

Mining 2011

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Canada

Michael Bourassa and John Turner*

Fasken Martineau

Mining industry

- 1 What is the nature and importance of the mining industry in your country?

Mining accounts for a significant portion of Canada's economy. Natural Resources Canada pegged domestic mineral production at C\$41 billion in 2010, up from just over C\$30 billion in 2009. Canada remains home to the most 'top 100' mining companies in the world with 19 companies.

The industry employs approximately 300,000 people in mineral extraction, smelting, fabrication and manufacturing, and in professional services such as engineering, finance and law. It also accounts for more than half of Canada's rail freight revenues and high portions of the country's port and marine revenues.

Canada's mining industry is active in more than 120 countries and is involved in more than 8,000 exploration projects and mining operations worldwide. Canadian mining companies operate over 350 mines in off-shore locations in the US, South America, Africa, Australasia, and Europe.

Close to 60 per cent of the world's public mining companies are listed on the Toronto Stock Exchange (TSX) and the TSX-Venture Exchange. In the last five years, 32 per cent of global mining capital and 82 per cent of financing transactions were handled through the TSX.

- 2 What are the target minerals?

Canada is a leading global producer of several minerals and metals, ranking at the top in the global production of uranium, potash, diamonds and nickel. Key exports include aluminum, nickel, copper, gold, uranium, coal, potash, zinc, iron ore and steel.

- 3 Which regions are most active?

All provinces and territories produce minerals, but Ontario, Quebec, British Columbia and Saskatchewan are the largest producers.

Legal and regulatory structure

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

Canada's legal roots are firmly entrenched in the systems of its founding nations: England and France. The federal government, nine of the 10 provinces, and the three northern territories have adopted a common law legal system similar to the common law systems in the United Kingdom, the United States and Australia.

Quebec has adopted a civil law system (Civil Code) similar to the legal system used throughout most of Europe, Asia, South America and parts of Africa.

- 5 How is the mining industry regulated?

Canada's legal, regulatory and policy environment promote mineral exploration, mining operations and investment. Mining law is divided between the federal and provincial governments. Ownership of lands and minerals generally belongs to the province in which they are situated. The provinces have jurisdiction over mineral exploration, development, conservation and management. The federal government shares jurisdiction with the provinces on some related matters (eg, taxation and the environment) and has exclusive jurisdiction over areas such as exports, foreign investment controls and nuclear matters.

The exception is uranium, which is a strategic mineral regulated by federal laws. Exploration is a provincial matter, but the federal government regulates all downstream aspects, including mining and milling, processing, transporting and the export of uranium.

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

Federal and provincial legislation affecting mining operations tends to fall into two main categories. The first relates to the essentially private matters of title and taxation, while the second concerns economic, social and environmental policies. Significant decision-making powers are delegated to subordinate bodies or officers to deal with the complexity of the various matters dealt with under the second category.

Each province and territory has its own laws regulating mining activity (with varied names such as Mineral Act, Mining Act, Mineral Resources Act, and Mineral Tenure Act). Some provinces have recently amended their legislation to reflect current attitudes related to sustainable development and consultation with aboriginal communities (eg, 2010 amendments to Ontario's Mining Act).

Federal and provincial/territorial laws and regulations related to environmental protection, labour and employment relationships, occupational health and safety matters, etc, also apply to mining activities.

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

Canada adheres to the CIM Standards (Canada), which were adopted in 2005 to establish definitions and guidelines for the reporting of exploration information, mineral resources and mineral reserves in Canada. They are incorporated by reference into the Canadian Securities Administrators' National Instrument 43-101 (NI 43-101), which sets the standards for all technical public disclosure for min-

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eral projects. Mining companies listed on the TSX and TSX-Venture must comply with NI 43-101.

Mining rights and title

- 8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

All lands and minerals that have not been granted to private persons are owned by ‘the Crown’ (which in Canada refers to either the federal or provincial government in the name of Her Majesty the Queen). Ownership rights to these ‘Crown minerals’ are vested by the Canadian Constitution in the province where the minerals are located. The federal government owns minerals underlying reservations for aboriginal peoples, national parks and other federally owned lands (eg, certain public harbours), and in the Northwest Territories, Nunavut and underlying Canada’s territorial sea and continental shelf.

