

Practice Guides

Mining

Editor
Michael Bourassa

GETTING THE
DEAL THROUGH 

Mining

Practice Guide

Editor

Michael Bourassa

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GETTING THE
DEAL THROUGH 

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Introduction

Michael J Bourassa¹

This is the first edition of *Practice Guide – Mining* published by Getting the Deal Through, a division of Law Business Research. It is my pleasure to serve as editor and to have assisted in recommending authors who were prepared to contribute an assortment of chapters. The final product addresses various legal themes that are topical to the international mining industry, and are written from diverse jurisdictional viewpoints. The authors are from the following countries: Argentina, Brazil, Canada, Chile, Ecuador, Mexico and Ukraine. For the most part, the contributors have been active with the International Bar Association or the Rocky Mountain Mineral Law Foundation, or both.

In this introduction I will provide a summary of each of the chapters. Prior to doing so, I thought the chart would be interesting to readers of this edition. It is a summary of the biggest mining mergers to be seen in recent history, as reported by Mining Technology on 2 October 2018.²

¹ Michael J Bourassa is a partner at Fasken Martineau DuMoulin LLP.

² 'Hot Prospects: the biggest mining mergers to rock the industry' by Talal Husseini, 2 October 2018, <https://www.mining-technology.com/features/biggest-mining-mergers/>.

Introduction

<i>Value (US\$ billions)</i>	<i>Merging parties</i>	<i>Completion date</i>	<i>New entity</i>	<i>Commentary</i>
272.96	Shenhua Group and China Guodian Corporation	20 November 2017	China Energy Investment Corporation	Two of China's largest state-owned enterprises became the world's largest organisation in the coal mining, thermal power, renewable energy and coal-to-liquid conversion industries. (A workforce of 326,000 staff - four times that of the entire US coal-fired power industry in 2016.)
90	Glencore and Xstrata	2 May 2013	Glencore	The merger created one of the world's largest natural resources conglomerates (and the world's largest mining company, with an annual revenue of US\$205.5 billion) with a workforce of 190,000 people across 50 nations, and a portfolio of 90 commodities, including copper, barley, oil and vanadium.
38.1	Rio Tinto and Alcan	July 2007	Rio Tinto Alcan	Rio Tinto Alcan was the world's largest producer of aluminium and bauxite at the time (currently, China Hongqiao Group is the world's largest aluminium producer, producing 7.5 million tonnes of aluminium; Rio Tinto Alcan produces 3.6 million tonnes.
18	Barrick Gold and Randgold Resources	Incomplete (announced 24 September 2018)	'New' Barrick	This merger will create the world's biggest gold mining company, with a combined production capacity of 6.6 million ounces of gold per year.
13.3	CVRD and Inco	2006	Vale (name change 2010)	Vale is now the second-largest nickel mining company worldwide, with annual nickel production of 260 kilotonnes (Norilsk Nickel produces 285 kilotonnes nickel per year).
8.8	Caterpillar and Bucyrus International	June 2011	Caterpillar	The merger was to position Caterpillar to offer a broad range of surface and underground mining products and solutions to its customers.
8.72	BHP and Billiton	2001	BHP Billiton (became BHP in 2017)	As part of a rebranding campaign, BHP dropped Billiton from its name and ran an advertising campaign called 'Think Big', which addressed global supply chain issues and sustainability, and focused initially on steel (crucial for growing cities) and electric vehicles (requiring four times more copper than conventional cars).
8.5	Alpha Natural Resources and Massey Energy	2011	Alpha Natural Resources (ANR)	The merger created the second-largest US coal mining company by market value. ANR holds 2,110 mines and total coal reserves of 5 billion tons, with a goal to become the largest US supplier of metallurgical coal for the world's steel industry, and a highly diversified supplier of thermal coal to electric utilities in the United States and overseas.

What follows is a summary of each of the chapters contained in this book.

Project Financing in the Mining Sector

This comprises a summary of common regulatory framework issues and general considerations in Mexico, as well as corporate structures typically used and usual forms of securities for project financing. The Mexican Constitution provides that natural resources are the heritage of the nation, and the federal government sets out the conditions for exploiting these resources. Project financing is not governed by one specific law, and there are rules and laws applicable to mining activities.

