GETTING THE DEAL THROUGH

Mining

The regulation of exploration and extraction in 32 jurisdictions worldwide

2009

Contributing editors: Sean Farrell, Robert McDermott and Jeffery Snow

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Overview

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2008 was a year comprised of two very different times for the mining industry. The first part of the year was a continuation of the golden days that the industry basked in for all of 2007. Metal prices were high, demand robust and mergers and acquisitions were still at the forefront of industry news. Admittedly, there were a few clouds appearing on the horizon. The subprime mortgage crisis in the US was making it difficult to get credit, and people worried that the slowing US economy would put an end to the strong demand for commodities. Many in the industry, however, took comfort in the 'de-coupling' theory: the premise that the BRIC countries would continue to drive the world's economy notwithstanding how events ultimately unfolded in the US.

The events which subsequently transpired in the second part of 2008 seemed to be so different and unrelated to the conditions of the first part as to have taken place years, and not months, later. In fact, measured in economic terms, the world lost seven years of growth in less than one year during this period. Nowhere was this retrenchment more apparent than in the mining industry.

While virtually every industry participant suffered, some companies and their shareholders fared much better than others. Where many industry participants faced only challenge and adversity, the new economic environment presented others with a mixed basket of challenges and opportunities.

The dividing line between these two groups was, to a large extent, a function of cash. Those who entered the second part of 2008 with a healthy balance sheet still faced significant economic hurdles, but were also in a position to take advantage of growth and buying opportunities that come along only once in a very long time. Those unfortunate enough to have gone on a spending spree in the first part of the year found themselves faced with horrendous operating conditions and little or no manoeuvring room. For the first time in a number of years, mining companies in need of funding were confronted with equity and credit markets that were effectively closed.

Timing is everything

While it is tempting to attribute the circumstances that individual companies found themselves faced with in the second half of 2008 to the calibre of their respective management groups, in many cases it came down to simple timing. When certain investment decisions made in 2008 are compared, it is not the business acumen that was brought to bear that determined whether the deal was a good one or a bad one, it is more a case of when they occurred.

Examples of decisions that now appear (with the advantage of hindsight) to have been terrible include Teck's US$14 billion purchase of Fording Coal, and RTZ's US$38 billion purchase of Alcan. Each of these transactions was made at the peak of the market just before the economy went over the cliff.

Moving along the continuum to decisions that were simply bad, is a function of moving further back from the peak of the market. Xstrata's purchase of Falconbridge, Norilsk's purchase of LionOre and the Zinifex merger with Oxiana to form Oz, now appear to be questionable decisions, but at the time they were made, were positively received by the market.

The number of good decisions which occurred are fewer in number, and are represented more by deals which didn't happen rather than deals which did. Examples include BHP's decision to abort its US$66 billion hostile takeover for RTZ (although the costs of going through the exercise were reported to have amounted to US$386 million); Xstrata's decision to drop its US$10 billion bid for Lonmin; and Minmetal's takeover bid for Oz.

Reshuffling the deck

The wide swings experienced in 2008 have had the effect of changing the status quo in regards to the centres of power and influence in the industry. The shake-out created by the economic crisis has seen many long-established players diminish in stature and new entrants come in. Historical relationships have undergone profound changes and are not likely to revert back anytime soon.

China – white knight or corporate marauder?

China has come to represent the largest market for minerals and metals. According to Canaccord Adams Research, in 2008, China consumed 28 per cent of the world's copper, 34 per cent of the world's aluminium, 50 per cent of the world's seaborne iron ore and 25 per cent of the world's zinc. Securing the ongoing supply of these and other commodities has become of the utmost strategic importance to China.

To ensure continued access to these inputs, China invested heavily in mineral properties in a number of developing countries at the top of the economic cycle in 2006 and 2007. In addition to hosting vast mineral wealth, many of these developing countries offered China lower acquisition costs and less competition from western companies due to the political risk inherent in investing in these jurisdictions. In addition, investments in the mineral wealth of these countries generally meant less public resistance to foreign investors, easier operating rules, cheaper labour and less stringent environmental rules and oversight.

Following the collapse in the metal markets, however, a noticeable shift has taken place. China now appears to be targeting developed countries to secure its metal supply requirements. Australia in particular has seen Chinalco's failed attempt to invest US$19.5 billion in RTZ, the US$1.2 billion takeover of Oz Minerals by China Minmetals and the acquisition of a majority share of Perilya by Zhongjin.

China's shift from the developing world to the developed world can be attributed to a number of factors. Prices for attractive western companies have been dramatically reduced. The overall economic decline has created more receptive governments and shareholders looking for a white knight. A number of unfortunate events in various African countries have also graphically illustrated to Chinese investors the difficulties associated with operating in developing countries. Finally, Chinese companies have developed greater sophistication and experience in making large investments in western countries.

Many industry observers view this as good news since it confirms that China has a positive long-term view of metal demand and prices. China's interest also underscores the long-term demand for metals associated with China's continued industrial and social development.

Others, however, fear this as bad news. This is in part because China's objectives and long-term plans are not completely consistent with traditional western economic market models. China's needs go beyond profitability producing metals and instead relate more to strategic sourcing of materials essential to keep China's internal development growing.

