



INVESTORS' GUIDE TO MINING IN CANADA

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INTRODUCTION

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INTRODUCTION

MINING IN CANADA

Canada is a leader in the global mining industry. It is one of the world's largest producers of minerals and metals, producing more than 60 mineral commodities annually. Canada is rich in the key industrial minerals (metallurgical coal and potash) and in metals (gold, iron, steel, lead, nickel, aluminium, copper, uranium and zinc). In 2010, Canada ranked first in global production of potash, second in uranium, third in aluminium and titanium concentrate, fourth for elemental sulphur and nickel, and fifth for platinum-group metals. There are more mining companies based in Canada than in any other country in the world. In 2010, the total value of minerals produced in Canada totalled more than \$41 billion.

The success of Canada's mining industry stems not only from an abundance of natural resources and first-rate production and processing capabilities, but also from a stable and favourable legal and tax regime designed to support the industry. Canada welcomes foreign investment in the mining sector with a fair, open and competitive environment for foreign investors.

Canada is also a major source of financing for mining exploration and development companies around the world. The Toronto Stock Exchange (the "**TSX**") and its related junior venture exchange (the "**TSX-V**") (collectively, the "**TMX Group**") combine to create one of the world's strongest public markets for international mining finance.

- 58% of the world's mining companies are now listed on the TMX Group, making the TMX Group home to the largest concentration of mining companies in the world.
- These companies range from grassroots explorers to world-class producers.
- TMX Group added 208 new mining listings in 2010.
- In 2010, mining companies listed on the TMX Group raised \$17.8 billion in equity financing, while mining companies raised \$2.2 billion on the AIM, \$2.1 billion on the London Stock Exchange and \$1.9 billion on the Australian Securities Exchange.
- The value of mining company shares traded on the TMX Group in 2010 exceeded \$416 billion.

The TMX Group offers more flexible regulation than the United States, resulting in a less costly initial and continuous listing process, and listing criteria that are specific to the mining sector. The TSX's listing fees are competitive and its rules facilitate both small and large financings. The TSX acts as a gateway to North American liquidity pools with a significant U.S. investor base and has the capacity to cover the full spectrum of enterprises from micro cap to large multinationals.

As a result of Canada's long history of mining activity and the strength of its mining finance markets, Canada is also an international centre for geological, environmental, engineering, legal, accounting and other professional services required by mining investors and companies.

THE CANADIAN LEGAL SYSTEM

Canada is a federal state with one federal, 10 provincial and three territorial governments. Under the Canadian Constitution, the federal Parliament has jurisdiction over matters concerning Canada as a whole, such as international trade, trade between provinces, national defence, ports, currency and broadcasting. The federal Parliament is also responsible for the Yukon territory, the Nunavut territory and the Northwest Territories, which have been given some authority to govern themselves on local matters. In addition, Canada's native peoples exercise limited self-government.

The 10 Canadian provincial governments have authority to make laws concerning such matters as property, contracts, natural resources, employment, land use and planning, education, health care and municipalities. Most laws in Canada of a commercial nature will therefore be provincial laws.

Mining activities for the most part are governed by the laws of the province or territory in which a mine is physically located, although the laws of other jurisdictions may also be relevant to matters such as financings, the issuance of securities and environmental regulation. In addition, the federal government has overlapping jurisdiction in a number of areas such as taxation and the environment.

THIS GUIDE

Davies has produced a guide titled *Doing Business in Canada* which summarizes important information relevant to foreign investors interested in acquiring Canadian companies or otherwise operating a business in Canada. We have also produced the guides *Canadian Mergers and Acquisitions* and *Investment Canada Act*. These guides are available at www.dwpv.com or you can contact us directly for copies. This *Investors' Guide to Mining in Canada* guide supplements these other publications and provides additional information for foreign investors interested in investing in the Canadian mining sector, either by acquiring Canadian mining companies or by acquiring and developing Canadian mining properties.

Acquiring Canadian Mining Interests

Acquiring Canadian Mining Interests

Mining interests may be acquired in a variety of different types of transactions. Generally, the way in which a mining interest is acquired is a matter for negotiation between the buyer and seller, although legal and tax issues are often key determinants in selecting the appropriate form of transaction.

DUE DILIGENCE

Prior to the acquisition of any mining interests, a purchaser must conduct a thorough due diligence review in order to:

- confirm the existence and validity of the mineral rights and other assets being acquired and identify any title defects or encumbrances that may exist;
- identify the tax, environmental, contractual and other liabilities to which a purchaser may become subject;
- determine whether a change of control of the seller will have any adverse consequences or require any governmental or other third-party consents;
- review the geological, mineralogical, operating, accounting and other data necessary to confirm the purchaser's understanding of the assets being acquired;
- identify any existing or pending lawsuits or other such potential liabilities;
- determine whether there are any management or employee issues that may be relevant to the purchaser; and
- establish the informational base from which to negotiate the seller's representations and warranties in the purchase agreement.

A due diligence review may be conducted prior to or in parallel with the negotiation of business terms and the preparation of final legal documents. While some purchasers conduct significant portions of the due diligence review themselves, it is also common for purchasers to retain the services of outside advisers, such as lawyers, accountants and mining engineers to conduct key aspects of the review on their behalf.

TYPES OF ACQUISITIONS

Interests in mineral properties in Canada are generally acquired in one of the following ways:

(a) Joint Ventures

A mining joint venture agreement is an agreement entered into by two or more parties to pool capital and skills for the purpose of exploring, developing and operating a mining property. Parties enter into joint venture arrangements principally to share the significant financial and operating risks involved in developing mining properties. The considerations relevant to joint ventures are described in more detail below under the heading *Options and Joint Ventures - Joint Venture Arrangements*.

(b) Exploration and Mining Rights

If a party wishes to explore for a mineral property in Canada, it must first obtain exploration rights over the property under the relevant provincial or territorial mining legislation. Once a successful exploration program is completed, any party wishing to construct and develop a mine on the property must obtain a mining licence together with environmental and other permits. The Canadian mining law regime applicable to exploration and mining rights is described below under the heading *Exploration and Mining Rights*.

(c) Acquisitions of Existing Mining Properties

Where existing mining properties are held by companies, the properties may be acquired directly from the companies in an asset acquisition or the company itself may be acquired by purchasing newly issued shares or existing shares from current shareholders.

(i) *Acquisitions of Outstanding Shares* - In a share acquisition, a purchaser acquires a mining company by acquiring all of the outstanding shares of the company. The purchaser may pay for the shares with cash, other property, shares of the purchaser or any combination of these. Absent an agreement to the contrary, the purchaser of all of the shares of a company will acquire all mineral rights held by the company together with all other assets held by the company, such as inventory, cash, equipment, and intellectual property. The purchaser will also acquire all of the company's known and unknown obligations and liabilities for such matters as taxes, environmental and mine closure responsibilities, supply contracts, royalties and employee wages and benefits. Where a public company is to be acquired, see below under the heading *Acquisitions of Public Mining Companies* regarding the special considerations that will apply.

(ii) *Acquisitions of Newly Issued Shares* - A purchaser may also acquire an interest in a public or private mining company by purchasing newly issued shares being offered for sale by such mining company. Such shares can be issued to the public pursuant to (a) a prospectus (a detailed and lengthy disclosure document disclosing all material facts about the mining company and the shares being offered) or (b) an exemption from the requirement to provide a prospectus to purchasers where shares in a public or private company are to be acquired without a prospectus. See below under the heading *Private Placement Share Acquisitions* for a description of the legal regime governing the issuance of shares without a prospectus in Canada.

(iii) *Acquisitions of Public Mining Companies* - Where mineral properties are held by Canadian public companies, these companies may be acquired by way of various M&A transactions such as public take over bids and plans of arrangement. If a target company is listed on a Canadian stock exchange, shareholder approvals may be necessary even if the transaction does not constitute a takeover bid for securities law purposes. Please refer to the Davies guide *Mergers and Acquisitions in Canada* for a detailed summary of the legal and other issues relevant to the acquisition of public companies.

(iv) *Acquisitions of Assets* - In an asset acquisition, a purchaser acquires some, substantially all or all of a company's assets. For example, a purchaser may negotiate to purchase only the mining rights, equipment and other assets relating to a single mining property, and all other assets and liabilities of the selling company would remain with the selling company. Payment may be made with cash, shares of the purchaser or some other form of consideration.

(d) Choosing Between Asset and Share Acquisitions

There are a number of important factors a purchaser must consider in deciding whether to acquire shares of a mining company or to acquire a specific mining asset from the company instead. In many cases, the choice between an asset and share acquisition is determined by commercial considerations rather than strict legal requirements. For example, an asset sale may be preferred where the seller owns both the mineral property being sold and other assets it intends to keep. Where all of the assets of a company are being sold, the parties

may prefer a share sale because of its greater simplicity. The structure of an acquisition transaction will be determined by negotiation between the parties, and the following commercial, tax and legal issues will affect their decision:

TAX ISSUES

The *Income Tax Act* (Canada) (the "**Tax Act**") contains rules that limit the deductibility of various development and exploration expense pools of a seller by a purchaser corporation that purchases all or substantially all of the resource properties of the seller. These rules also apply on the change of control of a corporation. As a result, the transferability of these expense pools is generally not a relevant consideration in determining whether to structure the sale of a mining business as a share sale or an asset sale.

A seller will generally prefer selling shares rather than selling the assets of a corporation. The primary advantage to the seller of selling shares is the certainty that any gain on the sale will be taxed as a capital gain, only one-half of which is taxable under Canadian tax law.

A purchaser will generally prefer to purchase the assets of a corporation. The main advantage to the purchaser is that normally the assets of the business will be acquired at a higher tax value and the purchaser will be entitled to a higher capital cost allowance deduction. In addition, the purchaser of assets will generally not assume the vendor's past tax liabilities. Moreover, although a sale of assets could be subject to retail sales tax or land transfer tax, these taxes will not generally apply to the majority of assets of a mining business.

Notwithstanding the tax preferences of purchasers, the non-tax considerations favouring a share sale are generally considered to outweigh the tax benefits that a purchaser may enjoy from purchasing the assets of a business, and accordingly, most sales of mining businesses in Canada are structured as share sales. See *Tax Considerations* below for a more detailed discussion of the tax considerations relevant to Canadian mining companies generally.

PRE-EXISTING LIABILITIES

As a general rule, the buyer of assets will assume only those liabilities of the seller that it had agreed to assume in its negotiations with the seller. However, notwithstanding any agreement between a buyer and a seller to restrict the assets and liabilities being acquired, certain obligations or liabilities may be imposed on the buyer as a matter of law. For example, pursuant to environmental legislation, the seller of a mining property will remain liable for environmental obligations existing prior to the sale, and the buyer of a mineral property will be liable for any historical environmental liabilities even if caused by previous owners. In addition, pursuant to provincial labour legislation in most provinces, a buyer may, in certain circumstances, be deemed to be a successor employer of the seller and therefore liable for collective bargaining and other employee obligations. Notwithstanding these exceptions, a buyer will generally prefer an asset sale as the simplest structure to avoid unwanted liabilities of the seller.

SHAREHOLDER APPROVALS

Most Canadian corporate statutes require shareholder approval of any sale, lease or exchange of all or substantially all of the property of a corporation outside of the ordinary course of its business. These statutes also provide dissenting shareholders with the right to be paid the fair value of their shares. Parties must give careful consideration to the possible application of these requirements whenever a substantial portion of a company's assets is being sold and the selling company has multiple shareholders.

SIMPLICITY

As a general rule, share sales are simpler to complete than asset sales. In order to complete an asset sale, the seller must transfer each individual asset to the purchaser. In many cases, this can be accomplished in the asset purchase agreement with little legal formality. For assets such as mineral and surface rights, mobile equipment and contractual rights, however, formal government registrations and government and other third-party consents may be required.

To complete a share sale, by contrast, a seller need only transfer the shares to the buyer in order for ownership of the company and all of its assets to be transferred. There may be instances, however, where a company's licences, permits or other contractual commitments require government or other third-party consents if a change of control occurs in respect of the company.

EMPLOYMENT RELATIONS

Share purchase transactions do not typically change the status of the employment relationships between the employer corporation and its unionized or non-unionized employees. The sale of the shares does not terminate employee agreements nor would it be tantamount to the company going out of business. In relation to non-unionized employees, employment agreements may specifically provide for a change in the employment relationship as a result of the sale of shares. Generally, it is only the employment agreements of senior executives that would contain these types of provisions. The purchaser will also assume pension and employee benefit plans of the seller and liability for past service of current employees, including any deferred or vested obligations.

Asset purchase transactions have different implications for employment matters. Such transactions terminate the employment relationship with non-unionized employees. Often, employees are immediately offered new employment under substantially similar terms to avoid severance payment obligations. If employees are unionized, in most cases, the successor provisions of labour legislation, such as the *Labour Relations Act* (Ontario), have the effect of binding the purchaser to any certification or collective agreement to which the seller was a party. The objective of such provisions is to preserve the existing bargaining rights of unionized employees. Absent the existence of a collective agreement governing the employees affected by the transaction, the purchaser has greater flexibility in terms of whether or not to establish pension and employee benefit plans as well as what types of plans it wishes to offer.

BULK SALES ACT COMPLIANCE

Bulk sales legislation applies in most Canadian provinces to asset acquisitions to ensure that payment is made to a company's trade creditors whenever a company sells the assets relied on by those creditors when they extended credit to the company. This legislation does not apply to share sales.

Bulk sales legislation applies to "sales in bulk", typically defined as a "sale of stock in bulk out of the usual course of business or trade of the seller". "Stock" is usually defined as (i) goods, wares, merchandise or chattels ordinarily the subject of trade and commerce, (ii) the goods, wares or merchandise or chattels in which a person trades or that the person produces or that are the output of a business or (iii) the fixtures, goods and chattels with which a person carries on a trade or business.

Unless applicable bulk sales legislation is complied with, a creditor may bring an action to have a court set aside the sale or declare the sale void. If a court issues such an order and the purchaser has taken possession of the stock in bulk, the purchaser is personally liable to account to the creditors of the seller for the value of the stock in bulk.

Due to the timing issues and costs involved in complying with bulk sales legislation, sellers and buyers sometimes agree to dispense with complying with the requirements of this legislation. In such cases, the buyer may be prepared to rely on an indemnity from the seller for any resulting liabilities. To accept such an indemnity, the buyer must be comfortable with the seller's financial resources and ability to perform its obligations under the indemnity.

OTHER CONSIDERATIONS RELATING TO MINING ACQUISITIONS

Regardless of whether a Canadian mining property is acquired pursuant to an asset sale or a share sale, the following legal implications relating to the *Investment Canada Act* and the *Competition Act* must be considered prior to completing the transaction.

INVESTMENT CANADA ACT

Any non-Canadian who proposes to acquire an existing business or establish a new business in Canada must be aware of the provisions of the federal *Investment Canada Act* ("ICA"). Subject to certain limited exceptions, any acquisition by a non-Canadian of a business carried on in Canada will either be subject to review by the Canadian government or will, at minimum, require that notice of the acquisition be provided to the Canadian government. Similarly, the establishment of a new business will generally require that notice be provided to the Canadian government, although a review may also be required in certain circumstances (for example, where a "cultural" business is being started). In addition, the ICA now incorporates a separate review process to determine if investments by non-Canadians in Canada "could be injurious to national security". The rules surrounding the application of the ICA are detailed and complex. For more information, please refer to Davies' guide, *A Guide for Foreign Investors in Canada*.

COMPETITION ACT APPROVALS

Like many other countries, Canada has a complex set of competition laws. Among other things, these laws: (i) prohibit cartel behaviour; (ii) prohibit the abuse of a dominant position; (iii) regulate mergers and acquisitions; and (iv) otherwise govern the conduct of businesses in their relationships with competitors, customers and suppliers. Canada's competition laws are contained in a single federal statute, the *Competition Act* ("CA"). In contrast to jurisdictions such as the United States, Canada does not have provincial competition laws, although several provinces have fair business practice laws directed primarily at consumer protection. With the exception of a limited number of activities that are specifically exempted, all business activities in Canada are subject to the CA. Please refer to the Davies' guide *Doing Business in Canada* for a detailed summary of requirements under the CA which must be carefully considered before completing any transaction that is subject to this legislation.

Options and Joint Ventures

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OPTIONS AND JOINT VENTURES

OPTIONS TO ACQUIRE MINING INTERESTS

As is common in many countries, holders of Canadian mineral properties often grant options to other parties to acquire an interest in the property, particularly in respect of early stage exploration and development projects. While options on mineral properties can take many forms, they often entitle the option holder to earn an interest in the property by funding specified exploration and development costs during a defined period. Upon performance of the work and expenditure commitment, the option holder has the option to acquire an agreed percentage interest in the property. This type of option is usually referred to as an "earn-in" or "farm-in" right. If the option is exercised, the parties typically agree to proceed on a joint venture basis to develop and operate the property by sharing expenses and revenues in accordance with each party's percentage interest.

An earn-in option typically transfers 100% of exploration and development expenses to the option holder during the option period. The option terms may also require the option holder to make cash payments to the option grantor as compensation for the option. These cash payments can later be used by the option grantor to fund its share of joint venture expenses in the event the option is exercised and the joint venture is formed.

The earn-in option allows the holder to gain exclusive access to a property during the option period without making the upfront financial commitment involved in actually purchasing an interest in the property. The option holder can then fund the exploration in stages and cease funding or give up the option at any time if exploration work fails to establish the property's economic potential.

JOINT VENTURE ARRANGEMENTS

OBJECTIVES OF A MINING JOINT VENTURE

Joint venture arrangements are commonly used by investors to explore, develop and operate mineral properties in Canada. Often coupled with the granting of "earn-in" options or other types of options, joint venture structures permit mining companies to achieve a number of important commercial objectives, including:

- sharing geological, construction, permitting, operating and other substantial mine development risks by having multiple parties share the costs involved in developing a mining project;
- reducing operational risk by, for example, involving offtakers who will contract to buy eventual mine production or by bringing in a participant with recognized operating expertise or processing technology;
- reducing financing risk by involving participants with the financial resources required to advance a project and gain the credibility required to attract project financing and other lenders if third-party financing becomes necessary;
- diversifying risk by allowing limited resources to be invested in multiple projects;
- accelerating project development by involving parties with the resources, expertise and technology to advance development quickly;

- reducing the risks of projects in countries perceived to have heightened political concerns by involving local parties whose interests will be affected by adverse government action;
- optimize synergies and take advantage of economies of scale (for example, a joint venture milling operation to service separately owned mine properties);
- broaden the range of technical, management and operating expertise that can be drawn on to develop the project; and
- create long-term strategic relationships between exploration companies, mining companies, offtakers and other parties that can form the basis for developing multiple mining properties on an ongoing basis.

LEGAL FORMS OF JOINT VENTURES

A mining joint venture may be carried out through various legal forms such as partnerships, corporations and contractual joint ventures:

(a) Partnerships

Canadian provincial legislation governing partnerships generally defines a partnership as the relationship between persons carrying on business in common with a view to profit. Partnerships are governed by provincial partnership legislation (such as the *Partnerships Act* (Ontario)). However, Canadian partnership legislation allows partners significant flexibility to vary their mutual rights and duties as partners by agreement.

There are two principal types of partnerships. In a general partnership, all of the partners can participate in management of the business but are exposed to unlimited liability for partnership obligations. In a limited partnership, a limited partner's liability is limited to their investment but they must remain passive investors and not participate in the control of the partnership business. Since most participants in mining joint ventures demand involvement in key decisions, limited partnerships are not generally appropriate for mining joint ventures.

The use of a general partnership structure exposes the partners to potentially unlimited liability for obligations of the partnership. However, partners are not generally liable for obligations incurred prior to the date they become a partner or after ceasing to be a partner. Each partner has the ability to incur partnership obligations that will bind the other partners and, for this reason, most Canadian mining joint ventures are structured as incorporated or contractual joint ventures rather than as partnerships.

In Ontario, the *Partnerships Act* governs general partnerships and defines the rights and obligations of the partners between themselves and in relation to third parties. Partnership law also includes non-statutory common law and equitable principles. In Québec, partnerships are governed by the *Civil code of Québec* which sets out the rights and obligations of partners between themselves and towards third persons, as well as conditions for the creation, operation and dissolution of a partnership. The provisions of these statutes that address the rights and obligations of partners between themselves can generally be altered by agreement between the partners. Because the relations between partners can be determined by agreement, great flexibility is possible in providing for such matters as capital contributions or other financing of the partnership, participation in profits and management structure.

In Ontario, all of the partners of a general partnership must register the name of the partnership under the *Business Names Act*, unless the business is carried on under the names of the partners themselves. In Québec, the general partnership must file a declaration every year under *the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*. This declaration must include a French name for the purpose of carrying on business in Québec. In both Ontario and Québec, these registrations require that the partnership

business and names and addresses for the partners be disclosed. Similar requirements apply in the other Canadian provinces.

Income and losses of a partnership, although computed at the partnership level, are taxed in the hands of the partners. This tax treatment allows each partner to offset its eligible share of the partnership's business tax losses against income from other sources.

(b) Incorporated Joint Ventures

Incorporated joint ventures consist of corporations that hold the joint venture assets (mineral claims or leases, mining equipment, etc.). The joint venture parties hold shares in the joint venture company. The affairs of the joint venture are governed by the applicable incorporating statute (such as the *Canada Business Corporations Act*) and by the shareholders agreement typically entered into by the joint venture shareholders setting out how the joint venture will be governed and managed.

Unlike a contractual or partnership joint venture, income and losses of an incorporated joint venture are computed and taxed at the joint venture level (i.e., the corporation), and shareholders have limited ability to utilize the corporation's losses directly. Where a joint venture is incorporated, the corporation will be taxed on its taxable income, and profits will be distributed by way of dividends to the shareholders.

(c) Contractual Joint Ventures

A contractual joint venture is formed by an agreement between the parties to share the costs of exploring, developing and operating a mining property and dividing the revenues from sales of production. The internal affairs of a contractual joint venture are not governed by any legislation so that parties to such joint ventures are generally free to structure management of the joint venture as they wish.

