



# Mining

The regulation of exploration and extraction in 31 jurisdictions worldwide

Contributing editors: Sean Farrell and Robert McDermott

# 2010

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# 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 2009, the value of Canada's mineral production was approximately C\$32.2 billion, about 50 per cent of which was metallic minerals.

Canada's capital markets are major sources of debt and equity capital for the mining industry worldwide. At 31 December 2009, over 1,400 mining companies were listed on the Toronto Stock Exchange (TSX) (senior market) and the TSX Venture Exchange (TSX-V) (junior market).

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## 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.

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## 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 rights holder 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.

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### 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, as of 1 July 2010, Ontario and British Columbia; sales taxes in Saskatchewan, Manitoba, and Prince Edward Island; federal and provincial excise taxes; and federal customs duties on goods imported into Canada.

### 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.

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

For 2010, the federal tax rate applicable to income derived from mining extraction and processing is 18 per cent. The provincial and territorial income tax rates vary from a low of 2.5 per cent in the Yukon Territory (in respect of manufacturing and processing income) to a high of 16 per cent in Nova Scotia and Prince Edward Island.

### Mining taxes or royalties

All provinces and territories that have significant mining activities impose mining taxes, mining royalties or mineral land taxes, or a combination thereof in respect of 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 certain companies 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. General capital taxes in respect of non-financial institutions are gradually being phased out in these provinces and are scheduled to be eliminated in Ontario as of 1 July 2010, in Manitoba and Quebec as of 1 January 2011, and in Nova Scotia as of 1 July 2012.

### 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, Newfoundland and Labrador, and, as of 1 July 2010, Ontario and British Columbia, a harmonised sales tax (HST) has replaced both the provincial sales tax and the GST. As of 1 July 2010, the HST will be applied at rates ranging from 12 per cent in British Columbia to 15 per cent in Nova Scotia on the same categories of goods and services as the GST. Quebec imposes a 7.5 per cent on the same categories of goods and services as the GST (although the Quebec government has stated that it intends to increase this tax to 8.5 per cent as of 1 January 2011, and 9.5 per cent as of 1 January 2012).

### 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 2011.

**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 generally 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.

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### 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.

**Update and trends**

The Canadian mining sector has proven to be relatively resilient. Recent trends include: continued acquisitions and joint ventures by and involving foreign investors; efforts by many Canadian mining companies to reduce debt levels; spin-offs or sales of non-core assets; strategic acquisitions by well-capitalised senior companies of junior and mid-tier companies; continued demand for equity (from both public markets and strategic investors); and use of non-traditional debt financing (including public debt and royalty agreements).

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

- incorporated joint venture – the joint venturers are shareholders in a company that 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-venturer's 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 2009, approximately C\$22.2 billion was raised by TSX- and TSX-V-listed mining companies.

The TSX has 331 listed exploration and mining companies with an aggregate market value of approximately C\$347.1 billion, representing approximately 19 per cent of the TSX's total market capitalisation. In 2009, 18 new mining companies were listed on the TSX. The TSX-V has 1,103 listed exploration and mining companies with an aggregate market value of approximately C\$20.4 billion, representing approximately 57 per cent of the TSX-V's total market capitalisation. In 2009, 86 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

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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).

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#### **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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