An analysis is presented of the various laws applicable to mining such as the Mining Law itself, official standards, foreign investment, the Commercial Code, the law of credit transactions and negotiable instruments, and others. Regarding conflict of laws, project agreements can be made by whatever law the parties agree to, and foreign law is binding and enforceable in Mexican courts provided it is not contrary to Mexican public policy. A summary of federal government agencies involved in the Mexican mining sector is also provided.

Project financing corporate structures will depend on several factors, with the most common being the incorporation of a new entity – either a stock corporation or the equivalent to a limited liability company – as a special purpose vehicle for the project. Securitisation can be any contractual tool that secures a debt (the most used forms are the security trust and the non-possessory pledge), which allows lenders to create a security interest on all types of property (security interests created over a mining concession must be registered with the Mining Public Registry). Security trusts and non-possessory pledges are governed by various laws, which are summarised in this chapter.

Streaming Agreements

This piece addresses the relevance that streaming agreements have gained as a financing alternative for mining projects, and discusses how these agreements are structured as well as the benefits and risks that may result for the streaming company or investor, and the mining company.

An overview and history of streaming arrangements is provided, starting in 2004 when Wheaton River shareholders decided they were not getting value for its by-product silver production, and incorporated Silver Wheaton Corp to maximise revenues from such by-product.

Following a statement that there is no standard form to be used for each streaming transaction, the chapter then describes in detail the way certain provisions are drafted and what distinguishes them from other agreements (royalties and off-takes). Provisions such as purchase price and deposit (paid in advance), streamed metal, representations and warranties, security packages (with emphasis on requirements in civil code countries), covenants, buy-back and other rights for the operator, dispute resolution (typically by arbitration), tax matters, and general matters such as confidentiality and change of control provisions are described in detail.

Legacy Issues in M&A Transactions

Legacy liability (also known as successor liability) in M&A transactions greatly differs between civil and common law countries. This piece is an analysis of issues from the former perspective with particular emphasis on the Mexican legal system.

The authors provide an overview of the different structures to carry out an M&A transaction, and analyse the general implications of such structures under a legacy liability standpoint; flag the areas that typically involve legacy liability issues in the mining sector; and discuss some strategies and tools to minimise legacy liability risks.

Although asset transactions provide less successor liability risk than share deals, it is noted that asset deals may be more difficult to achieve in Mexico because of transfer formalities applicable to certain assets, such as real estate and intellectual property. Share acquisitions are easier to achieve since the target company assets do not need to be listed, and a detailed purchase price allocation of the acquired assets is not required.

Selected Commercial Mining Agreements

This chapter addresses some key agreements in the mining industry, focusing on how they can affect mining ventures at an international level, as well as summarising the current trends, opportunities, challenges and risks within the industry. It provides an overview of joint venture, option, royalty and streaming agreements, ending with a discussion of different approaches to mining agreements, perspectives of juniors and majors, and civil law versus common law concerns.

Transactions in the mining sector are often cross-border – mining companies and sources of capital come from common law countries like the United States, Canada or the United Kingdom, whereas the mineral properties may be located in civil law jurisdictions. This may present more challenges than expected from a legal standpoint, and the implications of local legislation and the civil law system need to be taken into account. One cannot simply draft an agreement from a foreign law template and then state that the agreement is governed by local law and subject to the jurisdiction of local courts.

It must be recognised that the enforcement of rights and obligations will likely take place in the hosting country. As the authors conclude, ‘Having concepts of foreign law interpreted and enforced in the hosting country can be challenging and in some cases even ruled invalid, especially if the legal systems are different.’

Battery Minerals – A View on Lithium Brine Projects in Latin America

This section provides a current overview of market trends and legal aspects related to battery minerals and the evolution of the electric vehicle industry in a constantly changing environment. A detailed explanation is offered on lithium-ion batteries and the various cathode compositions that use differing combinations of raw materials (lithium, graphite, cobalt and nickel). Energy storage systems are being revolutionised, with the biggest demand coming from electric vehicles.

