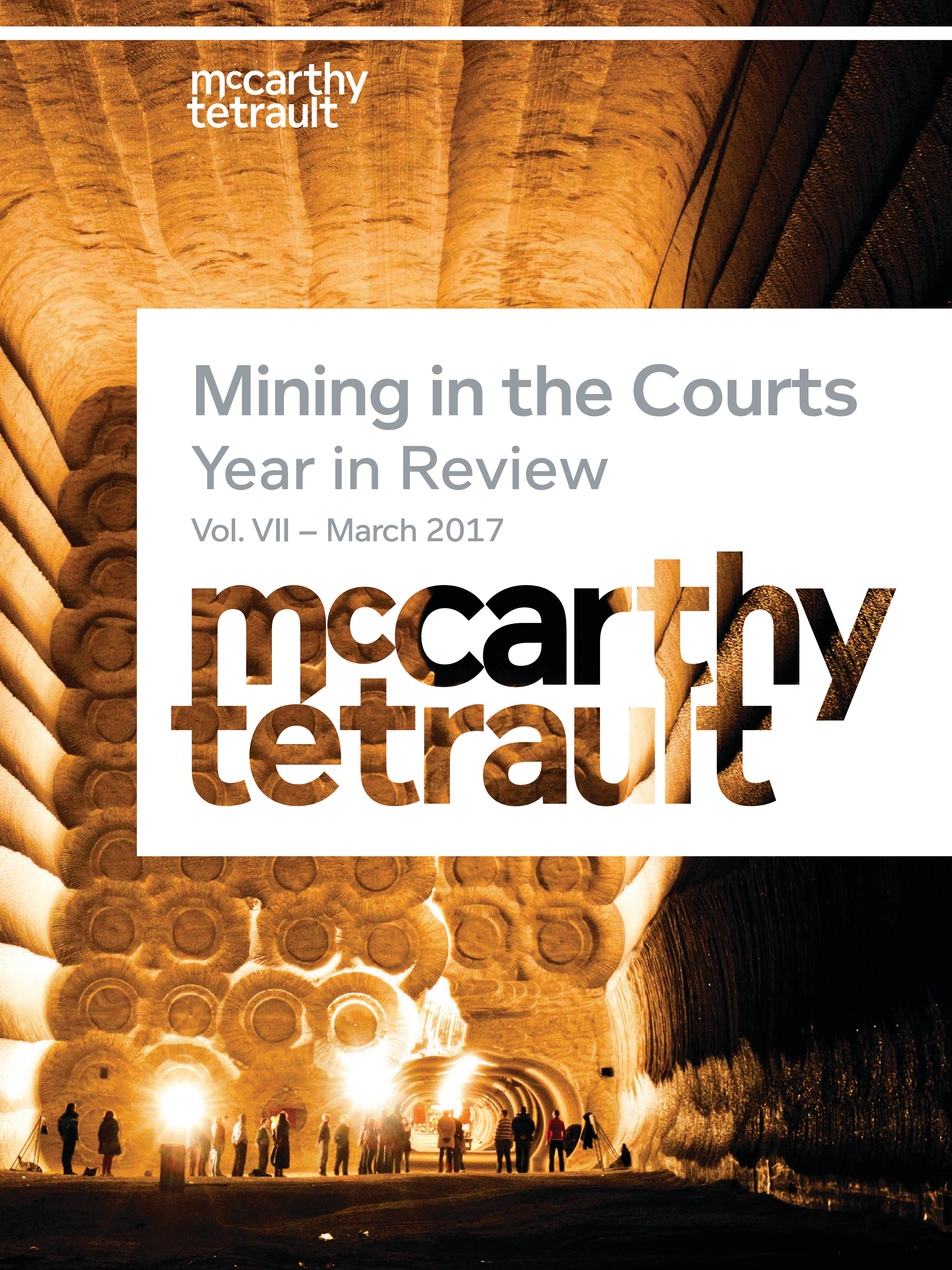

Mining in the Courts

Year in Review

Vol. VII – March 2017

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Mining in the Courts

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Welcome to *Mining in the Courts*, Vol. VII

This is our seventh year bringing you *Mining in the Courts*, a publication that provides an annual update on legal developments impacting the mining industry.

This edition contains a blend of insightful articles on issues of interest to the mining sector, and summaries of important Canadian court cases from the past year that may impact your business.

The case summaries are arranged by subject matter, including Aboriginal law, class actions, contract disputes, municipal law, tax, and others, reflecting the breadth of issues that mining companies face.

The articles provide our insights on current legal trends and what the mining sector can expect in 2017. Articles of particular note include *Change on the Horizon for Aboriginal Consultation and Involvement in Mining Projects* (page 6), *50/50 Joint Ventures — Paved with Good Intentions (page 37)*, and *Art or Science? A Look at Carbon Pricing and Competitiveness in the Mining Sector* (page 31).

Mining in the Courts is a publication of McCarthy Tétrault LLP's Mining Litigation Group. The Group draws from one of Canada's largest and longest-standing litigation groups involved in many of the most high-profile, precedent-setting cases in Canadian legal history. Our Group also has the benefit of being able to draw from the extensive expertise of our mining business lawyers. Together we achieve positive outcomes for our clients.

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Change on the Horizon for Aboriginal Consultation and Involvement in Mining Projects

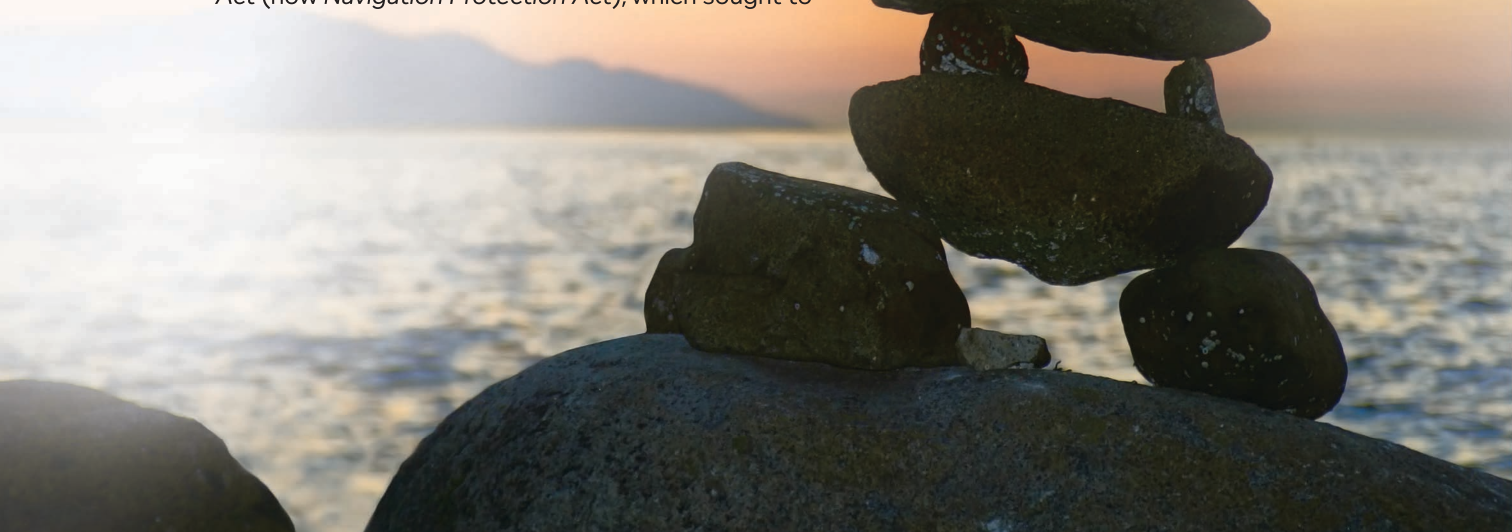
Bryn Gray and Daniel Goudge

The rapidly evolving legal landscape for Aboriginal consultation and involvement in mining and other resource development projects in Canada is likely to see a number of significant changes in 2017. In addition to three anticipated Supreme Court of Canada decisions on the duty to consult, 2017 will likely bring legislative and policy changes to the nature and extent of expected Aboriginal involvement in the assessment, permitting and monitoring of resource development projects that require federal approval. Also expect changes to federal and certain provincial Aboriginal consultation policies, as well as the implementation of the *Extractive Sector Transparency Measures Act* for payments to Aboriginal groups.

Federal Environmental Assessment and Permitting

The first half of 2017 will see the completion of four different reviews of the federal government's environmental assessment and regulatory processes for resource development. There will be four separate reports issued for these reviews, which collectively could result in significant changes to the way and extent to which Aboriginal groups are consulted for mining projects requiring federal environmental assessments or permits.

These four reports stem from election platform commitments of the Trudeau government to modernize the National Energy Board and review Canada's environmental assessment and regulatory processes. This has included the review of a number of contentious changes introduced by the previous federal government, including the introduction of the *Canadian Environmental Assessment Act, 2012* and amendments to the *Fisheries Act* and the *Navigable Waters Protection Act* (now *Navigation Protection Act*), which sought to



streamline certain regulatory processes and reduce the number of projects subject to federal environmental assessments or requiring federal permits. These changes were widely criticized by Aboriginal groups across the country at the time, as they were seen to reduce federal oversight and associated federal Aboriginal consultation obligations for projects that could adversely impact asserted or established Aboriginal or treaty rights.

The reports for the reviews of the *Fisheries Act* and the *Navigation Protection Act* will likely be released first. These reviews were undertaken by two Standing Committees of the House of Commons and were fairly narrow in scope, focused specifically on changes made in 2012 that were perceived to reduce the protection of fish habitat and reduce the number of waterways listed as "Navigable Waters" in the *Navigation Protection Act*, (although not to the pre-2012 level), which could increase permitting and associated consultation requirements for certain projects. It is also likely that the *Fisheries Act* review will turn back the clock on the changes to s. 35 of the *Fisheries Act*. It is questionable whether such changes will have a significant impact on permitting requirements for mining projects.[1] That said, the review could result in an increase in resources for the enforcement and monitoring of such requirements going forward.

The two remaining reports for the reviews of Canada's environmental assessment processes and the National Energy Board are scheduled to be released by March 31, 2017 and May 15, 2017, respectively, and are being undertaken by independent expert panels. The mining industry will likely be most impacted by the environmental assessment review given its broad scope and the way in which mining is federally regulated. That said, principles flowing from the National Energy Board review could influence the way in which the federal government responds to both reports, particularly with respect to Aboriginal consultation issues.

The expert panel for the environmental assessment review was tasked with examining a broad range of issues including several specific issues relating to Aboriginal consultation and involvement in environmental assessment processes. The most closely watched will likely be what the expert panel recommends regarding the incorporation and interpretation of the principle of Free, Prior and Informed Consent (FPIC) in the federal environmental assessment process and how the panel suggests the role of Aboriginal groups be enhanced in the planning, reviewing and decision-making process in federal environmental assessments.

Many Aboriginal groups have long asserted that development projects cannot proceed in their traditional territories without their free, prior and informed consent. This is based largely on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), a resolution of the U.N. General Assembly, which stipulates that states must obtain the FPIC of Aboriginal groups in a number of situations, including for resource

1. See, for example, Paul Cassidy, "Fisheries Act Review: Well-intentioned but Misguided?" *Environment Policy & Law*, May 2016.

development in their traditional territories. Canada initially voted against UNDRIP in 2007 (along with the U.S., New Zealand, and Australia) but announced its "qualified support" in 2010, noting it was an "aspirational document" that does not change Canadian laws. The main concern in both 2007 and 2010 was around the principle of FPIC, which could be interpreted as an Aboriginal veto over government decision-making.

FREE, PRIOR AND INFORMED CONSENT UNLIKELY TO BE A VETO POWER.

While it remains to be seen what the expert panel will recommend, it is unlikely that the federal government will ultimately interpret FPIC as a veto or require the consent of affected Aboriginal groups in all circumstances before granting approvals for projects. Indeed, the Trudeau government has already qualified their "unqualified support" for UNDRIP by stating that it would not be adopted "word-for-word" into Canadian law[2] and that it would be implemented "in accordance with the Canadian Constitution." This latter caveat is particularly significant as it would be inconsistent with the Canadian Constitution[3] to interpret Aboriginal consent as an absolute requirement/veto except in cases of unjustifiable infringements of established Aboriginal or treaty rights.[4] Moreover, the Trudeau government has demonstrated on several occasions that a lack of Aboriginal consent will not necessarily stop a project from being approved or permits being issued, such as the environmental assessment approvals for Trans Mountain Pipeline and the Petronas LNG project, as well as the federal permits issued for the Site C project.

This is not to say that the adoption of UNDRIP will have no consequences for the mining industry. Rather, its influence is more likely to be seen in the panel's recommendations and the government's response to enhancing the role of Aboriginal groups in the planning, review, and decision-making processes for federal environmental assessments. While Aboriginal groups will not have a veto, it is likely that the panel will recommend, and that the federal government will introduce, changes to the environmental assessment process targeted at giving Aboriginal groups a greater say and a more significant spot at the table for the assessment and ongoing monitoring of projects in their traditional territories. As part of this, industry proponents may be expected to do more to minimize impacts on asserted or established Aboriginal or treaty rights, to ensure more meaningful and active involvement of Aboriginal groups during the life of projects, and to gain Aboriginal support where possible. There may also be additional requirements on industry proponents to address capacity

2. The Canadian Press, "UN Declaration Can't be Made Law, Minister Says," September 8, 2016.
3. Stephanie Axmann, Selina-Lee Andersen, Bryn Gray and Adam Goldenberg, "Canada announces unqualified support for UNDRIP — suggests Canada's existing constitutional obligations serve to fulfill the principles of 'free, prior, and informed consent,'" *Canadian ERA Perspectives*, May 11, 2016.
4. See *Tsilhqot'in v. British Columbia*, [2014] 2 S.C.R. 257 (S.C.C.) at para. 76.

barriers of Aboriginal groups to meaningfully participate in the process, which continues to be a frequently raised concern of Aboriginal groups.

Consultation Policy Reviews

The federal, Alberta and Manitoba governments may also release updated consultation policies in 2017, which could have implications for how mining companies are expected to undertake consultation with Aboriginal groups.

The federal government last updated its guidelines on the duty to consult for federal officials in 2012, and it undertook a review of these guidelines, as well as proposed draft guidance for industry proponents in 2015.[5] The review culminated in a report to the Minister of Indigenous and Northern Affairs in May of 2016, which contained 47 recommendations on how Canada can improve its approach to the duty to consult.[6] It is likely that the federal government will move forward with reforming its consultation policies once the four aforementioned federal reviews are completed, given that they also raise issues with respect to Aboriginal consultation.

ABORIGINAL GROUPS WILL LIKELY HAVE GREATER SAY IN ENVIRONMENTAL ASSESSMENTS.

The current Alberta policy, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*[7] was introduced on August 16, 2013. In June 2016, the Alberta government began an engagement process with First Nations and industry to develop a new policy that would be responsive to the evolving needs of First Nations and to bring their policy in line with UNDRIP. The Notley government has also committed to implementing UNDRIP with the similar caveat that it would be implemented in accordance with Alberta law. [8]

While it has only released limited details to date, the Manitoba government has also indicated that it intends to create a new framework for consultation with Aboriginal Peoples for mining and exploration projects. It is unclear how this framework will differ from Manitoba's current policies but the Minister of Growth, Enterprise, and Trade, Cliff Cullen, has pledged to have this framework developed by May 2017.

5. Indigenous and Northern Affairs Canada, *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011; *Public Statement — Canada's Approach to Consultation and Accommodation*; and *Consultation and Accommodation Advice for Proponents*.
6. Bryn Gray, *Building Relationships and Advancing Reconciliation through Meaningful Consultation — Report to the Minister of Indigenous and Northern Affairs*, May 30, 2016.
7. Indigenous Relations Alberta, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*.
8. Premier of Alberta, *Letter to Cabinet Ministers*.

