extraordinarily well endowed with natural resources. It is also a relatively high-cost jurisdiction. While foreign investment in the Canadian mining sector has been affected by the recent global downturn in commodity prices, this has been offset to some extent by the decline in the strength of the Canadian dollar and Canada continues to attract strong interest from foreign investors.

Investment, including foreign investment, in the resources sector is an important aspect of the Canadian economy. Historically, the principal challenges for mining operations in Canada have included obtaining environmental and other approvals, and a lack of infrastructure, particularly in the remote northern regions. Trends being observed in Canada include the desire of Canada's federal government and several provincial governments to ensure that environmental impact assessments and other regulatory process are finite, and cannot be needlessly delayed by third-party challenges. The view is that there is sufficient knowledge and experience to mitigate most (if not all) risks posed by mining and infrastructure development, and that the process is being abused, thus needlessly increasing project costs and delaying development. In other words, governments across Canada view natural resource development as being positive, provided that it has the support of local populations; it is compliant with all laws, particularly environmental laws; and it is financially beneficial to the province or territory wherein it is located. This represents a considerable change from the situation of 10 to 20 years ago, particularly in central and eastern Canada.

In order to tap into demand for minerals, Quebec and Ontario have each announced plans to develop their northern regions. Both plans will require considerable infrastructural investment. The intent in both provinces is to develop infrastructure using public–private partnerships and other schemes in which the private sector shares the burden. While the plans have many features in common (e.g., consultation with local populations, including First Nations and Inuit, creation of very large protected areas and rational land-use planning), the Ontario plan appears at first glance less centralised than the Quebec one.

Under the Ontario plan, the First Nations appear to have a greater advisory role. Among other things, they will be asked to provide their perspectives on protection and conservation for the purpose of land-use planning, and will be directly involved in the implementation of land-use planning.

Quebec's updated plan for the economic development of its vast northern territory (i.e., all of Quebec north of the 49th parallel) was unveiled in 2015. The updated plan places considerable emphasis on how infrastructure and economic development must benefit and meaningfully involve local populations. The Quebec government has earmarked almost C$2 billion to be spent over the first five years of the plan (2015–2020) to improve access to, and telecommunications within, the northern territory and increase environmental knowledge in a manner that benefits communities, First Nations and mining and forestry companies.

Part II

Capital Markets

Chapter 21

CANADA

Erik Richer La Flèche, David Massé and Jennifer Honeyman[1]

I INTRODUCTION

More mining companies are listed on the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) than on any other stock market in the world. Each year, more equity capital is raised in Canada for mining exploration and development than in any other capital market.

This is the case even though many of the companies listed in Canada have all or nearly all of their mining and exploration activities outside Canada. Canada's mining capital markets are comprised of Canadian issuers with projects in Canada and abroad, and foreign issuers with projects in Canada or with no affiliation to Canada other than their Canadian listing. Canada is where the world comes to finance mining exploration and development.

As an overview of the Canadian securities regulatory system, in general, regulatory standards imposed by Canadian securities regulators and stock exchanges are typically comparable to US standards (although when it comes to mineral disclosure, Canada and the US have very different rules). The most important thing to understand about the structure of the Canadian securities regulatory framework, however, is that it is largely the responsibility of the governments of Canada's 10 provinces and three territories. While there have been ongoing efforts to create the equivalent of a national securities regulator with responsibility over a single set of national securities laws and regulations, certain provinces have resisted on constitutional grounds. As a result, Canada does not have a national securities law or a national securities regulator. Rather, the laws themselves are provincial and territorial, and many substantive aspects of securities regulation, such as registration and prospectus requirements, and exemptions and continuous disclosure requirements, are harmonised through the use of 'national instruments' or 'national policies', which are adopted by each of the provincial and territorial regulators. In addition, the national electronic filing system (SEDAR) and the passport system encourage regulators to delegate responsibilities to one another, effectively creating a system of 'one-stop shopping' for issuers and registrants for most issues.

As the home jurisdiction for the TSX and the principal regulator for a majority of Canadian reporting issuers, the Ontario Securities Commission (OSC) has generally taken a more active role in the development of securities law in Canada through the introduction of various regulatory instruments, policies and rules. As such, the OSC tends to exercise a very broad regulatory and disciplinary jurisdiction, and is arguably the nearest equivalent in Canada to the Securities and Exchange Commission in the US. Given the importance of

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mining in the Canadian capital markets, the OSC is active in the formulation and application of mining disclosure rules in Canada. In addition, given that many mining and exploration companies are based in Vancouver, the British Columbia Securities Commission is also active in this area.