Ultimately, however, the continuation of this trend will rest on the harsh reality that, in a world full of sellers, long-term deep pocketed buyers are essential if the market is ever to stabilise.

Russia – after the oligarchs

In 2008, the Russian stock market lost 70 per cent of its value and the rouble lost more than a third of its value against the euro and the US dollar.

One graphic outcome of these declines was that the number of billionaires in Russia fell from 101 to 49. Ten of Russia's richest men collectively lost a staggering US$131 billion in 2008 (representing a 63 per cent drop in wealth), according to Moscow's *Finance* magazine.

The biggest losers were the oligarchs controlling metals and other natural resources. By way of illustration, Oleg Deripaska (who was the wealthiest Russian in 2007) went from a personal net worth of US$40 billion to US$5 billion. The primary reason for this loss was the ill-timed purchase by his main holding company, UC Rusal (the world's biggest aluminium company) of a 25 per cent stake in Norilsk (the world's biggest nickel producer).

Russia's economy continued to deteriorate throughout 2008 and there were a number of instances of the Russian government participating in the debt restructuring of distressed mining companies previously controlled by the oligarchs (Deripaska asked the Kremlin for US$6 billion for a 15 per cent stake in Rusal).

This trend may continue and, with Russian companies facing the requirement to repay over US$140 billion in foreign debt in 2009, government bailouts will result in the control over many of these companies shifting from the oligarchs back to the Russian government (where the ownership resided prior to the 1991 collapse of the USSR and the rise of the oligarchs).

To a lesser extent, foreign companies may also come into Russia for quality assets at low prices as the oligarchs reach out for partners. Kinross has successfully joint ventured with Polyus bringing fresh capital and mining expertise to the venture. As many western companies have painfully discovered, however, venturing into Russia without a well-developed exit plan can give rise to negative results.

'Out of Africa'

Insatiable demand and high prices for metals over the past few years induced many companies to invest heavily in politically unstable areas or areas with little infrastructure. This pioneering spirit developed for a number of different but inter-related reasons:

- acquisition costs for mineral properties had become prohibitively expensive in established areas;
- record high metal prices, when factored into feasibility studies, produced margins that could absorb the costs for security, infrastructure and expatriate staffing;
- herd mentality meant that individual companies would not have to go it alone, as other western companies were also entering these areas: this not only resulted in the possibility of shared infrastructure costs but also gave comfort to nervous directors that if others were there, the political risks must be acceptable; and
- the general business environment was consistently rewarding risk-taking investors and companies as well as their bankers.

A reversal of this process has taken place. This reversal resulted from the following factors:

- lack of availability of credit for mining projects in politically risky areas;
- lower metal prices meant that projects could no longer carry the extra costs associated with jurisdictions with high political risk or no infrastructure;
- investors punished by market declines became completely risk adverse;
- foreign and host governments reeling from the economic crisis were no longer willing or able to provide infrastructure assistance; and
- quality assets in low political risk areas became available at bargain prices for the few companies with acquisition war chests.

Developing countries – open for business (again)

In the midst of the boom cycle of 2005 to 2008, many governments came to the conclusion that they were not receiving a fair share of the revenues produced by mining companies operating within their borders. Various initiatives were undertaken during this period designed to carve out a larger piece of the metals pie for the host country. This trend occurred across the globe in both developed and developing countries. Examples included:

- Zambia, Chile, Peru, Ontario, Alberta – new royalties and taxes;
- Democratic Republic of Congo, Guinea, Ecuador – mining licence review and revised mining law;
- Venezuela and Bolivia – direct and indirect expropriation of assets; and
- Russia and Mongolia – mandated percentage state ownership.

The silver lining in the decline in the metals markets has been the cancellation or deferral of these initiatives by a number of governments. Examples include Zambia cutting its newly imposed mining taxes, Ecuador passing mining friendly mining laws to encourage investment, and Indonesia finally granting Contacts of Work over areas that were previously off limits according to its forestry law.

The massive job losses in other developing countries plus lower tax and royalty revenues are acting as an impetus for many of the more astute governments to make mining more, and not less, attractive in their countries.

Bargaining power shifts

The turmoil in the industry has precipitated a number of fundamental shifts in the relative bargaining power of a number of the participants.

An over-supply of concentrates has forced miners to accept lower treatment terms from smelters and refiners. One stark example of this is in the iron ore market which has seen huge reductions in prices as bargaining power swings back to steelmakers after the dramatic price increases imposed in 2007/2008 by Vale, BHP, RTZ and others.

Equipment suppliers, drilling companies, consulting engineers, assay laboratories and other mining service providers have moved from dictating prices and terms to aggressively searching for business. Demand for mining supplies and services is down, overcapacity and excess inventory exists, orders are being cancelled or renegotiated and used (or newly purchased) equipment is now crowding the market.

Technical trends

The credit crunch

One of the most significant issues currently facing the industry is the lack of credit and limited access to equity markets.

Larger companies are struggling with diminished cash flows and reduced access to external financing. This has created a shortfall of funds required to advance key projects or execute strategic acquisitions.