Rights to Crown minerals are obtained through mining statutes (see question 6), often by staking claims, performing assessment work and then obtaining leases or similar forms of tenure to conduct mining operations. The provincial governments (and in some cases the federal government) set out operating terms and conditions on alienated Crown mineral lands and impose taxes and royalties. The contractual capacity of the Crown as owner provides a means by which governments supplement their authority as legislators.

Once private parties obtain the rights to Crown minerals through the legislated leasing process, such minerals are held by the private party for the tenure of the lease. Subject to compliance with general laws and in some instances, obtaining of government consents, the leases can be encumbered for security purposes in financings, transferred and renewed.

There are significant areas where mining rights are privately held, either because of land grants made in the 1800s and early 1900s where mining rights were attached to surface right grants; or earlier mining legislation provided for grants of ‘freehold’ tenure or outright ownership of mineral rights. In those instances, if a company is interested in acquiring rights to explore or develop such private lands, it is a matter of private negotiation with the owner. Mining activities on those lands are subject to the same environmental, labour and other laws as activities conducted on Crown leases.

- 9 What information and data is publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Information and data related to exploration and mining activities in Canada is available through:

- *Provincial and territorial mining recorders offices* – Provide services related to staking ownership and mining claim maintenance, including receiving ‘assessment work’ reports and filings of exploration activities (eg, geological maps and reports, drill logs, surveys). Typically assessment work reports become public (usually for a fee) after a specified period of time.
- *Provincial geological surveys* – Most provinces gather geological information, and may conduct broad ground or aerial surveys (eg, geochemical and geophysical). This information is generally made public to encourage exploration activity.
- *Provincial and territorial land title and registry offices* – Record information about the title of leasehold and freehold property

(including minerals). This information is available (usually online) for a fee.

- *Natural Resources Canada* – Publishes the Canadian Minerals Yearbook (www.nrcan.gc.ca/mms-smm/busi-indu/cmy-amc-eng.htm) and maintains a database of Canada’s operating mines and mineral processing facilities (<http://mmsd.mms.nrcan.gc.ca/stat-stat/mine-mine/index-eng.aspx>).

Some provinces also maintain additional information on mining activities, including Ontario’s Drill Core Library Catalogue (www.mndmf.gov.on.ca/mines/ogs/dclo/default_e.asp).

- 10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder to a preferential right to acquire a mining licence?

Prospectors can explore ‘open’ Crown lands with a prospecting permit and can ‘stake’ the mineral rights if the land has not already been staked and recorded by another party. These rights are acquired on a first come, first served basis. Land can be staked on the ground through traditional methods (ie, cutting claim posts and blazing claim lines) but the provinces are moving towards ‘map staking’ where claims are delineated online and located through geographic positioning system (GPS) technology.

Mining claims that are staked and recorded are generally referred to as ‘unpatented mining claims’ and are subject to certain payments and assessment work obligations. Failure to meet such requirements on an annual basis can result in automatic forfeiture of the claim and the area will automatically become open for staking by others (a ‘use it or lose it’ type regime). The conversion of an unpatented mining claim to a lease varies by province, but generally can be done after a specified assessment work requirement has been met (the need for a discovery prior to lease conversion is no longer required in most provinces). No other party can acquire a mining lease over the particular area other than the unpatented claim holder. Leases are usually for 21 years or longer with an opportunity to renew if mining activity is occurring or if it can be shown that the lessee is committed to developing the mineral potential on the leased area.

- 11 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction in Canada for the acquisition of mining rights by domestic or foreign parties.

- 12 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by independent administrative tribunals. Appeals from these tribunals’ decisions lie with the Canadian courts. Mineral tenures are generally granted by Canada’s free entry mining system, which limits the government’s involvement in disputes over mining rights. In all other situations, the exercise of governmental discretion over mining rights and disputes are subject to the rules of Canadian administrative law.