With an increase of global electric car sales from less than 2 per cent currently to 28 per cent of all new car sales by 2030, there is uncertainty that the lithium market will be able to meet the demand. Production from brine from salars in the ‘lithium triangle’ – Argentina (9.8 million tonnes in resources; 2 million tonnes in reserves), Chile

(8.4 million tonnes in resources; 7.5 million tonnes in reserves) and Bolivia (two major lithium reserves) – could become stressed as these salars hold extremely fragile and dynamic ecosystems, and there is a need to determine and understand the origins of the waters that feed them. These systems in the Andean region are very complex, and studies have yet to be undertaken to understand the implication of brine extraction.

Authors provide an analysis of community engagement issues regarding lithium projects as well as a discussion of cobalt production and pricing issues.

Tax Stability in the Mining Industry

This is an analysis of tax stability in Argentina, as well as other jurisdictions in the region. Since the enactment of the Mining Investments Law No. 24,196, in 2017, mining activity in Argentina has grown, becoming one of the major industries in the export sector and attracting important investment and infrastructure projects for the country. Some of the benefits of the Mining Investments Law are discussed, such as a total tax burden stability for 30 years after the filing of a feasibility study, and special income tax deductions for amounts invested in prospecting, exploration, and other work intended to determine the technical and economic feasibility of mining projects. The authors provide an excellent summary of a court challenge made by mining company Cerro Vanguardia regarding an equalisation tax imposed in addition to corporate tax. The Supreme Court concluded that the application of the equalisation tax increased the total tax burden of the company and was therefore contrary to the stabilisation regime obtained by the taxpayer.

Finally, a comparison with the laws in Chile and Peru is provided, concluding that the guarantee of tax stability is an essential tool to protect mining investments from regulatory changes that could occur during the life of a mining project. In Argentina, the tax stability guarantee is stipulated by law, whereas in Chile and Peru the investor must enter into an agreement with the state in order to benefit from the tax stability.

A High Price to Pay – An Overview of Anti-Corruption Law in Canada

This section offers an overview of the Canadian legal framework with regard to corruption and anti-bribery, which are codified in the Corruption of Foreign Public Officials Act (CFPOA) – which came into force on 14 February 1999 – and the Criminal Code. Major amendments to the CFPOA occurred in June 2013, which codified its primary offence – bribing a foreign public official. The authors identify the nature and scope of the offences (with high-level comparisons to the US Foreign Corrupt Practices Act and the UK Bribery Act), explore in detail recent Canadian case law (to demonstrate the severity and seriousness with which courts have addressed the issue of bribery and corruption), and include a selection of best practices regarding international commercial dealings and corporate governance.

Recent cases have resulted in substantial fines and prison terms: Niko Resources – C\$8.26 million; Griffiths Energy – C\$10.35 million; and Karigar – three years' imprisonment.

The chapter concludes with recommendations for compliance programmes that involve the following elements: (i) management support and resources; (ii) written standards and controls; (iii) monitoring, auditing and evaluation protocols; (iv) enforcement measures; (v) continuous review; and (vi) whistle-blower procedures that are described in detail.

Community Engagement

This piece presents a discussion of ISO 26000 – the international standard developed to help organisations effectively assess and address those social responsibilities that are relevant and significant to their mission and vision, operations and processes, customers, employees, communities and other stakeholders, and environmental impact. Community engagement is a particular type of dialogue that falls within the social responsibility of an organisation, and the authors discuss the particular requirements of ISO 26000 in this regard.

Principles of social responsibility with respect to community engagement to be followed by an organisation include accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour and respect for human rights. Commercial mining ventures face an increasingly complex and challenging framework of international regulations that touch upon different aspects of their activities.

There is also focus on international instruments that ‘(i) provide general norms and principles of behaviour that are not mining sector specific but fundamental to comprehend the responsibility of an organisation in the context of community engagement, and (ii) regulate general or specific aspects of community engagement, whether they are mining sector specific or generic to all commercial ventures’ (such as United Nations principles and others).

Social Licence and the Rule of Law

This is a discussion on the interaction between social licence and the rule of law, and draws upon an article written by Jim Cooney, ‘Reflections on the 20th anniversary of the term “social licence”’, 20 years after he first coined the expression ‘social licence’. In March 1997, Mr Cooney was vice president of International Government Affairs with Placer Dome Inc, and he used the term during a World Bank gathering held in Washington, DC. In a recent article he expressed surprise about the evolution of his original concept.