The reaction to this challenge has been varied. Xstrata undertook a rights issue to raise US$6 billion but at prices which were a huge discount to the market. RTZ initially struck a US$19.5 billion deal with Chinalco but has recently walked away from that deal in favour of a rights offering and a strategic joint venture with BHP. Oz Minerals has essentially sold its entire suite of assets (except for Prominent Hill, which the Australian government insisted be carved out) to Minmetals for US$1.2 billion just to relieve its debt. Cameco was able to complete a US$400 million equity issue (at a 10 per cent discount to market) to enable it to shore up its balance sheet.

Small and medium-sized mining companies have been confronted with almost no availability of external credit or financing. Their limited options were to merge, sell, or go into hibernation and try to wait it out. A common scenario for many was a successful financing in 2007 or early 2008 that enabled management to give the green light for the start of a large capital project. Many such projects were reliant on a second-stage financing part way through or were caught in the middle of dramatic input cost increases. The net effect was that many companies found themselves with partially built projects, some but not enough cash on hand to get to production, and no prospects for raising the additional cash required to complete. Even for those few with access to credit, the terms of borrowing had become prohibitive.

As a result, by early 2009 the landscape was littered with small and medium-sized companies with projects that were partially complete. These projects often had delineated ore bodies and partially completed infrastructure as well as some (but not enough) cash on the balance sheet. In better times, these companies would be prime takeover targets. As conditions improve, however, the race will be on to see if they can access the funds they need to complete their projects before being picked off at discount prices by their larger competitors.

Another consequence of the plight of the smaller mining companies was that virtually all grass roots exploration was terminated. This lack of activity will severely impact the front end of the metals pipeline – setting the stage for future supply shortages.

Industry consolidation – stalled but not stopped

There were record levels of M&A activity in 2006 and 2007. In 2007 alone, there were over 411 transactions that had an aggregate value of over US$145 billion. Much of the value was represented by mega-transactions such as *Xstrata/Falconbridge, CVRD/Inco, Freeport/Phelps Dodge, Barrick/Placer Dome, BHP/WMC,* and *Rio Tinto/Alcan.*

Starting in the third quarter of 2008, there was a dramatic reversal of this trend (BHP terminating the RTZ acquisition) as well as a certain amount of buyer's remorse (*RTZ/Alcan* and *Teck/Fording*).

Two competing tensions that continue to influence the current environment are:

- financial – bargain prices exist for target companies and projects versus poor credit conditions and low share prices for potential acquirers; and
- strategic – management wants to buy assets at the low point in the cycle versus boards that want to preserve cash to get through the cycle.

In the face of these opposing forces, a number of factors will eventually emerge to kick-start renewed M&A activity:

- desire to lower production costs by closing old high-cost operations and acquiring new lower-cost operations;
- desire to access cash currently held by companies with cash;
- stabilisation of metal prices and demand;
- share for share acquisitions or mergers with no cash involved;
- parent companies taking private their majority-controlled public subsidiaries;
- target companies seeking 'white knights' to fend off opportunistic bids;
- strong partners buying out weaker partners;
- majors selling off of assets to reduce debt; and
- Chinese and Indian companies making strategic acquisitions.

The end of the beginning

Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.
Winston Churchill following the victory at El Alamein, 10 November 1942.

The impact of input cost reductions

The upward spiral in mining input costs has stopped and, in some cases, is reversing as the supply of manpower and materials outstrip demand. It is expected that input costs will continue to decline and the resulting lower capital and operating costs will improve the economics of mining projects that are currently stalled.

Metal prices, however, continue to stay at lower levels as world demand for metals remains depressed. Mining projects that were conceived at the higher metal prices of 2005 to 2007 will not proceed on the basis of reduced costs alone. Overall increases in prices for metals are a prerequisite for the start-up of most of these projects.

The one bright spot is the gold sector, which is currently enjoying record high prices and slowly declining costs. Even in this sector, however, those operations that rely on revenue from base metal by-products to subsidise the overall cost of producing gold are struggling. Low base metal prices have greatly reduced the amount of by-product credits previously received and have therefore resulted in sharply increased net production costs for these gold operations.

The seeds of the next cycle – production cut-backs

A distinguishing feature of the recent downturn in the metals market has been the unprecedented speed with which producers have scaled back on production. In previous downturns, many producers reacted to lower prices by increasing their production levels in the hopes of achieving lower costs per unit of production. This, in turn, led to even lower prices as the growth in supply quickly out-paced demand.

Perhaps having learned from this experience, large mining companies have recently delayed or suspended projects and closed or cut back marginal production facilities. BHP has closed Ravensthorpe, RTZ has shut down a number of its recently acquired Alcan operations, Oz Minerals has shut down its Century operation and Xstrata and CVRD/Inco have suspended production at their respective operations in Sudbury. All of these are major operations producing large quantities of metals.

Likewise, many small and medium-sized companies have recently shut down high-cost facilities and stopped the development of advanced projects. Junior explorers are running out of cash to fund their exploration projects and are finding it almost impossible to raise new exploration funding.

The consequence of this collective action on the part of the mining industry will be a significant reduction of supply throughout the entire metals pipeline.