The provinces have broad jurisdiction over most international arbitrations and have passed legislation governing the conduct and enforcement of international arbitral proceedings. Canada’s federal Commercial Arbitration Act applies to arbitrations involving the federal Crown and Crown-owned corporations as well as to maritime and admiralty matters. In 1986, Canada adopted the UNCITRAL Model Law on International Commercial Arbitration and signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Canada has

signed but not yet ratified the International Convention on the Settlement of Investment Disputes (ICSID Convention).

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

In all but some very remote parts of Canada, the Crown lands available through the claim staking and leasing process consist only of the mining rights because the surface rights are owned privately by another party. The mining rights owner is nevertheless entitled to conduct exploration and even mining activities on the leasehold interest, subject to compensation to the surface rights owner. Disputes arising in these situations can be settled through special tribunals (eg, the Mining and Lands Commissioner in Ontario) or through the courts. However, a mining rights lessee would be well advised to negotiate the acquisition of the surface rights through private negotiations.

14 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Responsibility for environmental protection and conservation is shared between the federal and provincial/territorial governments. Development is restricted according to the level of protection assigned to a protected area. As of 2009, close to 1 million square kilometres of land plus some marine territory in Canada is protected, most of which (88 per cent) is 'strictly protected'.

There is a growing movement by some provinces to protect more land. For example, Ontario's Far North Act and Quebec's proposed Plan Nord both provide for development of vast areas rich in natural resources, but with new processes and greater controls to reflect current attitudes related to sustainable development and consultation with aboriginal communities.

Duties, royalties and taxes

15 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?

Corporations carrying on mining activities in Canada are subject to the general income rules applicable to all corporations. Federal income tax is levied under the Income Tax Act (Canada); the provinces and territories also have their own income tax statutes. A number of unique tax measures and rules also apply specifically to Canada's mining industry.

As a general matter royalties and mining taxes are imposed separately from income taxes by the province or territory in which the minerals are mined. The rates and basis for calculation of royalties and mining taxes vary depending upon the type of mineral and the jurisdiction. In some jurisdictions, many minerals are not subject to provincial mining taxes or royalties. In other jurisdictions, the mining tax is levied on the basis of a progressive rate system based on the mining profits or value of output, depending upon the particular jurisdiction. When the tax is computed by reference to mining profits, the rules for computing mining profits generally differ significantly from those applicable for income tax purposes. In many cases, an attempt is made to calculate roughly the mining profits at the pit's mouth by permitting a processing allowance.

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

Recognising that mining is a highly cyclical and capital-intensive industry with a long lead time between initial investment and commercial production, the income tax systems and provincial mining taxes provide a generous treatment of exploration and other intangible expenses. They allow mining companies to recover most of

their initial capital investment before paying a significant amount of taxes.

Canada's Income Tax Act segregates exploration and development expenses into various pools and permits deductions for the pools in a specified order. The classification of an expense into a particular pool depends upon the date the expense was incurred, the nature of the expense, and certain other considerations. Precise rules govern how these exemptions can be calculated:

- *Canadian exploration expenses* – Expenses incurred to determine the existence, location, extent or quality of a mineral resource in Canada (eg, prospecting, drilling and trenching, digging test pits, preliminary sampling, and geological, geophysical, and geochemical surveying) and expenses incurred prior to the commencement of commercial production to bring a new mine into production (eg, clearing, removing overburden and stripping, and sinking a mine shaft, or constructing an adit or other underground entry).
- *Canadian development expenses* – Expenses incurred prior to the commencement of commercial production to bring a Canadian mineral resource into commercial production and the cost of acquiring a right to prospect, explore, drill, or mine for minerals in a mineral resource in Canada, a rent or royalty computed by reference to the amount of production from or value of a mineral resource, and real property in Canada whose principal value depends on its mineral content.
- *Earned depletion allowance* – Certain depletion allowances are allowed as deductions from income since mineral resources are wasting assets.
- *Purchase and sale of resource properties* – The cost of acquiring a Canadian resource property is generally deductible on an annual 30 per cent declining balance basis as a Canadian development expense.
- *Flow-through shares* – Corporation carrying out exploration in Canada can pass on the deduction associated with certain types of expenses to shareholders by issuing 'flow-through shares'.