A brief description of Argentine history is presented to give some factual background to the constitution of 1853. The expression ‘social licence’ has gained a predominant role in the mining industry. As stated in the chapter ‘it is fair to say that the current, global and expanded notion is that social licence is an essential condition, something that a project simply can’t afford not to have.’ In fact, in some ways it is stronger and far more important than any legal requirement relating to a mining facility. In that regard, this chapter addresses in good part the conflict and uncertainty between the rule of law and social licence.

Mining Closure

Starting with a summary of mining’s economic contribution to various countries, an argument is made that the greater the impact mining has on the GDP, the greater the dedication should be of each country to deal with mine closure. A failed mine closure is discouraging for a country and its citizens, and will lead to less motivation to support mining development.

The authors focus on the main challenges that arise in connection with closure, and recommend the most effective solutions and good practice principles (such as in Canada and Australia where mine closure plans must be part of the mining project from the very beginning). The chapter discusses successful processes such as adequate legal regimes that stress not only environmental but also socio-economic elements; continuous state monitoring; companies' obligations to report and update their closure plans; the existence of financial guarantees to assure closure costs are covered; and full transparency and publicity regarding companies' closure processes and plans.

Under the section 'Legal regimes: Challenges and solutions' the authors identify the main challenges in Argentina, Chile, Canada and Australia, followed by a discussion and comparison of financial assurances. Laws must be established to protect a country and its community from closures, and particularly from abandonments or unforeseen closures upon which, most often, the company that is facing closure costs does not have available funding. In that regard, each country deals with the issue differently; where Argentina has weak requirements, with annual funds to be fixed in the companies' discretion, Chile requires an instrument that guarantees the value of implementing closure, and Canada and Australia go one step further by proposing that cost analysis for guarantees needs to be based on a transparent and verifiable planning of tasks to be carried out for closing and post-closing activities.

Finally, for mining operations and closure to succeed it is recommended that mining plans be public, with communities having the right to give their opinions. Mining remediation costs and guarantee amounts should also be public, and reviewed and updated periodically.

Argentina, Mining and Glacier Protection

This chapter provides a thorough analysis of the National Glacial Law approved by the Argentine National Congress in October 2010, specifically regulating the minimum environmental protection standards for the preservation of glacial and periglacial zones. The Law is not without controversy and continues to be subject to interpretation and disputes between mining companies and environmentalists. The Law created an inventory of glaciers, which provides information necessary for their protection, control and monitoring.

The Law sets out types of prohibited activities in a glacial environment, including 'mining and hydrocarbon exploration and exploitation'. All activities that are not prohibited are subject to an environmental impact assessment process.

Some actions have been brought by environmentalists and anti-mining non-government organisations in an attempt to suspend mining operations, which are waiting to be decided by the National Supreme Court, and several mining companies challenged the constitutionality of the Law. Charges have even been brought against certain former government officials for failing to properly create the glacier inventory. The discussion on the Law continues to be influenced by political interests, with the outcome of persons being unjustifiably indicted and legal uncertainty being maintained.

The Legal Nature of Mining Rights in Ecuador

In Ecuador, the state owns all minerals and non-renewable natural resources within the national territory, but can delegate the development of such resources to individuals or entities by granting mining concessions for a term of 25 years. Ecuador is similar to Chile

and Peru regarding the richness of its resources (especially with attractive gold, silver and copper deposits), however much of the country is still unexplored. In the opinion of the authors, the main reason is ‘erred public policy’ for minerals and the absence of legal security, owing to legislation influenced by the oil industry.

Mining concessions are awarded by public tender, unlike other Andean countries. An explanation is presented of the civil law concepts of real versus personal rights and how they differ from a common law system. In the Ecuadorian system, complications arise as to whether the enforcement of certain rights (such as illegal mining issues, agreements with third parties, pledges) lie with the state or the concessionaire. Recommended amendments to the legislation are provided to clarify these issues – specifically to eliminate the public tender process and phases in the concession process that are inconsistent with the timing of a mining project.

On a positive note, the Mining Ministry was created in 2015 and there have been various initiatives in the right direction: the signing of the Fruta del Norte exploitation contract with Lundin, the mining cadastre opening, and the construction of Mirador and Río Blanco projects resulting in the return of some major mining companies.