Supreme Court of Canada to Release Three Duty to Consult Cases

This year we also expect to see the release of three decisions by the Supreme Court of Canada (SCC) on the duty to consult. This will be a record number of duty to consult cases released by Canada's highest court in a single year, since it first set out the framework for the duty to consult in *Haida Nation* in 2004. These new cases may have significant implications for Aboriginal consultation relating to mining projects.

The first two cases will require the SCC to consider the role of regulatory tribunals in discharging the duty to consult and the extent to which the Crown can rely on regulatory processes and proponents to fulfill the duty (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* and *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA*). In both cases, all consultation with potentially impacted Aboriginal groups was conducted by the respective proponents and through the NEB process, with no direct separate consultation conducted by the Crown.

To date, the courts have upheld the Crown's ability to rely on regulatory processes and proponents to fulfill the duty to consult. However, the courts have found that the degree of reliance permitted depends on the facts of each case. This has been an ongoing source of frustration for many Aboriginal groups, which feel they should always be separately engaged by the Crown.

SCC EXPECTED TO RELEASE FIRST DECISION ON ABORIGINAL SPIRITUAL RIGHTS IN 2017.

While the Court is likely to reaffirm that the Crown has significant flexibility in designing consultation processes, the Court may develop further principles to assist the Crown and lower courts in determining the circumstances in which the Crown may be required to engage in separate, additional consultation, beyond consultation undertaken through regulatory processes and by proponents. The SCC's determination of these cases will also likely further clarify the role of regulatory tribunals in the consultation process, which remains an area of confusion.

The SCC will also be releasing a decision that may have significant implications for projects that may adversely impact asserted Aboriginal spiritual rights. This case relates to the B.C. government's approval of a master development agreement for a proposed ski resort in the Jumbo Valley (*Ktunaxa Nation v. British Columbia*). The Ktunaxa alleged both a breach of the duty consult and their freedom of religion to exercise a spiritual practice under s. 2(a) of the Charter, as the Ktunaxa claim that the proposed resort would desecrate a sacred area of spiritual significance. The B.C. Supreme Court and the B.C. Court of Appeal both rejected Ktunaxa's arguments and dismissed their claim.

This appeal is the first time the SCC has been called upon to consider an

Aboriginal spiritual rights case and the protections such beliefs attract under both s. 2(a) of the Charter and s. 35. This case could have significant impacts on future development projects in Canada given that there are large tracts of land throughout the country that are subject to asserted Aboriginal spiritual rights claims.

New Reporting Obligations for Payments to Aboriginal Groups

In addition to the above changes relating to Aboriginal consultation, there are also new transparency measures that are scheduled to be implemented later this year, which could impact negotiations, terms, and expectations related to impact benefit agreements with Aboriginal groups. In particular, certain mining companies making payments of $100,000 or more to Aboriginal groups will be required to report such payments to the federal government as of June 1, 2017, unless the implementation is further delayed by the federal government.

These changes are part of the *Extractive Sector Transparency Measures Act* (ESTMA), which came into force in June 2015 as a part of the previous federal government's attempt to bring Canada in line with global anti-corruption standards. ESTMA requires that all "Reporting Entities" annually report certain specified payments of $100,000 or more to a "Payee." A "Reporting Entity" is broadly defined as any commercial entity engaged in the development of oil, gas, or mineral projects that is either (a) listed on a Canadian stock exchange or (b) has assets or does business in Canada and meets two of the following criteria: (i) at least $20 million in assets (ii) $40 million in revenue or (iii) employs an average of at least 250 employees. A "Payee" is similarly broadly defined to include any government or any body exercising a government function, including an Aboriginal government. The implementation of the reporting requirement for payments to Aboriginal groups was delayed for two years to allow for further consultation with Aboriginal groups.

As of January 2017, the federal government had given no indication that it would be removing or further postponing this requirement. This future disclosure obligation remains a significant and contentious policy change that may affect industry and Aboriginal negotiations. Further complicating matters is that the federal government has given very little guidance regarding how this requirement will be applied to payments to Aboriginal groups, particularly to identify which payments will need to be disclosed. The scope of payments captured will likely be the subject of further guidance or regulation but early consultation documents indicate that certain "social payments" for things like capacity funding and related in-kind payments may be excluded.

All in all, it appears 2017 will be a banner year for change when it comes to Aboriginal involvement in — and consultation related to — mining projects. For further analysis of these changes as they are announced over the coming year, please visit McCarthy Tétrault's Canadian ERA Perspectives blog.

Aboriginal Law

Aidan Cameron, Kate Macdonald, Bianca Depres and Laura DeVries

DOUBLEVIEW CAPITAL CORP. V. DAY, 2016 BCSC 231

In this decision, the British Columbia Supreme Court refused to grant an interlocutory injunction that would prevent First Nation defendants from physically interfering with exploration because the mining company failed to show that any physical interference had occurred.

Doubleview Capital Corp. had an option to explore and acquire mineral claims located on unceded traditional territory of the Tahltan First Nation in northwestern British Columbia, over which the First Nation asserts Aboriginal title and rights. Doubleview hired Tahltan Drilling Co. Ltd., whose employees were primarily from the First Nation, to commence drilling. The defendant members of the First Nation believed that Doubleview had not satisfied the conditions of its exploration permit, and they opposed any drilling. In July 2015, the defendants flew by helicopter to the site and met with members of the drilling crew, following which the drilling crew refused to undertake any further drilling. There was no physical blockade or other physical interference with operations.

Doubleview sought an injunction restraining the defendants from physically interfering with its exploration. Doubleview characterized the actions of the defendants as equivalent to a physical blockade, arguing that the defendants committed the torts of trespass to land, private nuisance, inducing breach of contract, intentional interference with economic interests by unlawful means, intimidation, and conspiracy, as well as criminal mischief.

The Court rejected Doubleview's characterization of the defendants' actions, finding that it did not equate with a blockade or other physical obstruction. It followed that the injunction Doubleview sought, which would prevent physical obstruction, interference and intimidation, did not accord with the evidence and the application was dismissed.

GITXAALA NATION V. CANADA, 2016 FCA 187

This is the Federal Court of Appeal decision considering the Crown's duty to consult in the context of the Northern Gateway Pipeline Project. The Court concluded that the Canadian government fell "well short of the mark" in the fourth phase of consultation, which occurred before issuing the order-in-council approving the project.

The approval process for Northern Gateway commenced in 2005 and culminated in the governor-in-council's June 2014 order-in-council (order) adopting recommendations of a joint review panel and directing the National Energy Board to issue certificates allowing the project to proceed subject to 209 conditions. The project had gained the support of many Aboriginal communities and much of the Aboriginal population along the pipelines' right of way. However, some First Nations still opposed the project and sought to overturn the order by bringing nine applications for judicial review.

As a part of the approval process, Canada created a five-phase framework for consulting with Aboriginal groups: (i) preliminary phase, (ii) pre-hearing phase, (iii) hearing phase, (iv) post-report phase, and (v) regulatory/permitting phase.

As a preliminary issue, the Court determined that the governor-in-council was required to consider the adequacy of Crown consultation before issuing the order. The Court went on to consider whether the duty to consult had been met by Canada and found that while overall it had designed an appropriate framework to fulfill its duty, Canada failed to fulfil its duty to consult at Phase IV, the post-report phase. Phase IV was the phase occurring after the joint review panel released its report and was Canada's first and only opportunity before the order to directly consult with affected First Nations on matters of substance.

The first specific error the Court identified was that Canada allowed only 45 days for the entire Phase IV consultation process and did not respond to First Nations' concerns about the short timeline. Second, there was a lack of meaningful, two-way dialogue and as a result, Canada failed to grapple with First Nations' concerns. Third, the Court held that the dialogue necessary to fulfill the duty to consult was frustrated by Canada's failure to disclose information it had about affected First Nations' strength of claims to rights and title, and that this information was necessary to identify, mitigate and accommodate the impacts of the project. Finally, the Court found that the order was required to provide reasons regarding the adequacy of consultation, but failed to do so.

As a result, the Court quashed the order. Since the order was the basis for the issuance of the two certificates, these certificates were also quashed. The matter was remitted to the governor-in-council for redetermination.

NORTHERN SUPERIOR RESOURCES INC. V. ONTARIO, 2016 ONSC 3161

In this case, the Ontario Superior Court considered whether a project proponent could successfully bring a claim for damages against the Crown for its failure to consult.

Northern Superior Resources (NSR) holds various claims in the Red Lake Mining Division northwest of Thunder Bay. Beginning in the mid-2000s, NSR involved elders and leaders of the Sachigo Lake First Nation in its work and entered into a series of agreements that provided NSR would employ members of the First Nation and would conclude its work in time to avoid interfering with traditional hunting seasons. In late 2011 and early 2012, various disagreements about the arrangement arose and in May 2012, the First Nation presented NSR with a new draft agreement, which NSR refused to sign. In June 2012, the First Nation informed NSR that further exploration activities were no longer in the community's best interests.

NSR commenced an action for damages, but not against the First Nation. Instead, it sued Ontario, alleging that the deteriorated relationship arose due to the province failing to fulfil its constitutional duty to consult Aboriginal groups and, in doing so, the province breached a legal duty to NSR.

CROWN'S DUTY TO CONSULT IS OWED TO FIRST NATIONS AND IS NOT ENFORCEABLE BY A PROJECT PROPONENT.

The Court dismissed the action, holding that because the Crown owes its duty to consult to First Nations, not to third parties, that duty conferred no legally enforceable benefit on NSR. The Court also held that the Crown did not owe NSR a separate legal duty. There had been no direct contact between the province and NSR about the latter's deteriorating relationship with the First Nation until after that relationship had broken down. Further, the Court rejected NSR's argument that the Crown's lack of involvement amounted to a lack of, and therefore improper, delegation of its duty to consult. Still, the Court left it open for other courts to find, in the future, that a more direct relationship between the Crown and the proponent and more direct Crown involvement in consultation could give rise to a duty of care.

NSR has appealed the decision.

For more on this decision, see McCarthy Tétrault LLP's Canadian ERA Perspectives blog post entitled "Northern Superior Appeals Dismissal of Aboriginal Consultation Claim Against Ontario."

UASHAUNNUAT (INNUS DE UASHAT ET DE MANI-UTENAM) C. COMPAGNIE MINIÈRE IOC INC (IRON ORE COMPANY OF CANADA), 2016 QCCS 5133

In this case, the Québec Superior Court held that it had jurisdiction to consider First Nations' claims for violation of Aboriginal title and rights not only within Québec, but beyond the Québec border in Labrador.

The case involves a claim by the plaintiff Innu communities for $900 million in damages from Iron Ore Company of Canada (Iron Ore) and its subsidiary, the Québec North Shore and Labrador Railway Company, for infringement of Aboriginal title, Aboriginal rights and treaty rights, as well as for a declaration recognizing Aboriginal title over territory along the Québec-Labrador border region. The defendants operate a mine in Labrador City, in Newfoundland and Labrador, and operate a 418-kilometre railroad, which links the mine to a deep-water port facility located in Sept-Îles, Québec.

In this particular decision,[1] the Québec Superior Court considered the application of the Attorney General of Newfoundland and Labrador to strike portions of the pleadings related to the facilities located in Labrador, on the basis that the Québec Superior Court lacked jurisdiction over those claims.

QUÉBEC COURT TAKES JURISDICTION OVER ABORIGINAL TITLE CLAIMS IN LABRADOR.

The Court dismissed the application and refused to strike the pleadings. In doing so, the Court determined that Aboriginal title exists independently of provincial boundaries, and that the law governing Aboriginal title and rights applies across Canada. The Court held that Québec courts have jurisdiction to hear the entire claim against the defendant companies, and as a result, the Court will be able to decide on the Innu communities' claims to right and title on both sides of the Québec-Labrador border.

Leave to appeal has been granted. See 2017 QCCA 14.

1. For discussion of other preliminary motions in this case, see *Mining in the Courts*, Vol. VI.

Mining Outside the Courts: Advantages of Arbitrating Global Mining Disputes

Claire Seaborn

Remember when "globalization" became a buzzword? It was the early 1980s, when the global economy saw a surge in the exchange of knowledge, trade, and capital driven by developments in technology and transport. Not surprising then, that in the 1980s the world also saw a surge in international arbitration — a mechanism to resolve commercial disputes between parties located in different legal jurisdictions. Like globalization, international arbitration had been developing for decades before the 1980s and was finally making its *grand début*.

As the mining industry has become more global, many of its disputes have migrated away from national courts and towards arbitral tribunals. Disputes involving mining assets can be high-value, complex, and cross-border, which can make using the legal system of any particular country less than ideal. Fortunately, international arbitration has become a viable alternative for resolving disputes that arise from global mining projects. This article discusses three major advantages of using international arbitration to resolve disputes in the mining industry:
(1) flexibility, (2) avoiding national legal systems, and (3) enforcement.

Advantage #1: Flexibility

The most unique thing about arbitration is that the parties can design how they want to resolve disputes before the disputes have arisen. Unlike litigation, arbitration allows parties to draft an "arbitration agreement" (which may take the form of a dispute resolution clause in a contract) that sets a framework for how a potential dispute will be resolved. When the arbitration agreement is silent on an aspect of the dispute resolution, pre-existing national and international rules and laws can also impact how the arbitration is governed.

At a minimum an arbitration agreement should describe (i) the scope of disputes

subject to arbitration, (ii) the place, seat, and language of arbitration; (iii) the number of arbitrators (usually one or three) and how they will be selected; and (iv) whether particular rules will govern the arbitration, beyond those that may apply by default. The parties can further customize their arbitration agreement by considering other mechanisms, such as split provisions based on the value of the dispute; procedural limits and evidentiary rules; and whether to allow appeal rights. Legal advice is recommended, particularly to ensure that an arbitration agreement will cover all potential disputes, ensure confidentiality and be enforceable.

International arbitration in the mining sector often takes place in the world's financial centers with the support of a set of arbitral rules, such as those provided by the International Chamber of Commerce (ICC), the United Nations Model Law on International Commercial Arbitration (UNCITRAL), and the World Bank's International Center for Settlement of Investment Disputes (ICSID). Parties should be aware of the classes of disputes that national laws may prohibit from being resolved by arbitration, including certain types of labour, tax, intellectual property, environmental, and bankruptcy disputes.

Advantage #2: Avoiding national legal systems

In a 2015 survey conducted at Queen Mary University of London, 64% of respondents cited "avoiding specific legal systems/national courts" as one of the top three most valuable characteristics of international arbitration.[1] Indeed, when faced with global mining disputes, national court systems can be inefficient, have built-in appeal rights parties may not want and provide little to no confidentiality.

International arbitration allows the parties to select neutral arbitral seats and decision-makers, as well as systems to overcome procedural hurdles quickly and avoid appeals. In addition, international arbitration generally allows parties to maintain confidentiality throughout the process (with some exceptions, such as in the investor-state context).[2]

When parties choose international arbitration, they may find themselves in the court system of the legal jurisdiction of their seat of arbitration, or where the parties operate, hold assets, or want to enforce an arbitral tribunal's decision. The larger centres in Canada, including Toronto, Montreal, and Vancouver, are reliable arbitration seats. The justice system can accommodate both civil and common law systems, and Canadian courts may show deference to arbitrators' decisions.[3]

1. http://www.arbitration.qmul.ac.uk/docs/164761.pdf
2. In the investor-state arbitration context, for example, the trend has been towards more transparency and arbitral awards are usually published by consent of the parties. For ICSID arbitrations, the parties, relevant dates, and proceeding's method of termination are always publicly available.
3. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

Advantage #3: Enforcement

International arbitration would be of little use if arbitration agreements and arbitrators' decisions could not be enforced. Fortunately, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, known as the *New York Convention*, has been in force since 1959 and now binds 156 countries, including almost every country relevant in the mining industry.[4] The *New York Convention* requires national legal systems to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other countries.