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

Canadian residents are subject to tax on their worldwide income. A non-resident of Canada is subject to Canadian income tax on income from employment exercised in Canada, income from carrying on business in Canada, and gains arising from the disposition of 'taxable Canadian property', which includes any interest in resource properties in Canada. A non-resident corporation that carries on business in Canada is also liable to pay branch taxes equal to 25 per cent of its profits, to the extent such profits are not reinvested in the Canadian business.

Certain types of property income paid to a non-resident by a Canadian resident (including rents and royalties) are subject to 25 per cent non-resident withholding tax. Canadian income taxes payable by a non-resident of Canada may be reduced or be eligible for exemptions under an applicable tax treaty. In some provinces, there is potential for non-residents to be subject to land transfer taxes and equivalent duties on the acquisition of mining properties in Canada at tax rates that are higher than those imposed on Canadian residents.

Business structures

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

Canada's open, free-market economy allows for a wide range of business structures and forms, including corporations, partnerships, limited partnerships, joint ventures and trusts.

Corporations are popular with offshore investors because they are relatively simple to establish, can grow with the business, and

offer flexibility in terms of business and tax planning. In some cases, corporations receive favourable tax treatment compared to other business forms. Corporations also provide limited liability protection to shareholders.

Corporations can be incorporated under the federal Canada Business Corporations Act or the laws of a province (each province has its own business corporations legislation). To carry on business in another province, a corporation must register (ie, 'extraprovincial registration') in that province.

Federally incorporated corporations can carry on business in every province in Canada but must satisfy local registration requirements. Some provinces (eg, British Columbia and Quebec) do not impose a residency requirement for directors but others require at least some directors to be Canadian residents.

Instead of operating as an incorporated subsidiary, existing businesses from foreign jurisdictions can register a branch in Canada. Offshore investors typically prefer to carry on business in Canada through a Canadian subsidiary instead because of concerns about limited liability, privacy, creditor protection and a local preference to deal with a 'Canadian company'. Financing options from Canadian lenders tend to be more favourable for locally incorporated subsidiaries compared to branch offices of foreign business concerns.

19 Is there a requirement that a local entity be a party to the transaction?

There is no such requirement, although for tax planning or other reasons, a foreign entity may choose to conduct their Canadian activities through a local entity.

20 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Canada has developed an extensive network of bilateral and multilateral trade and investment treaties, together with a network of double taxation agreements to promote and encourage foreign investment in the Canadian mining sector.

Canada is an original member of the World Trade Organization and is a signatory to numerous bilateral and multilateral free trade agreements that contain both trade and investment protection provisions. The most notable is the North American Free Trade Agreement (NAFTA) with the USA and Mexico. Canada is currently in free trade negotiations with 11 additional countries or trade blocs.

Canada has also concluded Foreign Investment and Protection Agreements (FIPAs) with 26 countries and is currently in FIPA negotiations with nine additional countries including China, India, Indonesia and Vietnam.

Canada has concluded close to 90 bilateral double taxation treaties with other countries. Such treaties are generally based on the OECD model tax convention and alleviate double taxation of companies doing business in both jurisdictions. Among treaties of interest for foreign investors in the Canadian mining sector are the Canada-Barbados Double Taxation Agreement signed in 1980 and the Canada-Cyprus Double Taxation Agreement signed in 1984.

Financing

21 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?

At the exploration stage, mining activities not financed by 'grubstakers' (a term used by Canada's mining industry for private funds) or under a farm-in arrangement are often financed by the issuance of common shares (stock exchange listed or otherwise), the sale of limited partnership units, or the sale of flow-through shares.

At the extraction stage, financing is more frequently by debt

instruments, which are often in the form of syndicated loans from chartered banks or their overseas agencies. Some production financing is also done by means of business unit, unit issuance, production payments, advances against the purchase price and royalties.

Restrictions

22 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Canada does not control or restrict the importation of industrial machinery or equipment. Most goods from most countries of origin can be imported upon the payment of the applicable customs duties and taxes. As a general rule, the applicable customs duties are relatively low or, in many cases, no duty is assessed. The exact amount of duty payable is a function of the classification of the equipment and its value.