Sanctions and the Mining Industry

This is an overview of the history of the mining industry and the different types of sanctions. New sanctions are being introduced frequently and it is often difficult to determine the reasons behind them. At the time of writing, the United States imposed about 19 sanctions programmes, and the European Union implemented and amended about 95 sanctions and restrictive measures since the start of 2018. The chapter discusses the difference between measures restricting trade (protecting domestic markets by imposing restrictions or tariffs, or both, on certain goods) and sanctions proper (political measures aimed at facilitating political change or forcing compliance with international agreements).

The authors focus more on ‘sanctions proper’ – particularly on those that may affect mining. Natural resources are often located in countries affected by an assortment of sanctions. Companies need to have an understanding of the various sorts in order to achieve their business goals. In worst-case scenarios, it could lead to major financial and reputational losses, and personal liability for directors and officers.

Sanctions compliance policies are recommended and should include risk assessments, screening and monitoring of counterparties, analysis and reporting of potential sanctions-related circumstances, and ensuring compliance by counterparties. In doing so, a sanctions compliance group should keep an inventory of sanctions, watch lists and politically exposed persons relating to affected areas, which are put into effect by international institutions and major countries. This chapter provides some useful tips on implementing tracking policies and compliance mechanisms.

Global Mining Resources Disclosure

The guide concludes with an excellent overview of mineral resource and reserve disclosure standards, starting with the Poseidon scandal in Australia and the establishment of the Joint Ore Reserve Committee (JORC) in 1971. The JORC Code played an important

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role in the development of standard definitions for codes and guidelines, including the concept of a competent person. Developments in Australia were later followed by the Bre-X fiasco in Canada and the establishment of National Instrument 43-101 in 2000 (and the similar concept of a qualified person). Today's disclosure rules began to see some uniformity following the establishment in 1994 of the Committee for Mineral Reserves International Reporting Standards (CRIRSCO). It comprises organisations from around the world with mining as its focus. Much of the current disclosure in the industry is presently derived from CRIRSCO standard definitions and has been adopted in Australasia, Brazil, Canada, Chile, Colombia, Europe, Indonesia, Kazakhstan, Mongolia, Russia, South Africa, Turkey and the United States.

The author concludes by saying that the world of mining disclosure is gradually converging because of the efforts of CRIRSCO and the national mining associations, and the application of regulators and stock exchanges throughout the world of similar disclosure standards.

Appendix 1

About the Authors

Michael Bourassa

Fasken Martineau DuMoulin LLP

Michael Bourassa is a member of the global mining group at Fasken Martineau DuMoulin LLP, and acted as the group's coordinator from 2004-2012. A recognised expert, Michael has accumulated extensive experience on both Canadian and international mining projects.

Michael will remain co-chair of the International Bar Association's (IBA) Mining Law Committee until 31 December 2018, at which time he will become a council member of the IBA's Section on Energy, Environment, Natural Resources and Infrastructure Law. He currently serves as vice-chair of the international resource conference of the Rocky Mountain Mineral Law Foundation (RMMLF) to be held in Rio de Janeiro in April 2019. He also served as director of the RMMLF and the Prospectors & Developers Association of Canada.

Widely recognised for his mining expertise, Michael has been ranked in several leading legal publications including *Chambers Global*, *Chambers Canada* and the *Canadian Legal Expert Directory*. He has also been named by *Who's Who Legal* as 'Mining Lawyer of the Year' in 2010, 2011, 2012, 2014 and 2017, and recognised in *Who's Who Legal* (compendium edition) for 13 consecutive years (which also recognised Fasken as the 'Global Mining Law Firm of the Year' in 2018 for the 10th time - the firm's fourth consecutive win).

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Written from diverse jurisdictional viewpoints by leading industry practitioners, this Practice Guide – published by Getting the Deal Through – examines key themes topical to the international mining community.

Featuring detailed analysis and guidance on navigating critical issues facing commercial mining ventures worldwide, this Guide provides essential reading for lawyers, financiers, mining companies, advisory firms, consultants and contractors.

Subjects covered include project financing; commercial agreements; anti-corruption; battery minerals; glacier protection; community engagement; sanctions; and mining closure.