Canada's mining capital markets benefit from the presence of a large community of bankers, lawyers, engineers and other professionals with deep experience in mining activities.

II CAPITAL RAISING

i General overview of the legal framework

Capital raising in the Canadian capital markets is governed in particular by the securities laws and regulations of each of the provinces and territories of Canada, the rules of the stock exchange applicable to listed companies and the corporate law applicable to the issuer.

Prospectus offerings and private placements

The securities laws and regulations provide that distribution of shares, debt securities and other securities must be preceded by the filing of a prospectus to be cleared with the principal securities regulator of the issuer, which is typically the regulator of the province where the head office of the issuer is located. Subsequent to an initial public offering or listing, issuers can proceed with follow-on offerings in an efficient manner through the use of short-form prospectuses that incorporate by reference the latest financial statements and other continuous disclosure documents of the issuer. Issuers in the Canadian capital markets have also made extensive use of a public offering financing method known as a 'bought deal', whereby underwriters commit to purchasing an entire offering at a fixed price immediately before the offering is announced and before any marketing efforts, thereby providing a quick and efficient method to raise capital without execution risk.

There are exemptions from the prospectus requirements of Canadian securities laws that allow capital to be raised on a private placement basis. These are applicable whether or not the issuer is based in Canada. For example, distributions of securities to investors who qualify as 'accredited investors' and purchases of securities, by investors who are not individuals, for cash at a purchase price of at least C$150,000 are exempt from the requirement to file a prospectus.

In addition to prospectus requirements, any individual or entity who is in the business of trading in securities must be registered as a dealer, subject to exemptions. There are exemptions that apply to, among other circumstances, distributions in Canada of securities of non-Canadian entities by non-Canadian dealers who are registered in a similar capacity in their jurisdictions.

In addition to obtaining a listing in connection with an initial public offering, mining projects can also obtain a listing through a reverse takeover pursuant to which an existing listed shell company acquires a mineral project in consideration for the issuance of a number of shares that results in the existing owners of the project controlling the listed company.

Continuous disclosure requirements

Once a company completes an initial public offering by way of a prospectus filed in a province of Canada, or lists its shares on a Canadian stock exchange, such company becomes a 'reporting issuer' under applicable securities laws and is subject to continuous disclosure requirements.

The Ontario Securities Commission has stated that, as a general principle, the purpose of continuous disclosure is to promote equality of opportunity for all investors in the market. Disclosure achieves this by advising the investors, promptly, of all of the material facts that might reasonably affect an investment decision. The filing of a prospectus is the first link in the chain of disclosure, but it must be followed up with the continuous reporting of information and developments that might affect investment decisions.

Two kinds of reporting are required under Canada's continuous disclosure regime: 'periodic' and 'timely'. Periodic reporting requires the reporting issuer to prepare and file continuous disclosure documents such as financial statements, management's discussion and analysis, proxy circulars and annual information forms. Timely reporting provisions require the reporting issuer to disclose material changes as they occur through press releases and material change reports. Reporting issuers are also required to file business acquisition reports and material contracts in a timely fashion. 'Reporting insiders', a category that includes members of senior management or the board, key personnel and significant shareholders, must also report trades in the reporting issuer's securities, as well as interests in related financial instruments and changes in economic exposure, to the reporting issuer, generally within five days.

Disclosure for mineral projects

Although the Canadian capital markets, the TSX and TSXV continue to lead global mining equity finance, this pre-eminent position could have been permanently ended by the infamous Bre-X scandal in 1997. In an effort to restore confidence in Canadian capital markets following Bre-X, the Canadian securities regulators, stock exchanges and mining industry participants worked together to introduce new regulatory standards. The result was National Instrument 43-101 – Standards of Disclosure for Mineral Projects (NI 43-101), which provides specific rules for mining disclosure. Canadian and foreign mining companies accessing the Canadian capital markets, whether by way of a public offering or through the exempt market, are of course subject to the general regime of securities laws applicable to all issuers, but in addition they must adhere to NI 43-101. Accordingly, in this chapter we will deal primarily with NI 43-101.