Contractual joint ventures may be difficult to distinguish from partnerships, and the parties' characterization of their relationship may not be conclusive at law. The most important legal distinction is that sharing of profits is essential to a partnership, whereas joint venture parties generally contribute to expenses and divide revenues of the project but do not calculate profit at the joint venture level. Equal participation in management of the business is characteristic of a general partnership, but less common in a joint venture, where one party often operates the project or management is contracted out. In the case of a 50/50 joint venture with all key management decisions made by a management committee consisting of equal representatives of both joint venture parties, however, it is more difficult to argue that the parties are not carrying on a "business in common" so as to constitute a partnership.

Joint venture parties who do not wish their joint venture to be treated as a partnership should enter into a joint venture agreement clearly stating that no partnership is intended to be formed and that the parties' liabilities for joint venture obligations are several and not joint or collective. Where consistent with the commercial arrangements between the parties, the agreement should also make clear that profits are not being shared and that the parties are merely agreeing to share expenses and revenues. Such statements are not conclusive, however, and courts will look to the substance of the agreement and the parties' actions to determine whether a partnership exists in fact.

In Québec, joint venture parties should also file the proper declaration under *the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* to avoid being characterized as a general partnership, in which case each partner would be fully liable for partnership obligations and subject to tax as a partner, rather than as a party to a joint venture.

Despite such precautions, however, partnerships and contractual joint ventures are not clearly distinguished under Canadian law, and parties wishing to avoid exposure to partnership liabilities should take care to conduct

operations under a contractual joint venture in such a way as to minimize any suggestion of a partnership.

Unincorporated joint ventures are not recognized as entities for tax purposes. For this reason, income and losses for tax purposes are computed separately for each joint venture party rather than at the joint venture level. As with partnerships, this permits joint venture parties to offset their share of the joint venture's business tax losses against income from other sources.

TABLE 1

Comparison of Different Forms of Joint Ventures

	Partnership	Unincorporated Joint Venture	Incorporated Joint Venture
Governing document:	partnership agreement	joint venture agreement	shareholders agreement and corporate articles and bylaws
Internal formalities:	few statutory requirements	parties free to create	corporate legislation imposes numerous requirements such as number of directors, residency of directors, formalities for directors and shareholder meetings, registered corporate offices, maintenance of records, etc.
Tax status:	income and losses computed at partnership level but taxed in hands of partners	income and losses computed at the level of the joint venture parties and taxed in their hands	income and losses computed at corporate level and tax is paid by the corporation and by shareholders upon receipt of dividends
Liability:	partners have unlimited joint liability for partnership liabilities	risk of partnership liability	in general, shareholders not liable as shareholders for any act, default or liability of the corporation or of the other shareholders
Joint venture assets:	registered in name of partnership	joint venture parties may be registered as joint owners	registered in name of the corporation

Exploration and Mining Rights

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Exploration and Mining Rights

In Canada, with the exception of limited cases of private or aboriginal ownership, metallic minerals in the ground are owned by provincial or territorial governments. Minerals located in offshore waters and the continental shelf are owned by the federal government. Given this Crown ownership of minerals in Canada, the federal and provincial governments are responsible for regulating mineral rights. Each of these governments has its own mining, environmental and occupational health and safety legislation that applies to mining projects within their jurisdictions.

The legal framework governing mining activities in Canada primarily consists of mining legislation and common law property rights. The real property laws applicable in each jurisdiction usually set out recording and title matters relating to mineral rights.

PROTECTION OF MINING RIGHTS

Mining rights in Canada are well developed, recognized and protected. Established dispute resolution bodies, such as courts and independent tribunals, allow industry participants to function within an environment of certainty. While provincial and territorial governments exercise wide-ranging authority to approve and regulate mining activities, they must do so in accordance with an established body of administrative law that imposes duties of fairness and natural justice.

ACQUIRING MINING RIGHTS IN CANADA

Canada has two main systems for acquiring mining rights: the "free-entry" system and the "Crown discretion" system. The Canadian provinces of British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Québec and Saskatchewan, along with the territories of Nunavut, the Yukon, and the Northwest Territories, have adopted the "free-entry system." The free-entry system allows individuals and corporations to obtain mineral rights by staking claims on their own initiative and later acquiring Crown leases if they so desire. Mining rights under this system are acquired on a first-come, first-served basis.

Alberta, Nova Scotia, and Prince Edward Island have adopted the "Crown discretion" mining system. Under this system, the grant of mineral rights is subject to the discretion of the applicable provincial or territorial government.

FREE-ENTRY SYSTEM

Under the free-entry system, a person may enter public or private lands that are open for exploration and development to pursue Crown minerals and to stake a claim. Staking a claim typically involves erecting a designated number of posts inscribed with information about the claim and running blazed lines over the pertinent land. The manner in which each of these activities is undertaken is closely regulated. In most provinces and territories, a prospecting or similar licence must be obtained before claims may be staked. After a claim has been staked, the particulars of the claim are recorded with the appropriate local authority, usually the provincial mining recorder. Subsequently, exploration work may be carried out on the mining claim which will generally require certain work permits under environmental, health and safety and other legislation. For a more detailed summary of staking a claim, conducting exploration work on such claim and obtaining a mining lease in Ontario, see the discussion below under the heading *Summary of Mining Legislation in Ontario*.

The holder of a claim is not permitted to let the claimed lands sit idle. Typically, a claimholder is required to perform specified work on the claimed land. In some instances, information must be provided to the province or territory about the presence of a mineral deposit on the claimed land and whether the claim holder intends to develop the deposit. Generally, under the free-entry system, as long as a claim is in good standing and the minimum requirements of the applicable legislation are met, the claim holder is *entitled* to apply for and receive a mineral lease for the claimed land to develop and exploit any mineral deposits.

CROWN DISCRETION SYSTEM

Under the Crown discretion system, the provincial or territorial government, as owner of the mineral resources, has the discretion to decide whether and on what terms a person may prospect for minerals. Governmental approval of a prospector's activities generally takes the form of a licence or permit. If a permit holder wishes to develop a mineral deposit on the land subject to the permit, the permit holder usually must apply for and obtain a mineral lease. Again, the Crown has the discretion to decide whether and on what terms it will issue a mineral lease. The exercise of discretion by governments is subject to the rules of administrative law.

MINING LEASES

Some form of a mining lease is generally required prior to the extraction of minerals from the ground for re-sale. The holder of a mining lease possesses the right to extract minerals from the area(s) to which the lease applies. Generally, mining leases in Canada are: (a) issued for a specific term that is renewable; (b) subject to an annual rental charge and (c) transferable with the prior written consent of the relevant provincial or territorial government.

Generally speaking, in order to obtain a mining lease a miner must (i) have completed a specified amount of assessment work on the applicable mining claim and (ii) file with the appropriate governmental authority a mining lease application accompanied by the application fee and, in some cases, a plan of survey and evidence that surface rights compensation, if any, has been paid, secured or settled. For more details on obtaining a mining lease in Ontario, see the discussion below under the heading *Summary of Mining Legislation in Ontario - Mining Leases*.

SURFACE RIGHTS

"Surface rights" refers to the rights of the owner of surface lands under which minerals are found. In most provinces and territories, mining legislation governs the relationship between the surface rights owner and the mineral owner. Any gaps in the legislation are filled by the common law (or in the case of Québec, the civil law). The general rule governing the relationship between a surface rights owner and a mineral rights owner is that each owner must use its property so as not to injure its neighbour. Usually, a surface rights owner must provide a mineral rights owner reasonable access to allow the relevant mineral deposit to be exploited, and the mineral rights owner must support the surface owner's land without subsidence.

In most provinces and territories, mineral rights owners are required to compensate surface rights owners for any significant adverse effects to the surface lands. In many cases, the mining legislation in each jurisdiction delegates to a government official the discretion to decide the particular circumstances under which a surface rights owner will be entitled to compensation. The amount of compensation and the manner in which it is paid is also in the discretion of government officials and is usually determined after a formal hearing. In some instances, where surface owners cannot be compensated adequately for extensive or irreparable harm caused to their lands, mineral owners may be required to purchase the surface rights owners' lands.

TAXES AND ROYALTIES

Almost all Canadian provinces and territories impose mining taxes and/or mining royalties and/or mineral land taxes on mining operations within their jurisdictions. These taxes and royalties are in addition to federal and provincial/territorial income taxes and any amounts that may be paid as rent on a mining lease. Mining taxes and royalties are intended to compensate the province or territory for the extraction of its non-renewable resources. The provinces of British Columbia, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia and Newfoundland and Labrador, and the federal government in respect of mines in the Yukon, Nunavut and the Northwest Territories, all impose mining taxes on defined mining profits. Other provinces, such as Alberta, impose various royalties that vary according to the specific mineral product.

The tax regime applicable to mining companies is summarized below under the heading *Tax Considerations*. In addition, the royalties imposed by various provincial and territorial governments are summarized in Table 2 below.

RESTRICTIONS ON FOREIGN OWNERSHIP

While the investment in a Canadian mining company may require filings and approvals under the *Investment Canada Act* (see *Acquiring Canadian Mining Interests - Types of Acquisitions - Investment Canada Act* above), provincial and territorial mining legislation does not restrict the ownership and development of mineral rights based on citizenship or residency. Foreign mining companies are generally free to hold mineral rights either directly or through Canadian incorporated subsidiaries, as they wish.

However, the federal government has a specific policy limiting non-resident ownership of uranium mining properties to 49% at the stage of first production. Exemptions to the policy may be granted, subject to federal government approval, only in cases where it can be demonstrated clearly that (i) the project remains Canadian controlled or (ii) Canadian partners cannot be found. There are no restrictions on uranium exploration by foreign entities.

A copy of the non-resident ownership policy related to uranium mining in Canada is available at: <http://nrcan.gc.ca/eneene/sources/uranuc/uranium/respol-eng.php>.

The current Canadian government has stated its intention to increase foreign ownership limits for uranium mines, provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investment in this sector is not contrary to Canadian national security. To date, no such foreign ownership limitation increases have been implemented.

THE EXPORTATION OF METALS AND MINERALS

Canada is the world's leading exporter of metals and minerals. The exportation of minerals and metals is a heavily regulated industry. Legislative requirements imposed by various government departments dictate whether particular minerals may be exported and, if they may be exported, the manner in which such export should be carried out.

The Export Controls Division of the Department of Foreign Affairs and International Trade administers the issuance of export permits. In Canada, export permits are used to control the quantity and quality of exported goods. These permits can be obtained for a nominal fee. Exporters are often required to provide documentation establishing the purpose for which an applicant proposes to export goods. This documentation may take the form of an end-use certificate outlining the eventual purpose for which a product will be used.

The exportation of minerals is often governed by industry-specific permitting schemes, such as in the uranium industry. Canada is the world's leading producer of uranium, accounting for approximately one-third of the world's production. Under the *Nuclear Non-proliferation Import and Export Control Regulations*, a special licence is required to export a controlled nuclear substance, including uranium 233. In respect of a controlled substance deemed a Category I, II or III nuclear material under the *Nuclear Security Regulations*, an application for a licence must include a description of the measures that will be taken to facilitate Canada's compliance with the *Convention on the Physical Protection of Nuclear Material*.

In some instances, the exportation of minerals from Canada is significantly restricted. Several Canadian provinces require any minerals extracted from that province to be processed within that province or within Canada. Ontario, for example, requires that all ores or minerals raised or removed from any land in the province be treated and refined in Canada so as to yield refined metal or other product suitable for direct use without further treatment.

PROVINCIAL AND TERRITORIAL MINING LEGISLATION

As discussed above, certain provinces have adopted "free-entry" mining systems while others operate under the "Crown discretion" system. Despite these different systems, the mining acts and regulations in each Canadian province share many common features.

The following provides an overview of the principal mining legislation applicable to mining exploration, development and operations in Ontario. A comparison chart for other Canadian jurisdictions is provided at the end of this section.

See *Environmental and Social Issues* below for a summary of additional approvals, permits and other government actions that will be required under a wide variety of legislative and regulatory requirements that regulate mining exploration, development and operations, including mine closure plans and financial assurance, water rights, environmental approvals for effluent discharges, occupational health and safety and Aboriginal rights.

SUMMARY OF MINING LEGISLATION IN ONTARIO

MAJOR AMENDMENTS TO ONTARIO'S MINING ACT

Ontario's *Mining Act* was significantly amended by the *Mining Amendment Act, 2009* that became law in 2009. The amendments are as a result of the Ontario government's initiative to modernize the way mining companies stake and explore claims in Ontario and relate to prospecting land, staking mining claims, disputing claims, assessment work, surface rights owners, exploration work, diamond mine royalties and consultation with Aboriginal communities. As set out in the summary below, some provisions came into effect in 2009, while other changes are being phased in over the next four years as relevant details are developed in new or amended regulations and policies.

The amendments add significant new requirements regarding Aboriginal consultation and dispute resolution and the protection of sites of Aboriginal cultural significance from the impacts of mineral exploration. These amendments have not yet been proclaimed in force pending the development of regulations. The government's implementation target date is 2012. In addition, the amendments add a new Part XIV - Far North (and other related provisions in the Act) that prohibits new mine openings in Ontario's Far North (the northern 42% of the province, above the 51st parallel, as defined in Ontario's *Far North Act*, which is discussed in more detail in the *New Far North Legislation* section below) in areas without a community-based land use plan. In addition, no

mining claims or new mines will be allowed on lands designated in Far North community land use plans as inconsistent with mineral exploration and development or the opening of a new mine. These amendments have not yet been proclaimed in force. Although these amendments are briefly discussed in this section, see *Environmental and Social Issues* for further discussion on these and other important considerations, both current and proposed, concerning Aboriginal and Far North communities in connection with mining project approvals in Canada.

PROSPECTING LICENCES

In Ontario, any person wishing to stake and record a mining claim must obtain a prospector's licence, which any natural person aged 18 or older is entitled to obtain. The applicant need not be an Ontario or Canadian resident, but must have an address for service in Ontario. An application for a prospector's licence can be made to the provincial recording office in the form prescribed by Ontario's *Mining Act* and upon payment of the relevant fee. A prospector's licence is valid for five years and can be renewed but it is not transferable.

- *Amendment (unproclaimed)*: A significant amendment not yet proclaimed in force requires first-time applicants and those renewing their prospector's licences in the future to complete a *Mining Act* awareness program. Existing licensees will be required to successfully complete the awareness program within two years after the provision is proclaimed in force. The awareness program is not a training course or certification but rather is to serve as a guide on the changes brought about by the modernization initiative, including information on Aboriginal and treaty rights. The target implementation date for this amendment is June 2012.

MINING CLAIMS - RESTRICTED LANDS

The holder of an Ontario prospector's licence may proceed to stake a claim. Staking a claim allows the claim holder to perform assessment work on the relevant lands to determine whether it is worthwhile to pursue a mining lease with respect to the lands. A mining claim does not allow the holder to extract minerals for the purposes of re-sale.

Certain lands are not open for staking and recording a claim without the consent of the Minister of Northern Development, Mines and Forestry (the "**Minister**", for the purposes of this section). Such areas are deemed "lands not open" and include: (i) land reserved or set apart as a town site by the Crown; (ii) land laid out into residential lots on a registered plan of subdivision; and (iii) any land forming the station grounds, switching grounds, yard or right of way of a railway.

- *Amendment (unproclaimed)*: Under amendments not yet proclaimed in force, the following additional lands are restricted from staking without the consent of the Minister: (i) on or within 100 metres of residential or cottage lots; (ii) natural gas, oil or water pipeline corridors; (iii) airport lands; (iv) artificial reservoirs or dams and buildings or structures used for their operation; and (v) improved municipal land used for public purposes.

On other lands, a claim may not be staked out at all. Such lands include: (i) any land that, without reservation of the minerals, has been sold, located, leased or included in a licence of occupation; and (ii) land for which an application brought in good faith is pending before the Ministry of Natural Resources under the *Public Lands Act* or any other act. Further, prospecting or the staking out of mining claims is prohibited in provincial parks.

- *Amendment (unproclaimed)*: A significant amendment not yet proclaimed in force is to prohibit the staking of claims on lands located in Ontario's Far North if a community-based land use plan has designated the lands for a use inconsistent with mineral exploration and development. Implementation of this amendment is scheduled for 2012 - 2013.

STAKING AND RECORDING MINING CLAIMS

Prior to the modernization amendments, a mining claim could only be staked on the ground. The amendments enable a claim to be staked by map staking. Effective April 4, 2011 and in accordance with new *O. Reg. 43/11 - Claim Staking and Recording under Ontario's Mining Act*, a paper-based map staking system is prescribed in Southern Ontario in lands that have been subdivided into lots and concessions (ground staking is no longer permitted in such areas). In unsubdivided areas, ground staking is permitted using the special staking rules for designated areas. The government intends to implement an online map staking system in Ontario that includes Northern Ontario in 2013.

The priority of claims is determined on a “first-in-time, first-in-right” basis. Generally, once a mining claim has been recorded, every instrument affecting the claim, other than a will, is void against a subsequent purchaser for value without notice. Mining claims delineated by ground staking must be recorded with the provincial mining recorder's office by making an application within 30 days of staking, or the rights thereunder will be lost. The staking of a map-staked claim and the making of an application to record it occurs simultaneously.

Once recorded and prior to the application and payment for a lease, a claim can be held for the life of the holder, provided that yearly reporting and assessment work requirements for claims are met. A claim holder generally has the right to transfer or sell an interest in a mining claim. However, after an application for a lease has been made with respect to a claim, the claim holder must obtain written consent of the Minister prior to transferring the claim.

MINERAL RIGHTS AND SURFACE RIGHTS

A mining claim grants a claim holder mineral rights to all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals within the claim area but does not include sand, gravel, peat, gas or oil. (Oil and gas mining is dealt with separately under Part IV of Ontario's *Mining Act* and *O. Reg. 263/02 - Exploration Licences, Production and Storage Leases for Oil and Gas in Ontario*.)

Surface rights are defined in Ontario's *Mining Act* to mean every right in land other than mining rights. Mining rights, by comparison, refer to the right to minerals on, in, or under the land. A set of acts and regulations regulates the relationship between the owners of surface and mineral rights in order to minimize conflict, ensure fair compensation to the surface rights holder and facilitate mining exploration and development.

Generally, the holder of a mining claim does not have any right, title or claim to the surface rights of the claimed lands other than the right to enter upon, use and occupy such parts of the land that are necessary for the purpose of prospecting and the efficient exploration, development and operation of a mining project.

Under amendments that came into effect on April 4, 2011, where there is a private surface rights owner anywhere in Ontario, licenced prospectors who have staked a mining claim must provide confirmation of staking to the surface rights owner and provide proof or confirmation with the Ontario Ministry of Northern Development, Mines and Forestry ("**MNDMF**") that such notice has been made within 60 days of making an application to record the claim. The mining claim becomes invalid after the 60-day period if this notice requirement is not met, even if the claim was recorded. In addition, the holder of a mining claim who first proposes to do assessment work on a mining claim must give notice of that intention in a prescribed form to the owner, if any, of the surface rights.

- *Amendment (unproclaimed)*: Significant amendments to Ontario's *Mining Act* not yet proclaimed in force establish a graduated regulatory scheme setting rules for early exploration activities on a mining claim, mining lease or licence of occupation, including consultation with Aboriginal communities. The

system categorizes exploration activities according to their potential impact. Under the scheme, exploration plans are needed before undertaking low impact activities, such as low intensity line cutting, and exploration permits are needed for higher impact activities, such as trenching. Assessment work is prohibited until these requirements have been met, including any Aboriginal consultation as may be prescribed. It is anticipated that such rules will require that Aboriginal communities be notified of newly recorded mining claims within their traditional use areas and that Aboriginal consultation is conducted as a necessary component of the exploration plan and a prerequisite for obtaining an exploration permit. Exploration permits may also have specific terms and conditions requiring the proposed work to take into account identifiable impacts on Aboriginal and treaty rights (such as restrictions on the claim holder's ability to use portions of the surface rights of the claim where sites of Aboriginal cultural significance have been identified), potential impacts on the environment and considerations for work on privately owned surface rights. The implementation target date for these amendments is April 2012 with the development of regulations; draft regulations have not yet been issued.¹

A private owner of surface rights is typically entitled to compensation from a person who prospects and stakes out a mining claim on the owner's land. In some circumstances, compensation may be owed to the surface rights owners of land used as a transportation route to access a claim. The mining legislative framework enables surface and mineral rights holders to negotiate their own compensation agreement. Where such agreements cannot be reached amicably, the Mining and Lands Commissioner (the "**Commissioner**", for the purposes of this section) can set compensation amounts. Where the amount claimed in a surface rights dispute exceeds \$1,000, a right of appeal to the Divisional Court of Ontario lies from decisions of the Commissioner. Where the amount claimed is less than \$1,000, the Commissioner's order is final.

Surface rights above or adjacent to mining properties in Ontario are frequently held by the Ontario government. In such cases, the holder of a mining lease (discussed below) may also apply to lease from the Ontario government the surface rights that are inside or outside the lands covered by the lease. The lands must be required for a purpose essential to mining and mining exploration, including for constructing a shaft or buildings or disposing of tailings or other waste material. The term of any lease of surface rights must coincide with the term of the underlying mining lease. Annual rental payments are required. Where the surface rights are owned by a private individual, other considerations apply.

WITHDRAWAL OF CROWN-OWNED LANDS, MINING RIGHTS OR SURFACE RIGHTS

Currently, the Minister may by order withdraw from prospecting, staking out, sale or lease any lands, mining rights or surface rights that are the property of the Crown and similarly by order may reopen them. Under the modernization amendments not yet proclaimed in force (implementation target 2012), the Minister may consider any factors that he or she considers appropriate in issuing an order to withdraw lands to mining, including (a) whether the lands, mining rights or surface rights are required for developing or operating public highways, renewable energy projects or power transmission lines or for another use that would benefit the public, whether the order would be consistent with any prescribed land use designation that may be made with respect to Ontario's Far North and whether the lands meet the prescribed criteria as a site of Aboriginal cultural significance; and (b) any other factors that may be prescribed. A withdrawal order under these amendments does not affect pre-existing mining rights and tenure such as mining claims, mining leases or licences of occupation.