It is this reduction of supply in the various stages of the metal production pipeline that will eventually lead to a sudden and dramatic rebound in metal prices as the world discovers that there are not enough metal products to meet the demands of a recovering global economy.

The hidden threat – manpower, materials and infrastructure

The abrupt reversal of fortunes that occurred in the latter part of 2008 and continued into 2009 has meant that the acute shortages of skilled workers and equipment for the mining industry have evaporated. The immediate issues now facing the industry relate to dealing with the mass lay-offs of workers and large excess inventories of equipment.

This, of course, has had a major impact on new graduates, universities, colleges and equipment suppliers, each of which was investing heavily in a growing industry and each of which is now looking at what other alternatives may exist outside the industry.

The fundamental long-term issue now is how to preserve as much of this manpower and materials capacity as possible to ensure that the labour and inputs constraints, which existed in the recent boom times, don't resurface to impede the inevitable recovery.

Likewise, the past few years have demonstrated the critical lack of infrastructure to support high levels of minerals production. For example, the shortage of electrical supply in South Africa; the lack of ports in Australia; the lack of access to natural gas in Chile, Argentina and Bolivia; the global shortage of railway and shipping transportation; and the lack of adequate sources of water in Chile and Peru were all serious constraints on the global mining industry that limited the industry's growth and development during the recent period of high prices. These constraints have not been solved nor have they gone away. They simply no longer impact the industry in the current downturn when production levels have been lowered in response to decreased demand.

Unfortunately, the few major initiatives that were started to build up the needed infrastructure to support an active minerals industry have been suspended or cancelled. As a result, the inevitable rebound or increase in demand for metals that will stimulate a return to higher production levels will ultimately be constrained by the continuing lack of infrastructure needed to support the industry. The countries that will benefit most from such a recovery will be those who are now actively working to expand their national infrastructure as well as their trained labour pools to support mineral development and production.

Almost every major jurisdiction in the world is currently embarking on a 'stimulus programme' intended to get their respective economies moving again. The mineral industry must make it a top priority to advocate for significant portions of the billions of dollars being budgeted or spent on these initiatives to be ear-marked for infrastructure improvements and skills training, especially those that will support mineral resource development.

Canada

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Mining industry

1 What is the nature and importance of the mining industry?

Canada produces a wide variety of metallic minerals. It is one of the five largest producers of aluminium, cadmium, copper, molybdenum, nickel, platinum group metals, titanium concentrate, uranium and zinc; and it is the seventh-largest producer of gold.

The mining industry makes a significant contribution to Canada's economy. In 2008, the value of Canada's mineral production was approximately C$45.3 billion, about 46 per cent of which was metallic minerals. Also in 2008, Canada exported C$94.6 billion of minerals and mineral products. These exports represented some 20 per cent of Canada's total domestic exports.

Canada's capital markets are major sources of debt and equity capital for the mining industry worldwide. At 31 December 2008, over 1,400 mining companies were listed on the Toronto Stock Exchange (TSX) (senior market) and the TSX Venture Exchange (TSX-V) (junior market).

Legal and regulatory structure

2 Is the legal system civil or common law-based?

With the exception of the province of Quebec, which is civil law-based, Canada's legal system is common law-based.

3 How is the mining industry regulated?

With limited exceptions, the provincial governments regulate mining in Canada's 10 provinces, the federal and territorial governments and aboriginal organisations regulate mining in Canada's three territories, and the federal government regulates mining in Canada's offshore waters (12 miles from the low water mark) and continental shelf. Generally, the mining industry is regulated by way of mining laws supplemented by mining agreements in appropriate circumstances. See also question 4.

4 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

Each of the provincial, territorial and federal governments has its own mining, environmental, worker health and safety and other laws, as well as related government ministries or agencies that regulate mining activities within the territory under their jurisdiction.

The real property laws of the provinces and territories govern recording and title matters relating to mining rights.

The provincial and territorial securities authorities (CSA) regulate how Canadian reporting issuers (ie, companies that have issued securities to the public in Canada pursuant to a prospectus or similar offering document, or whose securities are listed on a Canadian stock exchange) disclose technical information concerning mineral resources and mineral projects. The CSA has established National Instrument 43-101 (NI 43-101), which provides, among other things, that disclosure by Canadian reporting issuers:

- with respect to mineral resources and mineral reserves is restricted to five categories (measured, indicated and inferred in the case of mineral resources, and proven and probable in the case of mineral reserves) and must accord with industry standard definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum (CIM Standards); and
- with respect to mineral projects, including mineral resources and mineral reserves, must be based upon a written technical report prepared by or under the supervision of a qualified person (generally, an engineer or geoscientist with relevant experience) who in specified circumstances (eg, initial public offerings) must also be independent of the reporting issuer.

Foreign reporting issuers may use the Australasian JORC Code, the SEC Industry Guide 7, the UK IMMM Reporting Code or the South African SAMREC Code instead of the CIM Standards if reconciliation to the CIM Standards is provided in the technical report.

5 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Canadian mining industry uses the CIM Standards. See question 4. The Australasian JORC Code and the South African SAMREC Code are similar to the CIM Standards.