NI 43-101 applies to all disclosure, written and oral, made in Canada by every issuer (all private and public companies) with respect to a 'mineral project' on each property 'material' to such issuer. A 'mineral project' means 'any exploration, development or production activity, including a royalty interest or similar interest in these activities, in respect of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal and industrial minerals'.

The disclosure regime under NI 43-101 is founded upon three fundamental pillars:

a disclosure standards: rules prohibiting certain mineral disclosure and prescribing mineral disclosure standards;

b qualified persons: rules requiring that a 'qualified person' (who, in many circumstances, must be 'independent', but for established producing issuers need not be independent) prepare or supervise all of an issuer's disclosure of scientific and technical information relating to each mineral project on a property material to the issuer. In most instances, the qualified person must certify the disclosure and will be liable for any misrepresentations; and

c technical reports: the requirement that all scientific and technical information relating to a mineral project on each property material to the issuer contained in a prospectus

(or another type of disclosure document set out in NI 43-101) be based upon and supported by a technical report in prescribed form (a 'technical report') authored and certified by a qualified person (who again for established producing issuers need not be independent).

Disclosure standards

Under NI 43-101, the general principle is that an issuer may only make disclosure of a quantity and grade of mineralised material if such disclosure describes the material within certain categories of either 'mineral reserves' or 'mineral resources'. Mineral resources are defined within categories based upon the level of confidence and certainty as to the quantity and grade of the material being described, where 'inferred resources' are the least certain, 'indicated resources' reflect greater confidence based upon more extensive exploration results and 'measured resources' are most certain based upon even more comprehensive results and data. Mineral reserves are mineral resources to which feasibility-level economic analysis has been applied, such that on the basis of at least a 'preliminary feasibility study', the mineral resources have been shown to have economic feasibility. Mineral reserves are defined in two categories, 'probable reserves' and 'proven reserves', again relating to the level of certainty of the material being described.

The introduction of these categories resulted in a level of standardisation in mineral disclosure from one company to the next. On the other hand, it is important to recognise that all such categorisations are, nonetheless, the result of determinations made by the qualified persons generating the disclosure, having regard to all relevant factors in light of the given facts, including geology, metallurgy and a host of other considerations. As a result, while there may be some level of comparability (for example, comparing indicated resources of silver at one deposit to indicated resources of silver at another), a variety of factors may also make any such comparison one of apples to oranges, rather than apples to apples.

In general, disclosure of quantities and grades can only be made if stated with attribution to any of the five categories of reserves and resources.

There are disclosure exemptions, one of which is for 'exploration targets'. This exemption is very narrow and must follow the strict guidelines set out in NI 43-101. An issuer may make disclosure of a potential quantity and grade of a mineral deposit that is to be the target of further exploration if:

a the issuer expresses the estimate of the quantity and grade in terms of ranges for both quantity and grade;

b the issuer explains how the estimate was made; and

c the disclosure includes a statement to the effect that 'the potential quantity and grade is conceptual in nature, there has been insufficient exploration to define a mineral resource and it is uncertain if further exploration will result in the exploration target being delineated as a mineral resource'.

Another exemption is that issuers may make disclosure of mineral reserves and mineral resources in accordance with certain sets of disclosure standards accepted in other countries. While certain international codes, such as the JORC Code, are very similar to NI 43-101 and typically require little to no reconciliation, other codes are less similar and reconciliation with NI 43-101 is more complicated.

Qualified persons

NI 43-101 introduced the requirement that all disclosure of a scientific or technical nature (including resources and reserves) disclosed by an issuer in respect of a mineral project on any of its material properties be based on information either prepared by, or the preparation of which has been supervised by, a qualified person. Under NI 43-101, a 'qualified person' means an individual who:

a is an accredited engineer or geoscientist;

b has at least five years of experience in mineral exploration, mine development or operation or mineral project assessment;

c has experience relevant to the subject matter of the mineral project and the technical report in respect thereof;

d is in good standing with a self-regulatory professional organisation acceptable under NI 43-101; and

e in the case of a professional organisation in a foreign jurisdiction, has a certain minimum membership designation.

If the disclosure described above is written disclosure, the qualified person must be identified in the disclosure and must disclose how he or she verified the data.

Technical reports are required to be prepared by or under the supervision of one or more qualified persons, and such qualified persons are required to sign and file with the securities regulatory authorities a certification and consent. In addition, in connection with the preparation of a technical report, at least one qualified person responsible for preparing or supervising the preparation of such technical report must complete a current personal inspection of the property that is the subject of the technical report.