¹ Under amendments not yet proclaimed in force, the rights of unpatented claim holders will be diminished. In particular, the Minister may by order impose restrictions on an unpatented mining claim holder's right to the use of portions of the surface rights of a mining claim if (a) the portions of the surface rights are on lands that meet the prescribed criteria as sites of Aboriginal cultural significance; or (b) any of the prescribed circumstances apply. The order is not appealable.

Lands with private surface rights and Crown mining rights that are open for staking represent only 1.4 % of the land in Southern Ontario and less than 1% of Northern Ontario's landmass. However, to mitigate conflicts where private surface rights owners do not hold the mining rights on their lands, the modernization amendments include the following new provisions for the withdrawal of such lands from mining:

- Effective 2009, lands in Southern Ontario for which there is a surface rights owner and the mining rights belong to the Crown are deemed to be withdrawn from prospecting, staking, sale and lease. Pre-existing claims and leases are unaffected; however, should those claims or leases ultimately revert back to the Crown, those mining rights will be automatically withdrawn. Private landowners have the option of applying to the Minister to have the withdrawn mineral rights re-opened for staking and exploration.
- Effective January 1, 2011, surface rights owners in Northern Ontario (defined for purposes of the withdrawal provisions as that part of the province of Ontario lying north of the south shores of the French River, Lake Nipissing and Mattawa River, which includes Ontario's Far North as well as areas farther south) can apply to have Crown mineral rights withdrawn on their properties if there are no existing claims and leases. The Minister will consider the mineral potential and size of the land, as well as the existing and proposed uses of the land when deciding whether to grant the withdrawals. Pre-existing claims and leases are unaffected.

MINING CLAIMS ASSESSMENT WORK

Until a mining lease is applied for, the holder of a mining claim must perform claim assessment work having a minimum value of approximately \$400 per year for each 16 hectares of the claim. Claim assessment work includes such activities as: prospecting, physical work (i.e., overburden stripping or bedrock trenching), dewatering of underground workings, geophysical/geological surveying, and exploratory drilling. Reports of any assessment work should be filed at the provincial recording office with all required technical information, such as drill logs or geological reports.

- *Amendments (unproclaimed):* Under amendments currently not proclaimed in force, the claim holder has the option of making payments in place of assessment work in accordance with the regulations (draft regulations for the selective use of such payments have not yet been issued). This is in line with most other Canadian jurisdictions. The province also intends to modernize, by regulation, allowable activities for assessment credit for work performed or payments in lieu of assessment work and intends to allow expenses incurred for Aboriginal consultation to qualify for assessment credits.² Implementation of this amendment is scheduled for 2012 - 2013.

MINING LEASES

In the past, to produce a mineral product for sale, a claim holder had to first obtain a mining lease or patent of the claim. A "patent" is a grant from the Crown in fee simple, also referred to as a "freehold patent". A patent cannot be terminated by the MNDMF, except as a consequence of voluntary surrender or non-payment of mining land taxes. Crown patents are no longer granted in Ontario. Today, mining leases are issued to grant rights to produce mineral product for sale. A mining lease differs from a mining patent. A "lease" is a conveyance or grant of possession of land for a defined period of time which carries with it an obligation to pay a periodic

² Canada Revenue Agency already permits certain community consultation expenses that are incurred by mining companies at the exploration stage to qualify as Canadian exploration expenses for tax purposes.

predetermined rental charge. Generally, a lease is transferable and may be renewed, whereas patents do not possess these characteristics.

Unless a mining lease states otherwise, the lease vests in the leaseholder all title of the Crown in the lands described and all mines and minerals within those lands. In general, a claim holder in Ontario is entitled to a mining lease as of right, provided the following conditions are satisfied:

- An application for the lease can only be made after the first prescribed unit of assessment work on the claim is performed (under amendments not yet proclaimed in force, changed to after the fifth prescribed unit of assessment work or, if a regulation provides that payment may be made in place of performing some or all assessment work, the payment has been made and the work performed as required by the regulation; any assessment work must have been reported and, if necessary, approval received for the work). A wide variety of activities qualify as "assessment work", including physical work such as digging pits, surveying, or bedrock trenching. For a claim holder to be eligible for a lease, the cumulative value of assessment work on a 16-hectare claim must amount to \$400 per year, save in the first year, in which no assessment work need be completed.
- The application must be accompanied by an agreement that surface rights compensation, if any, has been paid, secured or settled.
- The application must be accompanied by a plan of survey approved by the Surveyor General of Ontario.
- The required fee must be paid.

The annual rent on a mining lease in Ontario is calculated at the rate of \$3.00 per hectare. The application fee for a mining lease is currently \$75.00 plus, for each 16-hectare unit of land, a fee of \$4,400.00 less the dollar value of assessment work recorded to date.

Ontario mining leases have an initial term of 21 years and are renewable for further 21-year terms. The holder of a mining lease cannot transfer, mortgage, charge or sublet the lease or make the lease subject to a debenture without the written consent of the Minister.

To maintain a lease in good standing, the holder of a mining lease in Ontario must comply with various requirements under Ontario's *Mining Act*. The lands, surface rights or mining rights issued under a lease must be used solely for the purposes of the mining industry. Any breach of this requirement could invalidate a lease. Furthermore, for a lease to be renewable after its first term (a) the production of minerals must be continuous for over one year since the issuance or last renewal of the lease, or (b) the lessee must demonstrate, to the satisfaction of the Minister, a reasonable effort to bring the property into production.

All mining leases issued in Ontario are subject to a number of reservations. These reservations relate to such public interest matters as power lines, pipelines, roads, railways and waterways. In addition, pursuant to modernization amendments in effect as of 2009, every lease issued under the act, including leases issued or renewed before the enactment of the amendment, includes or is deemed to include the provision that the lessee's rights under the lease are subject to the protection provided for existing Aboriginal or treaty rights in section 35 of the *Constitution Act*, 1982 and the lessee shall conduct itself on the demised premises in a manner consistent with the protection provided to any such rights.

MINING LICENCES OF OCCUPATION

Mining licences of occupation were once commonly issued to allow the mining of minerals under the beds of water bodies. Such licences were issued prior to the amendment of Ontario's *Mining Act* in 1964 and are no longer issued. As mining licences of occupation were issued in perpetuity, there is no requirement to renew them, and a small number of such licences still remain in existence. To transfer a licence of occupation, the consent of the Minister is required.

NEW FAR NORTH LEGISLATION IN ONTARIO AND QUÉBEC

Both the Ontario and Québec governments are attempting to develop their northern regions in collaboration with local and Aboriginal communities. Ontario enacted the *Far North Act* for this purpose and, in its attempt to stimulate sustainable northern development, Québec introduced its *Plan Nord* and is in the process of introducing significant changes to its *Mining Act*.

ONTARIO'S FAR NORTH ACT

In Ontario, the recently enacted *Far North Act, 2010* provides a legislative foundation for community-based public land use planning as a joint process between Aboriginal communities in Ontario's Far North and the Ontario government.³ The act is intended to promote sustainable resource development in Ontario's Far North, with the requirement that development benefit Aboriginal communities and take into consideration ecological and cultural values. It is also intended to provide clarity and certainty for industry about how and where sustainable development of natural resources may take place in Ontario's Far North.

Under the act, Aboriginal communities will assume an advisory role and contribute their traditional knowledge and perspectives on protection and conservation for the purpose of land use planning. They will also be involved in the development, implementation and co-ordination of land use plans. The Minister is required to work with the First Nations, as defined in the act, that have one or more reserves in the Far North and that indicate their interest in preparing a community-based land use plan. If other Aboriginal communities, without a reserve in the Far North indicate their interest, the Minister can agree to work with them as well. The parties work together by way of a joint planning team that they are required to create. First, the parties must approve terms of reference to guide the designation of a planning area and the preparation of the plan. Then, the Minister must make an order designating a planning area, to which the plan will apply. Finally, the parties prepare a draft plan for public consultation. By asking Aboriginal communities to identify areas that require protection and approve areas suitable for economic development, the act is intended to protect areas of cultural value and ecological systems while enabling sustainable economic development.

Ontario's *Far North Act* stipulates that a company cannot open a new mine on public land in the far north without a community land use plan. However, prospecting, mining claim staking, mineral exploration and obtaining a mining lease or licence of occupation for mining purposes are permitted without a plan in place.

3 The boundaries of Ontario's Far North are laid out in the act. Much of the rest of Ontario's public land is covered by a different regime: *Ontario's Living Legacy Land Use Strategy* outlines the intended strategic direction for the management of 39 million hectares of Crown lands and waters in a planning area covering 45% of the province (the central to mid-northern part of the province). The strategy is a guidance document that sets a framework for future land and resource management on Crown lands in the planning area. It provides guidance and direction on what activities are proposed or preferred in certain areas and what activities will be permitted. This direction is primarily outlined through defining and locating land use categories that identify the general objectives, policies and uses for these areas. It also provides some general direction for resource management activities, as well as identifying a range of future planning and consultation needs. The strategy focuses on several specific objectives including providing the mining industry with greater land and resource use certainty.

As well, if a community-based land use plan is made or amended after a mining claim, mining lease, patent or licence of occupation for mining purposes is granted, only opening a mine can affect: the validity of the mining claim, mining lease, patent or licence of occupation for mining purposes; obtaining a lease; obtaining the necessary approvals and permits or making the necessary filings for mineral exploration and development activities; and undertaking mineral exploration and development activities. There is also an exception for development if the Lieutenant Governor in Council, after taking into account the objectives for land use planning set out in the act, makes an order stating that the development is in the social and economic interests of Ontario.

THE GROWTH PLAN FOR NORTHERN ONTARIO, 2011

The Growth Plan for Northern Ontario is a 25-year plan that guides decision-making and investment planning in northern Ontario. Prepared under the *Places to Grow Act, 2005* and echoing the many goals of Ontario's *Far North Act*, the Growth Plan is intended to build a sustainable northern economy that will provide people living in northern Ontario with more education and career opportunities. The Growth Plan aims to strengthen the economy of the north by diversifying the region's traditional resource-based industries, stimulating new investment and entrepreneurship, and nurturing new and emerging sectors with high-growth potential.

The government intends to work with industry to grow and diversify the minerals sector and mining supply services sector through combined efforts to: (i) expand the mining supply and services industry; (ii) increase exports and support particular areas of competitive advantage including deep mining technology techniques and clean technologies; (iii) improve timelines and clarity in regulatory processes; (iv) expand geoscience mapping and data collection to expedite the discovery and development of new minerals and other resources; (v) invest in research and innovation that improves the efficiency of industry operations, with an emphasis on extraction and exploration technologies, environmental technologies, and mine closure and rehabilitation processes; (vi) enable new mining opportunities; (vii) facilitate partnerships among communities and industry to optimize community employment and benefits; and (viii) facilitate the entry of new participants and entrepreneurs, including Aboriginal businesses, co-operatives and commercial developers.

QUÉBEC'S PLAN NORD/NORTHERN PLAN

Québec's Plan Nord, or Northern Plan, is a 25-year, \$88-billion plan for economic and social development in Northern Québec, an area above the 49th parallel that comprises 72% of the province (1.2 million km²). The execution of the plan is broken down into five-year phases, with the first spanning from 2011 to 2016. Of the \$2.1 billion of public funds budgeted under this segment of the plan, the funds will be allocated as follows: \$1.191 billion in spending on infrastructure; \$382 million for social measures; \$52 million to cover operating costs of the Société du Plan Nord ⁴ and to fund initiatives to solicit investment from abroad; and \$500 million to be invested in private resource companies by Investissement Québec.⁵

4 In order to coordinate public investment in transportation and telecommunications infrastructure, as well as social sector projects, the government will establish the Société du Plan Nord (the "**Société**"). This state-owned entity is designed to play a leading role in the implementation of the Plan Nord, namely overseeing the development of the first phase's infrastructure projects. The Société will be responsible for inter-governmental coordination, working in direct collaboration with Hydro-Québec in the development of key energy projects. The Société will also be responsible for negotiating financing for infrastructure development and will negotiate the financing agreements covering both the construction and maintenance of such infrastructure with the private-sector users. The Société's board of directors will be composed of representatives of the regions, aboriginal nations, private-sector and government of Québec. Bill 27, *An Act respecting the Société du Plan Nord*, is in the presentation stage in the Québec legislature.

The Plan Nord will be funded through four channels: (1) tax revenues from economic development initiatives; (2) direct and indirect benefits from public infrastructure projects; (3) Hydro-Québec's funding of development projects; and (4) contributions by private-sector partners to fund infrastructure investments built primarily for the benefit of an economic development project. The projects administered by the Société will be funded by the government's newly created special-purpose fund, the Fonds du Plan Nord (the "**Fund**").⁶ The benefits from new mining projects, Hydro-Québec's new projects and infrastructure projects will be paid into the Fund. Finally, Hydro-Québec will contribute \$10 million to the Fund per year for the funding of social projects.

The Plan Nord promotes northern development in several sectors including the mining sector, which is a growing sector of the provincial economy. To encourage the development of mining projects, the Québec government plans to introduce tax credits for efforts to minimize environmental impact and has already set aside \$500 million for direct investment by the government in private-sector ventures. However, the government has emphasized that environmental and social concerns, particularly related to aboriginal groups, will take precedence over development. Development under Plan Nord must benefit local communities and must not occur at the expense of the natural environment.⁷

BILL 14: PROPOSED CHANGES TO QUÉBEC'S MINING ACT

The Québec government describes Bill 14, the *Act respecting the development of mineral resources in keeping with the principles of sustainable development* (tabled on May 12, 2011), as a key measure of its Plan Nord. The bill was created to amend Québec's *Mining Act* and, if enacted in its current form, it will have a significant impact on the Québec mining industry.

If Bill 14 is enacted, amendments to Québec's *Mining Act* will include: if land was granted by the province for non-mining purposes, the owner of the soil will also own the surface mineral substances; the minister will be granted additional powers to reserve lands for the province to avoid conflicts with other uses of the land; within a year of submitting a notice of claim, a claim holder will have to submit a work plan describing the work to be performed, which will have to be updated annually and submitted with a report on completed work; certain mining right holders or operators will have to submit a rehabilitation and restoration plan to the minister for approval; before applying for a mining lease, the claim holder will have to hold a public consultation in the proposed mining area; and mining rights holders or operators will have to provide a financial guarantee for all the anticipated costs of completing rehabilitation and restoration work. Bill 14 also proposes increasing fines and creating additional infractions.

PROVINCIAL COMPARISONS

While in most respects the legislative scheme governing mining activities in Ontario is typical of the schemes in effect in other jurisdictions across Canada, notable distinctions do exist. Table 2 below compares key mining licence terms and conditions in the Canadian provinces and territories as well as those under federal jurisdiction.

5 Investissement Québec ("IQ") is both a financial institution and an economic development agency that provides consulting and financing to support and encourage local and foreign expansion projects in Québec. As part of the Plan Nord, IQ will be responsible for negotiating equity interests in development projects, which will take the form of either joint ventures or the purchases of share capital or investments in the form of convertible debentures. Since merging with the Société générale de financement, IQ has integrated both the Department of Mining Investment from the Société générale de financement with the Société québécoise d'exploration minière. This combination of mining expertise from different organizations allows IQ to provide investors with strategic advice regarding their business opportunities.

6 Bill 10, which will establish the Fund, is currently in the sanction stage in the Québec legislature.

7 As a result, the Plan will ultimately protect 50% of the Northern Québec area from industrial development and by 2015, the government plans to earmark at least 12% of the Plan Nord area for the establishment of protected areas including provincial parks, biodiversity reserves, aquatic reserves, ecological reserves, and wildlife habitats.

TABLE 2

Comparison of Mining Legislation Across Canada

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Alberta	<ul style="list-style-type: none"> No licence required to prospect for metallic and industrial minerals 	<ul style="list-style-type: none"> Term: 14 years Renewable: No Area: Between 16 and 9,216 hectares Fee: \$625.00 Minimum Assessment Work: For each two-year period, \$5.00 per hectare for the first period; \$10.00 per hectare for each of the next two periods and \$15.00 per hectare for each of the next four periods 	<ul style="list-style-type: none"> Term: 15 years Renewable: Yes Annual Rental: \$3.50 per hectare Area: Not more than 2,304 hectares Transfer: With the Minister's consent 	<ul style="list-style-type: none"> Before payout, 1% of mine mouth revenue; after payout, the greater of 1% of mine mouth revenue and 12% of net profits¹
British Columbia	<ul style="list-style-type: none"> Term: one year Renewable: Yes Fee: \$500.00 	<ul style="list-style-type: none"> Term: one year Renewable: Yes Area: Up to 25 complete or partial adjoining mining cells² Fee: \$0.40 per hectare per year Minimum Assessment Work: \$4.00 per hectare for the first year; \$8.00 per hectare for each subsequent year 	<ul style="list-style-type: none"> Term: Not more than 30 years Renewable: Yes³ Annual Rental: \$10.00 per hectare Transfer: No consent required 	<ul style="list-style-type: none"> Tax of 2% of net current proceeds and 13% of net revenue

1 This royalty only applies to metallic minerals. For the royalty on placer minerals, quarriable minerals and salt, see *Metallic and Industrial Minerals Royalty Regulation*, Alta Reg 350/1993.

2 A "cell" is an area shown electronically on a map of British Columbia for purposes of the registry. See *Mineral Title Online Grid Regulation*, BC Reg, 530/2004.

3 The right of renewal of a mining lease applies to a lease issued before December 1, 1995. See *Mineral Tenure Act*, RSBC 1996, c 292, s. 42(6).

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Manitoba	<ul style="list-style-type: none"> • Term: Three or five years depending on location⁴ • Renewable: Yes • Fee: \$359.00 • Minimum Expenditure: Between \$0.50 per hectare per year and \$15.00 per hectare per year depending on the location of the area and the year of the licence 	<ul style="list-style-type: none"> • Term: Two years • Renewable: Yes • Area: Between 16 and 26 hectares • Fee: \$14.00 for surveyed territory; \$60.00 for unsurveyed territory • Minimum Expenditure: \$12.50 per hectare per year increasing to \$25.00 per hectare per year after year 10 	<ul style="list-style-type: none"> • Term: 21 years • Renewable: Yes • Annual Rental: \$10.50 per hectare, but not less than \$193 • Transfer: Requires the Minister's consent • Minimum Expenditure: \$625.00 per hectare for initial lease; \$1,250.00 per hectare for renewal 	<ul style="list-style-type: none"> • Tax is applied at graduated rates from 10% to 17% on mining profit

4 The information provided relates to "mineral exploration licences" which grant you the exclusive right to explore for minerals on specified Crown lands. There is also the option to obtain a non-exclusive "prospector's licence" for a fee of \$257.00. See *The Mines and Minerals Act*, CCSM, c M162.

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
New Brunswick	<ul style="list-style-type: none"> Term: Expires on December 31st in the year of issuance Renewable: Can extend for a maximum of 12 months Fee: \$500.00 	<ul style="list-style-type: none"> Term: One year. Renewable: Yes; up to three terms of one year each Area: Not less than one mineral claim unit and no more than 256 mineral claim units⁵ Fee: \$10.00 per mineral claim unit Minimum Required Work: \$100.00 per mineral claim per year for the first term increasing to \$800.00 per mineral claim per year for all terms after the twenty-fifth term 	<ul style="list-style-type: none"> Term: 20 years Renewable: Yes; two additional terms of 20 years each Annual Rental: \$6.00 per hectare Transfer: Requires the Minister's consent Minimum Required Work: \$60.00 per hectare per year 	<ul style="list-style-type: none"> Two-tier mining tax system with a 2% tax on net revenue and a 16% tax on net profit⁶

⁵ A "mineral claim unit" is an area described as a unit used to determine the location of a mineral claim on the New Brunswick Mineral and Petroleum Grid. See *General Regulation - Mining Act*, NB Reg 1986-98.

⁶ There are also royalties applied under the *Mining Act*, SNB 1985, c M-14.1, however you are exempt from these provided you are liable to pay tax under the *Metallic Minerals Tax Act*, RSNB 1973, c M-11.01.

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Newfoundland and Labrador	<ul style="list-style-type: none"> Term: Five years Renewable: Yes Fee: \$60.00 per claim 	<ul style="list-style-type: none"> Term: Five years Renewable: Yes; three terms of five years Area: Up to 256 coterminous map-staked claims (each map-staked claim is 25 hectares or less) Fee: \$60.00 per claim. Minimum Assessment Work: Between \$200 and \$1,200 per claim per year depending on the year and term of the licence 	<ul style="list-style-type: none"> Term: Not more than 25 years Renewable: Yes; for term of not more than 10 years Annual Rental: \$80.00 per hectare Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> Tax of 15% on 80% of a mine's net profit, plus 20% on the remaining 20% of net profit
Northwest Territories and Nunavut	<ul style="list-style-type: none"> Term: One year Renewable: Yes Fee: \$50.00 	<ul style="list-style-type: none"> Term: Three years or five years, depending on location of claim Renewable: Yes Area: Maximum 2,582.5 acres Fee: \$25.00 plus \$0.10 per acre Minimum Assessment Work: Ranges from \$0.10 per acre for the first work period to \$0.40 per acre for the third work period (work periods are either one or two years depending on the location of the claim) 	<ul style="list-style-type: none"> Term: 21 years Renewable: Yes Annual Rental: \$1.00 per acre for the first 21 years; thereafter \$2.00 per acre Transfer: No consent required 	<ul style="list-style-type: none"> Royalty of the lesser of 13% of output and the amount determined by a formula in the regulations that applies a progressive rate that starts at 5% for output in excess of \$10,000 and increases to 14% for output in excess of \$45 million

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Nova Scotia	<ul style="list-style-type: none"> • Term: n/a • Renewable: n/a • Fee: \$11.42 	<ul style="list-style-type: none"> • Term: One year • Renewable: Yes • Fee: \$5.71 per claim in the first year, increasing to \$182.85 per claim in years 26 and after • Minimum Assessment Work: \$200.00 per year per claim for the first 10 years; \$400.00 per year per claim for years 11 to 15; \$800.00 per year per claim for years 16 and after 	<ul style="list-style-type: none"> • Term: 20 years • Renewable: Yes • Annual Rental: \$114.25 per claim • Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> • Annual royalty of the greater of 2% of net revenue or 15% of all net income. If gross income for the fiscal year is less than a prescribed minimum amount, the total royalty is 2% of net revenue
Ontario	<ul style="list-style-type: none"> • Term: Five years • Renewable: Yes • Fee: \$25.50 	<ul style="list-style-type: none"> • Term: No expiration provided work requirements are met and fees are paid • Renewable: Yes • Area: Minimum 16 hectares; maximum 256 hectares • Fee: \$20.40 to \$61.20, depending on the number of claims staked • Minimum Assessment Work: No minimum for the first year; minimum for each 16-hectare claim increases by \$400.00 each year 	<ul style="list-style-type: none"> • Term: 21 years • Renewable: Yes; further term of 21-year • Annual Rental: \$3.00 per hectare • Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> • Tax of 10% on net profit (5% for remote areas)⁷

⁷ There is a different royalty regime for diamond mining under the *Mining Act*, RSO 1990, c M-14.