Crystallex International Corporation v. Bolivarian Republic of Venezuela[5] is a recent example of a party using the *New York Convention* to enforce an arbitral award in an Ontario court. In that case, an arbitral tribunal found that Venezuela breached its obligations under a bilateral investment treaty by prohibiting Crystallex from commencing its gold mining operations. Crystallex was awarded US$1.2 billion, following which it obtained a court order for the recognition and enforcement of the arbitral award.

MINING COMPANIES CAN PREPARE FOR DISPUTES BY USING ARBITRATION AGREEMENTS.

Conclusion

Since the 1980s a lot has changed within both the global mining industry and international arbitration: mining projects span more legal jurisdictions; the volume of legal precedents in commercial and investor-state arbitration has grown; and legal principles are developing specific to arbitrating global mining disputes. While the primary goal within the industry is often to avoid a dispute, mining companies can prepare themselves for potential disputes by drafting carefully considered arbitration agreements that will allow them to avoid national legal systems, where desirable, and by being aware of relevant enforcement mechanisms. While international arbitration is always evolving, its inherent advantages will likely mean that it will continue to be a chosen method for resolving global mining disputes well into the future.

4. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), online: < http://www.newyorkconvention.org/>.

5. 2016 ONSC 469.

Case Law Summaries

Arbitration

Aidan Cameron and Kate Macdonald

BELOKON ET AL. V. THE KYRGYZ REPUBLIC, 2016 ONSC 4506 AND 2016 ONCA 981

In the continuing efforts to enforce foreign arbitral awards against the Kyrgyz Republic,[1] the Ontario Superior Court dismissed the applications of various arbitral creditors to execute their awards in Ontario by seizing shares of an Ontario company owned by a state-owned Kyrgyz entity. The Ontario Court of Appeal upheld the Superior Court's decision.

The largest gold mine in the Kyrgyz Republic is owed by a subsidiary of Centerra Gold Inc., which is a Canadian mining company. A state-owned Kyrgyz company owns approximately one third of the shares in Centerra. The Kyrgyz Republic was involved in a number of arbitral proceedings. The arbitral creditors in four of these disputes (the Creditors) wanted to execute their awards in Ontario by seizing the Centerra shares owned by the state-owned company. To do so they needed to establish that the Kyrgyz Republic had an ownership interest in the shares for purposes of the Ontario *Execution Act*, notwithstanding the fact that the Kyrgyz Republic did not own the shares directly.

The Creditors argued that the wording of the recital of a 2009 agreement entered into to settle a dispute that had arisen between the Kyrgyz Republic and Centerra (the Agreement) indicated that the Kyrgyz Republic owned the shares in Centerra. The Superior Court rejected this argument, noting that if the parties had intended the Kyrgyz Republic to own the Centerra shares, they would not have done so on the strength of a few words and a definition contained in a recital. The key operative clauses made it clear that the company was to be the registered and beneficial owner of the Centerra shares. While finding that the evidence in the Agreement was conclusive, the Superior Court also rejected the Creditors' alternative arguments that the Kyrgyz Republic's ownership interest was demonstrated by the wording of a government resolution authorizing the state-owned company to hold the Centerra shares "on behalf of the

1. See *Mining in the Courts*, Vol. VI.

Government of the Kyrgyz Republic," or by the Kyrgyz Republic's conduct, such as establishing a working group to address the issues relating to the sale of the Centerra shares and the use of the proceeds. The Superior Court held that these were equally consistent with the Kyrgyz Republic having a stake in Centerra as a sole shareholder of the state-owned company. The Ontario Court of Appeal agreed with the Superior Court and dismissed the appeal.

CONSOLIDATED V. AMBATOVY, 2016 ONSC 7171

This decision upholding an arbitral award emphasizes that courts will not lightly interfere with binding arbitral decisions.

Ambatovy Minerals S.A. (Ambatovy) constructed the nickel mine referred to in *International Steel Services Inc. v. Dynatec Madagasgar S.A.*, 2016 ONSC 2810, discussed above. In 2008, Ambatovy entered into an agreement with Consolidated Contractors Group S.A.L. (Consolidated) whereby Consolidated was responsible for constructing the $300 million, 220 km pipeline to move raw ore from an open pit mine to the coast. The agreement contained an arbitration clause. During the course of construction of the pipeline, disputes arose between the parties and an arbitration was held. At the end of the lengthy and expensive proceedings, the tribunal issued a unanimous final award in favour of Ambatovy.

Consolidated applied to set aside the arbitral award under Article 34 of the UNCITRAL Model Law, adopted in Ontario under the *International Commercial Arbitration Act*, R.S.O. 1990, c. 19. Article 34 provides that a court has discretion to set aside an arbitral award, but only in limited circumstances. Consolidated argued that the discretion should be exercised because the tribunal assumed jurisdiction over claims not properly before it and failed to exercise jurisdiction over claims that were before it. It also argued that the tribunal developed novel theories of liability not argued by the parties (thus depriving Consolidated of the opportunity to be heard on those theories), relied on certain submissions of Ambatovy made contrary to the tribunal's prior procedural order, ignored numerous submissions made by Consolidated, and made findings permitting double recovery, contrary to the public policy of Ontario.

COURTS RARELY INTERFERE WITH AWARDS MADE BY EXPERT TRIBUNALS CHOSEN BY PARTIES.

The Court rejected all of Consolidated's arguments and upheld the arbitral award.

INTERNATIONAL STEEL SERVICES INC. V. DYNATEC MADAGASGAR S.A., 2016 ONSC 2810

In this decision, the Ontario Superior Court granted an interim injunction restraining the defendant from interfering with the plaintiff's contractual rights pending an arbitration. This case provides an important reminder that courts will enforce parties' agreements to arbitrate, and will not look favourably on parties who attempt to avoid arbitration through delay and other tactics.

Dynatec entered into an agreement with ISSI whereby ISSI would operate the sulphuric acid facility required for Dynatec's nickel and cobalt mining project. The agreement had been extended once, but was set to expire on April 30, 2016. Prior to the expiry, a dispute arose about whether a further extension had been agreed to. ISSI gave notice to Dynatec that it was invoking the arbitration provisions in the agreement, and took steps to initiate arbitral proceedings. Dynatec maintained its position that there was no agreement to extend and failed to respond to ISSI's notices and requests for arbitration. In April 2016, ISSI applied to the Court for an interim injunction restraining Dynatec from interfering with the facility before the dispute was resolved by arbitration.

The Court granted ISSI an interim injunction restraining Dynatec from prohibiting, hindering, restricting, or interfering with ISSI's contractual rights under the agreement until the arbitration concluded. Of particular note is the Court's finding that Dynatec had not come to the table with clean hands: it acted "deliberately and high-handedly" in ignoring ISSI's position and the arbitration agreement, and instead pressed ahead with its transition plans in hopes of taking over the facility before the arbitration could take place.

MILLER SALES & ENGINEERING INC. ET AL. V. METSO MINERALS INDUSTRIES INC. ET AL., 2016 NWTSC 23

In this decision, the Supreme Court of the Northwest Territories enforced a broad arbitration agreement between a supplier and a distributor, even though the distributor was attempting to enforce a claim assigned to it by a party who was not subject to the arbitration agreement.

Miller distributed Metso's products pursuant to a distribution agreement.

The distribution agreement included a broad and "all-encompassing" clause to the effect that any dispute arising between the parties would be settled through arbitration. In 2006, Metso supplied pumps to Miller, who in turn distributed them to Diavik Diamond Mines Ltd. for dewatering its mining property. In 2011, Diavik brought an action against Miller for damages resulting from negligence and breach of contract in the evaluation, engineering, and design of the pumps. Miller subsequently added Metso as a third party. At the end of 2012, Diavik and Miller reached a settlement but Miller intended to continue to pursue Metso for contribution towards the amount paid. In March 2015, Miller was substituted for Diavik as plaintiff, and Metso was substituted for Miller as defendant.

Metso brought an application to have the action stayed or dismissed based on the arbitration clause in the distribution agreement. Miller argued that the arbitration clause did not apply because Miller was the plaintiff by assignment of Diavik's claims, and Diavik was not a party to the distribution agreement containing the arbitration clause. The Court rejected Miller's argument, holding that Miller was simply attempting to escape the bounds of the agreement it voluntarily entered with Metso. The Court found that while in form, the claim was in Diavik's name, in substance, the litigation was a dispute between Miller and Metso, and substance must trump form. The parties were referred to arbitration pursuant to the distribution agreement, and Miller's action against Metso was stayed.

Silvercorp Metals: Ontario Court of Appeal Confirms Robust Test for Leave to Proceed in Securities Class Actions[1]

Paul Davis, Miranda Lam and Dana Peebles

On August 24, 2016, the Ontario Court of Appeal released its decision in *Mask v. Silvercorp Metals Inc.*[2] The Court addressed three important issues in the statutory secondary market liability regime in the wake of the Supreme Court of Canada's 2015 decisions in *Canadian Imperial Bank of Commerce v. Green*[3] *and Theratechnologies Inc. v. 121851 Canada Inc.*[4]

First, the Court summarized the law with respect to the "robust" statutory screening mechanism that plaintiff investors must meet. It confirmed that motion judges are entitled to analyze all of the evidence filed on the motion for leave to proceed, and to weigh competing factual and expert evidence to determine whether the plaintiff has established a reasonable possibility of success at trial. Second, the Court considered the standard of review applicable to a motion judge's analysis of the evidence on the leave motion, and adopted a deferential standard. Third, the Court affirmed a significant costs award against the unsuccessful investor, accepting that unsuccessful plaintiffs, like unsuccessful defendants, may face significant costs awards on motions for leave.

As described below, *Silvercorp* continues the trend in the secondary market jurisprudence towards establishing a balance between the rights of aggrieved investors and the protection of public issuers and their current shareholders from unmeritorious litigation.[5]

1. McCarthy Tétrault LLP acted as counsel for Silvercorp Metals Inc. and the other defendants on the leave to proceed and certification motions, and on appeal.
2. 2016 ONCA 641.
3. [2015] 3 S.C.R. 801.
4. [2015] 2 S.C.R. 106.
5. See *Goldsmith v. National Bank of Canada*, 2016 ONCA 22; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901. For a more comprehensive discussion of the statutory leave to proceed test, its origins and development, see Dana M. Peebles, Brandon Kain and Paul Davis, "Developments in Class Action Law: The 2014-2015 Term — Securities Litigation Comes of Age at the Supreme Court of Canada" (2017) 77 S.C.L.R. (2d) (forthcoming).

Background and Motion Decision

The claim in *Silvercorp* had its genesis in anonymous Internet postings. In two blog posts in September 2011, a short seller alleged that Silvercorp, a Vancouver-based company that owns and operates mining projects in China, was overstating the quantity and quality of its mineral reserves. Silvercorp's shares, which traded on the New York and Toronto Stock Exchanges at the time, declined significantly in the aftermath of the postings. While Silvercorp's investors lost, the short seller cleared a personal profit of $2.8 million.[6]

The proposed representative plaintiff (not the short seller) commenced an action against Silvercorp seeking leave to proceed with a claim for secondary market misrepresentation on the basis that the previous technical reports filed by Silvercorp were prepared negligently, and that the company had, in those reports and its other disclosure, misrepresented its production results and mineral reserves. The plaintiff relied on expert evidence to support those allegations. In response, Silvercorp delivered (1) independent expert evidence that the earlier technical reports were appropriately prepared, and (2) evidence from AMC Mining Consultants (Canada) Ltd., the author of the 2012 technical report filed by Silvercorp, which the plaintiff alleged demonstrated inaccuracies in the company's earlier technical reports. The supervising author of that report stated that the plaintiff's expert had misunderstood the 2012 AMC report's conclusions.

In October 2015, Justice Belobaba dismissed the plaintiff's motion for leave to proceed under Part XXIII.1 of the Ontario *Securities Act*. Justice Belobaba indicated that the plaintiff's expert evidence, if taken alone, gave the case a reasonable possibility of success. However, he accepted the evidence from the author of the 2012 AMC report, to which, he concluded, the plaintiff's expert had not responded on the critical issues, and on which the affiant had not been effectively cross-examined.

After dismissing the motion, Justice Belobaba ordered costs of $500,000 against the plaintiff. He concluded that the discretion applied by motion judges to limit costs awards against unsuccessful plaintiffs on certification motions under class proceedings legislation, which assess the procedural viability of the proposed class action, do not apply to leave to proceed motions under the *Securities Act*, where the parties file extensive competing evidence going to the merits.[7]

6. The British Columbia Securities Commission investigated and prosecuted that short seller, but the Commission ultimately concluded that although his conduct was "unsavory" and "morally unsupportable," it did not constitute a prohibited act: see *Re Carnes*, 2015 BCSEC-COM 187.

7. 2015 ONSC 7780.

Ontario Court of Appeal's Decision

On appeal, the plaintiff's primary argument was that Justice Belobaba should not have looked to Silvercorp's evidence once he was satisfied that the plaintiff's evidence alone could meet the statutory threshold. The plaintiff argued that Justice Belobaba had set too high a bar, and had overstepped his role on leave to proceed, which is not intended, he submitted, to be a final assessment of the parties' evidence in the case, but rather to show that the case is not a strike suit.

COURT LEAVE IS A "ROBUST DETERRENT SCREENING MECHANISM. "

The Court rejected the plaintiff's argument. This entailed addressing two related questions: the 'height' of the bar and the role of the motion judge. Writing for a unanimous panel, Chief Justice Strathy first accepted that the leave standard was intended to act as a "robust deterrent screening mechanism" and claims must therefore be subject to scrutiny.[8] The Ontario Court of Appeal had previously confirmed this higher bar in *Goldsmith v. National Bank of Canada*, which analyzed and adopted the law as explained in the 2015 Supreme Court of Canada decisions in *Canadian Imperial Bank of Commerce and Theratechnologies*.[9]

The second critical issue in *Silvercorp* was the degree to which motion judges are entitled to analyze and weigh the evidence. The role of the motion judge was addressed previously in more detail in *Kinross*, where the Ontario Court of Appeal had confirmed that the leave standard necessarily entailed some weighing of the evidence adduced."[10]

In describing the higher bar and the powers of the motion judge, Chief Justice Strathy accepted that the "reasonable possibility" test requires scrutiny of the evidence of both sides and that failing to weigh the competing evidence would render the leave requirement "hollow:"

> [41] … Far from undermining the objective of the legislation, such scrutiny of the entire body of evidence is necessary to give effect to the purpose of the screening mechanism.
>
> …
>
> [43] … a "reasoned consideration of the evidence" must include scrutiny of the evidence proffered by both sides, and some weighing of the defence evidence against that adduced by the plaintiff. To suspend the analysis when the plaintiff has presented a case that could satisfy the "reasonable possibility" test is inconsistent with the leave test acting as a "robust deterrent screening mechanism."… [T]he motion

8. *Silvercorp*, at para. 42.
9. *Goldsmith v. National Bank of Canada*, 2016 ONCA 22 at paras. 24-32.
10. *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 at para. 56.