Mining rights and title

6 Who has title to metallic minerals in the ground?

With the exception of limited cases of private or aboriginal ownership in certain provinces and territories, and subject to aboriginal title (see question 11), the metallic minerals in the ground are owned, in the case of the provinces and territories, by the provincial or territorial government and, in the case of the offshore waters and continental shelf, by the federal government. These governments are commonly referred to as the Crown.

Generally, except for Ontario, a Crown patent or grant of land to a third party does not convey an interest in the metallic minerals in the ground unless otherwise specifically provided in the grant. Since 1913, in Ontario, a Crown patent or grant of land conveys the metallic and other minerals in the ground.

7 What information and data is publicly available to private parties that wish to engage in mining activities?

Information and data is available from the following sources:

- mining recorders offices – each province and territory has one or more mining recorder offices where mining claims and specified information with respect to mining activities on lands within the

province or territory must be filed (eg, copies of geological maps, geological reports, drill logs, work reports and similar information). This information is accessible by the public for a fee after the expiry of a confidentiality period that varies by province and territory;
- land titles or registry offices – each province and territory has land titles recording offices where information with respect to title to owned or leased lands is recorded. This information is accessible to the public for a fee; and
- others – the federal government maintains a database of operating mines and processing facilities; the Ontario government maintains a library of core samples obtained from drilling activity in the province.

8 What mining rights may private parties acquire? How are these acquired? What obligations does the rightsholder have?

Except for aboriginal-owned lands and for the limited cases where private ownership of lands includes ownership of the metallic minerals in the ground, and with the exception of the provinces of Alberta, Nova Scotia and Prince Edward Island and the Northwest Territories, Canada operates a 'free entry' system (ie, mining rights are acquired on a 'first come, first served' basis).

Under the free-entry system, a person may enter Crown lands and private lands that are open for exploration and development in pursuit of Crown minerals and stake a claim. Staking usually involves erecting a designated number of posts, inscribing information on the posts and running blazed lines through the bush and trees, all in accordance with staking regulations. The particulars of the claim are then recorded with the appropriate government office. Recording happens as a matter of course. The holder of a claim is required to survey and perform specified work on the claim. In some cases, information must be provided about the presence of a mineral deposit in the lands covered by the claim and whether the claim holder intends to develop the deposit. As long as a claim is in good standing, the claim holder is entitled to apply for and receive a mining or mineral lease of the lands covered by the claim in order to develop and exploit a mineral deposit. In most provinces and territories, a prospecting or similar licence must be obtained before lands may be entered and claims staked. Usually, these licences are granted on application and payment of the requisite fee. In some provinces and territories, a special permit is required to carry out an airborne geophysical survey over an area not covered by a mineral claim.

In the provinces of Alberta, Nova Scotia and Prince Edward Island and the Northwest Territories, a person who wishes to enter Crown lands and private lands that are open for exploration and development in pursuit of Crown minerals must apply for and obtain an exploration or land use permit. The government, as owner of the mineral resource, has the discretion to decide whether and on what terms it will issue the permit. In addition, if a permit holder wishes to develop a mineral deposit on the lands subject to the permit, the permit holder must apply for and obtain a mining or mineral lease. Again, the government has the discretion to decide whether and on what terms it will issue the lease. The exercise of discretion is subject to the rules of administrative law (see question 10).

Mining or mineral leases normally have a term of 10 or 21 years, with the right to extend for one or more further terms. The leases usually require development within a specified period and provide for the payment of annual fees and, upon production, mining taxes. Generally, default in the performance of the terms of a lease will result in the termination of the lease.

9 Is there any distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties.

The acquisition by a non-Canadian of 'control' of a Canadian mining business that exceeds prescribed monetary thresholds is reviewable under the Investment Canada Act and subject to the approval of the federal minister of natural resources. An acquisition below the applicable monetary thresholds is subject to a 'tick-the-box' notification process that may be made post-closing. If an acquisition is reviewable, the acquirer may be prohibited from acquiring, or may be required to divest, the Canadian business if the relevant authorities are not satisfied that the acquisition is likely to be of net benefit to Canada.

10 How are mining rights protected?

Mining rights are well developed, recognised and protected. There are independent tribunals (eg, mining recorders) as well as courts to resolve disputes with respect to mining rights.

Where the free-entry system applies, the government has limited discretion to decide among applicants for mining rights. Where the free-entry system does not apply, the exercise of governmental discretion is subject to the rules of administrative law, including duties of fairness and natural justice.

Generally, the government's role with respect to mining activities is to provide a stable legal framework that will encourage responsible mining activities.

11 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

The Crown's ability to deal with metallic minerals in the ground may be affected by both proven and potential aboriginal title to the lands where the minerals are located.

Aboriginal title to lands is different from aboriginal ownership of lands that has been formally recognised under an agreement between the Crown and aboriginal peoples. It is a unique interest in land, something between a Crown patent and a personal right to occupy, use and enjoy the land. It is held communally, is inalienable except to the Crown, and has its legal source in the prior occupation of the land by the aboriginal peoples. Although aboriginal title includes the right to use and enjoy the land and is not tied to any particular 'aboriginal use', there is an inherent, although largely undefined, limit on the possible uses that can be made of the land.