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Prince Edward Island	<ul style="list-style-type: none"> • No general licence for prospectors • Information on "exploration licences", which are exclusive, is listed under the "Mining Claims" section of the chart 	<ul style="list-style-type: none"> • Term: One year • Renewable: Yes; four terms of one year each • Area: Maximum of 80 claims • Fee: \$5.00 per claim • Minimum Assessment Work: No dollar value provided 	<ul style="list-style-type: none"> • Term: 20 years • Renewable: Yes; further period of 20 years • Rental: \$1.00 per acre • Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> • No royalty regime in place⁸

8 The *Mineral Resources Act*, RSEI 1988, c M-7 allows for the imposition of mining royalties through regulation, however no regulations have been enacted.

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Québec	<ul style="list-style-type: none"> • Term: Five years • Renewable: Yes • Fee: \$33.00 	<ul style="list-style-type: none"> • Term: Two years • Renewable: Yes • Area: Maximum 500 hectares in surveyed territory and 16 hectares in unsurveyed territory • Fee: Ranges from \$27.00 to \$123.00 per claim depending on the size and location of claims • Minimum Assessment Work: Ranges from \$48.00 to \$3,600.00 per claim depending on the size, location and term of the claims 	<ul style="list-style-type: none"> • Term: 20 years. • Renewable: Yes; three periods of 10 years each • Rental: \$21.00 per hectare on granted or alienated lands; \$44.00 per hectare on lands in the public domain • Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> • Duties payable for a fiscal year are equal to 15% of annual profit for 2011 and 16% for 2012 and after

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Saskatchewan ⁹	<ul style="list-style-type: none"> • Term: Two years • Renewable: No • Fee: \$0.15 per hectare, with a minimum of \$1,500.00 and a maximum of \$7,500.00 • Area: Between 10,000 and 50,000 hectares • Expenditure Requirements: \$1.25 per hectare in the first year and \$4.00 per hectare in the second 	<ul style="list-style-type: none"> • Term: Two years. • Renewable: Yes • Area: Between 16 and 6,000 hectares • Fee: \$0.30 per hectare • Expenditure Requirements: \$12.00 per hectare per year for years two to 10 (min. \$192.00 per claim); \$25.00 per hectare per year afterwards (min. \$400.00 per claim) 	<ul style="list-style-type: none"> • Term: 10 years • Renewable: Yes • Annual Rental: \$10.00 per hectare, minimum of \$1,600 per lease • Transfer: No consent required (however you must register it) • Expenditure Requirements: Ranges from \$25.00 to \$75.00 per hectare per year depending on year of lease 	<ul style="list-style-type: none"> • 5% of net profit from sales of up to 1 million troy ounces of precious metals; 10% of net profit from sales in excess of 1 million troy ounces of precious metals • There is a 10-year royalty holiday from the date that commercial production begins, provided that commercial production begins after 2002

⁹ The information for Saskatchewan is taken from *The Mineral Disposition Regulations*, 1986, Sask Reg 30/86. Subsurface mineral salts, such as potash, may be subject to *The Subsurface Mineral Regulations*, 1960, Sask Reg 541/67, under which the information presented may be different.

Jurisdiction	Prospecting Licences	Mining Claims	Leases	Royalties / Tax
Yukon ¹⁰	<ul style="list-style-type: none"> No licence required for prospecting 	<ul style="list-style-type: none"> Term: One year Renewable: Yes Area: Maximum size 1,500 feet by 1,500 feet Fee: \$10.00 per claim Minimum Assessment Work: \$100.00 per claim per year 	<ul style="list-style-type: none"> Term: 21 years Renewable: Yes Initial Term Rental: \$50.00, plus \$5.00 for each acre over 51.65 acres Renewal Term Rental: \$200.00, plus \$20.00 for each acre over 51.65 acres Transfer: Requires the Minister's consent 	<ul style="list-style-type: none"> Annual royalties are based on the value of the output of the mine The rates are 3% on output between \$10,000 and \$1 million; 5% on output between \$1 million and \$5 million; and a proportional increase of 1% on each additional \$5 million in output, to a maximum of 12%

¹⁰ The information for the Yukon portion of the table is taken from the territorial *Quartz Mining Act*, the act governing hard rock mining in the Yukon. For mining that uses methods to retrieve minerals from gravel or sand the *Placer Mining Act* is the governing statute.

Royalties

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Royalties

OVERVIEW

In the broadest sense, a royalty is the right to be paid a specified amount for each unit of production or a percentage of revenues generated from a mineral property if that property is ultimately developed into a producing mine. There are several reasons why a royalty may come into existence and several commercial applications for royalties in the Canadian mining industry.

A royalty is a common form of compensation paid to a land owner as full or partial consideration for the acquisition of a resource property. In this case, an owner/grantor would be looking to benefit as a passive participant in the development of the mineral project.

A royalty can also be employed by an owner/operator as an alternative form of financing or as a method of obtaining capital assets in order to develop a mineral property. This will allow the owner/operator to avoid diluting the equity in the asset base, as well as avoiding the use of traditional leverage. Royalty payments are usually based on either (i) production or (ii) some measure of revenue or profit. Therefore, an operator has the ability to access capital by selling a royalty when a project is in its early stages without incurring the obligation to make payments until after the mineral property is producing.

A royalty is passive in nature and, as a result, a royalty holder has no say in the development or operation of the mineral property. Accordingly, however, the royalty holder will not be responsible for any corollary expenses such as additional capital contributions, operating costs, reclamation costs or environmental liabilities. The passive nature of a royalty interest is in contrast to a "working interest", which is an active interest in the development and operation of a mineral property. The holder of a working interest will be liable for its proportionate share of capital, development, operating and environmental costs, and will also receive its percentage share of revenues generated from that project.

Royalties are also a common means by which governments extract payments for the right to exploit natural resources. Government royalties, which are effectively a tax on mineral extraction, are created by statute, imposed on mineral operations within the government's territorial jurisdiction and vary from one jurisdiction to another. This section is intended to provide a general overview of royalties made pursuant to negotiated agreements between private parties, and therefore the topic of royalties extracted by governments will not be addressed.

TYPES OF ROYALTIES

There are several different types of royalties in the Canadian mining industry, and they are generally based on either (i) revenues, (ii) accounting profits or (iii) production. It is important to note, however, that there is no such thing as a "standard" or "generic" type of royalty, and despite the name ascribed to any particular royalty it is ultimately the contractual definition (and not industrial custom) that will govern the manner in which the royalty payment is calculated. The specific characteristics or structure of a royalty will be the subject of commercial negotiations, and will be limited only by the creativity of the contracting parties. As such, the following discussion will lay out certain generally accepted interpretations of the various types of royalties, but is by no means exhaustive.

NET SMELTER RETURN ROYALTY ("NSR")

An NSR is a very common method of calculating a royalty payment in Canada. An NSR is a payment based on gross revenues and does not take into account operating or financing costs. An NSR generally refers to a percentage of gross revenues generated from the proceeds of sale of a mineral product, less a few relatively straightforward deductions. The allowable deductions are usually restricted to items such as the cost of shipping, sampling, insurance and taxes. The benefit of an NSR is that operating and financial costs (which can be subject to debate and accounting manipulation absent a well drafted agreement) will not have an impact on the royalty payment.

NET PROFIT ROYALTY ("NPI")

An NPI is a payment based on a percentage of the profits realized from operations after capital, development (including interest) and operating costs have all been recouped. In addition, an NPI will generally permit certain accounting reserves to be deducted, including reserves for working capital and reclamation. The calculation of an NPI can be very complex and subject to different accounting interpretations and manipulations, and as such, parties must exercise diligence in ensuring that royalty provisions are clearly and carefully drafted.

NET PROCEEDS ROYALTY ("NPR")

An NPR is similar to an NPI and generally implies a royalty based on net operating profit, less deductions for operating costs and certain accounting reserves. However, unlike an NPI, the payor is not entitled to recoup capital costs. In addition, since an NPR is based on operating profit (and not bottom line accounting profit) the royalty would not include revenues from any other sources such as interest on invested funds, sale of capital items or proceeds from hedging transactions.

PRODUCT TONNAGE ROYALTY ("PTR")

A PTR is a payment based on the tonnage of a mineral produced. It is a very straightforward method of calculation provided that the agreement clearly sets out the manner of calculating the tonnage to be used in determining the quantum of the royalty payment. A PTR is not a popular form of royalty in Canada and is typically employed only for small precious metal ore bodies and open pit operations.

GROSS ROYALTY ("GR") OR GROSS OVERRIDING ROYALTY ("GOR")

The GR and the GOR are similar to an NSR in that they are payments based on gross revenues generated from the proceeds of sale of a mineral product, however, unlike an NSR, they allow for very few, if any, deductions.

OVERRIDING ROYALTY ("ORR")

An ORR constitutes payments based on the proceeds of sale of gross production which are usually not subject to deductions for any portion of development, operation, maintenance or environmental costs.

ADVANCE AND MINIMUM ROYALTIES

Advance and minimum royalties are enhancements that may be added to any of the foregoing royalties. An advance royalty is a payment made to the royalty holder prior to the payment of the actual royalty, which can often be deducted against later royalty payments when production commences. A minimum royalty will usually come into effect post production and essentially sets a floor on the quantum of the actual royalty payment.

The NSR, NPI and NPR are the most common forms of royalties employed in Canada. Each of the foregoing are only examples of customary meanings generally attributed to these terms. The actual manner of calculating any particular royalty will be determined through negotiation and may be tailored to meet the commercial needs of the parties involved.

LEGAL AND COMMERCIAL CONSIDERATIONS

Generally, the most contentious aspect of royalty agreements is the manner in which the royalty payment is calculated. As such, it must be ensured that the items to be included in the royalty calculation are defined with certainty. A well-drafted agreement will assist in avoiding future pitfalls, and will enable the parties to have a clear understanding of how the payments are to be calculated and what rights and responsibilities they will have. Certain critical commercial considerations which must be addressed include:

- legal description of the subject property and confirming grantor's title and/or legal rights;
- determining whether the basis for calculating royalties should be revenue, profit or production (referred to as "sliding royalty rates");
- which revenues should be included in the royalty calculation;
- permitted deductions, including amounts for accounting reserves, recoupment and accrual of interest;
- payment schedule and the period for which royalty payments will be made;
- advance or minimum royalty, if any;
- whether the royalty should be based on actual profits/revenues received or based on prevailing market prices;
- whether to incorporate a mechanism to deal with market price fluctuations;
- audit rights on the part of the royalty recipient; and
- dispute resolution procedures.

A royalty holder must also consider what form of security will be taken in order to ensure that the royalty interest is appropriately protected. Without sufficient security, or other protective measures, a royalty holder would be exposed to a default on the part of the operator, such as the operator's insolvency, bankruptcy or the sale of the subject property. A recipient's royalty interest is generally the most secure if it is construed as an interest in land (as compared to a contractual interest). The question of whether any particular royalty is a contractual interest or an interest in land is a complex legal question which is yet to be resolved in Canada, and suffice it to say, the contracting parties should take great care in structuring a royalty so that their respective commercial interests are appropriately protected. Many jurisdictions have legislation that allows for (and in certain cases, requires) the registration of a royalty interest on title to the subject mineral claims. Even if the registration of a royalty interest on title is ultimately found to be insufficient to create an interest in land, the registration of the interest will nonetheless provide public notice of the existence of such interest to any potential third-party purchaser of the subject mineral property. Examples of some of the additional protective measures which can be undertaken by the recipient to protect a royalty interest include:

- in creating the royalty, including unequivocal language which is in keeping with the creation of a real property interest or rent (such as the "reservation" or "retention" of a royalty);

- if possible, reserving the royalty in the transfer documents and having the reservation shown on the official title record in order to attempt to create an interest in land;
- registering the royalty interest, or notice thereof, against title to the property in order to provide public notice of the royalty;
- creating a security interest in the assets of the payor and registering such security interest in accordance with local laws;
- ensuring that all registrations are kept current in order to maintain priority;
- if the royalty was granted for an unpatented mining claim, ensuring the re-granting of a royalty upon the subsequent grant of a mining lease or patent by the appropriate authority; and
- obtaining a novation agreement with anyone who acquires any right in the property.

Investors would be well-advised to seek out professional advice prior to engaging in royalty negotiations in order to ensure that the transaction is structured in a manner that meets the parties' commercial needs while at the same time complies with the legal formalities required to adequately protect the royalty interest.

CANADIAN SECURITIES LAWS

Under Canadian securities laws, holders of certain royalty interests are responsible for the preparation and filing of reports which must be compliant with National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("NI 43-101"), and certain ongoing disclosure requirements prescribed by National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102"). The definition of a "mineral project" contained in these instruments specifically includes a royalty interest, and as such, an issuer that is required to comply with the foregoing rules will be required to make certain disclosures, which includes technical reports, in accordance with the prescribed forms.

It will be extremely difficult, if not impossible, for the royalty holder to comply with its securities law obligations without the ability to access the property and technical data relating to the property. There is limited relief available from the requirements of these instruments, and a royalty holder will not necessarily be able to rely on the reports filed by the project operator. As such, a royalty holder should ensure that the royalty agreement contains a provision for continued access to technical information, and access to the property itself, such that the royalty holder is able to fully comply with its legal obligations.

Capital Markets Financing For Mining

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CAPITAL MARKETS FINANCING FOR MINING

Equity capital for a company engaged in mining can be raised by "going public" in Canada or in the United States and listing shares of the public company on a stock exchange such as the TSX or one of the stock exchanges in the United States such as The New York Stock Exchange (the "NYSE") or The Nasdaq Stock Market ("Nasdaq").

Davies has prepared a guide titled *Going Public in Canada and the United States*, which provides a detailed summary of the important legal and business issues to be considered when raising capital in North American public markets. Mining companies that access North American capital markets will be subject to regulations and other requirements that are particular to the mining industry. The following is a summary of additional information relevant to the mining industry which supplements Davies' guide on *Going Public in Canada and the United States* specifically in regard to:

- the special public disclosure obligations in Canada and the United States for companies carrying on business in the mining sector; and
- the TSX and TSX-V minimum listing requirements for mining issuers.

STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS

NATIONAL INSTRUMENT 43-101

All Canadian provinces have adopted NI 43-101, which establishes standards for disclosure of scientific and technical information regarding mineral projects. Principally, NI 43-101 requires that disclosure be based on a technical report or other information prepared by or under the supervision of a "qualified person" and that disclosure of mineral resources and reserves be made using the categories of resources and reserves adopted by the Canadian Institute of Mining, Metallurgy and Petroleum ("**CIM Categories**").

(a) CIM Categories

Although NI 43-101 refers to the CIM Categories for determining mineral resources and mineral reserves, the instrument does permit foreign reporting issuers or Canadian reporting issuers with properties located in a foreign jurisdiction to make disclosure and file a technical report that utilizes the mineral resource and mineral reserve categories of the JORC Code, the SEC Industry Guide 7, the IMMM Reporting Code or the SAMREC Code, provided a reconciliation to the CIM Categories is provided.

The SEC Industry Guide 7 (discussed below) only recognizes the categories of proven (measured) and probable (indicated) *reserves*. Measured and indicated *resources*, which are permitted to be disclosed under NI 43-101, are not recognized under the SEC guide and are generally disclosed together as "mineralized material" rather than "mineral resources". The SEC does not permit disclosure of "inferred" *resources*. These differences in terminology and disclosure standards can pose a challenge for qualified persons in preparing reconciliations between the SEC Industry Guide 7 and the CIM Categories.

(b) Qualified Person

A "qualified person" is an individual who:

- is an engineer or geoscientist with at least five years of experience in mineral exploration, mine development or operation, or mineral project assessment, or any combination of these;

- has experience relevant to the subject matter of the mineral project and the technical report; and
- is a member in good standing of a professional association of engineers or geoscientists recognized by NI 43-101.

In certain circumstances, the qualified person must also be independent of the reporting issuer. Non-independent persons include those who, by reason of employment, securities ownership, affiliation or physical proximity are in some way connected with the issuer. An independent qualified person is required when an issuer (a) first becomes a reporting issuer in Canada, (b) files a long form prospectus, or (c) provides first-time disclosure of mineral resources or reserves or disclosure of a 100% or greater change in total mineral resources or reserves on a material property in the case of producers falling below a certain gross revenue threshold based on mining tests.

(c) Mineral Projects

NI 43-101 only applies to public disclosure of "mineral projects", which includes interests in diamonds, base and precious metals and coal but does not include natural gas, bituminous sands or shales, groundwater or coal bed methane.

(d) Technical Reports

NI 43-101 requires a public company, on becoming a reporting issuer in any Canadian jurisdiction, to publicly file a technical report for a mining project on each material property. Thereafter, the reporting issuer must publicly file a new technical report to support scientific or technical information disclosed in securities offering documents such as a prospectus, proxy circular or rights offering circular, the annual information form. Canadian reporting issuers are required to provide, press releases and other types of required disclosure documents.

Prior to filing a technical report, the issuer must have the qualified person responsible for preparing or supervising the preparation of the report conduct an inspection of the property (excluding early stage exploration properties) that is the subject of the report. An issuer must also file certificates and consents of the qualified persons responsible for the report at the time of filing the report.

The form and contents of a technical report are dictated by Form 43-101 attached to NI 43-101. The form calls for a detailed description of the property, including factors such as location, ownership, environmental liabilities, required permits, accessibility, infrastructure and history. The report must also include exploration and drilling results, as well as sampling methods, sample preparation, and data verification measures. The form sets out rules regarding mineral resource and reserve estimates and prohibits references to unproven and improbable resources or reserves in an economic evaluation used in a feasibility study.

TSX DISCLOSURE RULES

Mining companies whose securities are listed on the TSX must comply with the TSX's Disclosure Standards for Companies Engaged in Mineral Exploration, Development & Production (the "**TSX Standards**"). These standards, although not as onerous or detailed as NI 43-101, are aimed at ensuring accuracy and consistency in public disclosures. Any information published by or on behalf of the listed issuer must comply with the TSX Standards, except for prospectuses and technical reports, which have their own specific securities legislation and TSX requirements. The TSX Standards deal with matters such as:

- timely disclosure of material changes;
- contents of press releases;
- contents of websites;

- disclosing the results of exploration activity and assay results in a manner that is not misleading;
- support for estimations of mineral resources and reserves;
- scope and parameters of feasibility studies and the key assumptions made in valuations;
- tenure, permitting and other issues relating to rights of exploration and exploitation of any newly acquired material property; and
- calculations of production cost and figures.

SEC INDUSTRY GUIDE FOR MINING OPERATORS

The SEC has prescribed industry-specific guides for use in preparing registration statements of companies. For the mining industry, the SEC has established mining disclosure guidelines in its Industry Guide 7. These guidelines set forth technical, legal and economic criteria for determining whether a company's ore reserves can be classified as proven and probable and require the disclosure of information on these reserves, production capacity, land available for extraction and other similar information.

As discussed above, one of the notable distinctions between the SEC disclosure guidelines and all other internationally recognized disclosure guidelines is that the SEC does not permit, except in limited circumstances, the disclosure of mineral estimates that are not proven (measured) or probable (indicated) *reserves*. That being said, the SEC has allowed companies to report "mineralized material", which is generally interpreted as being equivalent to mineral *resources*. The SEC is of the opinion that only the equivalent of "measured" and "indicated" mineral resources can be disclosed as "mineralized material", while the equivalent of "inferred" mineral *resources* should not because "inferred" mineralization is too speculative to report. All other internationally accepted reporting codes define and allow the reporting of mineral resources as inferred, indicated or measured.

LISTING REQUIREMENTS ON THE TORONTO STOCK EXCHANGE

In order to list securities on the TSX, the following minimum listing requirements must be satisfied:

- The company must have outstanding at least one million free-trading public shares with an aggregate market value of at least \$4 million held by at least 300 public shareholders, each holding one board lot (100 shares) or more.
- International issuers already listed on another recognized exchange that is acceptable to the TSX (such as the Nasdaq or the NYSE) and that are incorporated outside Canada, are generally required to have some presence in Canada and must be able to demonstrate that they are able to satisfy all of their reporting and public company obligations in Canada. This requirement may be satisfied by having a member of the board of directors or management, an employee or a consultant of the issuer situated in Canada.
- The management of an applicant company is an important factor in the consideration of its listing application. The TSX will consider the background and expertise of management in the context of the business of the company. Management (including the company's board of directors) should have adequate experience and technical expertise relevant to a company's mining projects and adequate public company experience. Companies are required to have at least two independent directors, a chief executive officer (CEO) and chief financial officer (CFO) who is not the same person as the CEO, and a corporate secretary.