Anyone importing goods into Canada must register with Canada Border Services Agency to obtain an importer number. A non-resident can register and can act as the importer of record into Canada.

Foreign workers coming to perform work in Canada, even installation work on imported machinery or equipment, require permits from the federal government. The requirements vary depending on the nature and duration of the work and the nationality or country of permanent residence of the incoming worker. Many of Canada's free trade agreements, including NAFTA, contain provisions that make it significantly easier for qualified technical workers from a free trade partner to enter Canada temporarily to do certain work in association with the sale of equipment or services to Canada.

23 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Some provinces require extracted minerals to be processed domestically, notably in Canada by Ontario's Mining Act (section 91), and in province by Newfoundland's Mineral Act (sections 31(5) and 31.1) and as a requirement of the lease.

In the absence of legislation, some provinces may attempt to negotiate processing requirements for a specific period of time as part of the general approvals process.

24 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Canada imposes no controls on the import or export of capital and no repatriation, domestic use or export performance requirements.

Environment

25 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Both federal and provincial environmental laws apply to the mining industry. The federal government has legislative jurisdiction over fisheries, navigable waters, federal lands (including Indian reserves and national parks) and environmental matters of international and inter-provincial concern. Approvals required under federal legislation also trigger the requirement to complete a federal environmental assessment under the Canadian Environmental Assessment Act.

The provinces and the territories are generally responsible for matters within their boundaries. Each province has adopted laws dealing with environmental protection and regulating effluent discharges, atmospheric emissions, waste management and other environmental impacts. These laws are supported by a regulatory scheme

to prohibit and limit contaminants to the environment and by a permitting system that authorises activities that impact the environment. Most also have legislation requiring a provincial environmental impact assessment of a project.

Provinces have also adopted requirements with respect to mine reclamation and closure as well as the requirement to provide financial assurance. Generally these are administered by provincial Ministries responsible for mines or natural resources.

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

Depending on the location of a mining project and its size, it may be subject to both federal and provincial permitting requirements and environmental assessment processes. Projects may not begin before the environmental assessment process is completed as it is often a precursor to granting the permits required. In certain circumstances, both a federal and provincial environmental assessment process can be triggered with respect to the same project. Eight provinces and territories have entered into cooperation agreements with the federal government with a view to avoiding duplication.

Generally the environmental assessment process requires preparation of an environmental study (potentially also a social impact study) and public information or consultation. The thresholds for triggering the process and requirements for information disclosure and public consultation vary depending on the province. Generally the process seeks to identify impacts so that they are addressed through the implementation of mitigation measures.

The time required to complete the process varies depending on the location and can be lengthy in certain jurisdictions. Generally it takes at least two years to complete.

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

Canada's provinces and territories impose mine closure and reclamation obligations. Generally this requires the preparation and filing of a mine closure plan before mine production can proceed. As part of the plan, mine closure costs are estimated and financial assurance must be provided to the government to cover the closure costs. The method of calculating and the acceptable forms of financial assurance (eg, letters of credit, government bonds, cash, mine reclamation trusts) varies depending on the jurisdiction.

Health & safety, and labour issues

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

Canada's constitution divides the authority to enact labour and employment laws between the federal government and the provinces and territories. Approximately 90 per cent of employees in Canada fall under the jurisdiction of provincial or territorial laws. While the laws and statutes vary between jurisdictions, there is a fair amount of uniformity across the country regarding basic labour and employment matters.

Employment statutes regulate matters such as minimum employment standards, labour relations, human rights, occupational health and safety, workers' compensation, universal health insurance, and privacy.

Minimum employment standards laws cover minimum wages, hours of work, overtime hours and premiums, rest and meal periods, mandatory holidays, vacation periods and pay, leaves (pregnancy, parental, emergency, family medical), termination notice and sever-

ance pay, and unjust dismissal hearings (in some jurisdictions).

Labour relations statutes govern how employees may become represented by a trade union, as well as the rights and obligations of unions and employers once a union is designated to represent a group of employees. Such union 'bargaining units' are generally limited to a particular business establishment in a defined location or locations.