The Crown may infringe on proven aboriginal title if the infringement furthers a 'compelling and substantial legislative objective' (in appropriate circumstances, mining may be one such objective) and is consistent with the Crown's fiduciary obligations to the affected aboriginal peoples. Normally, before any infringement can take place, the interests of the aboriginal peoples must be accommodated. This involves notifying and consulting with the aboriginal peoples with respect to the particular infringement and, where appropriate, providing them with fair compensation. In some cases, the consent of the aboriginal peoples will also be required.

Where there is no proven aboriginal title but the Crown knows of the existence of potential aboriginal title, the Crown must notify and consult with the affected aboriginal peoples if it is considering permitting activities that may adversely affect such title. The nature and scope of the consultation required is proportionate to the strength of the potential title and the nature of the proposed activities. Depending on the circumstances, compensation may be required.

12 What surface rights may private parties acquire? How are these rights acquired?

Surface rights refer to the respective rights of the owner of lands (surface owner) and the owner of mineral rights in lands (mineral owner) where the mineral rights are separately owned.

In most provinces and territories, there is legislation governing the respective rights of the surface owner and the mineral owner. Where there is no legislation, the common law (or in the case of Quebec, the civil law) applies.

The general rule is that each owner must use his property so as not to injure his neighbour (eg, the surface owner must give the mineral owner reasonable access rights to permit the mineral owner to exploit the mineral deposit and the mineral owner must support the surface owner's land without subsidence).

In most provinces and territories, mineral owners are required to compensate surface owners for the damage caused by their entry to surface owners' lands. In some cases, the mineral owners are required to go through an expropriation procedure in order to acquire surface owners' lands.

Duties, royalties and taxes

13 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these duties, royalties and taxes revenue-based or profit-based?

Companies carrying on mining activities in Canada are subject to:
- federal and provincial or territorial income taxes;
- provincial or territorial mining taxes or royalties; and
- provincial (Manitoba, Ontario, Quebec and Nova Scotia) capital taxes.

In addition, they are subject to: payroll levies and health or education taxes in several provinces and territories; workers' compensation levies in all provinces and territories; federal value-added taxes; provincial value-added taxes in Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador; and excise and sales taxes in British Columbia, Saskatchewan, Manitoba, Ontario and Prince Edward Island.

Income taxes
Federal and provincial income taxes are payable on a taxpayer's 'taxable income' calculated in accordance with the relevant taxing statute.

The rules related to the calculation of taxable income for federal and provincial purposes are substantially similar. In general, the rules provide special treatment in respect of certain activities associated with the extraction and processing stages (including concentrating, smelting and refining) of mining activities. The semi-fabrication and fabrication stages of mining activities are considered to be manufacturing activities and are accorded the same treatment as manufacturing activities for income tax purposes.

Provincial and territorial mining taxes and royalties are fully deductible for federal income tax purposes.

For 2009, the federal tax rate applicable to income derived from mining extraction and processing is 19 per cent. The provincial and territorial income tax rates vary from a low of 2.5 per cent in Yukon to a high of 16 per cent in Nova Scotia.

Mining taxes or royalties
All provinces and territories that have significant mining activities impose mining taxes, mining royalties or mineral land taxes, or both on mining activities. The taxes and royalties are intended to compensate the provinces and territories for the extraction of the non-renewable resources owned by them. The tax and royalty rates vary among the provinces and territories.

Capital taxes
Manitoba, Ontario, Quebec and Nova Scotia impose a tax on the capital employed by a company carrying on business in their province. The capital on which tax is imposed generally consists of the aggregate of a company's equity and indebtedness, less an allowance for loans receivable and certain investments. The rates of provincial capital tax range from a low of 0.225 per cent in Ontario to a high of 0.3 per cent in Manitoba.

Value-added taxes
The federal government imposes a 5 per cent value-added tax, called the goods and services tax (GST), on the supply of goods and services in Canada, to the extent that the supplies are not exempt or 'zero-rated'. Exported goods and services are 'zero-rated'. The GST applies at each stage of the production and distribution chain. Registered businesses are entitled to 'input tax credits' for GST paid on inputs into taxable supplies.

In Nova Scotia, New Brunswick, and Newfoundland and Labrador, a harmonised sales tax (HST) has replaced both the provincial sales tax and the GST. The HST is applied at a single rate of 13 per cent on the same categories of goods and services as the GST. The Ontario government has stated that it intends to harmonise its existing sales tax with a similar HST. Quebec imposes a 7.5 per cent value-added tax on the same categories of goods and services as the GST.

Sales and other taxes
No retail sales tax is imposed at the federal level.

All provinces that do not impose a value-added tax, other than Alberta, impose sales taxes that are payable at rates varying from 5 per cent to 10 per cent.

Customs duties may be payable on goods and services imported into Canada.

The federal, provincial and territorial governments impose excise taxes on motor fuels (diesel and gasoline).