- Sponsorship by a participating organization of the TSX and the corresponding written sponsor's report is mandatory for all companies seeking to list on the TSX, with the exception of those classified as "TSX exempt". In order to be classified as TSX exempt, the applicant issuer must have (i) net tangible assets of \$7.5 million or more; (ii) pre-tax profitability from ongoing operations in the fiscal year immediately preceding the filing of the listing application; (iii) pre-tax cash flow of \$700,000 in the fiscal year immediately preceding the filing of the listing application and an average pre-tax cash flow of \$500,000 for the two fiscal years immediately preceding the filing of the listing application; (iv) proven and probable reserves to provide a mine life of at least three years, calculated by an independent qualified person; and (v) adequate working capital to carry on the business and an appropriate capital structure.
- The applicant issuer must sign a listing agreement to formally place on record the issuer's commitment to comply with TSX requirements for the duration of its listing.

TSX listing requirements for mining companies are summarized in Table 3 below.

LISTING REQUIREMENTS ON THE TSX VENTURE EXCHANGE

The TSX-V's listing requirements are specifically designed for emerging companies and therefore focus more on the experience of the management team and their products and services.

The TSX-V classifies issuers into the following two tiers based on historical financial performance, stage of business development and financial resources at the time of listing:

- **Tier 1** is reserved for more advanced issuers with greater financial resources and entitles these issuers to less onerous filing requirements than Tier 2 issuers.
- **Tier 2** represents innovative, early stage companies in all industry sectors and is the tier where the majority of the TSX-V's listed issuers trade. Tier 2 issuers can apply to graduate to Tier 1 status once the minimum listing requirements of Tier 1 have been met.

Minimum public distribution requirements are specific to the particular tier on which the applicant issuer is applying to be listed:

- **Tier 1:** At least 1 million free-trading public shares held by at least 250 public shareholders, each holding one board lot or more.
- **Tier 2:** At least 500,000 free-trading public shares held by at least 200 public shareholders, each holding one board lot or more.

Issuers are further classified within each of the two tiers into industry sectors based on the issuer's business (e.g., mining). Minimum quantitative requirements such as net tangible assets, working capital and financial resources are specific to each particular tier and industry sector, and are broken down into further categories.

Sponsorship and a sponsor's report may be required in relation to each application for a new listing. In making a determination as to whether an applicant meets the listing requirements, the TSX-V will rely heavily on the fact that a sponsor has agreed to sponsor the applicant issuer and prepare and file a sponsor's report.

The capital structure of an issuer making an application for a new listing must be acceptable to the TSX-V. Generally speaking, securities issued to principals of the issuer or the resulting issuer, as well as securities issued below certain price levels, are required to be escrowed or held subject to hold periods.

TSX-V listing requirements for mining issuers are summarized in Table 4 below.

TABLE 3

TSX Minimum Listing Requirements for Mining Issuers

	TSX Non-Exempt Mining Development Stage or Producing Issuers	TSX Non-Exempt Mining Senior Producing Issuers	TSX Exempt Mining Issuers
Net Tangible Assets, Earnings or Revenue	<ul style="list-style-type: none"> • \$3 million net tangible assets 	<ul style="list-style-type: none"> • \$4 million net tangible assets; evidence indicating a reasonable likelihood of future profitability supported by a feasibility study or historical production and financial performance 	<ul style="list-style-type: none"> • \$7.5 million net tangible assets; pre-tax profitability from ongoing operations in last fiscal year; pre-tax cash flow of \$700,000 in last fiscal year and average of \$500,000 for past two fiscal years
Property Requirements	<ul style="list-style-type: none"> • Advanced exploration property;¹ minimum 50% ownership in the property² 	<ul style="list-style-type: none"> • Three years proven and probable reserves as estimated by an independent qualified person (if not in production, a production decision made) 	<ul style="list-style-type: none"> • Three years proven and probable reserves as estimated by an independent qualified person

1 "Advanced exploration property" refers to a property on which a zone of mineralization has been demonstrated in three dimensions with reasonable continuity indicated. The mineralization identified must have economically interesting grades.

2 A company must hold or have the right to earn and maintain a 50% interest in the qualifying property. Companies holding less than a 50% interest, but not less than a 30% interest, will be considered on a case-by-case basis looking at program size, stage of advancement of the property and strategic alliances.

	TSX Non-Exempt Mining Development Stage or Producing Issuers	TSX Non-Exempt Mining Senior Producing Issuers	TSX Exempt Mining Issuers
Recommended Work Program	<ul style="list-style-type: none"> At least \$750,000 on advanced exploration property¹ as recommended in the independent technical report.³ 	<ul style="list-style-type: none"> Bringing the mine into commercial production 	<ul style="list-style-type: none"> Commercial-level mining operations
Working Capital and Financial Resources	<ul style="list-style-type: none"> Minimum \$2 million working capital, but sufficient to complete planned programs, plus 18 months general and administrative expenses, anticipated property payments and capital expenditures; appropriate capital structure 	<ul style="list-style-type: none"> Adequate funds to bring the mine into commercial production as well as adequate working capital for all budgeted capital expenditures and to carry on the business; appropriate capital structure 	<ul style="list-style-type: none"> Adequate working capital to carry on the business; appropriate capital structure
Distribution, Market Capitalization & Public Float	<ul style="list-style-type: none"> At least one million freely tradable shares with an aggregate market value of \$4 million; 300 public holders, each holding one board lot or more 		
Sponsorship	<ul style="list-style-type: none"> Required (may be waived) 	<ul style="list-style-type: none"> Required (may be waived) 	<ul style="list-style-type: none"> No requirement

3 A "technical report" or "geological report" is a report prepared in accordance with National Instrument 43-101 - *Standards of Disclosure for Mineral Projects*, a policy governing scientific and technical disclosure for mining projects.

	TSX Non-Exempt Mining Development Stage or Producing Issuers	TSX Non-Exempt Mining Senior Producing Issuers	TSX Exempt Mining Issuers
Other Criteria	<ul style="list-style-type: none"> • Up-to-date, comprehensive technical report³ prepared by an independent qualified person; 18-month projection (by quarter) of sources and uses of funds, signed by CFO 	<ul style="list-style-type: none"> • Up-to-date, comprehensive technical report³ prepared by an independent qualified person; 18 month projection (by quarter) of sources and uses of funds, signed by CFO 	<ul style="list-style-type: none"> • Up-to-date, comprehensive technical report³ prepared by an independent qualified person

TABLE 4

TSX-V Minimum Listing Requirements for Mining Issuers

	TIER 1 ISSUERS
Net Tangible Assets	\$2 million net tangible assets
Property or Reserves	Material interest in a Tier 1 property ¹
Prior Expenditures	No requirement
Recommended Work Program	\$500,000 on the Tier 1 property ¹ (as recommended by geological report)
Working Capital and Financial Resources	Adequate working capital and financial resources to carry out stated work program or execute business plan for 18 months following listing; \$200,000 in unallocated funds
Earnings or Revenue	No requirement
Distribution, Market Capitalization and Float	One million free-trading public shares; 250 public shareholders with a board lot and no resale restrictions; 20% of issued and outstanding shares in the hands of public shareholders
Other Criteria	Geological report recommending completion of work program; sponsor report may be required

¹ "Tier 1 Property" means a property that has substantial geological merit and is:

- (i) a property in which the issuer holds a material interest;
- (ii) a property on which previous exploration, including detailed surface geological, geophysical and/or geochemical surveying and at least an initial phase of drilling or other detailed sampling (such as trench or underground opening sampling), has been completed;
- (iii) drilling or other detailed sampling on the property has identified potentially economic or economic mineralization; and
- (iv) an independent geological report recommends a minimum \$500,000 Phase 1 drilling (or other form of detailed sampling) program based on the merits of previous exploration results; or an independent, positive, feasibility study demonstrates that the property is capable of generating positive cash flow from ongoing operations.

	TIER 2 ISSUERS
Net Tangible Assets	No requirement
Property or Reserves	Significant interest (at least 50% interest) in a qualifying property or, at the discretion of the TSX-V, rights to earn a significant interest in the qualifying property
Prior Expenditures	\$100,000 of approved expenditures by the issuer on the qualifying property in last three years by applicant issuer
Recommended Work Program	\$200,000 on the qualifying property as recommended by geological report
Working Capital and Financial Resources	Adequate working capital and financial resources to carry out stated work program or execute business plan for 12 months following listing plus \$100,000 in unallocated funds
Earnings or Revenue	No requirement
Distribution, Market Capitalization and Float	500,000 public free trading shares 200 public shareholders with a board lot and no resale restrictions 20% of issued and outstanding shares in the hands of public shareholders
Other Criteria	Geological report or technical report ² recommending completion of work program; sponsor report may be required

2 A "technical report" or "geological report" is a report prepared in accordance with National Instrument 43-101 - *Standards of Disclosure for Mineral Projects*, a policy governing scientific and technical disclosure for mining projects.

Tax Considerations

TAX CONSIDERATIONS

OVERVIEW

The federal and provincial income tax systems in Canada, as well as provincial mining taxes, recognize that mining is a highly cyclical and capital-intensive industry, with a long lead time between the initial investment and commercial production. Accordingly, Canada provides generous tax treatment for exploration and other intangible expenses and allows mining companies to recover most of their initial capital investment before having to pay a significant amount of taxes. The Canadian income tax regime also provides for loss carry-over rules to help mitigate the negative financial effects of fluctuating prices. Finally, a unique characteristic of provincial mining tax and royalty regimes is that they are principally based on net production profits rather than on the net smelter returns commonly found in other countries.

The following is a summary of the main aspects of Canada's federal and provincial tax systems that are relevant to non-resident investors in mining operations in Canada.

INCOME TAX

(a) Legislation

Income tax is imposed in Canada by the federal government and by the provincial and territorial governments.

The federal government levies income tax under the *Income Tax Act* (the "**Tax Act**"). It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident. A partnership is generally a flow-through entity for Canadian tax purposes and not generally itself a taxable entity (unless deemed to be a SIFT partnership, as further discussed below). The Tax Act is administered by a government agency, the Canada Revenue Agency ("**CRA**").

Each provincial and territorial government levies income tax computed on a similar basis as federal income tax, at different rates.

The combined federal and provincial rates of income tax for corporations for the 2011 taxation year are set out in Table 5 below.

For the remainder of this section, except where indicated otherwise, descriptions of taxation provisions refer only to the Tax Act.

(b) Jurisdiction to Tax

The primary basis for taxation is the residence of the taxpayer. Canada does not impose tax on the basis of citizenship.

Canadian residents are generally subject to income tax in Canada on their worldwide income, regardless of source, but generally entitled to tax credits or deductions for foreign taxes paid.

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty. Canada has an extensive network of treaties, with approximately 89 treaties currently in force.

The principal sources of income of non-residents that are subject to tax in Canada are:

- income from a business carried on in Canada;
- income from an office or employment performed in Canada;
- gains realized on the disposition of "taxable Canadian property"; and
- certain types of passive income such as dividends paid by a Canadian corporation or rent from Canadian real estate.

Taxable Canadian property includes:

- real or immovable property situated in Canada;
- assets used in a business carried on in Canada;
- a share of a private corporation, an interest in a trust or an interest in a partnership more than 50% of the value of which was derived from real or immovable property situated in Canada, Canadian resource property or timber resource property at any time in the 60-month period prior to the disposition of such shares or other interests; and
- units of a mutual fund trust and listed shares of a corporation, where at any time during the 60-month period preceding the disposition, a 25% ownership threshold is exceeded and more than 50% of the value of the units or shares was derived from real or immovable property situated in Canada, Canadian resource property or timber resource property.

(c) Determination of Canadian Residence

The term "resident in Canada" is not defined in the Tax Act but instead a person's residence is determined by common law criteria. However, there are some specific deeming rules in the Tax Act that deem certain persons to be either resident or not resident in Canada for purposes of the Tax Act.

A corporation incorporated in Canada after April 26, 1965 (or, in certain limited situations, before this date) is deemed to be resident in Canada.

There is no statutory rule that deems a corporation incorporated outside Canada to be resident in Canada. Under the common law test of residence, a corporation will be considered to be resident in Canada if its central management and control is located in Canada. Central management and control is generally considered to refer to the superior or directing decision making in respect of a corporation that is normally exercised by its board of directors. As a result, the place where the board of directors exercises its decision-making powers will generally be the place in which the central management and control of the corporation is located.

In the case of an individual, the courts have generally held that residence is determined on the basis of the degree to which an individual "settles into or maintains" his or her ordinary mode of living at the place in question. In addition, an individual will be regarded as establishing Canadian residency if he or she is ordinarily resident in Canada. The determination of whether or not an individual is ordinarily resident in Canada depends on whether Canada is the place where the individual, in the settled routine of his or her life, regularly, normally or customarily lives. In addition, the Tax Act deems an individual who "sojourns" in Canada for 183 or more days during a year to be resident in Canada throughout that year.

In general, a trust will be resident in Canada for income tax purposes where a majority of its trustees are resident in Canada. However, a careful examination of the facts of each situation, as well as a review of recent

jurisprudence, is necessary to help determine the residency of a trust. In addition, certain non-resident trusts will be deemed to be resident in Canada in certain circumstances.

A taxpayer who is considered under Canadian domestic law to be resident in Canada and at the same time resident in another country may be deemed by an applicable tax treaty to be resident in only one country for tax purposes.

(d) Annual Tax Returns

Canadian resident taxpayers are generally required to file an annual tax return. Partnerships that carry on business in Canada or that are "Canadian partnerships" (i.e., partnerships in which all of the members are Canadian residents) are generally required to file an annual information return.

Any non-resident of Canada who, in a taxation year, has a taxable capital gain or disposes of taxable Canadian property (even absent a gain) is generally required to file a Canadian tax return in respect of that year.

A non-resident corporation is required to file a Canadian tax return for any taxation year in which it carries on business in Canada directly or through a partnership. A non-resident individual carrying on business in Canada directly or through a partnership is also required to file a Canadian income tax return, but only in respect of a taxation year in which Canadian tax is owing by the non-resident on such business income.

The filing obligation applies regardless of whether the non-resident is entitled under an applicable tax treaty to relief from Canadian taxation.

(e) Section 116 Certificates

There is a reporting and tax collection mechanism that applies to dispositions of most kinds of taxable Canadian property by non-residents. A non-resident vendor must notify CRA in writing of such a disposition, providing particulars of the transaction, and is entitled to obtain a certificate (commonly referred to as a "**Section 116 Certificate**") from CRA, upon satisfying CRA that no Canadian tax is owing (e.g., because there is no gain or because any gain is exempt under an applicable tax treaty), or by paying 25% of the gain to CRA on account of the ultimate tax liability, or by posting acceptable security.

In addition, any person, whether a resident or non-resident of Canada, acquiring taxable Canadian property from a non-resident is required to withhold and remit to CRA 25% of the purchase price or, where the non-resident vendor provides a Section 116 Certificate, 25% of the amount, if any, by which the purchase price exceeds the limit indicated in the Section 116 Certificate. The rate is increased to 50% for certain types of property, including Canadian resource property and depreciable property (e.g., machinery and equipment, and buildings). If the property is "taxable Québec property", an additional withholding applies (at a rate of 12% (30% where the 50% federal rate applies)) and a separate certificate (equivalent to a Section 116 Certificate) must be obtained from the Québec tax authority. Failure to obtain a satisfactory Section 116 Certificate from the non-resident vendor or, in the alternative, to make the required withholding and remittance, will make the purchaser liable for the amounts that should have been withheld and remitted.

These requirements do not apply to certain excluded property, such as listed shares, units of a mutual fund trust and debt securities and any "treaty-protected property" (as defined in the Tax Act). A purchaser is exempt from the withholding obligation under section 116 in respect of the acquisition of taxable Canadian property (other than certain specified taxable Canadian property, such as depreciable property) from a non-resident person where (i) the purchaser concludes after reasonable inquiry that the non-resident person is, under a tax treaty between Canada and a particular country, resident in the particular country, (ii) any gain from the disposition of the property would be exempt from Canadian income tax by virtue of such treaty and (iii) where required, the purchaser provides CRA with notice of the acquisition within a specified period.

Notification requirements apply in respect of dispositions of taxable Canadian property that is "treaty-protected property" to a related person.

(f) Determination of Income

In very general terms, income for purposes of the Tax Act means income from business or property, income from office or employment and taxable capital gains.

Income from business or property is generally equivalent to the profit from the business or property calculated in accordance with "well accepted principles of business (or accounting) practice" or "well accepted principles of commercial trading", adjusted as required by specific rules in the Tax Act.

Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses. The amount of the capital gain generally equals the proceeds of disposition less the sum of the "adjusted cost base" of the property under the Tax Act (roughly the cost of acquisition) and any costs of disposition. If capital cost allowance (tax depreciation) has been taken in respect of the capital asset, part of the proceeds may be ordinary income (a recapture of the capital cost allowance previously claimed).

Employment income includes wages, bonuses and taxable employment benefits. Remuneration paid to directors constitutes income from employment. Deductions from employment income are very limited.

Employers are required to make regular "source deductions" for income tax and social security contributions from employees' income (including taxable benefits) and remit the amount to CRA on behalf of the employees. Directors of corporations may be personally liable if a corporate employer fails to make or remit source deductions. Employers may also be required to pay provincial payroll taxes.

(g) Losses

Canadian rules do not permit formal loss consolidation or other relief within a corporate group; however, there are established techniques that have been accepted by CRA within acceptable limits for shifting losses between members of the same corporate group. The federal government is currently exploring whether a formal system of loss transfers within corporate groups or consolidated reporting would be appropriate.

Non-capital losses of a taxpayer from business or property can generally be carried back three years or forward 20 years to reduce taxable income of the taxpayer. Losses incurred prior to 2006 are subject to more restrictive carry forwards.

Net capital losses may be carried back three years or forward indefinitely, but can only be applied against taxable capital gains.

Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation.

(h) Interest Expense and Other Financing Costs

Subject to proposed loss-limitation rules, reasonable interest expense on funds borrowed or indebtedness incurred to acquire property for the purpose of earning income from business or property is deductible on an accrual or cash basis (depending upon the method regularly followed by the taxpayer).

Non-interest costs, including commissions and fees, incurred to borrow money or issue debt for an income-earning purpose or to issue treasury shares are generally deductible on a straight-line basis over five years.

(i) Income from Shares

Taxable dividends received by a Canadian resident corporation from a "taxable Canadian corporation" are generally fully deductible to the recipient corporation (subject to certain anti-avoidance rules), permitting dividends to pass up through a chain of taxable Canadian corporations without taxation. A taxable Canadian corporation is any "Canadian corporation" (including any corporation incorporated in Canada) that is not exempt under the Tax Act by reason of special rules applicable in limited circumstances (e.g., Crown corporations, pension corporations).

Dividends received by an individual are taxable, subject to the dividend tax credit, which reduces the effective rate of taxation on dividends paid by a taxable Canadian corporation and is intended to compensate (partially) for underlying corporate tax paid by the dividend payer. The dividend tax credit for certain "eligible dividends" more fully compensates individual shareholders for the underlying corporate tax paid.

Dividends received by a Canadian resident corporation from a non-resident corporation are included in income, subject to certain deductions permitted under the Canadian foreign affiliate rules and subject to the foreign tax credit rules. The foreign affiliate rules are complex but, in general terms, provide that earnings from an active business carried on by a foreign affiliate in a jurisdiction with which Canada has a tax treaty, or in a non-treaty jurisdiction that has agreed to exchange tax information with Canada, may be repatriated to Canada free of Canadian tax. This regime affords some tax planning opportunities for Canadian-based multinational enterprises. Canada has three tax information exchange agreements currently in force, with several others either signed, but not yet in force, or currently being negotiated.

Conversely, under the foreign affiliate rules, Canadian residents are required to include their share of the "foreign accrual property income" (passive income or income deemed to be passive) of a controlled foreign affiliate whether or not distributed to the Canadian resident.

Taxpayers are also required to include, in certain circumstances, an amount of deemed income in respect of an interest in any "offshore investment fund property".

A shareholder of a Canadian private corporation, whether resident in Canada or non-resident, is generally entitled to the return of share capital free from Canadian tax (including Canadian withholding tax). This is an important planning point for non-residents acquiring shares of a Canadian private corporation, especially since capital may be returned without first distributing earnings and profits by way of dividend.

(j) Depreciation

Taxpayers are permitted deductions ("capital cost allowance") at prescribed rates in respect of depreciable property used in a business, including machinery and equipment, buildings and certain intangible property. Land is not eligible for tax depreciation. Capital cost allowance is generally computed by reference to the aggregate undepreciated capital cost of various asset classes and not the undepreciated capital cost of each individual asset.

A similar deduction is permitted in respect of certain otherwise non-deductible capital expenditures incurred for the purpose of earning income from a business, including purchased goodwill.

Most capital assets acquired by mining and oil and gas companies qualify for a depreciation rate of 25% on a declining balance basis. However, equipment used in a manufacturing and processing operation beyond the prime metal stage qualifies for a depreciation rate of 30% on a declining balance basis.

In addition to the normal 25% rate of depreciation accorded to most mining assets, in certain circumstances an accelerated capital cost allowance may be available to provide the full write-off of capital costs before a mine begins to pay income tax.

(k) Capital Tax

The federal government imposes a capital tax on financial institutions at a rate of 1.25% of "taxable capital employed in Canada" in excess of \$1 billion.

The capital tax on corporations that are not financial institutions was eliminated by the federal government for 2006 and subsequent taxation years.

Some provinces also impose their own capital tax on taxable capital employed in the province. As of 2011, both Ontario and Québec have eliminated their capital tax.

(l) Corporate Reorganizations

The Tax Act permits many corporate reorganizations to be effected on a "rollover" or tax-deferred basis to shareholders. Some reorganizations, such as share-for-share exchanges, are relatively straightforward from a tax perspective, whereas others, such as tax-deferred spin-offs, have complex statutory and administrative restrictions.