> judge must do more than simply ascertain whether the plaintiff has presented evidence of a triable issue. Instead, the motion judge must review all the evidence adduced by both parties to ascertain whether there is "a reasonable or realistic chance that the action will succeed."
>
> …
>
> [45] The judge was not limited to a consideration of the plaintiff's evidence. He was required to consider the evidence of both parties, keeping in mind the relatively low merits-based threshold, and the limitations of the record before him. He was entitled, indeed required, to undertake a critical evaluation of all the evidence and this necessarily required some weighing of the evidence, drawing of appropriate inferences and the finding of facts established by the record…[11]

Chief Justice Strathy's analysis thus synthesized the lines of authority addressing the question of the height of the bar to obtain leave — including the earlier "speed bump" jurisprudence[12] — in defining the powers of the motion judge to weigh the evidence. In doing so, the Court confirmed a robust standard that protects issuers from unmeritorious litigation and affirmed the critical function of the leave motion in the scheme of the legislation to that end.

The Court of Appeal also had an opportunity to consider the standard of review applicable to a motion judge's findings on a leave motion, because the appellant investor challenged a number of the motion judge's conclusions in respect of the expert evidence. Following from its acceptance that the motion judge was entitled to weigh evidence and make inferences, the Court applied a deferential standard of review. Chief Justice Strathy indicated that "the application of the leave test to a body of facts is a question of mixed fact and law" with which an appellate court will not interfere absent a palpable and overriding error.[13]

COST AWARDS WILL DETER UNMERITORIOUS CLAIMS FROM BEING ADVANCED.

On this standard, the Court deferred to the motion judge's assessment that the plaintiff's evidence criticizing the preparation of the previous technical reports was not sufficient to satisfy the leave to proceed standard.[14]

Finally, the appellant investor sought to appeal the award of costs against him on the motion for leave to proceed. The motion judge had rejected the investor's argument that access to justice considerations, which may limit a costs award against an unsuccessful plaintiff on a certification

11. *Silvercorp* at paras. 41, 43, 45. Internal citations omitted.
12. The case law used the metaphor of a "speed bump" to describe a lower statutory standard for plaintiffs to meet to obtain leave to proceed: *Theratechnologies* at para. 38; *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083 at para. 36.
13. *Silvercorp* at paras. 38, 51.
14. *Silvercorp* at paras. 50-54.

motion, should be applied to a motion for leave to proceed with a statutory securities claim. Justice Belobaba had concluded that the principles on a certification motion have less force on a motion for leave to proceed because, unlike the limited record on certification:

> there is little that can be constrained on [statutory] leave motions. Defendants will often mount a full-blown defence and file an enormous volume of evidence in an effort to win the preliminary merits test and stop the proposed class action at the threshold.[15]

Justice Belobaba endorsed the legitimacy of this approach in defence of leave and therefore awarded significant costs to the defendants in *Silvercorp*. Chief Justice Strathy found no error in Justice Belobaba's reasoning and deferred to his experience with the *Silvercorp* case and with securities class actions generally. The symmetrical costs regime the Court accepted for leave to proceed motions will serve to deter unmeritorious claims, an outcome consistent with the objective of the leave test.

The Ontario Court of Appeal's decision confirms the balance

The Ontario Court of Appeal's reasoning in *Silvercorp* recognizes that one goal of the secondary market liability regime is to balance the rights of (former) shareholders alleged to have suffered a loss with those of (present) shareholders who now have to bear the costs of a lawsuit. The statutory leave to proceed test is intended as one mechanism to ensure that public issuers and their current shareholders are protected from having to spend resources defending unmeritorious litigation. The robust deterrent screening mechanism and significant costs award that the Ontario Court of Appeal affirmed in *Silvercorp* are another step on the road to achieving the legislative objective of balance.

15. *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 7780 at para. 6 (costs endorsement).

Class Actions

Aidan Cameron and Kate Macdonald

AMMAZZINI V. ANGLO AMERICAN PLC, 2016 SKQB 53 AND 2016 SKCA 73

In this case, the Saskatchewan Queen's Bench ordered a conditional stay of a proposed multi-jurisdictional class action commenced in Saskatchewan in favour of a similar proceeding commenced in Ontario. Each proceeding concerns allegations that DeBeers overcharged for gem grade diamonds by restricting the world supply and inflating prices. A similar proceeding has also been commenced, and certified, in British Columbia.[1]

The representative plaintiffs in the B.C. and Ontario actions sought a conditional stay of the Saskatchewan action. The Court found that while the B.C. plaintiff did not have standing to make submissions since the proposed B.C. action was not multi-jurisdictional, the Ontario plaintiff did have the right to file evidence and apply for a stay.

The Court considered a variety of factors mandated by *The Class Actions Act* in Saskatchewan, including the similarity of the proceedings, their relative progress, the location of the plaintiffs and proposed class members, and the location and evidence of witnesses. Ultimately, although the Saskatchewan and Ontario proceedings were roughly at the same stage, the Court found that a conditional stay was appropriate given that the Saskatchewan plaintiffs had significantly built on the work in Ontario and B.C., and had commenced what essentially amounted to a duplicative proceeding in the context of multi-jurisdictional class actions. If the Ontario proceeding is not certified, the stay will be lifted.

The Saskatchewan Court of Appeal has granted leave to appeal this decision. See 2016 SKCA 73.

For more on this decision, see McCarthy Tétrault LLP's Canadian Class

1. Decisions in the B.C. proceeding (including the certification decision) have been discussed in previous versions of *Mining in the Courts*. See *Mining in the Courts*, Vol. II, III, V (certification decision) and VI.

Actions Monitor blog post entitled “More uncertainty in managing multi-jurisdictional class actions: leave to appeal granted in Ammazzini v. Anglo American PLC.”

BRADLEY V. EASTERN PLATINUM LTD., 2016 ONSC 1903

In this decision, the Ontario Superior Court confirmed that applicants seeking leave to commence securities class actions must provide an evidentiary basis for their claims that demonstrates a reasonable possibility of success.

Mr. Bradley sought leave under s. 138.8 of the Ontario *Securities Act* to proceed with a proposed class action alleging breaches by Eastern Platinum Ltd. (Eastplats) of the *Securities Act* provisions, requiring disclosure of a material change. Among other things, Mr. Bradley alleged that in Q1/2011 Eastplats failed to disclose a shutdown of the Crocodile River Mine and introduced cement grout pack supports for the mine roof, both of which led to a decline in production. He alleged that the non-disclosure caused Eastplats’ stock to trade at artificially inflated prices during the proposed class period and, as a result, the applicant and other Eastplats shareholders sustained damages by buying Eastplats securities at an inflated price.

The Court dismissed Mr. Bradley’s motion for leave, holding that he had failed to demonstrate a reasonable possibility of success at trial. In particular, while Mr. Bradley relied on a press release, transcripts of teleconferences, and certain analysts’ reports hypothesizing about why production had slowed at the mine, Eastplats tendered affidavit evidence of people formerly and currently involved with the mine, all who unequivocally denied the allegations. On balance, the Court concluded that Mr. Bradley’s allegations were unsupported by the evidence. The Court emphasized that the statutory leave provisions are designed to prevent an abuse of the Court’s process through the commencement of baseless actions, and the jurisprudence requires a robust, meaningful and critical evaluation of the evidence led (or not led) by the parties.

LBP HOLDINGS V. ALLIED NEVADA GOLD CORP., 2016 ONSC 1629

In this decision, the Ontario Superior Court considered the intricacies of adding underwriters who financed a secondary public offering as new defendants in a proposed securities class action.

In May 2013, Allied Nevada Gold Corp., a gold mining company which trades on the New York and Toronto stock exchanges, effected a cross-border US$150 million secondary public offering, which was financed as a “bought deal” with Dundee Securities and Cormack Securities (the Underwriters) acting as principals. The plaintiff LBP Holdings, a Nova Scotia company, purchased 20,000 Allied Nevada shares. When the share price collapsed after several “corrective disclosures,” LBP commenced a proposed class action against Allied Nevada for damages. When Allied Nevada filed for bankruptcy in the U.S., LBP sought to add the Underwriters as defendants.

In Ontario, a plaintiff will generally be granted leave to add a new defendant unless the proposed defendant can show non-compensable prejudice or that the claims being advanced are untenable at law.

The Underwriters argued that by attempting to add them as defendants only after Allied Nevada filed for bankruptcy, LBP had irrevocably compromised their ability to seek indemnification by Allied Nevada for legal costs, giving rise to non-compensable prejudice. The Court rejected that submission. The Underwriters also argued that three of the five claims that LBP sought to make were legally untenable, including (i) a primary market statutory claim under s. 130(1)(b) of the Ontario *Securities Act*, which the Underwriters said was barred by a limitation period; (ii) a secondary market statutory claim under s. 138.3 of the *Securities Act*, which the Underwriters said was not viable because “underwriter” was not in the included category of defendants; and (iii) a claim by LBP that the Underwriters had been unjustly enriched by receiving the underwriting fees, which the Underwriters argued had no prospect of success. The Court accepted each of the Underwriters’ arguments. In the result, the Court granted LBP leave to amend its statement of claim to add the two common law claims against the Underwriters (that were not challenged), but denied leave to add the other causes of action because it was “plain and obvious” that those claims were not legally tenable.

LBP’s motion for leave to appeal was dismissed in a subsequent decision indexed as 2016 ONSC 6037.

MASK V. SILVERCORP INC., 2016 ONCA 641

This Ontario Court of Appeal decision is another important one in the securities class action context.[2] The Court summarized the robust statutory screening mechanism that plaintiff investors must meet, signalled that deference will be given to motion judges’ analysis of the evidence, and affirmed a significant costs award against the unsuccessful investor.

For more this decision, see “*Silvercorp Metals*: Ontario Court of Appeal Confirms Robust Test for Leave to Proceed in Securities Class Actions” on page 23.

2. The underlying decision was reported last year in *Mining in the Courts*, Vol. VI.

Art or Science? A Look at Carbon Pricing and Competitiveness in the Mining Sector

Selina Lee-Andersen

There is no doubt that 2016 was an eventful year for climate change policy in Canada. Having reasserted its climate leadership role on the global stage, Canada signed the *Paris Agreement* — part of the *United Nations Framework Convention on Climate Change* — when it was opened for signature on April 22, 2016 and subsequently ratified it on October 5, 2016. In October 2016, the federal government also announced that it will set a minimum price on carbon starting at $10 per tonne of carbon dioxide equivalent (CO2e) in 2018, which will increase by $10 per year until it reaches $50 per tonne of CO2e by 2022. Under the federal carbon pricing plan, all provinces and territories will be expected to price carbon, whether in the form of a carbon tax or a cap-and-trade system. By the time 2016 came to a close, the First Ministers had released the *Pan-Canadian Framework on Clean Growth and Climate Change*, which outlines critical actions for growing the economy, while reducing greenhouse gas (GHG) emissions across the country.

In the wake of these various policy initiatives, this article provides an overview of carbon pricing mechanisms and considers their impact on the mining sector and its competitiveness, including opportunities for increased revenue streams.

Overview of Carbon Pricing Mechanisms

The announcement of a pan-Canadian carbon price follows a global trend where carbon pricing is being seen as a key mechanism by which meaningful GHG emission reductions can be achieved. A price on carbon looks to capture what are referred to as the external costs of carbon emissions, i.e. costs that the public pays for indirectly, such as damage to

property as a result of flooding. By placing a monetary value on carbon, the rationale is that governments, businesses and individuals will have an incentive to change their behaviour to less carbon intensive alternatives. Market instruments are perceived as providing more cost efficient and flexible compliance mechanisms to drive emission reductions. There are two main types of carbon pricing mechanisms:

- An **Emissions Trading System** (ETS) is a market-based approach designed to provide economic incentives for reducing emissions. Under an ETS, an annual limit or cap is set on the amount of GHG emissions that can be emitted by certain industries. Regulated entities are then required to hold a number of emissions allowances equivalent to their emissions. Regulated entities that reduce their GHG emissions below their target will require fewer allowances and can sell any surplus allowances to generate revenue. Regulated entities that are unable to reduce their emissions can purchase allowances to comply with their target. By creating demand and supply for emissions allowances, an ETS establishes a market price for GHG emissions. In order to achieve absolute reductions in GHG emissions, the limit or cap is gradually lowered over time.

- A **carbon tax** puts a price on each tonne of GHG emissions generated from the combustion of fossil fuels. The idea is that over time, the carbon price will elicit a market response from all sectors of the economy, thus resulting in reduced emissions. In terms of scope, some jurisdictions have focused on a narrow category of energy users and large emitters, while others such as British Columbia (BC) have adopted a broader scope where the carbon tax covers GHG emissions from the combustion of all fossil fuels.

The key differences between the mechanisms are that with an ETS, the quantity of emission reductions is known, but the price is uncertain. With a carbon tax, the price is known, however the quantity of emissions reductions is uncertain. Both carbon pricing mechanisms can generate revenue that can be used to lower other taxes or invest in sustainability initiatives.

Carbon Pricing and the Mining Sector

In recent years, companies have been working hard to reduce their carbon footprints by setting emission reduction targets and taking action to address climate change impacts in both their own operations and their supply chain. Given the range of climate policies across jurisdictions, companies are often faced with having to consider multiple carbon compliance costs in their business decisions. As a result, there have been increasing calls from the private sector to establish clear pricing and regulatory certainty to support climate-related investments and climate risk assessment efforts.

Based on information available from the Canadian Industrial End-Use Data Analysis Centre, total GHG emissions from Canada's operating metal and non-metal mines (excluding coal and oil sands mining) accounted for 1.1% of the country's direct and indirect GHG emissions in 2014 (of which 0.8% were direct emissions). Non-ferrous metal smelting and refining (excluding aluminum) accounted for 0.5% of Canada's direct and indirect GHG emissions in 2014 (of which 0.3% were direct). In the mining sector, GHG emissions result primarily from the use of fossil fuels for energy. According to the Mining Association of Canada (MAC), a typical mine in Canada spends about 30% of its budget on energy (ranging from diesel for trucks to electricity used to process base metals in a refinery). Given the diversity of energy sources across the country, this means that the impact of a pan-Canadian carbon price on industrial sectors will vary depending on the energy source and fuel mix available to facilities in each jurisdiction.

MAC has expressed its support for a carbon price and in April 2016, it issued its *Principles for Climate Change Policy Design* document to support an efficient pan-Canadian approach to addressing climate change. MAC's policy design principles include the following:

1. Establish a broad-based carbon price that is applicable to all sectors of the Canadian economy.
2. Apply any climate change policy-related revenues to manage the transition toward a lower carbon future, including climate adaptation.
3. Address competitiveness and carbon leakage concerns across all sectors.
4. Be predictable, flexible and sensitive to changing economic conditions and geographic circumstances to enable consumers and industry to adapt and to treat regions fairly.
5. Be simple, complementary and effective to ensure that a national climate change regime works in tandem with existing provincial schemes, avoids duplication, and is simple to understand and administer.
6. Support investments in lower-emission generation technology development and implementation.
7. Recognize early action, acknowledging that some companies have been proactive in reducing their climate footprints and that several provinces have already established climate change mitigation regimes.

Competitiveness Issues

Depending on the carbon price and the emissions intensity from production processes, compliance costs will vary across different systems and commodities. The diversity within the mining and metals sector itself means that it is difficult to make generalizations about how a particular sector, facility or commodity will be affected by carbon pricing. Adding a layer of complexity to matters is the broad range of carbon pricing policies that have been implemented in various jurisdictions, which means that companies often face a broad range of compliance costs if they operate in different jurisdictions. Where a competitive disadvantage results from GHG reduction policies, this may lead to a relocation of production and investment, particularly if industries are emissions intensive and trade exposed (EITE). EITE industries are at greater risk of 'carbon leakage,' which refers to a situation where businesses, for cost reasons, move production to other countries with less stringent GHG emission policies. Various academic and government studies have identified certain industries as being more vulnerable to competitiveness pressures, including cement manufacturing, aluminum production, iron and steel production, chemical manufacturing, pulp and paper production and refining. While mining is less commonly classified as an EITE industry, a number of systems have included mining activities, such as the European Union (EU), which has identified parts of the mining industry as being at significant risk of carbon leakage (see *2014/746/EU: Commission Decision of 27 October 2014*). Industry sectors and sub-sectors deemed to be exposed to a significant risk of carbon leakage in the EU (including: hard coal, iron ore, and non-ferrous metal ore mining; petroleum and natural gas extraction; copper, zinc, tin and lead production) receive a higher share of free allowances in the EU Emissions Trading System because they face competition from industries in other jurisdictions, which are not subject to comparable GHG emission restrictions.