14 What tax advantages and incentives are available to private parties carrying on mining activities?

Federal and provincial income tax legislation includes a broad range of incentives for companies carrying on mining activities, including:
- accelerated tax depreciation deductions for assets acquired before commercial production commences, for major expansions, and for certain investment expenditures that exceed more than 5 per cent of the gross income from the mine in any year;
- a 100 per cent optional deduction for 'Canadian exploration expenses' that can be carried forward indefinitely;
- access to flow-through share (FT shares) financing (described below); and
- investment tax credits for mineral exploration in Canada and bringing a new mine into production.

In simplified terms, FT shares permit a mining company to renounce or 'flow-through' certain costs and expenses to an investor in the FT shares and permit the investor to claim the benefit of the related tax deductions. FT shares are a common financing tool in Canada. In addition, individuals that invest in certain FT shares may also be entitled to a special mining exploration tax credit. This special mining exploration tax credit is currently only available in respect of FT shares acquired under FT share agreements entered into on or before 31 March 2010.

15 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Canadian resident mining companies pay income tax in Canada on their worldwide income.

Non-Canadian resident mining companies pay income tax in Canada only on the income from their Canadian-based activities. Generally, the amount of income and other taxes payable by these companies will be determined in accordance with the same rules that apply to a Canadian resident mining company carrying on the same activities.

Update and trends

On 30 April 2009, the government of the province of Ontario introduced Bill 173 (the Mining Amendment Act) which intends to modernise the way mining companies stake and explore claims in Ontario. Bill 173 contains a number of important provisions relating to: aboriginal rights (including recognition of aboriginal and treaty rights, the notification of aboriginal communities regarding claim staking and exploration activities, and aboriginal consultation and accommodation requirements); mining rights in general (including the withdrawal of mining lands in southern Ontario where the sub-surface rights are owned by the Crown or there is a registered private land holder and by way of application by private land holders in northern Ontario); new exploration provisions (including the introduction of map staking and a graduated regulatory regime for early exploration with exploration plans required for lower impact activities and exploration permits required for higher impact activities); a prohibition on new mine openings in northern Ontario until a community-based land-use plan is in place; and the introduction of a dispute resolution process through regulation.

Business structures

16 What are the principal business structures used by private parties carrying on mining activities?

The corporation is the principal business structure used to carry out mining activities.

Joint ventures are also common and typically take one of two forms:

- incorporated joint venture – the joint venturers are shareholders in a company which owns the mining rights and their relationship is governed by a unanimous shareholders' agreement; or
- unincorporated joint venture – the joint venturers own the mining rights as joint tenants (although often the bare legal title is held by a jointly owned nominee corporation) and their relationship is governed by a co-venturers agreement.

Financing

17 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing are equity and debt raised in the capital markets, and debt provided by project lenders and other financial institutions.

The Canadian capital markets are a significant source of financing for the mining industry. In 2008, approximately C$8.3 billion was raised by TSX- and TSX-V-listed mining companies.

The TSX has 356 listed exploration and mining companies with an aggregate market value of approximately C$207 billion, representing approximately 16 per cent of the TSX's total market capitalisation. In 2008, 42 new mining companies were listed on the TSX. The TSX-V has 1,071 listed exploration and mining companies with an aggregate market value of approximately C$8.7 billion, representing approximately 51 per cent of the TSX-V's total market capitalisation. In 2008, 96 new mining companies were listed on the TSX-V.

Restrictions and limitations

18 What restrictions and limitations are imposed on the importation of machinery and equipment or services required in connection with mining activities?

There are no material restrictions or limitations.

19 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

There are no specific restrictions or limitations. Foreign employees must, however, apply for and obtain either a work permit or permanent residence status to enter and work in Canada. Work permits for senior and technical foreign employees are regularly granted for one or more years, depending on the circumstances.

20 What restrictions or limitations are imposed on the processing, export or sale of metallic minerals?

Several provinces require metallic minerals mined in the province to be processed in the province. These requirements are not enforced and exemptions are routinely granted for specified periods and subject to periodic renewal.

21 What restrictions or limitations are imposed on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals?

There are no restrictions or limitations.

Environment, health and safety

22 What are the principal environmental, health and safety laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The mining industry is subject to provincial, territorial and federal environmental and worker health and safety laws depending on the location and nature of the particular mining project. The federal government regulates the nuclear industry in Canada. As a result, the mining and processing of uranium and other nuclear materials are subject to federal environmental and worker health and safety laws as well as provincial and territorial environmental laws.

Some governments (eg, Ontario) have specific environmental laws applicable to the mining industry. Other governments have generic environmental laws applicable to all industries. Some governments also have site-specific environmental requirements (eg, emission limits). Generally, governmental environmental ministries or agencies administer these laws.

Most governments have specific worker health and safety laws applicable to the mining industry in addition to those of general application. Generally, the specific laws deal with exposure to hazardous materials, ambient air criteria, handling and storage of explosives and generation of hazardous materials. Generally, governmental labour ministries or agencies administer these laws.

23 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The nature, scope and timing of the environmental review and permitting process for a mining project are dependent on the location and nature of the project and the infrastructure requirements for the project. Generally, the process includes a public consultation process and the preparation and approval of a mine closure and reclamation plan. It may also include an environmental assessment.