(m) Partnerships

Partnerships are common investment vehicles in Canada because they are generally flow-throughs for tax purposes. Although partnerships are not taxpayers *per se* under the Tax Act, a partnership is required to compute its income as though it were a taxpayer resident in Canada. Each member of the partnership includes in income the member's allocable share of the income, gain or loss of the partnership. Special rules apply to limited partners that may, in certain circumstances, restrict their ability to claim losses of a limited partnership allocated to them.

(n) Trusts

Unlike partnerships, trusts resident in Canada are taxable entities under the Tax Act. However, certain trusts, including personal trusts and mutual fund trusts, may be eligible for an offsetting deduction in respect of amounts distributed to beneficiaries. The effect of such rules is to reduce (or eliminate) tax at the trust level. Such distributions are generally taxable in the hands of the beneficiaries.

As previously noted, the Tax Act may deem non-resident trusts to be resident in Canada in certain circumstances.

(o) Specified Investment Flow-Throughs

The Tax Act has been amended to change the taxation of certain publicly traded trusts and partnerships referred to as "specified investment flow-through" entities or "SIFTs" (the "**SIFT Amendments**"). Under the SIFT Amendments, SIFTs and their unitholders are taxed in a manner similar to corporations and their shareholders. Certain real estate investment trusts are exempt from SIFT taxation.

Specific rules were enacted to facilitate the conversion of SIFTs into corporations. Such rules provide mechanisms for a unitholder to be able to dispose of SIFT units on a rollover basis on a corporate conversion reorganization. These rules also facilitate corporate conversions of SIFTs by addressing issues such as employee options, debt settlement and third-party creditors.

(p) General Anti-Avoidance Rule

The Tax Act includes a broadly worded general anti-avoidance rule ("**GAAR**") to prevent "abusive avoidance transactions". The rule supplements specific anti-avoidance rules in the Tax Act. GAAR is not intended to apply

to a transaction that is undertaken primarily for bona fide purposes other than to obtain a tax benefit, or that does not result in an abusive tax avoidance. If GAAR applies, CRA may redetermine the tax consequences of a transaction or series of transactions resulting in tax liability for one or more participants in the transaction(s).

MINING SPECIFIC PROVISIONS

(q) Resource Expenditures

Canadian resource expenditures (other than expenditures related to the acquisition of tangible property which would generally be treated as depreciable property) are classified as either a Canadian oil and gas property expense ("**COGPE**"), a Canadian development expense ("**CDE**") or a Canadian exploration expense ("**CEE**"). Expenditures related to the acquisition of Canadian oil and gas properties or rights are generally classified as COGPE. Expenditures related to the acquisition of Canadian mining properties or rights (including, in many cases, properties or rights in respect of heavy oil) are generally classified as CDE. Expenditures in respect of the exploration and development of Canadian resource properties are classified as either CDE or CEE.

Once classified as COGPE, CDE or CEE, the expenditures are added to the corresponding cumulative accounts. Subject to certain restrictions, a taxpayer may deduct in a taxation year 10% of its cumulative COGPE, 30% of its cumulative CDE and 100% of its cumulative CEE.

Some provinces, such as Québec, offer similar or additional incentives.

(r) Canadian Exploration Expense

CEEs are expenses incurred by the taxpayer for the purpose of determining the existence, location, extent or quality of a mineral resource, petroleum or natural gas in Canada, including expenses incurred in connection with:

- prospecting;
- geological, geophysical or geochemical surveys;
- drilling; and
- trenching, digging test pits and preliminary sampling.

CEE also includes expenses incurred for the purpose of bringing a new mine into production, including clearing, removing overburden and stripping, and sinking a mineshaft, but not including any expense that results in revenue.

CEE does not include any expense related to a mine that has come into production in reasonable commercial quantities. It also does not include any expense that qualifies as CDE.

There is a 100% deduction available in respect of CEE in the year that the expenditure is incurred. The deduction is optional. The deduction for corporations whose principal business is mining or exploring for minerals or certain other related businesses (a "**Principal Business Corporation**") is limited to the extent of such corporation's income, and as such, a Principal Business Corporation cannot use this deduction to create a non-capital loss. Any unused balance of CEE in a particular year can be carried forward indefinitely and claimed in a later year at the election of the taxpayer.

In addition to the 100% deduction for CEE, a corporation may also be entitled to a 10% tax credit for certain exploration expenses made to determine the existence, extent or quality of a mineral resource.

(s) Canadian Development Expense

A CDE consists of expenses incurred in:

- drilling, converting, and completing an oil well in Canada; or
- sinking or excavating a mineshaft, main haulage way or similar underground work for a mine in Canada built or excavated after the mine came into production.

The cost of any Canadian mineral property or of any right to or interest in any such property also qualifies as a CDE.

CDE is accumulated in a pool called "cumulative Canadian development expense". The taxpayer can deduct up to 30% of the unclaimed balance in that pool at the end of each year. Unclaimed balances may be carried forward indefinitely.

In the case where a corporation does not have taxable income against which to claim a CDE, the CDE can be used to create a non-capital loss. This non-capital loss can then be carried backward or forward to taxation years where the corporation can use the deduction to reduce its taxable income.

(t) Foreign Resource Expense

Foreign resource expense ("**FRE**") claims are available to taxpayers resident in Canada throughout the taxation year. FRE is computed on a country-by-country basis.

The basic FRE deduction for each country is an amount comprising between 10% and 30% of the cumulative FRE balance for that country, the upper limit being restricted to the amount of available foreign resource income for that specific country. However, a supplemental FRE deduction may be permitted if the country limitation results in a global FRE claim of less than 30% of FRE in respect of all countries. With this supplemental deduction, total FRE deductions are allowed to reach up to a maximum of 30% of a taxpayer's total cumulative FRE balances in respect of all countries, to the extent of available global foreign resource income from all countries.

FRE includes, subject to applicable date restrictions:

- expenses incurred in respect of exploration and drilling for petroleum and gas outside Canada;
- exploration and development expenses incurred in searching for minerals outside Canada;
- the cost of acquiring foreign resource properties;
- annual payments for the preservation of a foreign resource property; and
- the "at risk" portion of the corporation's share of any of the above expenses from a partnership.

(u) Flow-Through Shares

A flow-through share ("**FTS**") is a mechanism that allows a principal business corporation to obtain financing for expenditures on mineral exploration and development in Canada. The FTS regime is designed to be of principal benefit to junior exploration companies which cannot fully utilize income tax deductions for exploration and development expenses and whose access to alternative sources of funding is limited. By issuing FTSs, a company can renounce or flow through certain expenses to the purchaser of the share. These expenses are deemed to be incurred by the investor and not the corporation and reduce income subject to tax in the hands of the investor (which can be an individual or another corporation). The FTS mechanism, therefore, not only allows costs to be claimed sooner than they would have been if they were retained in the corporation incurring them, but also to be claimed against income subject to higher rates.

For individual investors, the advantages of investing in an FTS can be twofold: (i) they receive in effect a 100% tax deduction for the amount of money they invested in the share, and (ii) they stand to see the value of their investment appreciate in the event of successful exploration.

A non-Canadian corporation may issue an FTS, provided it incurs expenses on qualified activities in Canada. Resource expenses that may be flowed through include CEEs and certain CDEs. To be able to use the transferred deductions, FTS investors must be Canadian residents or non-residents subject to tax on their Canadian source income.

(v) Successor Corporations and Change of Control

The Tax Act contains detailed "successor corporation" rules that provide for the deduction, on a limited basis, of resource expenses, such as CEE, CDE and FRE, incurred by a previous owner of resource property by the purchaser (a "**successor**"). These rules can also apply to limit the deduction of a corporation's own expenses where there has been a change of control of the corporation. The amount available for deduction by the successor corporation under these provisions is, generally, all or a portion (depending on the particular expense) of the relevant resource expense of the original owner. However, the deduction available to the successor corporation is, in each case, generally limited to the amount of the successor's income for the year that can reasonably be regarded as attributable to the "particular property" transferred by the original owner to the successor.

(w) Qualifying Environmental Trust

In cases where a mine site owned by a single company is likely to require long-term reclamation, some provinces/territories now require the firm involved to establish a special purpose qualifying environmental trust ("**QET**"). Typically, contributions to a QET are structured as a series of payments over a specific time period. Using a QET allows a corporation to match reclamation expenses to income generated by a mine, as a corporation is generally entitled to deduct the contributions it makes to a QET. To the extent that a QET earns income, it will be taxed at a rate of 28%. All distributions from a QET will be included in computing the recipient corporation's income for tax purposes, but the corporation will be entitled to deduct all reclamation costs when incurred.

SPECIAL RULES FOR NON-RESIDENTS

(x) Withholding Tax

A person resident (or deemed resident) in Canada who makes a payment to a non-resident in respect of most types of passive income (including dividends, rent and royalties) is generally required to withhold tax equal to 25% of the gross amount of the payment. Interest that is "participating debt interest" and interest paid or credited by a Canadian resident to a non-arm's length non-resident person is also subject to withholding tax. Conversely, interest other than "participating debt interest" paid by a Canadian resident to an arm's length non-resident person is exempt from withholding tax.

The 25% withholding rate may be reduced under an applicable tax treaty. The typical treaty rate for interest is 10%. For dividends, the typical treaty rate is 15%, except where the shareholder is a corporation that beneficially owns 10% or more of the voting shares of the dividend payer, in which case the rate is generally reduced to 5%. The typical treaty rate on royalties is 10% and may be reduced to 0% on certain royalties.

Under the Canada-China Tax Treaty (which does not apply to Hong Kong), the withholding tax is reduced to 10% for interest, 15% for dividends except where the shareholder is a company which owns more than 10% of the voting shares of the dividend payer, in which case the dividend withholding rate is reduced to 10%, and 10% for royalties.

A partnership, any member of which is a non-resident, is itself deemed to be a non-resident under the Tax Act. Consequently, a payment by a Canadian resident to a partnership with any non-resident members is subject to full withholding tax; however, administratively, CRA may permit the payer to look through the partnership and withhold based on the residence and treaty status of the members of the partnership.

Although withholding tax is imposed on the non-resident recipient, the resident payer is required to deduct the tax and remit it to CRA on behalf of the non-resident, failing which the resident payer becomes liable for the tax.

A non-resident carrying on business through a Canadian branch may be deemed to be a resident of Canada for purposes of the withholding tax rules. The effect of these rules is to make certain payments, for example deductible interest, made by the non-resident to another non-resident subject to Canadian withholding tax.

(y) Canadian Branch Versus Canadian Subsidiary

In general, from a Canadian income tax perspective, there is little difference between carrying on business through a Canadian branch of a non-resident entity and carrying on business through a wholly owned Canadian subsidiary.

A Canadian incorporated subsidiary of a non-resident corporation is a Canadian resident for Canadian income tax purposes and is therefore subject to tax in Canada on its worldwide income. Certain types of payments (including dividends, interest, rent and royalties) made by a subsidiary to its non-resident parent are subject to withholding tax as discussed above.

Similarly, Canadian tax will apply to the profits attributable to an unincorporated branch of a non-resident carrying on business in Canada. The allocation of items of income and expense between head office and the Canadian branch may be unclear and can result in ambiguity in the computation of branch income for purposes of the Tax Act. In addition, the Tax Act imposes a branch profits tax on the profits of the Canadian branch not reinvested in Canada. The branch profits tax is intended to parallel the dividend withholding tax.

(z) Capitalization of a Canadian Corporation

A Canadian corporation may be capitalized with equity or with a combination of debt and equity.

As noted above, share capital of a Canadian private corporation can generally be returned to shareholders free from Canadian tax, including Canadian withholding tax applicable to non-resident shareholders.

A distribution to a shareholder in excess of such share capital will be deemed to be a dividend for purposes of the Tax Act. Deemed dividends to non-resident shareholders are subject to withholding tax in the same manner and at the same rate (including any reduced treaty rate) as regular dividends.

Repayment of principal loaned to a Canadian corporation by a non-resident shareholder is not subject to withholding tax but, where applicable, tax must be withheld in respect of interest paid or credited on the loan.

Subject to the thin capitalization rule discussed below and the general limitations on interest expense and losses described above, a Canadian subsidiary may deduct interest paid or credited by it to a non-resident in computing its income.

(aa) Thin Capitalization and Interest Imputation

The "thin capitalization rule" is intended to prevent a Canadian-incorporated subsidiary from excessively reducing its taxable Canadian profits, and hence its liability for Canadian tax, by maximizing its interest expense to related non-resident creditors. In very general terms, the subsidiary is denied an interest deduction to the extent that its "relevant debt" exceeds two times its "relevant equity". Under current rules, the thin capitalization restrictions only apply to corporate borrowers.

Conversely, where a Canadian resident corporation has made a loan to a non-resident and it is outstanding for one year or more and the loan does not bear a reasonable rate of interest, interest income calculated at a prescribed rate on the principal amount outstanding under the loan is imputed by the Tax Act to the Canadian lender.

(bb) Transfer Pricing Rules

Canada, like many other countries, employs transfer pricing rules to protect its tax base. The rules are designed to ensure that the income of Canadian taxpayers (and their corresponding Canadian tax liability) is not artificially reduced through non-arm's length transactions with related non-residents.

The transfer pricing rules apply to Canadian residents and to non-residents carrying on business in Canada; therefore, these rules are potentially relevant to both Canadian subsidiaries (and parent companies) and Canadian branches. The pricing of goods and the quantum of management fees, guarantee fees and royalties are common matters for transfer pricing scrutiny.

Where a Canadian taxpayer or a partnership participates in one or more transactions with a non-arm's length non-resident and either (i) the terms of the transactions differ from those that would have been made by arm's length persons or (ii) the transactions are not bona fide transactions entered into for non-tax purposes and would not have been entered into by arm's length persons, then CRA can make adjustments pursuant to the transfer pricing rules in the Tax Act, including imputing income or denying deductions.

In addition, penalties can be levied. Where a taxpayer's transfer pricing adjustments for a year exceed the lesser of \$5 million and the taxpayer's gross revenue for the year computed in accordance with the Tax Act, a penalty equal to 10% of the total transfer pricing adjustments applies unless reasonable efforts were made to apply arm's length terms. For these purposes, a taxpayer will be deemed not to have made reasonable efforts to apply arm's length terms unless the taxpayer makes or obtains complete records of the transactions establishing the appropriateness of the transactions from a transfer pricing perspective no later than the taxpayer's tax return due date (or in the case of a partnership, its annual information return due date). This rule is often referred to as the contemporaneous documentation requirement. For corporations, the tax return due date is six months after the taxation year end (e.g., for a taxation year ending December 31, 2011 the tax return due date would be June 30, 2012).

CRA has special audit powers in transfer pricing matters and can require that a taxpayer produce contemporaneous documentation within 90 days of CRA making a formal request. In recent years, CRA has become more aggressive in its auditing of transfer pricing records.

SALES AND OTHER TAXES

(cc) Overview of Sales Taxes

The Canadian federal government levies a goods and services tax, referred to as the GST, on most commercial supplies of property or services. The basic GST rate is 5% (12-15% in certain provinces that levy a harmonized provincial and federal goods and services tax ("HST")). Québec levies its own value-added tax ("QST"), similar

to the GST, under separate legislation which, when combined with the federal GST, results in a combined rate of 13.925%. Most other (non-HST) provinces also levy a sales tax on sales of tangible personal property and the provision of certain services.

(dd) Goods and Services Tax

(i) General Rules

Canada imposes a 5% GST on the consumption or use in Canada of most tangible or intangible property. A parallel system of input tax credits ("**ITCs**") is designed to ensure that intermediate users of goods and services receive a credit for the GST they pay, so that only the final consumer or end-user in the chain of supply effectively bears the GST. GST is imposed under Part IX of the *Excise Tax Act* (the "**ETA**") and is administered by CRA (except in Québec).

A person, whether resident in Canada or non-resident, who in the course of commercial activities makes a supply (defined in the ETA as a "**taxable supply**") of property or a service in Canada is generally required to register for the GST unless the person's aggregate annual worldwide taxable supplies do not exceed \$30,000. Therefore, any non-resident that makes a taxable supply in Canada and has worldwide non-exempt sales of \$30,000 or more (including non-Canadian sales) will generally be required to register for the GST. For the purposes of the ETA, "person" is defined broadly to include, among other things, an individual, a corporation, a trust and a partnership.

(ii) Exempt Supplies

The supply of certain types of property and services, defined in the ETA as an "exempt supply", is expressly exempted from the GST. The most common types of exempt supplies are:

- supplies of financial services (such as loans or securities transactions, including the sale or issuance of shares, and some related services);
- supplies (including sales and leases) of used residential real estate;
- certain supplies made by Canadian charities or other non-profit entities; and
- supplies of most medical and dental services.

(iii) Zero-Rated Supplies

The supply of certain types of property or services, defined in the ETA as a "zero-rated supply", is treated as a "taxable supply", but with the rate of tax being 0% (i.e., no GST is charged).

The principal categories of zero-rated supplies are:

- supplies of most forms of property or services for export;
- supplies of prescription drugs and basic groceries;
- supplies of certain agricultural products; and
- supplies of most forms of financial services to a non-resident.

(iv) Input Tax Credits

In general terms, a registrant engaged exclusively in making taxable supplies (including zero-rated supplies) is entitled to claim ITCs equal to all GST that the registrant has paid in connection with property or services acquired for consumption, use or supply in its commercial activities. Conversely, a supplier who is engaged exclusively in making exempt supplies is not entitled to claim ITCs. A registrant who makes both exempt and taxable supplies must allocate its GST expense reasonably between the two activities, and is generally permitted to claim ITCs only for the GST expense allocated to the making of taxable supplies.

(v) Collection and Reporting

Although the GST is payable by the recipient, a supplier which is (or is required to be) a registrant for GST purposes is liable, in most cases, to collect and remit the GST payable by the recipient to the federal government on a periodic basis. The supplier may net its ITCs against the GST collected and thus remit only the balance (if any) to the federal government. If the supplier's ITCs exceed the GST collected in any reporting period, the federal government will refund the excess to the supplier.

GST and ITCs are calculated, reported, and paid or refunded on a regular periodic basis. The reporting period of a registrant may be monthly, quarterly or annually, depending upon the registrant's revenues and whether the registrant elects to report on a more frequent basis than is otherwise required.

(ee) Provincial Sales Taxes

Every province except Alberta imposes some form of sales tax. Instead of GST and provincial sales tax, HST is charged at a single rate of 13% in Ontario, New Brunswick and Newfoundland and Labrador 15% in Nova Scotia and 12% in British Columbia. Voters in British Columbia recently voted to repeal the HST in that province and return to a system of GST and PST, which is expected to occur by 2013. HST is levied under the ETA and follows the GST rules described above. Québec levies its own version of the GST, which is described below, but has announced its intention to harmonize its sales tax with the GST by 2013. Currently, Prince Edward Island, Manitoba and Saskatchewan impose varying forms of a retail sales tax (commonly referred to as provincial sales tax or "PST"). A vendor in the business of selling taxable goods or providing taxable services in any one or more of these provinces is generally required to obtain a vendor's permit from each relevant provincial government and to collect and remit PST on taxable sales within that province.

Presently, Québec has a goods and services tax system that closely parallels the concepts and provisions of GST (including the requirement to register and collect tax). QST applies at a rate of 8.5% to the price of goods and services inclusive of GST, making the effective rate 8.925%, for a combined rate with GST of 13.925%. The Québec tax authority is responsible for the collection and administration of both GST and QST in Québec.

QST will increase to 9.5% on January 1, 2012, for a total combined rate with GST of 14.975%.

(ff) Property Taxes

Property taxes are imposed by municipalities or regional governments. They are normally applied as a percentage of the assessed value of land, buildings and other real estate, but typically exclude the value associated with the mineral rights of the property. The assessed value for determining the property tax amount may be determined by a number of different factors, including acquisition cost and fair market value. The portion of property taxes imposed on property that is used to earn income is deductible from income in the determination of corporate income tax.

(gg) Land Transfer Taxes

Many provinces impose tax on the transfer of real property (including with respect to certain leasehold interests). Ontario transferees of real property are generally liable for land transfer tax at a rate of 1.5% of the consideration paid. Québec also levies a land transfer tax at similar rates. Certain deferrals and exemptions may be available in respect of land transfer tax, particularly in the context of qualifying inter-corporate transfers amongst affiliated corporations. Certain transfers of real property may also be subject to GST (and QST or HST depending on the relevant provincial jurisdiction).

MINING TAXES AND CROWN ROYALTIES

All provinces and territories (except for Prince Edward Island) impose mining taxes, mining royalties and/or mineral land taxes on mining operations within their jurisdictions. The provinces of British Columbia, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia and Newfoundland and Labrador, and the federal government in respect of mines in the Yukon, Nunavut and the Northwest Territories, all impose mining taxes on defined mining profits. With the exception of the *Mineral Tax Act* (British Columbia), the mining taxes are conceptually levied on profits derived from the operations at the mining stage only. Practically, since no fair market value of production can reasonably be established at the mining stage, the starting point of the tax computation is generally the profits from both mining and processing operations, with the deduction of a processing allowance that removes from taxable profits a given return on the investment in processing assets. The processing allowance is computed as a given percentage (representing the allowed rate of return on processing investment) of the original cost of the processing assets. There are provisions that the allowance cannot exceed a stated percentage (usually 65%) of the combined mining and processing income calculated before the processing allowance. In some cases, a minimum percentage of mining and processing profits is allowed when this calculation yields a higher deduction than the one given by the application of the allowed percentage of processing asset cost.

Each of the statutes permits a deduction (at varying rates) for depreciation of mining and processing assets and for the amortization of pre-production expenses. However, none of the statutes allows a deduction for the cost of the mineral property, the exploration expenses carried out outside the province, depletion or interest expenses.