Qualified persons must complete certifications and consents (addressed to the applicable securities regulatory authorities) to each technical report before it is filed on SEDAR. When filing a technical report, if the information in the technical report is also included in a disclosure document, the qualified person must also complete and file a consent confirming that the qualified person has read the disclosure, and that it fairly and accurately represents the information in the technical report.

The general rule in NI 43-101 is that qualified persons are required to be 'independent' of an issuer, but a non-independent qualified person is entitled to act for a 'producing issuer'. A producing issuer is an issuer that has had gross revenues derived from mining of at least C$30 million in its most recently completed financial year and at least C$90 million aggregate in the three most recently completed financial years. For the purposes of NI 43-101, a qualified person is 'independent' of the issuer 'if there is no circumstance that could, in the opinion of a reasonable person aware of all relevant facts, interfere with the qualified person's judgment regarding the preparation of the technical report'.

Technical reports

Technical reports are of fundamental importance in Canada, as the information they contain will form the basis of all of the issuer's disclosure about its material mineral projects. Subject to certain narrow exemptions, technical reports are required to be prepared by qualified persons who are independent of the issuer (and accordingly, the preparation of technical reports can have a significant impact on the timeline of any listing or financing transaction).

An issuer is required to prepare and file a technical report in the circumstances set out in NI 43-101. In general terms, NI 43-101 requires an issuer to file a technical report to support disclosure of scientific or technical information in any of a number of public disclosure documents, notably:

a a long-form prospectus;

b a short-form prospectus that contains a first-time disclosure of a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer; or a change in a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer.

c an annual information form;

d a management information circular in which such information is presented and describing a transaction in which securities are to be issued; and

e a takeover bid circular in which a first time disclosure is made of a preliminary assessment, mineral reserves or mineral resources in respect of a property material to the offeror and in which the offeror is offering its securities as consideration in the bid.

Usually, the technical report must be filed not later than the time the disclosure document containing the information it supports is filed or made available to the public.

An issuer is also required to prepare and file a technical report to support disclosure in a press release or other written disclosure where such disclosure is either:

a a first-time disclosure of a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer; or

b a change in a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer.

However, an important distinction to be made in respect of press releases is that the technical report is to be filed within 45 days of the issuance of the press release.

The form and content of technical reports are prescribed in Form 43-101F1. Technical reports are all required to exactly follow the form requirements (headings, contents). Additionally, technical reports are required to be prepared for a mineral project on each property 'material to an issuer'.

A key issue in respect of the technical report requirement is the meaning of the phrase 'material to an issuer'. Essentially, the determination of what is 'material' to an issuer is a determination to be made by management of the issuer, and not by a securities regulator. It is a determination to be made 'in the context of the issuer's overall business and financial condition, taking into account qualitative and quantitative factors, assessed in respect of the issuer as a whole'. In other words, materiality in the context of technical reports will clearly be specific to a given issuer and its own circumstances – what would be material to one issuer may not be material to another.

In the context of public offering transactions by way of prospectus, the securities regulatory authority or regulator (each a 'securities commission') in the relevant Canadian jurisdictions will review and may comment upon the preliminary prospectus. The contents of technical reports will also be subject to detailed review and comment by the securities

commissions. Geological and mining engineers with significant expertise and experience in mineral disclosure matters on staff with certain securities commissions in particular will examine, in detail, an issuer's technical reports and mineral disclosure. An issuer will be required to file an amended and restated technical report to address all comments, and, given that the issuer's prospectus disclosure will be based upon the technical report, significant amendments and restatements can result from a review. Typically, NI 43-101 experienced legal counsel will be engaged directly with the qualified person and the issuer in the preparation of the technical report well in advance of filing it with the securities commissions and applicable stock exchange, in order to minimise regulatory comments and issues, deficiencies and time delays.

Corresponding with the high level of activity by exploration and mining issuers in the Canadian capital markets, the securities commissions and stock exchanges have also increased their own levels of activity. As mineral disclosure reviews and comments are occurring at an unprecedented level of frequency and detail, it is important that issuers focus on NI 43-101 and the quality of their mineral disclosure from the outset in connection with all of their continuous disclosure filings, and when preparing for any Canadian capital markets or public company transaction.