In addition to these statutes, many non-union employment rights are governed by the common law and enforced through the courts. Unionised employees' rights are generally enforced through tribunals.

The principal federal law governing occupational health and safety matters is Part II of the Canada Labour Code. Most of the provinces/territories also have specific regulations dealing with mining operations. Over the years, there has been enhanced government scrutiny of the mining industry and increased regulation of health and safety matters. For example:

- Ontario – made significant revisions to its mine safety regulations in 2007 to address training, vehicle safety, underground storage and transportation of explosives, and elevators.
- British Columbia – updated the provincial Mine Safety Code (often referred to as the Sullivan Mine Code Amendments) include increased reporting responsibilities for managers in the event of an incident that results in a fatality or as a result of any dangerous occurrence.
- Federal – as a result of a 1992 disaster in Nova Scotia in which 26 miners were killed in an underground explosion, the 'Westray Bill' amended the Criminal Code of Canada to hold corporations, directors and others accountable for criminally negligent acts in the workplace.

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

Canada's rules for foreign workers and business visitors apply to the mining industry.

To work in Canada, a foreigner needs to apply for a work permit. The federal government administers a Temporary Foreign Worker Program through Immigration and Citizenship Canada, the Ministry of Human Resources and Skills Development Canada (HRSDC) and the Canada Border Services Agency.

Generally a labour market opinion (LMO) from HRSDC is needed before issuance of a work permit. HRSDC ensures that the employment of foreign workers supports economic growth and helps create more opportunities for all Canadians. (Quebec Immigration also participates in decisions in Quebec.) There are several exemptions to the LMO requirement, including the intra-company transfer exemption and the NAFTA professionals' exemption. In the latter cases, issuance of a work permit follows a simpler procedure.

Business visitors from visa-exempt countries can be admitted to Canada to participate in business meetings without having to go through any particular formalities. Those from non-visa-exempt countries need to apply for a temporary resident visa to a Canadian embassy or consulate abroad.

Social and community issues

30 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

While Canada does not have an overarching CSR law, a myriad of federal and provincial/territorial laws apply, including: health and safety, labour relations, environmental protection and assessment, and in a few rare cases agreements with aboriginal people. Some form of environmental assessment is usually required to develop a mining project.

When aboriginals assert aboriginal rights, aboriginal title, or

Update and trends

Canada's mining industry is witnessing noticeable optimism in M&A activity. At the same time, there is increased focus and regulatory attention related to CSR practices, investor protection, and developments in the north.

Growth in M&A activity

Mining continues to be the focal point of a large portion of merger and acquisition activity in Canada. The number of transactions was relatively flat in 2010 compared to 2009, but the total value of transactions increased from C\$10 billion in 2009 to more than C\$29 billion in 2010. The aggregate market capitalisation of the TSX's top 100 mining companies increased from C\$325 billion in 2009 to more than C\$467 billion by the end of 2010.

2010 was a record-breaking year for new mining issues with three mining initial public offerings (IPO) exceeding C\$100 million. There were 208 new mining listings registered on the TSX and TSX-Venture in 2010.

Spending increased from C\$1.9 billion in 2009 to C\$2.6 billion in 2010 thanks to higher minerals and metals prices, as well as ownership changes and capital injections at some major projects. Spending indications for 2011 of C\$3.2 billion by Canada's mineral exploration sector suggest confidence is returning to pre-2008 levels (before the economic downturn soured confidence).

Investment in the mining sector is expected to grow for a second year in a row to a total of C\$11.5 billion in 2011. Much of the additional investment is expected to focus on the development of several metal ore mining projects.

Corporate social responsibility

Home to more than three-quarters of the world's exploration and mining companies, Canada is taking a leading role in the development of CSR matters in the mining industry. The federal government's 'Building the Canadian Advantage' strategy (introduced in 2009) has created a CSR counsellor and a nongovernmental CSR Centre of Excellence to:

- enhance the capacities of developing countries
- promote widely recognised international CSR performance guidelines with Canadian extractive companies operating abroad.