TABLE 5

2011 Combined Corporate Income Tax Rates by Province/Territory

Province / Territory	Combined Corporate Income Tax
Alberta	26.5%
British Columbia	26.5%
Manitoba	28.5%
New Brunswick	27.0%
Newfoundland and Labrador	30.5%
Northwest Territories	28.0%
Nova Scotia	32.5%
Nunavut	28.5%
Ontario	28.25%
Prince Edward Island	32.5%
Québec	28.4%
Saskatchewan	28.5%
Yukon	31.5%

Environmental and Social Issues

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Environmental and Social Issues

OVERVIEW

Mining companies around the world face complex challenges to address environmental and social issues associated with mining development; Canada is no different in this regard. The mining sector in Canada is subject to a complex array of environmental laws and regulations across three levels of government – federal, provincial/territorial and municipal – as well as Aboriginal governance under land claims agreements and self-government arrangements. Although provincial governments generally take the lead in regulating environmental matters in many areas of Canada, the federal government also has laws and regulations specifically aimed at the mining sector. While there has been some harmonization in Canada, separate federal and provincial requirements generally continue to apply. In particular, each province in Canada has its own unique environmental protection regime including legislation to regulate the permitting, rehabilitation, reclamation and closure of mine projects.

ENVIRONMENTAL IMPACT ASSESSMENT

The development or expansion of major mining projects generally triggers requirements for federal and/or provincial environmental impact assessments prior to commencing or expanding operations or even conducting exploration. These requirements are intended to determine whether or not a proposed mining project should proceed based on its environmental and social impacts. Although the process differs across Canada, the government generally has the authority to require a public hearing and the discretion to accept a proposed mining project or reject it (and prohibit mining development).

Environmental, Aboriginal and other non-governmental organizations ("**ENG**Os") often use the courts to challenge environmental impact approvals for controversial mining projects. As a result, judicial review of environmental impact assessments, even at the early scoping stage of the process, is common and can result in substantial delays and changes to a mining project.

Finally, regulatory overlap and duplication of environmental assessment processes across the various levels of government is a significant issue in Canada for mining proponents, particularly in Canada's far north.

FEDERAL ENVIRONMENTAL IMPACT ASSESSMENT

The federal *Canadian Environmental Assessment Act* ("**CEAA**") requires an environmental assessment if a federal authority proposes the mining project, provides financing or lands for the project or issues certain permits or approvals for the project.¹ In general, therefore, a federal environmental assessment is required for most major mining projects. Where, for example, a metal mining project requires a permit under the *Fisheries Act* for the use of a water body for a tailings impoundment, the mining project may trigger the CEAA process. The federal authority involved in the project (such as the Minister of Fisheries and Oceans) is responsible for ensuring that the assessment is carried out in compliance with the CEAA and prepares the environmental assessment report taking into account environmental and socioeconomic effects of the project and the alternatives considered. The public has an opportunity to comment on the assessment and the federal Minister of Environment may call a public hearing. The federal authority cannot take any action to initiate a project prior to CEAA approval. Approval may be conditional upon a number of specific terms, such as the implementation of measures designed to mitigate impacts identified in the environmental assessment.

¹ However, the CEAA does not apply everywhere in Canada. See the *Environmental Impact Assessment in the Far North* section.

The majority of resource projects are assessed under the CEAA through an "environmental screening", while large-scale mining projects undergo the more comprehensive study process under the CEAA. Under the comprehensive study process, there is a legal obligation to invite public comment on the comprehensive study report. The federal Minister of the Environment also has the power to request additional information or require that public concerns be addressed before issuing the decision statement and must take into account public input in the decision statement. A comprehensive study could be elevated to a mediator or review panel (which involves a public hearing) by the Minister at any time during the comprehensive study where the responsible authority or the Minister is of the opinion that the project, taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects or public concerns warrant it.

Under recent amendments to the CEAA, the Canadian Environmental Assessment Agency has sole responsibility for conducting comprehensive studies of major projects, except those regulated by the National Energy Board and Canadian Nuclear Safety Commission ("**CNSC**") (such as nuclear power developments and uranium mining projects - see *Environmental Impact Assessment and Licencing for Uranium Mines* below). In addition, new *Establishing Timelines for Comprehensive Studies Regulations* under the CEAA impose mandatory timelines on the Canadian Environmental Assessment Agency for its role in conducting comprehensive studies and prescribe the information to be included in a proponent's project description which the agency reviews in its determination on whether to commence a comprehensive study for the project.

The CEAA requires that the scope of the project is determined by the responsible federal authority (or the Minister of the Environment where the project is referred to a mediator or a review panel). However, the CEAA was recently amended to authorize the Minister to focus an environmental assessment on key components of a project under specific conditions that must be made available to the public. The new provisions also enable the Minister to delegate this scoping power to a responsible authority. Although this is a critical amendment, the Minister has yet to establish and make public the required conditions.²

The federal government's Major Projects Management Office ("**MPMO**") was established in 2007 to serve as a single point of entry into the federal regulatory process for all proponents of major mining projects including environmental assessment and Aboriginal consultation. Since its inception, many mining companies have entered into project agreements with the MPMO to coordinate federal statutory duties regarding proposed mining projects. Project agreements generally outline the roles and responsibilities of federal departments and agencies involved, key milestones and timelines for reviews and permitting and commitments to Aboriginal engagement and consultation.

ENVIRONMENTAL IMPACT ASSESSMENT AND LICENCING FOR URANIUM MINES

Uranium mining is a federal responsibility and the federal government takes the lead in regulating uranium mining activities in Canada. *The Nuclear Safety and Control Act* ("**NSCA**") and the *Uranium Mines and Mills Regulations* administered by the CNSC require a licence to design, construct and operate a new uranium mine or mill. A separate licence is required for each stage. The *Uranium Mines and Mills Regulations* detail the information to be supplied in order for the CNSC to reach a decision. Upon receipt of a licence application to prepare a site for and construct a uranium mine or mill, the CNSC performs a technical assessment of the information required by the regulations. A project description is also submitted to the MPMO which coordinates

2 This provision was added possibly in response to the decision of the Supreme Court of Canada in *Mining Watch Canada v. Canada (Minister of Fisheries and Oceans)* issued on January 21, 2010 that addressed the issue of whether the environmental assessment track (screening or comprehensive study) is determined by the project as proposed by the proponent or by the discretionary scoping decision of the responsible authority. The Court concluded that federal agencies designated as responsible authorities under the CEAA could not scope projects to avoid the application of the comprehensive study process and made it clear that while federal authorities can scope projects to include more than the activities included in a proponent's project description, they could not scope projects so as to include less, with the minimum scope of the project being that as proposed by the project proponent. The CEAA is to undergo a legislated review by a parliamentary committee beginning on October 18, 2011.

the regulatory process of all of the federal departments involved. An environmental assessment and a public hearing are also conducted as described below. The CNSC may not issue a licence unless it is satisfied that the applicant will make adequate provisions to protect health, safety, security and the environment and to implement international obligations to which Canada has agreed.³

Prior to any licence being granted, the CNSC carries out an environmental impact assessment, a public hearing and consultation with Aboriginal communities pursuant to its obligations under the CEAA. New uranium projects would most likely trigger a "comprehensive study" (that may require a public hearing pursuant to the CEAA) or "complex screening" (does require a public hearing under CNSC policy). The results of the environmental assessment (comprehensive study) are submitted to the federal Minister of Environment (in complex screenings, the CNSC Tribunal makes the decision on the environmental assessment). If the Minister of Environment determines that there would not be significant adverse environmental effects, the CNSC may proceed with the licensing process which includes a public hearing on the licence application. The CNSC must also satisfy itself that the Crown's duty to consult, and if appropriate, accommodate Aboriginal peoples, has been met.

The provincial government generally takes the lead in regulating uranium exploration activities in Canada; therefore, uranium removed during exploration activities and uranium prospecting and surface exploration activities are usually exempt from the NSCA and would not trigger federal environmental assessment. However, the transition from uranium "exploration" activities to uranium "evaluation" activities, which do require licensing and federal environmental assessment, is not clearly defined in the NSCA.

PROVINCIAL ENVIRONMENTAL IMPACT ASSESSMENT

Provincial environmental assessment regimes may also apply to mining projects. For example, in Ontario, a "major" private-sector mining project may be designated for environmental assessment by regulation. In Québec, the construction and operation of a uranium mine, or of a metal or other mine meeting certain threshold production levels, are also subject to environmental assessment. In British Columbia, environmental assessment applies to a new project or a significant modification of a project that either meets certain production levels or is specifically designated. In Saskatchewan, mining projects that meet one or more of the criteria defining a "development" will require an environmental assessment. At present, Yukon and all provinces except New Brunswick, Prince Edward Island and Nova Scotia have signed bilateral agreements with the Government of Canada to coordinate environmental assessments triggered under both federal and provincial law. Otherwise, collaborative arrangements would likely be negotiated by the two levels of government on a project-specific basis.

ENVIRONMENTAL IMPACT ASSESSMENT IN THE FAR NORTH⁴

Canada's far north is a complex, multi-jurisdictional region. Politically, each of the three northern territories of Yukon, the Northwest Territories and Nunavut have a unique and evolving governance structure that is a mixture of varying degrees of "public" governance (represented by the federal and territorial governments) and Aboriginal governance under land claims agreements and "self-government" arrangements. While the three

3 Uranium mining is a hot topic among ENGOs in Canada who have been calling for a ban on uranium mining for decades, with varying degrees of success. For example, Nova Scotia has had a moratorium on uranium mining in the province since 1982. The moratorium has been the subject of debate and is reportedly being reviewed by Nova Scotia's Department of Natural Resources. British Columbia's Energy Plan clearly states that nuclear power will not be part of British Columbia's energy supply mix. British Columbia has also stated that it will not support the development or exploration of uranium in British Columbia. New Brunswick has restrictions on exploring for and mining uranium. A bill was passed by the Nunavut government to prohibit uranium mining on certain Inuit land in Labrador. The government is currently reviewing the ban.

4 For a discussion of environmental assessment and permitting in the context of the rights of other Aboriginal communities in Canada, most of which are located south of the 60th parallel (i.e., the Indian, Métis and Inuit communities), please see the *Rights of Aboriginal Peoples* section below.

territories are predominantly government-owned ("**Crown**") lands under federal or territorial jurisdiction, they include significant areas of Aboriginal-owned lands governed by the terms of numerous distinctive land claims settlement agreements. In addition, under a process of "devolution", transfer of federal control to territorial governments (of lands, resources and waters) has been completed in Yukon and is under negotiation in the Northwest Territories. A framework for negotiations is being developed in Nunavut.

In this complex jurisdictional environment, obtaining approvals for mining projects, including compliance with environmental assessment requirements, involves an array of Aboriginal boards and committees, territorial governments and federal departments. Duplication is avoided in regions where legislation clearly establishes which agencies have jurisdiction.⁵ Otherwise, in practice, the Aboriginal and federal responsible agencies work to coordinate the review of a specific project in an attempt to reduce the regulatory burden.⁶

For example, under the federal *Mackenzie Valley Resource Management Act*, the Mackenzie Valley (which includes all of the Northwest Territories with the exception of the Inuvialuit Settlement Region⁷ and the Wood Buffalo National Park) creates an integrated co-management structure for public and private lands and waters throughout the valley and has established regional public boards to regulate land use, prepare regional land use plans, guide development, and carry out environmental assessment and reviews of proposed projects. When a mining project is proposed in the area, a regional board, or government board if there is no regional board in that area, conducts a preliminary screening. Then, if necessary, the Mackenzie Valley Environmental Impact Review Board carries out an Environmental Impact Assessment. Finally, when required, an independent panel established by the Review Board conducts an environmental impact review. After the review process is complete, the application can proceed to the permitting and licencing stage, which is carried out by a regional Aboriginal land and water board or by the Mackenzie Valley Land and Water Board in areas where there are unsettled land claims.

RIGHTS OF ABORIGINAL PEOPLES

Like many countries, Canada has an indigenous population (comprised of Indians, Métis and Inuit, and collectively referred to as "Aboriginal peoples") whose rights must be considered when conducting mining development activities. The rights of Aboriginal peoples arise in a number of different ways, including traditional rights to use of land (such as hunting, trapping and fishing), treaty rights and land claim agreements, unresolved land claims and Indian reserves.

CROWN DUTY TO CONSULT

Canadian courts have imposed a legal duty on the Crown to consult with Aboriginal peoples with respect to actions affecting their rights or land. The context of this duty is proportionate to the potential strength of the Aboriginal claim or right asserted and the anticipated impact of a mining project on those asserted interests. The scope and content of the Crown's duty to consult and accommodate varies widely and is proportionate to the strength of the asserted Aboriginal or treaty right and the seriousness of the potentially adverse impact

5 Following legislation provides for jurisdiction over environmental assessment impact review (with certain exceptions): (i) *Mackenzie Valley Resource Management Act*; (ii) *Yukon Environmental and Socio-economic Assessment Act*; (iii) Nunavut Land Claims Agreement, as amended by Order in Council 2008-977.

6 For example, with respect to the Inuvialuit Settlement Region (located in the Northwest Territories), the Government of Canada and the Environmental Impact Review Board ("**EIRB**") established under the Inuvialuit Final Agreement ("**IFA**") signed a Memorandum of Understanding outlining how the environmental assessment process of the EIRB under the IFA may be substituted for a panel review under the CEAA. The agreement details the process and steps each party would follow should the EIRB request such a substitution and provides for project-specific agreements to be concluded by both parties on a case-by-case basis whenever they deem it appropriate.

7 The CEAA applies in the Inuvialuit Region. However, in addition, public co-management (government and Aboriginal) bodies were established under the Inuvialuit Final Agreement to enhance environmental and resource co-management in the Inuvialuit Settlement.

upon it. In other words, the consultation activities to be undertaken will vary from project to project. For example, if there is little impact on an asserted or established Aboriginal or treaty right, the level of consultation required may simply be a duty to give notice, disclose and share information and discuss important decisions to be taken in relation to the proposed project with the relevant Aboriginal communities. Where the adverse impact on Aboriginal rights is potentially greater, the Crown's consultation requirements would be more substantial (e.g., more extensive consultation leading to mitigation and/or accommodation). Accommodation measures vary widely including, for example, the modification of a proposed project, enhanced environmental monitoring, training and employment for Aboriginal people and financial contributions to Aboriginal communities. In some cases, the duty to accommodate may require the Crown to obtain the consent of the Aboriginal peoples to the proposed action.

There have been numerous court challenges of Crown consultation efforts by Aboriginal communities but Canadian courts have been clear that there is no legal duty on the Crown to ultimately reach an agreement with an Aboriginal community. This means that Aboriginal communities do not have a veto over what the Crown can do. Rather, the Crown's duty to consult and accommodate is about a fair decision-making process and in all cases the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances. Canadian courts have also been clear that Aboriginal communities must not thwart the Crown's good faith efforts to consult.

There is growing recognition that Aboriginal peoples have unique knowledge about the local environment and this Aboriginal traditional knowledge is increasingly being seen as an important part of project planning, resource management and environmental assessment. The CEAA, for example, gives those conducting an environmental assessment the discretion to consider Aboriginal traditional knowledge. While people involved in conducting environmental assessments are most interested in traditional knowledge about the environment, or traditional ecological knowledge, traditional Aboriginal historical and cultural knowledge is part of the land planning process under Ontario's *Far North Act*. When sharing their traditional knowledge, some communities may request that an Aboriginal traditional knowledge access agreement (also referred to as a protocol agreement, or memorandum of understanding) be negotiated, setting out how that knowledge will be accessed and used.

PRIVATE-SECTOR OBLIGATIONS

Where the Crown takes any action in connection with mining activities, such as issuing permits, approving environmental impact assessments and accepting mine closure plans, these actions may be challenged if they adversely impact Aboriginal rights and the Crown has failed to fulfil its duty to consult. Although the duty is the duty of the Crown, mining companies risk having government approvals invalidated by the courts where the Crown has failed to discharge the duty. It is therefore critically important that mining companies ensure adequate consultations with potentially affected Aboriginal peoples have taken place.

A private-sector proponent does not have an independent constitutional duty to consult with or accommodate Aboriginal people but may have an express statutory obligation (see below). However, while the constitutional duty to consult generally rests solely with the Crown, private-sector proponents often play an important role in the Aboriginal consultation process. For example, the Crown often delegates procedural aspects of consultation regarding proposed mining or infrastructure projects to the project proponent. In these cases, the Crown will generally supervise these activities and their outcomes to ensure that any impacts of the proposed project on established or asserted Aboriginal or treaty rights are appropriately addressed, mitigated and/or accommodated. While the final responsibility for consultation and accommodation rests with the Crown, private-sector proponents often help fund Aboriginal participation in the consultation process and enter into impact and benefit agreements ("IBAs") with Aboriginal communities to facilitate Aboriginal accommodation.

STATUTORY OBLIGATION TO CONSULT

In addition to the Crown's duty to consult, various statutes impose duties on applicants for development approvals and permits to ensure consultations take place with Aboriginal peoples. For example, under the Ontario *Mining Act*, any closure plan filed for approval must be accompanied by a certification that the applicant company has carried out reasonable and good faith consultations with the Aboriginal peoples affected by the project. Recent amendments to Ontario's *Mining Act* with respect to Aboriginal rights and interests include the recognition of Aboriginal and treaty rights in the act's purpose statement,⁸ and notification and/or consultation requirements with Aboriginal communities throughout the mining process. More sections of the act will be proclaimed in force as relevant details are developed. Once brought into force, the amendments will also prohibit new mines in Ontario's Far North without a community land use plan, under Ontario's recently enacted *Far North Act*, in place. Additional business process requirements, which will be phased in 2012 or 2013 include: criteria for protecting sites that have Aboriginal cultural significance, and a dispute resolution process for Aboriginal issues.⁹

New regulations under Ontario's *Mining Act* will also prescribe rules for Aboriginal consultation when conducting early exploration activities on mining claims, leases and licences of occupation. The proposed approach to exploration plans and permits is as follows: early exploration activities will be carried out on a site covered by a closure plan and will be subject to a modified plan process. The proponent will submit the exploration plan to MNDMF and MNDMF staff will screen the plan to determine if Aboriginal consultation is required. If required, MNDMF will identify the appropriate Aboriginal communities to be notified and the proponent will be required to send the plan to the appropriate Aboriginal communities for consultation purposes.¹⁰

Once the provisions dealing with sites of Aboriginal cultural significance are in force, Aboriginal communities will be able to request a withdrawal from claim staking to protect sites that meet the criteria for sites of Aboriginal cultural significance from mineral exploration. Where a mining claim already exists on such sites, the Minister may impose a restriction on the claim holder's right to use the surface of the claim for mineral exploration. Under consideration in this area are sites with a strong association to an Aboriginal community for social, cultural, sacred or ceremonial reasons or because of their use by the community according to Aboriginal traditions, observances, customs or beliefs. In order to qualify as a protected site, a site must have a well-defined size and shape and fixed location that can be placed on a map.

CONSULTATION STRATEGIES

Prior to engaging in any exploration or development activities, mining companies should identify potentially affected Aboriginal communities and the nature of the Aboriginal rights that may be affected by the project.

As early as possible prior to engaging in any activities, developers should begin discussions with potentially affected Aboriginal peoples and should determine the impact the proposed activities will have on Aboriginal rights and what steps may be taken to: mitigate or avoid any adverse effects; identify the nature of any economic benefits that can be offered to Aboriginal communities such as training, job opportunities and bidding opportunities on service and supply contracts; be sensitive to Aboriginal peoples' concerns and cultural differences; engage in substantial dialogue with all elements of the affected Aboriginal community; provide

8 "The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment." Ontario *Mining Act* 2009, c. 21, s. 2.

9 Once the Aboriginal dispute resolution provisions are in force, opportunities for dispute resolution will arise at permit decisions and during consultation on closure plans for advanced exploration or mine production.

10 Note that MNDMF is considering granting assessment credit for costs related to consultation with Aboriginal communities.

financial support for independent technical reviews of reports; and carefully document the consultation process in case of future challenges or to comply with regulatory requirements.

Developers should consider entering into a memorandum of understanding outlining a consultation protocol that clarifies processes and standards of consultation and addresses other matters such as traditional knowledge (as discussed above) and capacity funding.

IMPACT AND BENEFIT AGREEMENTS

Aboriginal consultation is now part of the normal course of doing business in Canada. In circumstances where development activities have an adverse impact on Aboriginal rights, it has become increasingly common for natural resource companies and Aboriginal groups to negotiate an IBA for a proposed project, setting out arrangements concerning employment, training and business ventures and otherwise providing for compensation to Aboriginal peoples. IBAs are privately negotiated agreements between the proponent and an Aboriginal community that are intended to compensate the Aboriginal community for social and environmental impacts caused by the proposed project. An IBA can help mitigate the risks of Aboriginal litigation, direct action and negative publicity. On signing an IBA, an Aboriginal group generally accepts some restrictions on their traditional rights and Aboriginal title, provides access to their traditional lands and in so doing, supports the proposed project. In exchange for such support, the mining company often commits to providing a range of benefits including: (i) employment and contracting opportunities during the construction, development and operation of the project; (ii) funding for education and training including the creation of bursaries and scholarships; (iii) some form of royalty interest, revenue sharing and/or equity participation once certain milestones are met (e.g., signing of the formal IBA, the receipt of all government permits, financing, commencement of commercial production, etc.); (iv) the creation of specific project committees with representatives of the proponent and the Aboriginal community to address issues that arise in connection with the project; (v) lump-sum, annual or other payments towards specific legacy projects or for general economic development or other purposes; and (vi) creating joint ventures or partnerships between the proponent and the Aboriginal community in respect of the project.

ABORIGINAL DUE DILIGENCE

Aboriginal-related risk is a key issue for all project proponents across Canada. As a result, project proponents, investors and lenders are well advised to ensure that appropriate consultation and accommodation has been conducted. The failure to do so represents a significant risk of litigation, project delays, increased project costs and negative publicity.

ENVIRONMENTAL PERMITS AND APPROVALS

In Canada, environmental protection is not exclusively a federal or provincial/territorial responsibility. In the past, provincial governments set and enforced standards. However, the federal government has recently taken a more active role in regulating and enforcing environmental laws, causing a greater potential for jurisdictional disputes. Despite efforts to better harmonize federal and provincial laws through such vehicles as "single-window" frameworks for joint monitoring and enforcement, jurisdictional disputes continue.