Foreign investment

The direct acquisition of control of a Canadian mining business by a World Trade Organization (WTO) investor that is not a state-owned enterprise (SOE) would be reviewable under the Investment Canada Act (ICA) if the enterprise value of the investment is above a certain threshold. In June 2017, this threshold was set at C$1 billion. Starting in 2019, the threshold will be adjusted annually according to a formula based on the change in Canada's nominal gross domestic product. As part of the implementation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the threshold for review is expected to be increased to C$1.5 billion in enterprise value for non-state-owned enterprises from CETA and other trade agreement investors.

The review threshold for the direct acquisition of control of a Canadian business by a WTO SOE is based on the book value of the assets of the target (C$379 million in 2017). The thresholds for direct and indirect acquisitions where neither the investor nor the persons who control the vendor are from WTO countries are also based on book value of the target's assets but are considerably lower (C$5 million and C$50 million, respectively). Indirect acquisitions of control of a mining business by or from WTO investors are exempt from review.[2]

ii Market overview

Canada's two principal stock exchanges, the TSX and the TSXV, cater to the needs of domestic as well as foreign mining concerns. The TSX is Canada's stock exchange for large capitalisation issuers. The TSXV attracts companies with smaller capitalisations. There are also alternative trading systems and smaller stock exchanges providing a certain level of competition to the TSX and TSXV.

2 Additional information relating to the ICA and foreign investment restrictions in Canada is provided in Section V of the Canada mining law chapter.

The investors that are generally active in the Canadian capital markets include institutional money managers, pension funds, exchange-traded funds, mutual funds, hedge funds and arbitrage funds. A number of these funds are focused solely on the mining and resource sectors. In addition, retail investors are actively involved in Canada's capital markets and public offerings. Canadian underwriters will typically allocate to retail investors a relatively significant proportion of a public offering compared to the established practice in other markets such as the UK or US capital markets.

iii Structural considerations

Structural considerations relating to capital raising in Canada will typically revolve around the choice of a debt or equity investment, together with an evaluation of the tax residency of the issuer, and the resulting application of withholding taxes on any dividends or interest being paid to the non-Canadian investors. The different treatment of debt and equity investments and related Canadian tax rules pertaining to deduction of interest and taxation of dividends, capital gains and interest payments in the hands of the recipient is outside of the scope of this chapter. However, summary information relating to withholding taxes on interest payments and dividends by Canadian mining companies to non-Canadian residents is discussed below.

In addition, important structural considerations apply at the time of the acquisition of a publicly listed Canadian company, which can be achieved by acquiring the shares of the company from its shareholders or by acquiring all or a portion of the project and other business assets from the company.

The principal non-tax reason for preferring an asset purchase in Canada is the ability to choose the assets to be acquired (although tax attributes cannot be purchased from the company) and the liabilities to be assumed (although certain liabilities may flow by operation of law to the buyer, such as environmental liability, which generally flows with the land and, in most jurisdictions, collective agreements relating to unionised employees). Share sales also have a number of non-tax advantages, including simplicity from a conveyancing perspective, fewer third-party consents and simplicity in dealing with employees.

The sale of all or substantially all of the assets of a Canadian company will require prior shareholder approval. Accordingly, it is typical for the acquisition of a publicly listed Canadian company to be effected through the purchase of its stock through a takeover bid made to its public shareholders, or a plan of arrangement, the Canadian equivalent of the UK 'scheme of arrangement'.

iv Tax considerations

Mining exploration is fraught with risk and mining production is capital intensive. To compensate for this, the Canadian tax system has adopted a number of measures designed to provide tax relief to companies engaged in the mining sector, including:

a favourable deduction of Canadian exploration expenses and Canadian development expenses;
b accelerated depreciation for certain types of tangible property;
c tax credits for certain intangible property expenses;
d 20-year operating loss carry-forward period; and
e indefinite carry forward for capital losses.

In addition, tax advantages are provided to investors in Canadian resources companies. In particular, flow-through shares, a form of equity financing, allow an issuer to issue new shares

to investors at a higher price than it would ordinarily receive for similar shares. While there are a number of requirements and conditions to be satisfied, essentially, the investors and the company agree that the investors will purchase flow-through shares, the company will incur expenditures on Canadian exploration expenses within a specific period, and the company will renounce such expenses in favour of the investors, for their use. Investors are paying a premium for flow-through shares because they acquire and deduct some of the company's Canadian exploration expenses (and in some cases Canadian development expenses), thereby reducing their Canadian taxes. Flow-through shares financing is typically conducted by companies that do not have taxable income and therefore have no immediate need to deduct the expenses.