CARBON PRICING IS CREATING OPPORTUNITIES FOR MINING INDUSTRY TO CONSIDER ENERGY ALTERNATIVES.

Criteria and thresholds for identifying EITE industries differ across jurisdictions, but will typically assess the extent to which an industry is exposed to international trade and whether pricing is likely to increase costs significantly for activities based on its emissions profile. To address competitiveness issues for EITE industries, governments have certain policy tools available to them. For example, in a cap-and-trade system, governments may allocate free emission allowances to the most vulnerable industries. Other potential approaches to address competitiveness concerns include border adjustments, tax rebates and direct subsidies. The challenge for policy makers is to identify a price level that sufficiently protects industry, while providing an incentive to reduce operational emissions.

As Canada moves to implement policies to meet its emission reduction commitments under the Paris Agreement, industries continue to seek out innovative approaches to reduce their carbon footprints and the mining sector is no exception. Carbon pricing is creating opportunities for the mining industry to consider energy alternatives (for example at remote sites) to further reduce its GHG emissions and stabilize energy costs. There are also potential opportunities for mining facilities to create additional revenue streams from emissions trading and the creation of carbon offsets from their operations as they switch to less carbon-intensive processes.

Case Law Summaries

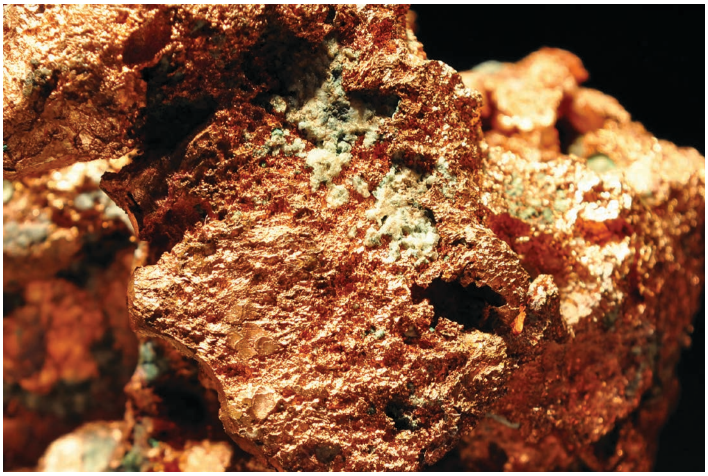
Conflicts and Jurisdiction

Aidan Cameron and Kate Macdonald

ARAYA V. NEVSUN RESOURCES LTD., 2016 BCSC 1856

In another important decision for Canadian resource companies operating abroad, the British Columbia Supreme Court has permitted claims to proceed to trial in relation to alleged human rights abuses at a mine in East Africa. This is the latest in a series of recent cases involving Canadian resource companies and allegations of their complicity in human rights abuses abroad, but it is the first of such cases in which claims against a Canadian corporation have been allowed to proceed.

The plaintiffs are three Eritrean nationals, now refugees in Ethiopia, who commenced a representative proceeding against Nevsun Resources Ltd., a British Columbia mining company, in connection with the Bisha Mine in Eritrea. The plaintiffs claim that they were forced to work at the mine by the Eritrean military, under construction agreements with Nevsun and its Eritrean subsidiary. The plaintiffs sought damages on behalf of all Eritreans forced to work at the mine from September 2008 to present, based on alleged breaches of customary international law for alleged torture, slavery, cruel, inhuman and degrading treatment, and crimes against humanity. They also sought damages under domestic B.C. law for the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress.



This particular decision concerned a series of preliminary applications in which Nevsun argued that the claims should not proceed because: 1) Eritrea is the more appropriate forum; 2) the plaintiffs' claims are barred by the act of state doctrine; 3) breaches of customary international law are not justiciable; and 4) the case is not appropriate for a representative proceeding.

The Court rejected Nevsun's first three arguments, but accepted the fourth. On the jurisdiction argument, the Court distinguished *Garcia v.*

Tahoe Resources Inc., 2015 BCSC 2045,[1] holding that Eritrea was not the more appropriate forum because the plaintiffs were refugees who faced real danger if they returned to Eritrea and the evidence established that there was a significant amount of state interference with the Eritrean justice system. The Court was also not prepared to dismiss the plaintiffs' claims on a preliminary application given some uncertainty surrounding the scope and application of the "act of state" doctrine and that the plaintiffs had at least an arguable case in respect of breaches of customary international law.

On the fourth argument about the appropriateness of a representative proceeding, the Court considered whether British Columbia's representative proceedings rule could be used in the context of a "common law class action." Ultimately, the Court held that the plaintiffs did not satisfy the criteria required for such proceedings because they failed to establish that the unrepresented parties had the same interest. The Court also held that the plaintiffs were improperly attempting to circumvent the residency requirement of the *Class Proceedings Act*.

Accordingly, the case will now proceed to trial on an individual basis.

For more on this decision, see McCarthy Tétrault LLP's Canadian Class Actions Monitor blog post entitled "*Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856: British Columbia Supreme Court refuses to allow a 'common law class action' alleging human rights violations at Eritrean mine."

1. See *Mining in the Courts*, Vol. VI.

50/50 Joint Ventures — Paved with Good Intentions

Adam Wanke and Roger Taplin

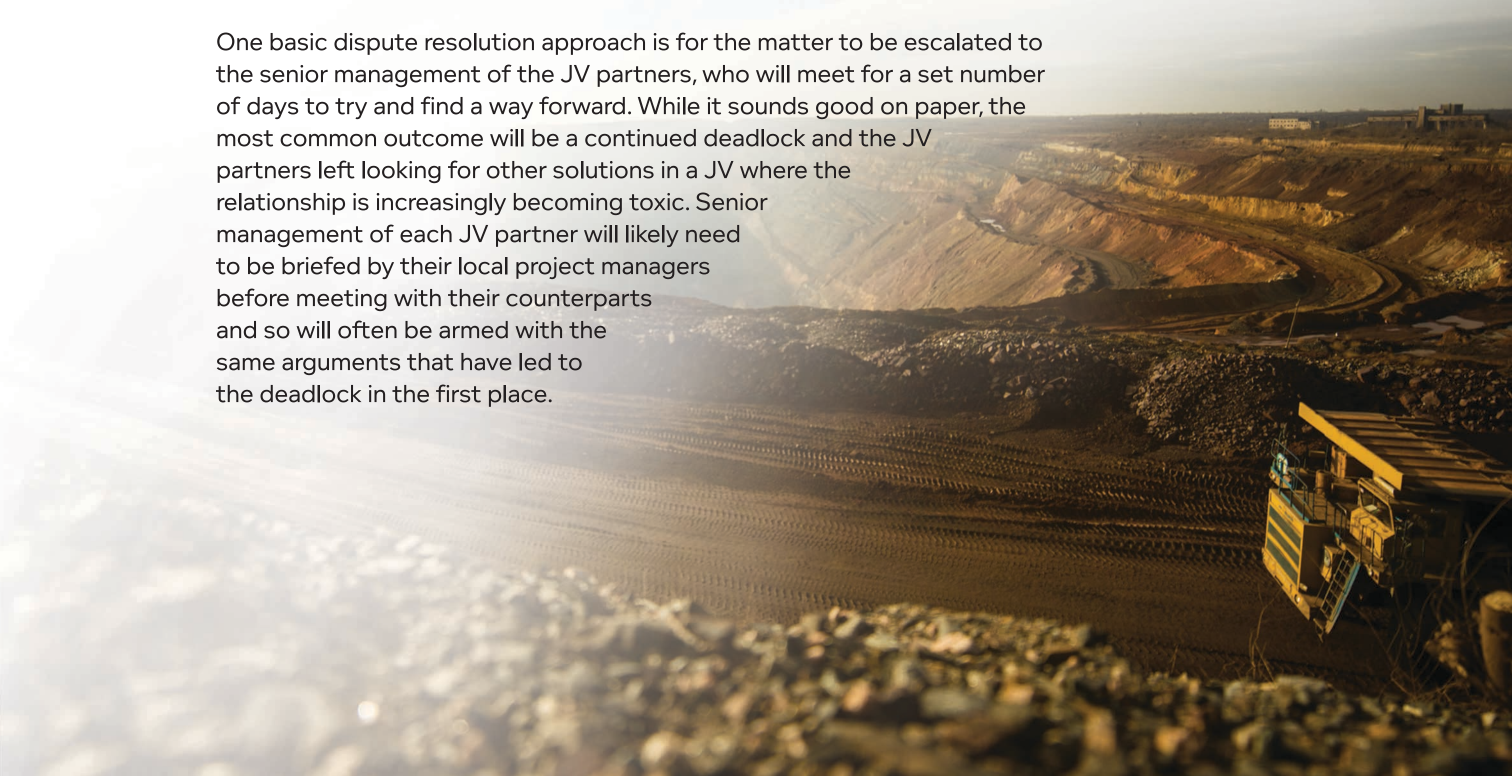
One of the most difficult things to plan for effectively in any joint venture (JV) is conflict resolution and decision deadlock between the JV partners. JV agreements in the mining industry can be voluminous documents. Pages are devoted to calculating partner dilution, setting out partner rights and outlining how JV operations will be managed. At the same time, little thought is often given to how the partners will deal with a deadlock over an operational decision.

In a way it is not surprising that mechanisms for dealing with decision deadlock can be an afterthought — most CEOs want to plan for success. However, spending some time thinking about how a JV partner can break a deadlock long before a deadlock occurs is a wise investment; this especially rings true in the case of a 50/50 JV where no single party will be able to make any decision, major or minor, without the agreement of its JV partner.

This article outlines some of the mechanisms we have seen used in 50/50 JVs by companies in the mining industry to resolve a deadlock or to solve a dispute. While it is often the case that parties in 50/50 JVs will spend more time thinking of solutions to deadlock than those in non 50/50 JVs, the concepts described below can be applied in almost any type of JV.

Escalation to CEO

One basic dispute resolution approach is for the matter to be escalated to the senior management of the JV partners, who will meet for a set number of days to try and find a way forward. While it sounds good on paper, the most common outcome will be a continued deadlock and the JV partners left looking for other solutions in a JV where the relationship is increasingly becoming toxic. Senior management of each JV partner will likely need to be briefed by their local project managers before meeting with their counterparts and so will often be armed with the same arguments that have led to the deadlock in the first place.



Chairperson Tie Break

Sometimes JV agreements will give a casting vote to the chair of the managing body for the JV at the time of the dispute. While a casting vote can be useful for dealing with minor issues that the JV partners disagree about, it would not be an appropriate method to resolve a deadlock over an important project milestone, such as whether a feasibility study should be prepared for the project, or whether a development decision should be made. Such decisions go to the core of the mining project and leaving them in the hands of one JV partner would defeat the purpose behind many 50/50 JVs, except in a scenario where one of the parties has acknowledged superior operational expertise.

Mediation, Arbitration and Experts

Referring disputes to mediation and its more potent (and expensive) cousin, arbitration, is one of the most common dispute resolution mechanics found in modern mining JV agreements. While useful in some instances to possibly head off a much more divisive and expensive court date between JV partners, mediation and arbitration are much less effective (or appropriate) for resolving operational differences or deadlock over a major project decision.

Part of the problem is that the arbitral award may not be what either party expected. While in most cases arbitrators will gamely attempt to fully apply themselves to find a solution to the problem at hand, the types of decisions that lead to operational deadlock will often have complicated technical and financial underpinnings. In such situations, well intentioned arbitrators faced with a technical decision that they are not equipped to properly make, may craft a "solution" that is (unintentionally) damaging for the project and both JV partners.

An alternative to the traditional arbitration model that has begun to appear in 50/50 JV agreements is for the JV partners to retain the services of an expert to make a binding ruling in the form of a baseball style arbitration — the expert can be chosen on the basis of the type of dispute at hand, whether technical, financial or legal in nature.

Shotgun Rights

An effective but somewhat extreme solution to operational deadlock is a "shotgun" clause. If the JV partners are deadlocked over an operational matter for an extended period of time, either partner can elect to send a buy/sell offer to its JV counterparty. Upon receipt of such an offer, the JV counterparty must either choose to buy the exercising party's JV interest, or choose to sell its own JV interest to the exercising party (in each case at the same fair market value).

While having the significant advantage of providing a definitive end to the deadlock, the obvious major drawback with this type of approach is its finality. Once exercised, the JV has in effect failed and one party will be walking away from the project with a — likely not entirely satisfactory — amount of cash in its pocket, while the now 100% owner will have to move the project forward on its own or find a new JV partner. It may also be an undesirable solution for a participant that has limited financial wherewithal.

"Path to Production"

An alternative to the finality of the shotgun clause — the "path to production" deadlock resolution mechanism — allows both parties to maintain an interest in the project, but allows one party to unilaterally move forward with its vision of the project, by funding such vision on its own. The risk to the sole-funding participant is that there may be no guarantee of recouping the amounts it solely funds.

While it may be a challenge to agree on how such a mechanism would actually work (since at some point a reckoning between the sole-funding partner and the free rider partner needs to happen), we have seen some creative solutions that provide for both parties to either re-engage in the project or for the sole funding partner to move forward on its own.

Care and Maintenance

The final deadlock mechanism mentioned here is not really a deadlock breaking mechanism, but rather a "time-out" for the partners and the project. Essentially in cases of certain extreme deadlock and no other contractual mechanisms to deal with such deadlock, the operator of the project is authorized to stop major operations at the project and only require expenditure at such levels as needed to maintain the mineral tenure in good standing. The idea is that during such time-out, the JV partners can continue to try and reach a mutually acceptable solution to the impasse while avoiding serious expenditure and at the same time protecting the project assets.

Conclusion

While the mechanisms described in this article will often be found in most well-constructed 50/50 JV agreements, they can be applied to almost any kind of JV as quite often major project decisions will require a unanimous or near-unanimous decision of the JV partners. Increasingly we are seeing two or even three or four of the above mechanisms used in a single JV agreement, with different categories of decisions being sent down different resolution paths. While a deadlock over a major decision is akin to being stuck up the proverbial creek, sophisticated parties will use the JV agreement to give themselves the tools to make a paddle.

Contracts

Aidan Cameron, Kate Macdonald, Bianca Depres and Laura DeVries

798839 ONTARIO LIMITED V. PLATT, 2016 ONCA 488

In this decision, the Ontario Court of Appeal brought an end to a "long-standing litigious war of attrition" concerning an option agreement.

The defendant, Mr. Platt was a mining promoter who owned a number of undeveloped mining claims containing kaolin deposits in Kipling Township in Northern Ontario (the Kipling Claims). The plaintiff, Mr. Hanemaaryer, incorporated 798838 Ontario Ltd. (798) to act as a "flow-through" Canadian resources corporation to invest in the Kipling Claims. 798 would issue flow-through shares to the plaintiff and other investors, through which the investors could obtain tax write-offs of the exploration costs.