Both federal and provincial levels of government have established broad frameworks for controlling the environmental effects of industry. In general, environmental regulation in Canada consists of prohibitions against the discharge of pollutants into the environment except where authorization for such discharges has been negotiated in advance. Authorization takes the form of approvals or permits issued by the government for particular sources of pollution, often based on pre-established standards or guidelines. Basic rules and objectives are set for air and water pollution and waste disposal that may cover all industry sectors or be specifically aimed at particular sectors such as mining.

PROVINCIAL/TERRITORIAL PERMITTING

Generally, Canada's 10 provincial and three territorial governments have two principal mechanisms for protecting the environment: (i) a general prohibition against the discharge of pollution, and (ii) a system of permits or certificates required for activities that may impair the environment.

For example, Ontario's *Environmental Protection Act* ("EPA") prohibits the unlawful discharge of contaminants into the environment and requires any parties that cause or permit such discharges to notify regulators immediately. Those who cause or permit unlawful discharges may be liable to offences of fines, imprisonment (in extreme circumstances), environmental penalties and administrative orders. To avoid such liability, all operational discharges (to air, water or land) must be approved by the provincial Ministry of the Environment. Conditions and requirements (including financial assurances) may apply to such approvals and any alterations to discharging equipment (including sewage and water works) must also be approved.

Ontario's Municipal/Industrial Strategy for Abatement ("MISA") regulations under the EPA include regulations specific to the natural resources sector and require mine owners to monitor and control the quality of effluent discharged from a mine site. For the purposes of MISA, the mining industry is divided into two groups — the Metal Mining sector (including copper, lead, zinc, iron, uranium and gold mines) and Industrial Minerals sector (cement, lime, stone and salt facilities).

In addition, under the *Ontario Water Resources Act*, persons taking more than 50,000 litres of ground or surface water a day must obtain a permit. The need for such "Permits to Take Water" may apply to process water used for mine operations or for mine de-watering.

As in Ontario, *Québec's Environmental Quality Act* ("EQA") imposes a duty not to pollute, to report accidental discharges without delay and to clean up contamination. A certificate of authorization must be obtained before undertaking any construction, industrial activity, use or change of an industrial process if it seems likely that this could result in the release of contaminants in the environment. Like Ontario, the range of regulated contaminants is very broad.

The federal government through the department of Aboriginal Affairs and Northern Development Canada ("AANDC") continues to have overall responsibility for the management of water resources and administers Crown lands in the Northwest Territories and Nunavut under a number of statutes (although, as mentioned above, the federal government continues to transfer responsibilities for lands, resources and waters through the negotiation of land claims agreements, self-government and devolution in these regions). For example, in the Northwest Territories, water licences are issued by the Northwest Territories Water Board under the federal *Northwest Territories Waters Act* for use of waters or deposit of waste in waters such as tailings impoundments. In addition, under the Northwest Territories' *Environmental Protection Act* (a territorial statute), discharging or permitting the discharge of a contaminant into the environment is prohibited except as authorized by a permit or licence issued under that act. However, as mentioned earlier, the federal *Mackenzie Valley Resource Management Act* gives the responsibility and authority for managing land and water resources to regional boards in the Mackenzie Valley.

Finally, provincial laws protecting endangered or at-risk plant and wildlife species continue to evolve. For example, Ontario's *Endangered Species Act*, updated and strengthened in 2007, prohibits damage or destruction of habitat for designated species at risk. Similarly, *Québec's Act respecting threatened or vulnerable species* prohibits persons from destroying or harming designated species or altering the ecosystem or biological diversity of the habitat of designated species.

FEDERAL PERMITTING

In general, the *Canadian Environmental Protection Act, 1999* ("CEPA") and the *Fisheries Act* are the two key federal controls over the environment. The main feature of CEPA relevant to the mining sector is the process by which certain priority substances are assessed to determine whether they qualify as "toxic" and therefore should be controlled by regulation or some other mechanism. Although current regulations and policies generally focus on organics, to date several metals are CEPA-listed toxics, such as asbestos, lead, mercury, arsenic, cadmium and nickel.¹¹ However, other than annual reporting to the National Pollutant Release Inventory ("NPRI") of the release of NPRI-listed substances,¹² mining activities are not specifically regulated under CEPA (other than asbestos mines and mills and secondary lead smelters).¹³ Regulations under CEPA of more general application, such as those regarding polychlorinated biphenyls, chlorofluorocarbons, chlorinated solvents, export and import of hazardous wastes, emergency plans and storage of petroleum products on federal and Aboriginal lands, may affect certain mine operations.

The traditional source of the federal government's environmental protection authority in the mining sector has been the *Fisheries Act* administered by Fisheries and Oceans Canada. This statute is important to mining activities. The act prohibits the harmful alteration, disruption or destruction of fish habitat and the deposit of a "deleterious substance" without authorization. For example, the alteration of a wetland or the use of a water body for tailings impoundment would generally require approval. As noted above, the requirement for approval also triggers an environmental assessment under the CEAA. In addition, the term "deleterious substance" is broadly defined and the prohibition has resulted in numerous prosecutions over the years. Both companies and individuals face significant fines for non-compliance and there is potential personal liability for officers, directors and agents of a corporation. The *Metal Mining Effluent Regulations* ("MMER") under the *Fisheries Act* define several substances and any acutely lethal effluent as deleterious and set limits on the concentrations of such substances that may appear in metal-mining effluent.¹⁴ The regulations also set out sampling, environmental effects monitoring and reporting requirements and provide for the designation, authorization and use of freshwater bodies as tailings impoundments.¹⁵

The federal *Navigable Waters Resources Act*, administered by Transport Canada, may also apply to mining projects in that construction of a work in navigable waters, such as bridges or dams, requires the approval of the Minister of Transport prior to its commencement. A permit under this act also triggers an environmental assessment under the CEAA. However, under recent amendments to the Act, "declassified" waterways would not require an approval under the Act and consequently would not trigger an environmental assessment.

The federal *Species at Risk Act* ("SARA") contains general prohibitions that make it an offence to harm a species designated as endangered, threatened or extirpated or damage or destroy its residence. SARA also prohibits

11 Uranium and uranium compounds contained in effluents from uranium mines and mills were assessed as CEPA-toxic but rather than use CEPA to control risks, Environment Canada and the CNSC added an annex to their existing Memorandum of Understanding to work cooperatively to ensure preventative and control actions are developed under the NSCA with respect to these effluents.

12 In 2009, after ENGOs won a law suit against Environment Canada for not requiring mines to report on the amount of NPRI substances placed in tailings impoundment areas and waste rock dumps each year (mines were only required to report data on releases from these waste areas), Environment Canada began collecting such information from the mining industry pursuant to a court order forcing the federal government to begin publicly reporting such data from 2006 onward.

13 Base metal smelters and refineries and zinc plants are also required to prepare and implement pollution prevention plans with respect to certain CEPA-toxic substances.

14 The prescribed substances are arsenic, copper, cyanide, lead, nickel, zinc, total suspended solids and radium 226, as well as the effluent's pH level.

15 The designation of fish-bearing lakes and rivers as tailings impoundments under the MMER is an issue that has received much attention from ENGOs across the country, particularly as there is a public list of lakes slated to be designated that are currently undergoing regulatory review. The MMER require mining companies to compensate for net loss of fish habitat but ENGOs argue that there is no scientifically viable means of compensation for the loss of lake ecosystems and view the practice as a massive subsidy to the mining industry.

the destruction of any part of "critical habitat" identified in recovery strategies or action plans established under SARA. The federal government must be notified if a project is likely to affect a listed species or its critical habitat. All federal environmental assessments must identify any species at risk listed under SARA or critical habitat likely to be affected by the mining project and any potential adverse effects and mitigation and monitoring measures consistent with applicable recovery strategies or action plans.

Similarly, the federal *Migratory Birds Regulations* under the *Migratory Birds Convention Act, 1994* prohibits the harming of migratory birds and the disturbance or destruction of their nests and eggs; consequently, their inadvertent destruction (called "incidental take") by mining activities is illegal as there is no current permit system authorizing, or legal mechanism exempting, incidental take, although enforcement of this act has not been robust. Meanwhile, the act was amended in 2005 to authorize the development of a permit system to allow a limited amount of incidental take appropriate to the level of risk and impact on migratory bird populations and consultations on amending regulations are under way.¹⁶

DIRECTOR AND OFFICER STATUTORY LIABILITY

Directors and officers of a corporation have personal statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws. For example, under the federal CEPA, corporate directors and officers have a statutory duty to take reasonable care to ensure that the corporation complies with all requirements under CEPA. In Ontario, there is a similar statutory duty requiring directors and officers to take all reasonable care. In Québec, a director or officer commits an offence under the EQA if, by means of an order or authorization or, through advice or encouragement, the officer or director leads the corporation to refuse or neglect to comply with the EQA.

Operational liability applies to anyone found to have personally permitted a discharge or deposit, such as under the federal *Fisheries Act* or the EQA. Officers are more likely than directors to be subject to such liability because their on-site management responsibilities may result in sufficient control over the discharge or deposit (as opposed to the general supervisory role of directors).

MINE CLOSURE PLANS AND FINANCIAL ASSURANCE

Provincial mining regulations require the approval of mine closure plans to rehabilitate and restore mining properties to former use and otherwise protect the environment after the completion and closure of mining operations. Financial securities (or financial assurances or guarantees) for closure plan obligations are required to be filed with closure plans. An approved closure plan and the accompanying financial assurance are required prior to mine production. In certain jurisdictions, a rehabilitation plan and financial assurance may be required prior to exploration activities. For example, in Ontario, a permit is required to mine, mill or refine a mineral-bearing substance from an unpatented mining claim for the purpose of testing mineral content and the application must include rehabilitation measures to be performed after completion of the excavation as well as financial assurance equal to the greater of \$500 or \$1.00 for each tonne of material to be excavated. Under recent amendments to Ontario's *Mining Act* not yet proclaimed in force, exploration plans and permits for early exploration activities include rehabilitation requirements.

MINE CLOSURE REQUIREMENTS IN ONTARIO

Ontario's *Mining Act* requires a closure plan to be filed with and acknowledged by the MNDMF prior to commencing advanced exploration or mine production or as ordered by the Ministry with respect to existing mine hazards. The MNDMF may require that public notice be given of the project and the proposed closure plan.

¹⁶ In a recent high-profile case, Environment Canada charged Syncrude in February 2009 with two offences under the *Migratory Birds Convention Act, 1994* after over 1,600 ducks died on a Syncrude tailings pond in Alberta in 2008. Syncrude was found guilty of both offences and in October 2010 was ordered to pay approximately \$3 million in penalties.

Mine rehabilitation in Ontario is also governed by the *Mine Rehabilitation Code of Ontario* (pursuant to regulations under Ontario's *Mining Act*), which specifies rehabilitation requirements and requires monitoring of surface and groundwater, leachate testing and mitigation measures to demonstrate water quality is unimpaired and satisfactory for aquatic life.

MINE CLOSURE REQUIREMENTS IN OTHER JURISDICTIONS

In Québec, rehabilitation and restoration plan requirements, including financial assurance, are set out in Québec's *Mining Act* and the *Regulation respecting mineral substances other than petroleum, natural gas and brine*. Under this legislation, a rehabilitation and restoration plan for a mine site must be submitted for approval to the Ministry of Natural Resources and Wildlife prior to commencement of exploration, mining and processing activities. Financial assurance (referred to as a "guarantee") is required, valued at 70% of the anticipated cost of carrying out the rehabilitation and restoration plan. A revised plan must be submitted for approval every five years or as needed to reflect changes in mining activities.

Under British Columbia's *Mines Act*, an approved mine plan and reclamation program is required for a permit before starting any work in, on or about a mine. As a condition of the permit, security may be required for mine reclamation and protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine. The *Health, Safety and Reclamation Code for Mines in British Columbia* prescribes the information requirements for closure plans. These include an estimate of the total costs of outstanding reclamation obligations over the planned life of the mine and long-term monitoring and abatement costs. An annual report outlining reclamation work and environmental monitoring undertaken in the previous year as well as reclamation plans for the following five years is required in compliance with the code. An updated estimate of total expected costs of outstanding reclamation obligations is also required.

Certain mining activities in British Columbia are subject to the "Contaminated Site Remediation" and "Remediation of Mineral Exploration Sites and Mines" provisions of the *Environmental Management Act*. For example, the Director of Waste Management may issue a remediation order for a "non-core area" (areas other than where waste rock and mine tailings are placed, where ground is disturbed by mechanical means, or where there are or have been access roads) at a producing or past producing mine and could issue a pollution prevention abatement order to a current or previous owner of the site.

In the Northwest Territories, obtaining a water licence under the *Northwest Territories Waters Act* for use of waters or deposit of waste in waters requires submission of plans for abandonment or any temporary closing of the proposed undertaking and security in an amount not exceeding the aggregate of the costs of abandonment, site restoration and any ongoing measures after abandonment. Land use permits issued under the *Territorial Land Use Regulations* with respect to Crown lands require that the site be restored as nearly as possible to the same condition it was in prior to commencement of the land use operation and a security deposit of not more than \$100,000 to cover restoration costs. Where the deposit is insufficient to cover the cost of restoration at closure, the deficiency is owed as a debt to the Crown. Regulations under the *Mackenzie Valley Land Use Regulations* require the holder of a land use permit to restore the permit area to substantially the same condition as it was in prior to the commencement of the land use operation as well as the posting of security not exceeding the aggregate costs of abandonment, restoration and any other measures necessary post abandonment.

AANDC issued a *Mine Site Reclamation Policy* for the Northwest Territories as well as one for Nunavut. The policies set out the general principles governing reclamation and financial assurance while providing for approval of reclamation measures at each mine site on a case-by-case basis. Coordination among regulatory agencies is a key principle of these policies. For example, on Crown-owned lands in the Mackenzie Valley, AANDC has jurisdiction with respect to land leases and related security issues, the Mackenzie Valley Land and Water Board has the jurisdiction to determine the amount of security in water licences and land use permits, and the Minister of AANDC has the power to determine the form of security provided under these instruments.

AANDC's role under the policy includes facilitating discussions between the various regulatory bodies to promote the coordination of financial security obligations.

CLIMATE CHANGE - GREENHOUSE GAS EMISSIONS

FEDERAL INITIATIVES

Government regulatory responses to climate change are changing rapidly across Canada and will likely have a significant impact on mining projects over the mid to long term. The Canadian government prefers a North American trading regime that would ultimately become part of a global approach. However, since the U.S. has indefinitely postponed its cap-and-trade program, the Canadian government has followed suit and no emission caps are expected in the near future. The federal government's most recent climate change proposal involves rules-based, industry-specific emissions, rather than a cap-and-trade program, but the final form and implementation of any regime will depend on the U.S. approach.

Given the ongoing disparity between provincial and federal policy, a Canada-wide climate change plan is unlikely in the short to mid term. Nevertheless, in the face of quickly evolving international, national and provincial regulatory regimes, compliance is a significant issue for mining companies as they come under pressure from shareholders, securities regulators and other stakeholders to accelerate the assessment of compliance costs and the development of risk strategies and to disclose related expenditures in public corporate filings. Further, given threats in the United States to impose "border carbon adjustments" on imports from countries without commensurate carbon regimes, there is a growing consensus among Canadian business leaders on the need for a clear and cohesive national carbon policy in Canada that would be compatible with a U.S. carbon regime.

PROVINCIAL CAP-AND-TRADE SYSTEM

At the provincial level, Alberta legislated an intensity-based emissions trading system for heavy industry in 2007. Since then, British Columbia, Manitoba, Ontario¹⁷ and Québec have also committed to a cap-and-trade system with hard caps and joined the Western Climate Initiative ("WCI"), a coalition that includes seven U.S. states (led by California) whose members are committed to the establishment of a regional cap-and-trade system. Saskatchewan has also registered as an observer. Each of the proposed and existing regimes place a cap on permitted emissions and permit at best some degree of emissions reduction credit trading to achieve compliance. The WCI hopes to have a cap-and-trade system in place by 2012.

GREENHOUSE GAS EMISSION DISCLOSURE

Despite pulling back on promises of regulating greenhouse gases, the federal government does require significant emitters to disclose their greenhouse gas emission levels. Under the authority of Section 46 of CEPA, operators of facilities that meet the criteria specified in the annual notice with respect to reporting of greenhouse gases, published in the *Canada Gazette*, are required to report facility greenhouse gas emissions to Environment Canada by the annual reporting deadline. The Greenhouse Gas Emissions Reporting Program applies only to the largest industrial greenhouse gas emitters in Canada. Starting with 2009 emissions data, all facilities that emit the equivalent of 50,000 tonnes (50 kilotonnes) or more of greenhouse gases in carbon dioxide equivalent units (CO₂ eq) per year are required to submit a report.

Some of the provinces also require greenhouse gas reporting. For example, in Ontario, Regulation 452/09 requires certain facilities emitting 25,000 tonnes or more of greenhouse gases to report emissions. The regulation is intended to obtain accurate emissions data to inform the development of Ontario's proposed cap-and-trade system.

¹⁷ The *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading) 2009* provides the foundation for Ontario to implement a greenhouse gas cap-and-trade system in Ontario that can link to other systems.

OCCUPATIONAL HEALTH & SAFETY AND WORKERS' COMPENSATION

Each of the provinces has enacted legislation to establish standards for occupational health and safety and to compensate employees who are injured in the course of their employment. Under the national Workplace Hazardous Material Information System, employers in all provinces also have an obligation to provide information and educational programs to employees who work with hazardous materials.

In Ontario, employers must meet the safety standards in the *Occupational Health and Safety Act* ("OHSA"), which imposes duties on employers, supervisors, workers and other persons (e.g., owners) concerning workplace safety.

The *Mines and Mining Plants Regulation* under the OHSA regulates occupational health and safety matters specific to mines and mining plants and to mining development in Ontario.¹⁸ These regulations apply to the metal and non-metal mining and aggregate operations whereas occupational health and safety matters related to the construction of a mining plant on the surface and the construction at the surface of a mine for the purpose of developing the mine are regulated under the *Construction Projects Regulation* under the OHSA.

Ontario employers must register with the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act, 1997*. The failure to do so within 10 days of becoming an "employer" is an offence. Most workers injured in accidents arising from employment or suffering from an occupational disease may receive compensation from the fund established under this legislation but cannot sue the employer for damages arising from such injuries.

Similarly, health and safety matters at Québec mine sites are regulated under the *Occupational Health and Safety in Mines Regulation* although certain provisions of the Québec *Safety Code for the Construction Industry* with respect to underground work sites may apply to mine shafts.

In Québec, the *Act respecting occupational health and safety* is intended to eliminate dangers to the health, safety and physical well-being of workers. It grants an employee the right to refuse to perform work if there is reasonable cause to believe the work would expose him or her to danger to health, safety or physical well-being or would expose another person to a similar danger. Employees cannot contract out of the statute, although they may agree with employers on more favourable working conditions than the minimum standards required by law.

Québec's *Act respecting industrial accidents and occupational diseases* provides for compensation for injuries arising from employment and may include income replacement, compensation for bodily injuries, rehabilitation and death benefits. Compensation is based on a no-fault system. Workers injured by accidents arising from employment or suffering from an industrial disease may receive compensation from the fund established for such purposes. They cannot, however, sue the employer for damages.

DIRECTOR AND OFFICER DUTIES AND LIABILITY

Under Canadian health and safety law, directors and officers have the legal duty to take "all reasonable care" to ensure that the corporation complies with applicable health and safety legislation, and can be held personally liable for offences. In Ontario, for example, directors and officers of a mining company have a duty to take all reasonable care to ensure the company complies with the OHSA and applicable regulations such as the *Mines and Mining Plants Regulation*.

¹⁸ Under the OHSA, "mine" means any work or undertaking for the purposes of opening up, proving, removing or extracting any metallic or non-metallic mineral or mineral-bearing substance, rock, earth, clay, sand or gravel and "mining plant" means any roasting or smelting furnace, concentrator, mill or place used for or in connection with washing, crushing, grinding, sifting, reducing, leaching, roasting, smelting, refining, treating or research on any substance mentioned in the definition of "mine".

CRIMINAL LIABILITY OF CORPORATIONS FOR CRIMINAL NEGLIGENCE IN THE WORKPLACE

Since 2004, Canada's *Criminal Code* has included an offence of criminal negligence with respect to occupational health and safety. Specifically, mining companies and individuals may be criminally liable if they fail to satisfy the legal duty to take reasonable steps to prevent bodily harm to those persons whose work they direct and the public that might be impacted by such work.¹⁹ This legal duty may apply to failures to implement and utilize both safety and environmental management systems at mines.

The legal duty is set out in Section 217.1 of the *Criminal Code* as follows: "Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task." For all criminal negligence offences, including this offence, in order to convict, the court must determine that the accused acted so carelessly or with such reckless disregard for the safety of others as to deserve criminal punishment.

In addition, under the *Criminal Code*, an "organization" (including a corporation, firm, partnership or trade union) is responsible for the negligent acts or omissions of its representatives (directors, partners, members, agents, contractors and employees acting within the scope of their employment). The organization is also liable for criminal negligence when a "senior officer" (anyone in the organization with executive or operational authority), or senior officers collectively, is or are party to the offence or, knowing that a representative is or is about to be a party to an offence, fails to take all reasonable measures to stop the representative from being a party to the offence.

¹⁹ This legal duty is, in part, a response to the death of 26 miners from an explosion in the Westray coal mine in Nova Scotia in 1992.

About this guide

Davies has extensive experience advising foreign and Canadian mining companies on mergers and acquisitions, capital market transactions, commercial bank and project financings, environmental regulation, joint ventures, operating agreements and many other types of mining transactions.

This guide is intended to provide the reader with an overview of Canadian legal issues and other considerations relevant to acquiring interests in Canadian mining properties and to developing, financing and operating a mine in Canada. The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions you may have. For additional information with respect to any matter discussed in this guide or for assistance on any transaction, please contact us directly.

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