Canada's mining industry itself has also been actively developing best practice guidelines regarding CSR, including the 'e3 Plus – A Framework for Responsible Exploration' (www.pdac.ca/e3plus/) developed by the Prospectors and Developers Association of Canada (PDAC) and the 'Towards Sustainable Mining (TSM)' initiative launched by the Mining Association of Canada.

In October 2010, Private Member's Bill C-300, which proposed the Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act, was defeated after being sharply criticised as being badly drafted, punitive, and not collaborative in resolving disputes or improving CSR standards.

Canada is also influenced by CSR-related legislative changes in other countries, including the recent Frank-Dodd Act in the US and the Bribery Act in the UK.

Regulatory: update to National Instrument 43-101

Of significance to mining companies listed on the TSX or TSX-Venture, the Canadian Securities Administrators (CSA) are updating NI 43-101, which governs the disclosure of scientific or technical information by securities issuers in Canada.

The CSA implemented NI 43-101 in December 2001 subsequent to the Bre-X fraud to protect the investing public from unsubstantiated and fraudulent claims on mineral resources. The stated purpose of the amendments – the first significant amendment since 2005 – is to make the instrument more efficient and effective without compromising investor protection. A complete list of the proposed changes is available from the Ontario Securities Commission (www.osc.gov.on.ca/en/NewsEvents_nr_20100423_csa-mining-rule.htm).

Aboriginal consultation for northern development

The concept of the 'duty to consult' with aboriginal peoples is an ongoing theme in the in development of projects or lands in Canada, or both. As noted in question 14, Ontario's Far North Act and Quebec's proposed Plan Nord both provide for development of vast areas rich in natural resources, but with new processes and greater controls to reflect current attitudes related to sustainable development and consultation with aboriginal communities.

treaty rights to a particular area, the Crown may owe a duty to consult with them or seek a workable accommodation in respect of any Crown decisions that may infringe those rights. While the duty to consult or seek a workable accommodation with aboriginal peoples is a legal duty imposed on the Crown and not on private parties, many private parties have consulted with and sought to accommodate aboriginal peoples' interests by entering into agreements with them.

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

While many aboriginal peoples have signed treaties with the Crown and have constitutionally protected treaty rights, many have not. Large parts of Canada are therefore subject to claims based on aboriginal title or aboriginal rights.

There are Indian reserves in most parts of Canada. Management and control of the reserve land is provided for under the Indian Act, with some powers being vested in the band and some powers in the federal Department of Indian Affairs and Northern Development.

Property rights and rights to minerals on reserves are governed primarily by two provisions of the Constitution Act, 1867. The pattern of rights to minerals on Indian reserves is complicated and very uneven – both between provinces and within provinces. The various federal-provincial agreements affecting minerals were concluded more for administrative expedience than for legal clarification. Provincial assertions add to the doubts that the agreements leave unresolved.

Moreover, the returns to Indian bands from mineral development, to the extent that development occurs, are often meagre. The combination of complexity, contested legal entitlement, and inadequate returns has had a dampening effect on mineral exploration on reserves.

32 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Canada has adopted a number of voluntary aspirational conventions regarding CSR that, because of their nature, are not directly applicable within Canada, including:

- UN Declaration on the Rights of Indigenous Peoples (2007)
- Voluntary Principles on Security and Human Rights (2000)
- Organisation for Economic Co-operation and Development (OECD) – Guidelines for Multinational Enterprises (1976).

These documents are used as touchstones by civil society in judging mining operations within Canada and mining operations undertaken internationally by Canadian companies.

Canada has also signed on to the OECD – International Convention on Combating Bribery of Foreign Officials (1997), which, although not directly applicable, is the genesis for the Corruption of Foreign Public Officials Act, 1999 that criminalises the bribing of foreign officials.

International treaties

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

Two international treaties apply:

- Kimberley Process Certification System for Rough Diamonds; and
- International Cyanide Management Code for the Gold Mining Industry (individual company basis).

Some of the information contained in this summary was drawn from Fasken Martineau's 2010 Canadian Mining Law, which was edited by Chuck Higgins (www.fasken.com/canadian-mining-law-book).

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