798 entered into an option agreement with Platt, which provided that on closing Platt would transfer 100% of its right, title and interest in and to the Kipling Claims. The option agreement also provided that 798 would undertake, over a period not exceeding five years, to finance and carry out certain exploration, development and testing work. By 1989, the relationship between the parties had broken down. 798 had advanced $10.8 million for the exploration of the claims, but had failed to carry out all the required conditions.

798 took the position that the option agreement was in effect an agreement of purchase and sale by which title and ownership of the claims was transferred to it outright in return for its discretionary undertaking to do certain work. Platt argued that the option agreement was merely an agreement through which 798 could earn a 100% interest in the claims by fulfilling certain conditions. The Court held that, although the option agreement stated that Platt would transfer 100% of its right, title and interest in the Kipling Claims to 798, this was to give 798 legal title to the claims for tax purposes only. The wording of the option agreement made it clear that 798 would only get a 100% interest in the claims by fulfilling its obligations. In reaching its decision, the Court applied the principles set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston*

Moly Corp., 2014 SCC 53,[1] interpreting the Option Agreement in light of its surrounding factual matrix. The Court also commented on option agreements more generally, noting that by their nature they can result in potentially unbalanced outcomes.

Ultimately, the Court agreed with the trial judge that 798 had no interest in the Kipling Claims, which rested solely with Platt, as they had failed to fully-finance the development of the claims.

For more on this decision, see McCarthy Tétrault LLP's Mining Prospects blog post entitled "Millions Invested and Nothing to Show for It – That's Just the Nature of Option Agreements."

BIRCH V. GWR RESOURCES INC., 2016 BCSC 117

In this case, the British Columbia Supreme Court considered whether the plaintiff, who had introduced an investor to a company, was entitled to a finder's fee.

The plaintiff, Mr. Birch, had formerly invested in the defendant, GWR Resources Inc. (GWR), and had introduced other investors to GWR in exchange for shares in the company. In 2009 or 2010, GWR indicated to Mr. Birch that GWR was looking for investors to do a private placement of capital for the exploration and development of the company's mining property in Lac Le Hache. There was no written agreement between the parties, but the GWR president undisputedly told Mr. Birch, "find us some money and we'll look after you." Mr. Birch subsequently began to co-ordinate with Mr. Gray, one of his contacts. In August 2010, GWR hired Mr. Birch as an investment relations consultant, in a month-to-month, part-time, salaried position. He remained in contact with Mr. Gray, who was then at MacQuarie Capital Markets, and arranged meetings between the directors of GWR and Mr. Gray/MacQuarie. In June 2011, MacQuarie invested $1.8 million into the Lac Le Hache project. GWR refused to pay Mr. Birch a finder's fee.

The Court first considered whether the president's statement amounted to an enforceable unilateral contract. Ultimately, the Court determined that it was not enforceable because although it was arguable that "some money" could objectively be understood to take its meaning from the general practice with respect to private placements, there was no meeting of the minds around the level of compensation to flow from "we'll look after you."

Notwithstanding the Court's finding that there was no enforceable agreement, the Court held that the plaintiff was entitled to receive compensation on a *quantum meruit* basis in the amount of $55,000. This was the case even though Mr. Birch subsequently became an employee of

1. See *Mining in the Courts*, Vol. V.

the company, thereby precluding him from receiving a finder's fee due to TSX Venture Exchange rules. In determining the amount of compensation, the Court considered the value of the TSX Venture Exchange guidelines and the need to recognize that the finder may be one of several parties who contributed to the successful outcome.

QUINTO MINING CORPORATION (ARRANGEMENT RELATIF À), 2016 QCCS 6342

In this case, the Québec Superior Court considered fundamental contract law principles relating to the formation of a contract, found that a contract was reached and was valid, and approved the contract under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (CCAA).

In April 2012, Mason Graphite Inc. purchased 215 mining claims from Quinto Mining Corporation. Approximately $5 million of the purchase price was deferred. In January 2015, Quinto sought protection under the CCAA. By December 2015, Mason informed the CCAA monitor that it did not have the funds to start production, and offered the monitor $366,500 in satisfaction of the remaining balance. The monitor rejected that offer and Mason's subsequent offer, but made a counter-offer of $4 million by email. Mason accepted this counter-offer also by email six days later, and the parties exchanged a draft settlement and mutual release agreement. However, before this agreement was executed, Mason announced a bought deal private placement offering of shares for $25 million. Following this, Quinto decided not to proceed with the settlement agreement with Mason because it was no longer in the best interest of its stakeholders.

Mason sought a declaration that the settlement agreement was valid and enforceable, and sought approval of the contract in the context of the CCAA proceedings.

Quinto argued that no binding contract had been reached because the parties had not agreed on all essential elements, and in the alternative, that the email counter-offer had been conditional on a written agreement being entered. The Court rejected these arguments, holding that the email contained all the essential elements of the proposed contract as required by the Québec Civil Code: it named the parties, the price, when the price was to be paid and why it was being paid. The Court went on to find that there had been a valid acceptance of the contract, and that the condition of a written agreement being entered into had been implicitly waived by both parties.

Quinto and the monitor also argued that the contract should be vitiated by Mason's misrepresentations that it had insufficient funds to pay the full amount due. The Court rejected this argument as well, finding no evidence that Mason misled Quinto or the monitor with respect to its capacity to pay Quinto, and to the extent that Quinto and the monitor were in error about Mason's capacity to pay, that error was not induced by Mason. In the result, the Court approved the agreement under the CCAA. In doing so, it rejected Quinto's argument that the agreement was not fair and reasonable, beneficial to the stakeholders or supported by the monitor. The Court relied on the monitor's view, prior to the private placement, that the agreement was fair and reasonable.

URAGOLD BAY RESOURCES INC. V. GOLDEN HOPE MINES LTD, 2016 QCCA 1772

In this case, the Québec Court of Appeal denied leave to appeal the lower court's decision considering whether a party to a joint venture agreement should be granted a discretionary safeguard order (a form of injunctive relief available in Québec).

Uragold Bay Resources Inc. and Golden Hope Mines Limited entered into a joint venture agreement whereby Uragold would operate and manage the exploration of a mine site and pay Golden Hope $100,000. In exchange, Uragold would receive 50% of the profits from the project. Uragold experienced delays in performing its obligations and in September 2015, it asked Golden Hope for an 18-month extension. Golden Hope refused. In October 2015, Golden Hope notified Uragold that the agreement would be terminated in 30 days if Uragold was unable to fulfill its obligations.

In November 2015, Uragold brought a motion asking the Québec Superior Court to issue orders affirming the agreement, granting Uragold the 18-month extension, forcing Golden Hope to keep its interest in the deposit, and enjoining Golden Hope from entering into a contract with another party to replace Uragold. Ten months later, in September 2016, Uragold filed an additional application seeking a safeguard order to maintain the contractual status between the parties.

The Québec Superior Court dismissed the application for a safeguard order, finding that any damage to Uragold's reputation had already occurred, since announcements indicating that Golden Hope had ceased to collaborate with Uragold had already been released. Moreover, the Court found that there was no apparent urgency: Uragold should have asked for the safeguard order in November 2015 when it brought its initial motion.

Uragold filed a motion for leave to appeal, which was dismissed by the Québec Court of Appeal.

Expropriation

Aidan Cameron and Kate Macdonald

YOUNG V. BRITISH COLUMBIA, 2016 BCCA 25

In this case, the B.C. Court of Appeal agreed with the lower court that damages for the tort of injurious affection are not available when the Crown's expropriation of some of a mineral holder's claims results in interference with the holder's ability to access remaining claims. [1]

In June 2008, the province expropriated 12 of the appellants' 28 adjoining mineral claims. It was assumed for purposes of the appeal that the expropriation significantly impacted access to the remaining claims. While the parties settled upon the compensation for the expropriated claims, the associated release did not apply to the appellants' common law claims for injurious affection.
In February 2014, the appellants commenced an action seeking damages for injurious affection and subsequently brought a summary trial application seeking judgment.

The issue before the Court was whether damages for injurious affection constituted "consequential damages" for purposes of the governing legislation, and in particular the *Mining Rights Compensation Regulation* (Regulation). Section 5(5) of the Regulation states that the value of an expropriated title must not include consequential damages that are caused to the mineral titleholder as a result of the expropriation. The appellants argued that the section did not apply to injurious affection because, among other things, the section was limited to consequential damages caused to the title holder, not to the property itself.

The Court of Appeal upheld the lower court's decision, finding that damages for injurious affection were consequential damages within the meaning of the Regulation and were therefore excluded as a form of compensation.

1. The lower court's decision was discussed in *Mining in the Courts, Vol. V.*

Insurance

Aidan Cameron and Kate Macdonald

CERTAIN UNDERWRITERS AT LLOYD'S V. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, 2016 BCSC 178 AND 2016 BCSC 665

In a proceeding related to *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, summarized above in the Conflicts and Jurisdiction section, one of Nevsun's insurers (Lloyds) sought a declaration that another of Nevsun's insurers (AIG) was obligated to contribute equally to the payment of Nevsun's defence costs in the underlying action.

Lloyds accepted that it had a duty to defend Nevsun in the underlying action. It sought a declaration that AIG's policy, which provided coverage to Nevsun for "bodily injury" and "personal injury liability", was co-primary with the Lloyds policy such that AIG was also responsible for defending the claims. Among other things, Lloyds argued that the allegations of the Eritrean miners (including torture) were "bodily injury" claims within the meaning of the AIG policy, and that some of the injuries continued or resumed after the AIG policy expired (when Lloyds was on the risk) thereby triggering a duty to contribute to the defence costs. AIG argued that the plaintiffs in the underlying action had not pled any bodily injury that was continuous or progressive or which could have continued or resumed beyond the end of the AIG policy.

The Court accepted AIG's submission and found that Lloyds was not entitled to an equal contribution to *all* defence costs. In reaching its determination, the Court reviewed the pleadings and the AIG policy and held that the allegations of damage due to abuse and mistreatment were not described as ongoing and did not fall within the ambit of AIG's policy.

Following the decision in 2016 BCSC 178, Lloyds brought the matter back before the Court with a supplemental argument. The supplemental argument was similarly rejected in reasons indexed as 2016 BCSC 665.

Miners Lien Claims

Aidan Cameron and Kate Macdonald

BAUMAN V. EVANS, 2016 YKSC 6

In this decision, the Yukon Supreme Court discharged miners' liens on the basis that the lien claimant who provided work and services to develop a mining claim was actually an owner who could not lien his own property.

In 2010, the parties entered into an oral agreement pursuant to which the petitioner would provide equipment, materials and services, and undertake the work to develop, remove overburden and mine the respondent's claims for an unspecified period. In 2014, the parties' relationship broke down. The petitioner claimed that the respondent had breached the agreement by failing to provide an adequate water license and the respondent directed the petitioner to cease operations. The petitioner subsequently claimed compensation for overburden removal, demobilization, operational expenses and one half the value of the mining claim assessment credits. He also registered a certificate of pending litigation and miners' liens to secure his claim.

The Court concluded that the petitioner was not entitled to register the liens because he qualified as an "owner" under the *Miners Lien Act*, R.S.Y. 2002, c. 151 (Act). The petitioner argued that he fell within the definition of "contractor" under the Act. In rejecting that argument, the Court relied on jurisprudence that dictated the definition of "contractor" should be interpreted narrowly, while the definition of "owner" should be interpreted liberally. The Court found that the arrangement between the petitioner and respondent was effectively a partnership because there was a clear intention between the parties to jointly make a profit and share that profit equally. Further, they had jointly purchased two mining hoes of significant value, the petitioner had a degree of control over the mining claims and project finances, and had taken on risk rather than performing a fee for service. In the circumstances, the Court concluded that the improvements to the respondent's claims were done: (a) upon the credit of the partnership; (b) at the request of the partnership; (c) on behalf of the partnership; (d) with the consent of the partnership; and (e) for the direct benefit of the partnership, such that the petitioner was an owner, not a mere contractor. The liens were discharged and the proceeding was dismissed.

HY'S NORTH TRANSPORTATION INC. V. FINLAYSON MINERALS CORPORATION DBA YUKON ZINC CORPORATION, 2016 YKSC 43 AND P.S. SIDHU TRUCKING LTD. V. YUKON CORPORATION, 2016 YKSC 42

In these proceedings, the Yukon Supreme Court interpreted the *Miners Lien Act*, R.S.Y. 2002, c. 151 (Act) to determine the validity of two lien claims. The decision follows the 2015 decision of the B.C. Supreme Court in *Yukon Zinc Corporation (Re)*,[1] which lifted the stay under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA) for the limited purpose of allowing Hy's and Sidhu to have the validity of their liens determined.

TRANSPORTING MINERALS AWAY FROM A MINE DOES NOT TRIGGER RIGHTS UNDER YUKON *MINERS LIEN ACT.*

Sidhu and Hy's both provided trucking services to Yukon Zinc Corporation hauling ore concentrates away from the Wolverine Mine. In 2015, Yukon Zinc, which had been experiencing financial difficulties, ceased operations and initiated relief proceedings under the CCAA. Sidhu and Hy's each applied to court for a declaration that it held a valid and subsisting miners' lien against the Wolverine Mine.

To claim a miners' lien, the contractor or subcontractor must have provided "services or materials to a mine…in connection with the recovery of a mineral." The main issue in the application was whether the transportation of minerals from the mine was a service "in connection with the recovery of a mineral" as set out in s. 2(1)(b) of the Act. The Court noted that the Act must be interpreted strictly, with its purpose being only to protect those workers who provide services or materials that contribute to the actual extraction of minerals from the mine. Applying the principles of statutory interpretation, the Court concluded that transporting minerals away from a mine is not, for the purposes of the Act, a service in connection with the recovery of a mineral. Therefore, neither trucking company fell within s. 2(1)(b) of the Act and neither had a valid lien.

1. 2015 BCSC 1961, discussed in *Mining in the Courts*, Vol. VI.

Municipal Law

Aidan Cameron and Kate Macdonald

COWICHAN VALLEY (REGIONAL DISTRICT) V. COBBLE HILL HOLDINGS LTD., 2016 BCSC 489, 2016 BCCA 160, 2016 BCCA 215, AND 2016 BCCA 432

In this case, the British Columbia courts considered whether the Cowichan Valley Regional District (District) bylaws regulating land use applied to a quarry operation north of Victoria, B.C.

While local governments cannot regulate extraction taking place under provincially-issued permits, they can impact mining activities through zoning bylaws, including the storage and processing of materials at a mine site. In this case, the District had passed a land use bylaw that permitted extraction and "uses accessory to" extraction in the F-1 zone where the property was situated. The bylaw prohibited the use of a parcel of land to store contaminated waste or contaminated soil, unless the waste or soil originated on the same parcel of land.

The quarry owners and operator (the Companies) had been operating under provincially-issued permits since 2006. During operations, the Companies' permits allowed them to bring imported soil into the quarry under certain conditions in order to reclaim the property for eventual revegetation. In 2013, the Companies received permission from the provincial government to import and encapsulate contaminated soil in engineered synthetic-lined cells as part of reclamation efforts. In accordance with the permits, the Companies had also constructed, though not put into use, a facility that would permit the Companies to undertake bioremediation of the imported contaminated soil on site. The Companies argued that the importation of contaminated soils was part of the reclamation efforts for the quarry, which were required by the provincially-issued permit and were thus allowed. The District disagreed, arguing that the Companies were operating a landfill or a contaminated soil treatment facility contrary to the bylaws.

LOCAL BYLAW DOES NOT APPLY TO QUARRY RECLAMATION EFFORTS.