In addition, a number of relevant tax structuring considerations apply to the acquisition of a Canadian mining company. From a tax perspective, a share purchase is the sole means of permitting a buyer to preserve significant tax attributes of the target company, such as tax-loss carry forwards and other tax accounts. The share purchase will result in a change of control for income tax purposes, and will thus trigger a taxation year-end and an obligation to file a tax return in respect of such year, and will also result in restrictions on the utilisation of certain tax attributes of the company in the future. An asset purchase transaction, on the other hand, will permit the allocation of the purchase price among the purchased assets – inventory (full deductibility); depreciable capital property and tax goodwill (partial deductibility through 'tax depreciation'); and non-depreciable capital property (e.g., land).

In either case, a foreign purchaser will typically establish a subsidiary company incorporated in a Canadian jurisdiction to act as the acquisition vehicle. The use of a Canadian acquisition vehicle is beneficial for three basic reasons:

a to facilitate the deduction of any interest expense associated with the bid financing against the Canadian target's income;

b in most cases, to maximise the amount of funds that can be repatriated from Canada to a foreign jurisdiction free of Canadian withholding tax; and

c in the event of a share acquisition, to possibly accommodate a tax cost step-up of the Canadian target's non-depreciable capital property (e.g., shares of a subsidiary company and other capital assets).

Canada does not provide for tax returns on a consolidated basis (as in the US) and does not otherwise provide group relief. Accordingly, if the Canadian acquisition vehicle is capitalised with any interest-bearing debt (either third-party debt or debt from within the corporate group), the Canadian acquisition vehicle and Canadian target company are often amalgamated immediately following the completion of the acquisition so that the interest expense on the debt can be used to offset or shelter the income generated by the business.

To this end, Canadian thin-capitalisation rules restrict or limit the deduction of interest paid by Canadian companies to 'specified non-residents' to the extent that the ratio of interest-bearing debt owed to such specified non-residents exceeds equity (basically retained earnings, contributed surplus and capital) by more than a prescribed threshold.

A non-public company may generally return or repatriate cross-border capital to a non-resident shareholder free of Canadian withholding tax and there is no requirement that income be returned before capital. However, any such return of capital is subject to applicable corporate solvency tests and may impact thin-capitalisation limitations (see above).

There is no Canadian withholding tax on interest paid by a Canadian resident to foreign arm's-length lenders (provided the interest is not participatory). Interest paid to a

non-arm's length lender is subject to Canadian withholding tax at a rate of 25 per cent, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on interest is typically reduced to 10 per cent under the terms of a majority of Canada's international tax treaties).

A dividend paid by a Canadian company to a non-resident shareholder is subject to Canadian withholding tax at the rate of 25 per cent, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on dividends is typically reduced to 5 per cent in circumstances where the non-resident shareholder owns a significant or controlling interest in the Canadian company paying the dividend).

The majority of Canada's reciprocal tax treaties provide favourable tax withholding rules in respect of distributions and other payments received from Canadian companies, and possibly relief from capital gains tax upon a disposition of the shares of a Canadian company that derives its value principally from real property interests situated in Canada where such property is property in which the business of the Canadian company is carried on. Therefore, a foreign investor, after considering its broader multinational network of companies, may wish to consider structuring its investment in Canada through a jurisdiction that has a favourable tax treaty with Canada.

III DEVELOPMENTS

As a result of the resurgence in commodity prices since 2015, there has been increased interest in the mining sector and Canada has seen increased activity in mining capital markets. Mining companies have been in a better position to raise capital in the markets, in particular precious metal producers with proven management teams. Markets participants are also optimistic that we may see the return of IPOs in the mining sector in Canada.

There was also ongoing M&A activity although companies remain cautious on value due to the excesses of prior years that led to destructive M&A transactions for a number of large mining companies. There have also been a number of privatisations of companies listed on the TSX and TSX-V in the past year, in particular in sectors where commodity prices did not rebound. Demand by junior and development companies for alternative financing options continues, include royalty and streaming arrangements, pre-payments against off-take commitments, equity investment from strategic investors and joint venture arrangements with strategic investors.

Appendix 1

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