If the project is small and relatively straightforward or in an area where the issues are well understood and the host community is supportive, the necessary permits may be obtained relatively quickly (eg, four to six months).

If the project is large and complicated, and in an area where the issues are not well understood or the host community is not supportive, the necessary permits may take years to obtain.

24 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

A mining project will not be allowed to proceed without a satisfactory mine closure and reclamation plan accompanied by satisfactory financial assurances that the plan will be carried out.

A mine closure and reclamation plan will generally provide for the closing or securing of shafts and openings to the surface, stabilisation of subsurface workings to address subsidence, the removal of buildings and infrastructure such as power lines and pipelines, re-grading and re-vegetation of surface areas and securing tailings disposal areas. Long-term water treatment for metal contamination is normally a feature of the plan.

Large, well-capitalised mining companies can frequently provide the necessary financial assurances directly based on the strength of their balance sheets. Other mining companies must normally provide other acceptable forms of financial assurances (eg, letters of credit, performance or security bonds and sinking fund payments).

International treaties

25 What international treaties apply to the mining industry or an investment in the mining industry?

Canada has entered into a number of international investment treaties relating to the mining industry, including bilateral investment treaties intended to ensure fair and equitable treatment of investment in foreign countries by Canadian companies.

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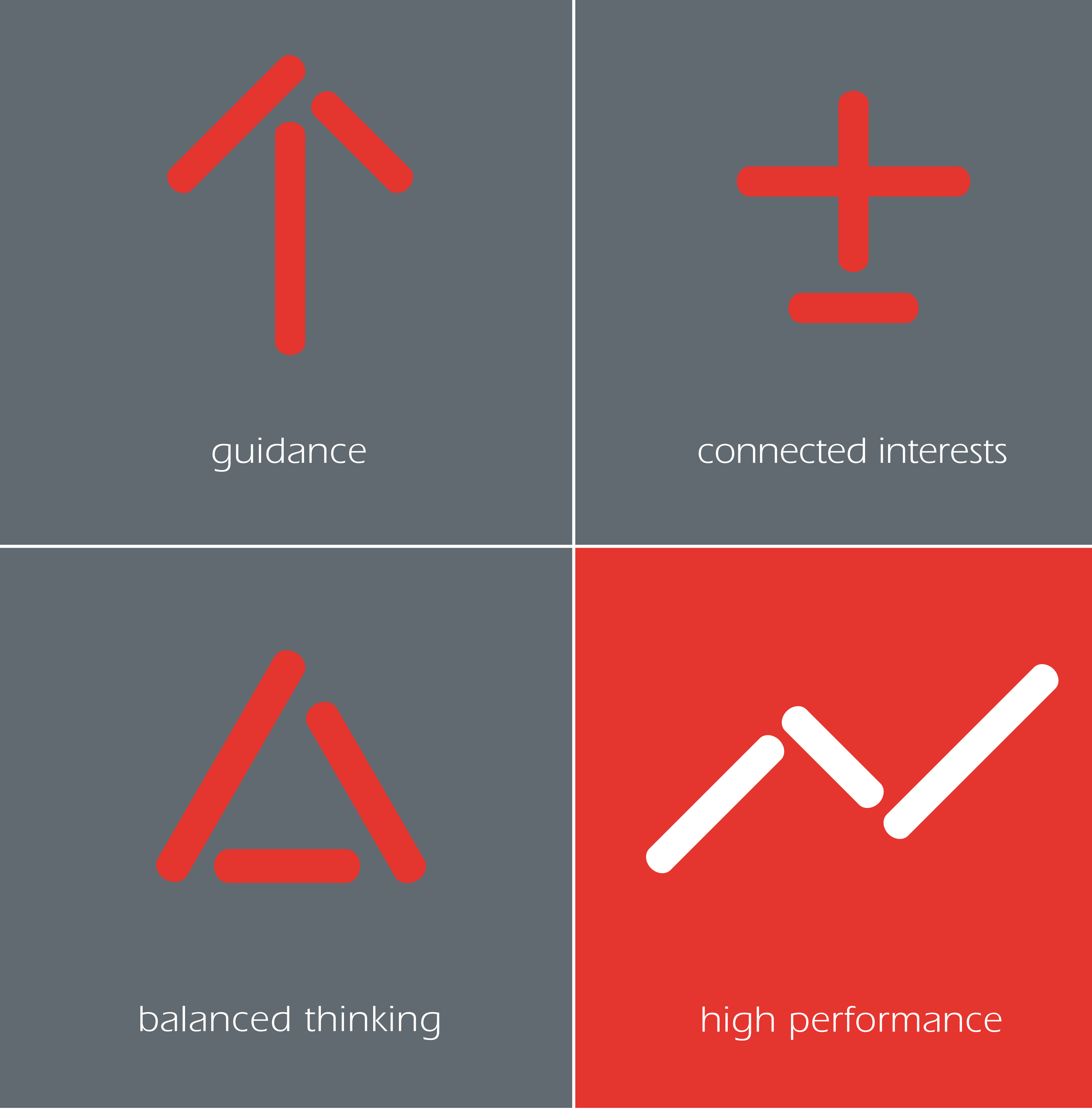

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