The B.C. Supreme Court agreed with the District that the Companies were operating in violation of the bylaws. The Court noted that only activities integral to the extraction of the resource are exempt from local land use laws, and that reclamation activities are not integral to the actual extraction process. As there was no conflict between the reclamation requirements under the provincial *Mining Act* and the bylaws, the laws could coexist and the District's bylaws applied to the reclamation activities. The Court held that the activities in question were not necessary or normal for such a small quarry, and agreed with the District that the Companies were effectively operating a landfill, which is properly characterized as land use and subject to the zoning bylaws. In addition to its declaratory order, the Court granted injunctions prohibiting the Companies from using the property as a contaminated soil treatment facility or a landfill facility and preventing the Companies from importing contaminated soil onto the land in question. The District's applications for mandatory injunctions to remove the existing contaminated soil and the bioremediation facility were dismissed.

The Companies appealed the Supreme Court's decision, and the District cross-appealed the dismissal of its application for mandatory injunctions. In 2016 BCCA 160 and in 2016 BCCA 215, the Court of Appeal made two pre-hearing rulings. In 2016 BCCA 432, the Court of Appeal released the substantive portion of its decision.

The Court of Appeal allowed the Companies' appeal in part. The Court found that the Supreme Court had erred when it held that the quarry site reclamation was a landfill, since the quarry reclamation site authorized by the provincial permits bears no resemblance to a municipal waste dump. The Court went on to hold that under the *Mines Act*, a quarry is a mine and its site reclamation, which includes the backfilling of the quarry cavity, is defined as a mining activity. The province has the exclusive jurisdiction to regulate the operation of the quarry and its site reclamation, provided the reclamation activity is integral to restoring the affected landform. The District's bylaw had no application to importing soil, contaminated or otherwise, as this was integral to restoring the affected landform. However, the soil treatment facility and bioremediation of the imported soil on site were not integral to site reclamation and were subject to local government land use regulation.

The Court of Appeal also dismissed the District's injunction applications except for the injunction enjoining the Companies from operating the soil treatment facility. The District's cross appeal was dismissed.

The District has sought leave to appeal to the Supreme Court of Canada.

Hecla Mining Decision Provides Guidance on Tactical Private Placements under the New Take-Over Bid Regime

David Woollcombe, Shane D'Souza, Heidi Gordon and Vanessa Chung

In *Re Hecla Mining*,[1] the Ontario Securities Commission (OSC) and the British Columbia Securities Commission (BCSC) released the first (and currently, only) decision considering the use of tactical private placements under Canada's new harmonized take-over bid regime (New Bid Regime). Mining issuers that are potentially "in play" should consider the guidance in *Hecla Mining* before undertaking a private placement.

One of the implications of the New Bid Regime is reduced utility of shareholder rights plans (or "poison pills"), which have long been the primary defensive tactic used by Canadian target boards faced with a hostile bid. As a result, tactical private placements, which are sometimes thought to present an alternative defensive tactic available to target boards, have experienced renewed interest amongst public issuers.

Key Elements of the New Bid Regime

The New Bid Regime came into effect on May 9, 2016 and represents the culmination of lengthy efforts on the part of the Canadian Securities Administrators (CSA) to modernize the rules governing Canadian take-over bids and to rebalance the dynamics among Canadian targets, target

1. (2016), 39 OSCB 8927 and 2016 BCSECCOM 359.

boards, target shareholders and prospective bidders.

The three key elements of the New Bid Regime are:

1. **105 Day Requirement.** All non-exempt take-over bids must remain open for a minimum of 105 days (rather than 35 days under the old take-over bid regime), subject to a target board's ability to reduce the bid period. The extension of the minimum bid period to 105 days is aimed at addressing concerns that target boards do not currently have enough time to respond to hostile take-over bids.
2. **Minimum Tender Requirement.** All non-exempt take-over bids must be subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the take-over bid. The purpose of this requirement is to ensure that the acquisition of control of a target through a take-over bid will occur only if a majority of independent shareholders support the transaction.
3. **10-Day Extension Requirement.** All non-exempt take-over bids must be extended by the bidder for at least an additional 10 days after the bidder achieves the mandatory minimum tender condition and all other terms and conditions of the bid have been complied with or waived. This requirement is aimed at alleviating the concern that target shareholders will be coerced into tendering their shares before the initial expiry of the bid (for example to avoid the risk of being left behind as a minority shareholder of an issuer with a controlling shareholder).

Implications of the New Bid Regime for Shareholder Rights Plans

One of the implications of the New Bid Regime is its effect on shareholder rights plans. Poison pills have been used by target boards to buy additional time beyond the 35-day minimum bid period that existed under Canada's old take-over bid regime so that the target board could, among other things, have more time to properly evaluate the bid, allow more time for competing bids to emerge and give directors more opportunity to explore alternatives to the hostile bid that might enhance shareholder value.

Although the New Bid Regime does not explicitly ban rights plans, their use as a means of blocking a bid or extending time are extremely limited under the New Bid Regime in light of the new longer statutory minimum bid period of 105 days. The principal purpose of rights plans going forward will be to prevent "creeping" bids.

Implications of the New Bid Regime for Tactical Private Placements

Given the limited use of shareholder rights plans under the New Bid Regime, target boards are likely to look for alternative defenses to hostile bids. One such alternative defence may include an increase in private placement activity where a target company issues shares to a friendly party with the consequence that it will make it more difficult for a hostile bidder to achieve the Minimum Tender Requirement (i.e. tactical private placements) to complete a take-over of the target company. While the Canadian securities regulators have considered the use of private placements several times in the context of a take-over bid, regulators had not, until the *Hecla Mining* dispute, had the opportunity to respond to a claim by a bidder operating under the New Bid Regime that a target company had used a private placement as an inappropriate defensive tactic.

The *Hecla Mining* Dispute

The basic facts of the *Hecla Mining* dispute are as follows:

- Hecla Mining Company made an all-cash offer for all of the outstanding common shares of Dolly Varden Silver Corporation.
- Hecla first announced its intention to proceed with the offer on June 27 and formally commenced the offer on July 8.
- A few days later, Dolly Varden communicated to its shareholders that they should take no action with respect to the hostile bid, and that Dolly Varden would be proceeding with a private placement it had previously announced on July 5.
- Hecla's offer was subject to a number of conditions, including that the private placement announced on July 5 would be abandoned by Dolly Varden.

On July 8 and July 12, Hecla filed applications with the BCSC and the OSC respectively, seeking to cease trade the private placement on the basis that it was an abusive defensive tactic in contravention of Canadian securities laws. At the time of these applications, Dolly Varden had not received approval from the stock exchange for the private placement, nor had the private placement closed. As such, Dolly Varden agreed not to close the private placement until Hecla's applications had been resolved.

On July 25, the commissions released their decisions dismissing Hecla's application, thus allowing Dolly Varden to proceed with the private placement.

In their joint reasons, the commissions explained that they had determined that the private placement had been instituted for non-defensive business purposes because: (i) Dolly Varden was contemplating an equity financing considerably in advance of Hecla's announcement of the offer (and therefore it was not implemented for the tactical purpose of circumventing the bid); (ii) the private placement had not been modified in response to the bid so as to become defensive in character; (iii) the size of the private placement and the decision to proceed with the private placement was reasonable in light of Dolly Varden's liabilities and planned activities (including the fact that Dolly Varden needed cash); and (iv) given the history between the parties, Hecla could reasonably have expected that Dolly Varden would seek to raise money through an equity financing.

Guidance for Assessing Tactical Private Placements After the *Hecla Mining* Dispute

While the *Hecla Mining* decision does not make any fundamental change to the way in which private placements are viewed by securities regulators, the decision provides capital markets participants with important guidance on the use of private placements as a defensive tactic under the New Bid Regime.

The decision also outlines the following framework for conducting the analysis of a private placement in the take-over bid context:

1. Is the private placement clearly <u>not</u> a defensive tactic?

The starting point is to consider whether the evidence clearly establishes that the private placement is not, in fact, a defensive tactic designed, in whole or in part, to alter the dynamics of the bid process.

In terms of the evidentiary burden, where a bidder is able to establish that the impact of a private placement on an existing bid environment is material, then the target board has the onus of establishing that the private placement was not used as a defensive tactic.

In determining whether the private placement is clearly not a defensive tactic, the following non-exhaustive list of considerations is relevant:

- whether the target has a serious and immediate need for financing;
- whether there is clear evidence of a bona fide, non-defensive, business strategy adopted by the target; and
- whether the private placement has been planned or modified in response to, or in anticipation of, a bid.

2. Should the securities regulators intervene?

If a transaction fails the first branch of the test, and is or may be a defensive tactic, the analysis does not stop there. The securities regulators will still need to determine whether or not it is appropriate to intervene.

In determining whether to intervene in a tactical private placement, the following non-exhaustive list of considerations is relevant:

- whether the private placement would otherwise benefit the target company's shareholders;

- the extent to which the private placement alters the pre-existing bid dynamics;
- whether the investors in the private placement are related parties to the target or whether there is some evidence that some or all of them will act in such a way as to enable the target's board to "just say no" to the bid or a competing bid;
- whether there is any information available about the views of the target company's shareholders with respect to the take-over bid and/or the private placement; and
- where a bid is underway as the private placement is being implemented, whether the target's board appropriately considered the interplay between the private placement and the bid, including the effect of the resulting dilution on the bid and the need for financing.

Of course, even where these considerations are not engaged, regulators retain broad jurisdiction to intervene to protect the capital markets.

Until Next Time…

The fact that Dolly Varden had agreed with the commissions not to close the private placement until Hecla's application had been resolved, taken together with the fact that the commissions decided against Hecla, was critical to the analysis. This fact left open (presumably, for another day…) a full discussion of what remedies might be available to a successful applicant in the context of a private placement that's already closed.

On the subject of remedies, the commissions did make two important observations.

The first is that, once completed, unwinding a completed financing transaction will involve potentially difficult issues denying the target and its shareholders and the investors in the private placement of the benefits of the contractual commitments that have been made.

The second is that, if the private placement has the effect of preventing a bidder from satisfying the Minimum Tender Condition, a bidder could potentially seek relief from securities regulators to exclude the shares issued in a private placement, for the purpose of determining whether the Minimum Tender Condition has been satisfied. Given that the objective of most bids is to acquire 100% ownership of a target company, this remedy will likely only be satisfactory to a bidder where it could still reasonably acquire enough securities in order to be able to complete a second-step, takeout transaction for the minority position post-bid.

The other issue that didn't get addressed in the joint reasons is the issue of forum. That is, when is it appropriate for securities regulators, as opposed to stock exchanges or courts to consider the appropriateness of a private placement in the take-over bid context? In the *Hecla Mining* dispute, the courts were not involved, and the stock exchange had not yet approved the private placement at the time of the hearings, and so the issue of forum did not arise.

Conclusion

The New Bid Regime helps level the playing field in favour of boards who have long expressed the view that the former take-over bid regime was too bidder friendly. These changes will have a significant impact on the Canadian mining sector, which accounts for approximately 40% of the number of listed companies on the Toronto Stock Exchange and TSX Venture Exchange.

Even with that playing field levelled, we anticipate that boards of directors will still consider a range of defensive tactics in the face of hostile bid activity, including potentially private placements. While any private placement will need to be examined in light of its own unique factual background, the *Hecla Mining* decision provides capital markets participants with guidance (including a framework) for assessing the use of tactical private placements under the New Bid Regime. The guidance and framework provided is largely based on decisions of the securities regulators that pre-date the New Bid Regime, but takes into account the new dynamics for hostile bids under the New Bid Regime.

Securities/Shareholder Disputes

Aidan Cameron, Kate Macdonald, Martin Thiboutot and Laura DeVries

AUTORITÉ DES MARCHÉS FINANCIERS (AMF) V. LIVE, 2016 QCCQ 12824

In this decision, the Court of Québec found the defendant guilty of insider trading pursuant to ss. 187 and 189(6) of the Québec *Securities Act*.

Consolidated Thompson Iron Mines Limited (Consolidated) and Quinto Mining Corporation (Quinto) were exploring an iron deposit in northern Québec. On April 17, 2008, the defendant, Mr. Live, purchased 5,000 Quinto shares (the Shares). On April 21, 2008, Consolidated and Quinto issued a joint press release announcing that Consolidated would acquire all of Quinto's outstanding shares (the Acquisition). One of the conditions of the Acquisition was the completion of a technical audit to Consolidated's satisfaction. Consolidated hired BBA to undertake this audit. Mr. Live, an employee of BBA, was BBA's designated project manager for the technical audit. The Autorité des marchés financiers (prosecutor) argued that Mr. Live acquired the Shares when he had inside, or "privileged," information about the Acquisition by virtue of his position as auditor.

The Court agreed, finding that Mr. Live must have known of the Acquisition when BBA was hired for the technical audit in early April 2008. Moreover, Mr. Live was an experienced specialist in open-pit mining and although it was not the first time he traded mining companies' shares, it was the first time he had purchased Quinto shares, and he did so very shortly before the Acquisition was announced. The Court concluded that these facts were not a coincidence.

The Court then considered whether the information about the Acquisition was privileged for the purposes of s. 5 of the Québec *Securities Act*, which requires that: (1) the information has not been disclosed to the public; and (2) the information could affect the decision of a reasonable investor. Referring to National Policy 51-201, the Court found that while the public had some general information about Consolidated and Quinto, it did not know about the Acquisition. The Court also concluded that a reasonable investor aware of the Acquisition could have traded in a different way, but found that the timing here was exceptional even taking into account the fact that purchasing shares in a mining company is generally a high-risk investment and that this was the first time Mr. Live had purchased Quinto shares.

MCCABE V. BRITISH COLUMBIA (SECURITIES COMMISSION), 2016 BCCA 7

This year the British Columbia Court of Appeal heard appeals from two decisions of the B.C. Securities Commission in a misrepresentation case.

Through his corporation, Jack Landon Publishing, Mr. McCabe wrote and published three reports promoting shares in Guinness, a Nevada mining corporation. Guinness was a deemed reporting issuer in B.C. but only traded in the United States. The reports falsely stated that Guinness' mining property had in excess of one million ounces of gold. The reports were published in South Dakota, and then distributed to approximately three million homes in the United States. There was no evidence that any person in British Columbia knew of, or read, any of the reports.

Mr. McCabe was charged by the Commission with breaching s. 50(1)(d) of the B.C. *Securities Act*, (Act), which prohibits misrepresentations. Mr. McCabe's application for a stay of proceedings on the basis that B.C. was not the appropriate jurisdiction was rejected by the Commission, and the Commission subsequently held that Mr. McCabe breached s. 50(1)(d) of the Act.

Mr. McCabe appealed both decisions, arguing that the Commission lacked jurisdiction because the impugned conduct took place in the United States. The Court held that the Commission did have jurisdiction, finding a real and substantial connection between the appellant's conduct and the province of British Columbia because Mr. McCabe's publications originated in B.C. In applying this test, the Court held that it must be cognizant of the realities of modern securities regulation which is often transnational in nature, crossing provincial and national boundaries, and investors from outside the province must be protected from unfair or fraudulent activities.

MISREPRESENTATIONS UNDER SECURITIES LEGISLATION ARE NOT ANALOGOUS TO TORTS.

The Court also rejected Mr. McCabe's argument that a misrepresentation under s. 50(1)(d) of the Act was analogous to the torts of misrepresentation and defamation, which only occur when the offending statement is read or acted upon. The Court held that while tort law is intended to protect individuals who have been injured by the conduct of another person, securities regulation is designed to regulate behaviour and not to remedy harm to victims. Further, the material element of the misrepresentation offence is that the representation was made, not that the misrepresentation was received or acted upon.

For more on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post entitled "The Long Arm of the B.C. Securities Commission."

RAGING RIVER CAPITAL LP V. TASEKO MINES LIMITED, 2016 BCSC 2302

In this decision, the B.C. Supreme Court determined that failing to allow shareholders to vote on a major transaction and failing to disclose a potential conflict of interest did not amount to oppressive conduct.

Taseko Mines Ltd. (Taseko) owns the Gibraltar mine near Williams Lake. Raging River Capital LP (Raging River) and Michael Scott Davis were both shareholders in Taseko. At a board meeting in May 2014, the acquisition of all the shares in Curis Resources Ltd. (Curis) was proposed. During the meeting, certain members of Taseko's board (the Respondents) declared a possible conflict of interest because of their shareholdings in Curis. Both Taseko and Curis established a special committee of independent directors to consider the transaction, and the Respondents recused themselves from any involvement in the transaction as directors. After a formal valuation and fairness opinion, the independent committee recommended proceeding with the transaction, and, soon after, Taseko's board approved it. As a result of their shareholdings in Curis, the Respondents would collectively receive an interest valued at about $4.2 million.

Taseko filed a material change report (MCR) in relation to the transaction, which described the acquisition. The MCR did not disclose the Respondent's interest in Curis, but this information was disclosed in an Information Circular issued by Curis a month later.

In October 2014, the TSX and NYSE approved the Curis transaction after Taseko informed both that it would not be seeking shareholder approval of the transaction. Soon after, Taseko closed on the transaction. Raging River and Mr. Davis filed a petition in dissent, seeking a declaration that the Curis transaction was oppressive.

Applying the approach set out by the B.C. Court of Appeal in *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193, the Court first considered whether Raging River and Mr. Davis had a reasonable expectation that Taseko shareholders would get the chance to vote on the Curis transaction, or that Taseko would disclose the conflicting interests of its directors and officers. Significantly, Raging River had not become a shareholder until almost 15 months after the Curis transaction was completed. The time at which to consider the reasonable expectation of a shareholder is when the shareholder acquired its shares. For this reason, Raging River could not establish a reasonable expectation upon which to base an oppression action. As for Mr. Davis, the Court similarly found no evidence suggesting he had a reasonable expectation about the opportunity to vote on the transaction. With respect to the failure to disclose a conflict of interest, the Court noted that, objectively considered, the expectation that the directors of Taseko would disclose a mere $4.2 million interest in the midst of an $85 million transaction was unreasonable. Such an interest was not material, especially in light of Taseko's near $1 billion in assets.

Since neither Raging River nor Mr. Davis had established the reasonable expectations precondition, their oppression petition failed.

SHEFSKY V. CALIFORNIA GOLD MINING INC., 2016 ABCA 103

In this decision, the Alberta Court of Appeal considered whether a corporation had acted oppressively. In doing so, the Court demonstrated the high threshold required to establish oppressive conduct.

California Gold Mining Inc. is a junior mining company listed on the TSX-Venture Exchange. It had unsuccessfully attempted to raise money to purchase a gold mining property in Mariposa County, California. The appellant Mr. Shefsky was introduced as a person who may be able to assist in raising the necessary funds. In 2012, California Gold Mining signed a term sheet with Shefsky, pursuant to which Shefsky would raise capital through private placements in the amount of $5 to 8 million, and in exchange would exercise significant control of the company as CEO. He would also be able to name three of five directors to the board.

After Shefsky raised the money, his nominee was unavailable and he did not have another nominee immediately ready. There was also some resistance amongst incumbent board members to the changes, and later efforts to make an appointment to the board were denied. Subsequently, the board put forward a secret private placement that was approved and which diluted the value of Shefsky's shares.

Shefsky commenced litigation, arguing that the corporation had acted oppressively, in a manner that unfairly disregarded his interests as a shareholder. The Court of Queen's Bench dismissed the motion, finding that Shefsky had a reasonable expectation that the term sheet would be honoured, and that he would be able to appoint a director, but that the expectations had not been violated. Shefsky was found to have not had a reasonable expectation that he would gain control of the company.[1]

FAILURE TO DISCLOSE $4.2 MILLION INTEREST IN MIDST OF $85 MILLION TRANSACTION IS NOT UNREASONABLE.

A majority of the Court of Appeal dismissed Shefsky's appeal, holding that Shefsky had no reasonable expectations with respect to the term sheet or gaining control. Nor did Shefsky have a reasonable expectation with respect to the secret private placement not proceeding. The Court held that directors must make decisions in the best interests of the corporation (not its shareholders), and that directors were entitled to deference in respect of their decisions.

1. The Court of Queen's Bench decision is discussed in *Mining in the Courts*, Vol. V.

Amendments to Québec *Mining Tax Act* and to Refundable Tax Credit for Resources

Ryan Rabinovitch, Angelo Discepola and Andrew Haikal

A number of mining-related (and largely taxpayer-friendly) amendments were introduced by the Québec Government as part of its 2016-2017 Budget. This article provides an overview of the amendments and their expected impact on companies engaged in mining activities in Québec.

Mining Tax Changes

Adjusted Annual Profit

Very generally, the *Mining Tax Act* (Québec) (the Mining Tax Act) imposes a “toll charge” on operators (taxpayers, for the purposes of the Mining Tax Act) who cease all activities related to their “mining operation” and consequently cease to be subject to Québec mining tax. This “toll charge” is imposed by deeming such an operator to dispose of all its depreciable property for an amount equal to the lesser of the property’s cost or its fair market value. As such, the operator is required to include/deduct in its “annual earnings” (which are relevant in computing its “annual profit” and thus, its Québec mining tax) for the fiscal year, any recaptured depreciation/terminal loss realized as a result of the deemed disposition. This inclusion or deduction may affect the operator’s “profit margin” for mining tax purposes in an artificial manner (since the relevant recaptured depreciation or terminal losses represent notional, rather than actual profits/losses), and in turn have an impact on the rate of mining tax that the operator pays. This is because under Québec’s new “graduated rate” system, operators pay a higher rate of tax on segments of their annual profits representing higher levels of profitability.[1]

In order to eliminate the distortive impact of the deemed disposition described above, and effective for any fiscal year beginning after December 31, 2013, the Mining Tax Act will be amended

1. Segments representing a profit margin of between 0% and 35% are subject to tax at a rate of 16.0%, segments representing a profit margin of between 35% and 50% are subject to tax at a rate of 22.0%, and segments representing a profit margin of over 50% are subject to tax at a rate of 28.0%.

so that an operator may elect to rely on its "adjusted annual profit," rather than its annual profit, in determining its annual profit margin for the fiscal year ending immediately before it ceases its mining activities. An operator's adjusted annual profit will be equal to the operator's annual profit for a fiscal year, without taking into account any amount included in its "annual earnings" as recaptured depreciation or deducted as a terminal loss reasonably attributable to the operation of the mine.

Tax Deferral and Cessation of Operations

The Mining Tax Act provides for a "rollover" (disposition by the vendor and acquisition by the purchaser for an amount equal to the tax cost of the relevant asset) of depreciable property transferred to a related person. The transferor is therefore not required to include any recapture in its annual earnings for the fiscal year of the transfer. This rollover applies regardless of whether or not the transferee is an operator. However, a person who is not an operator is not a taxpayer for the purposes of the Mining Tax Act. Thus, where the transferee is not an operator, the mining tax on the amount of recapture that was not included in the operator's annual earnings is lost indefinitely (i.e. no recapture will be realized and taxed when the asset is eventually sold). In order to address this issue, and effective for transfers on or after March 17, 2016, the Mining Tax Act will be amended so that the rollover treatment will only be available when the purchaser of the property is an operator (and therefore subject to Québec mining tax).

ROLLOVER TREATMENT WILL ONLY BE AVAILABLE WHEN PURCHASER OF PROPERTY IS AN OPERATOR.

Another change regarding the tax-deferral for related-party transfers relates to its interaction with the deemed disposition described in the preceding section. An operator may be considered to have ceased to carry on activities related to its mining operation as a result of a transfer of all of its assets on a tax-deferred basis to a related person. This creates an apparent conflict: the rollover provision suggests that the operator is deemed to dispose of its depreciable property for an amount equal to its tax cost, and the deemed disposition upon cessation of activities provision suggests that the disposition is deemed to occur at fair market-value (in which case, no rollover is available).

In order to address this conflict, the Mining Tax Act will be amended in order to deem an operator to have disposed of property on a rollover basis where the operator has ceased to carry on activities related to its mining operation as a result of a transfer of all of its assets on a tax-deferred basis to a related party who is also an operator. This amendment will apply to dispositions of property as of March 17, 2016, and will also apply on an elective basis to dispositions occurring after May 5, 2013.

Valuation of Gemstones

The Mining Tax Act requires that the gross value of the annual output of gemstones of an operator for a fiscal year be determined by both the operator and a valuator engaged by the Québec Minister of Revenue (Minister). The legislation currently provides that an operator is bound to reimburse the Minister for the fees paid to this valuator. The Mining Tax Act will be amended so that an operator will no longer be required to reimburse the Minister for such fees. A new rule will also be introduced to require an operator to provide the facilities and equipment, other than computer equipment, enabling the valuator to value the gemstones.

These changes will apply for fiscal years ended after March 17, 2016.

Refundable Tax Credit for Resources

Very generally, a "qualified corporation" (i.e., a corporation that has an establishment and carries on a business in Québec, except for a corporation that is exempt from tax or a Crown corporation) that incurs expenses related to certain resources may claim a refundable tax credit at a rate of up to 31% of the amount of such expenses. This rate varies according to a number of parameters, including the type of resource to which the expenses relate (mining, oil or natural gas, renewable energy, cut stone, etc.), the place where the expenses are incurred (Near North, Far North, or elsewhere in Québec) and whether the corporation exploits a mineral resource or an oil or gas well.

With respect to expenses relating to mining resources incurred in the Near North or Far North of Québec, the *Taxation Act* (Québec) will be amended to increase the applicable rates. Consequently, these rates will increase from 31% to 38.75% if the corporation does not exploit a mineral resource or an oil or gas well, and from 15% to 18.75% in other situations. This constitutes a return to the rates that were previously in effect, and that had been decreased following the 2014-2015 Budget.

This amendment will apply to eligible expenses incurred after March 17, 2016.

Tax

Bianca Depres and Laura DeVries

WESDOME GOLD MINES LTD. V. AGENCE DU REVENU DU QUÉBEC, 2016 QCCQ 1504

In this decision, the Court of Québec considered whether a company could claim Canadian exploration expense tax credits under the Québec *Taxation Act* in relation to a mine that was placed under care and maintenance for a period of time before the exploration was conducted.

In 2002, the Kiena mine was placed under care and maintenance and put up for sale. Although there were still some known and extractable resources, these were insufficient in quality and quantity to justify maintaining activities at the mine.

In 2003, Wesdome Gold Mines Ltd. purchased the Kiena mine in order to obtain access to previously identified targets at an exploration property located to the north by extending an access shaft in the Kiena property. The exploration program was successful and, after several years, processing activities recommenced at Kiena.

Wesdome subsequently claimed over $2 million in "Canadian exploration expenses" as tax credits under s. 395(c) of the Québec *Taxation Act*, which allows credits for expenses incurred "to determine the existence of a mineral resource in Canada, to locate such a resource or to determine the extent or quality of such a resource […] <u>other than Canadian development expenses or any expense that may reasonably be related to a mine in the mineral resource that has come into production in reasonable commercial quantities</u> or to an actual or potential extension of such a mine" (emphasis added).

The Québec Revenue Agency (ARQ) assessed taxes on the basis that Wesdome's related expenditures did not qualify for the Canadian exploration expense credits because the exploration work related to a mine that had reached the stage of "production in reasonable commercial quantities or to an actual or potential extension of such a mine" and thus fell into the exception set out in s. 395(c). The ARQ argued that a mine placed under care and maintenance and later reopened for exploration purposes does not necessarily become a new mine: rather, the exploration was part of a “continuum” of an existing mine.

Wesdome argued that when the mine was under care and maintenance, it was not economically viable and for all practical purposes, the mine was closed; thus, at the time the exploration was conducted, Kiena was not a mine that had “come into production in reasonable commercial quantities,” even though it had been such a mine in the past.

The Court found that it was not necessary to decide what was a “mine” in order to dispose of the case. Instead, it focused on the purposes of the tax credits: namely, to help the mining industry in difficult times and to foster exploration that could potentially lead to the discovery of deposits. The Court concluded that these were economic considerations. Therefore, an interpretation of s. 395(c) that excluded exploration work at a mine placed under care and maintenance for economic reasons was too restrictive, and the concept of “continuum” proffered by the ARQ was rejected. In the result, Wesdome was entitled to the tax credits.

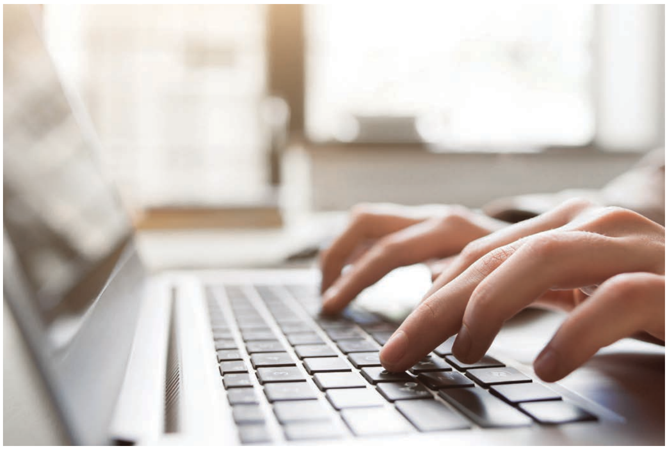
Torts

Aidan Cameron and Kate Macdonald

TASEKO MINES LTD. V. WESTERN CANADA WILDERNESS COMMITTEE, 2016 BCSC 109

In this case, the British Columbia Supreme Court considered whether an environmental organization's public commentary about a mining project constituted defamation. The decision demonstrates the high bar for a successful defamation claim and also provides an important reminder about potential costs consequences for improperly seeking punitive damages.

Taseko Mines Ltd. sought federal and provincial government approval for an open pit mine near Williams Lake. The first proposal was rejected. During the review process for Taseko's alternate proposal, the Canadian Environmental Assessment Agency invited public comment on two documents related to the review. During the time for public comment, Western Canadian Wilderness Committee published three articles on its website, urging members of the public to speak out against Taseko's proposed open pit mine. In March 2012, Taseko filed a notice of civil claim alleging defamation against the Wilderness Committee and Mr. Biggs, a former director and author of two of the articles. Subsequently, the Wilderness Committee posted two more articles, this time accusing Taseko of launching a SLAPP suit (strategic lawsuit against public participation). Taseko amended its claim to include those further articles and sought punitive and special damages against the Wilderness Committee.



The Court held that the first three Wilderness Committee articles were not defamatory. While they met the first and second requirements for the tort of defamation by referring to Taseko and being published, they did not meet the third requirement, which is that the words must "lower the plaintiff's reputation in the eyes of a reasonable person." The Court noted that a reasonable person would simply view the articles as part of the wider debate surrounding the proposed mine, and that Taseko's reputation would not be lowered. The Court also found that the defence of fair comment was made out for those articles, as they were (i) commentary about a matter of public interest, (ii) based on fact, (iii) recognizable as opinions, (iv) based on an objectively honestly held belief, and (v) free of malice. While the fourth and fifth articles were held to be defamatory because a reasonable, law-abiding person would not use litigation to improperly silence critics, the Court found that the defence of fair comment was made out for them as well.

The Court then considered Taseko's claim for punitive damages, which it characterized as an economic threat made against the Wilderness Committee that was potentially intended to silence critics. The claim was unreasonable, especially after the first environmental assessment was released, which cohered with many of the Wilderness Committee's published opinions. In this context, the Court awarded special costs to the Wilderness Committee starting from one month after the first environmental assessment, during which period the Court found that Taseko should have reconsidered its decision to seek punitive damages.

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