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Fasken Martineau DuMoulin LLP

South Africa's Mineral and Petroleum Resources Development Bill – A Brief Overview

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On April 19, 2002, the South African government published the Mineral and Petroleum Resources Development Bill, which will fundamentally change mining rights in South Africa. The Ministry has invited submissions on the Bill until May 19, 2002. In view of the limited time given for response, we have prepared the following overview of the main features of the new Bill. Fasken Martineau is also preparing more critical commentary based on further review and discussions with industry participants, which will be made available next week.

This Bill is the long-awaited revision to the Mineral Development Draft Bill that the South African government released in December 2000. The previous Bill generated an extensive amount of commentary, partly because South Africa was perceived to be creating a legislative template for other African nations to follow and partly because the previous Bill departed radically from the familiar model of tenured and transferable property rights. The many submissions included a substantial commentary from the Prospectors & Developers Association of Canada (PDAC), which was prepared with the guidance of Fasken Martineau. The PDAC commentary appears to have influenced the South African government, which subsequently distributed it with Ministry publications, in part, to perhaps signal to the mining community the direction in which the revised Bill would

proceed. The Mineral and Petroleum Resources Development Bill is a remarkable improvement from the previous Bill and the Minister should be heartily congratulated for her pragmatic responsiveness.

The overall objective of both the new Bill and the previous Bill is to foster development of mining in a way that expands opportunities for “historically disadvantaged persons” in South Africa, in a way that is consistent with environmental responsibility. The previous Bill, however, sought to do so by making the granting, transferring and cancellation of prospecting and mining rights matters entirely within the discretion of the Minister and mandating that the Minister must give preference to historically disadvantaged persons. The PDAC commentary accepted as immutable the objectives that South Africa would convert common law property rights (the “old order regime”) into a system where the government held all title and licensed prospecting and mining rights and that this would have to be done in a way that promotes historically disadvantaged people. The PDAC commentary argued that affirmative action could not be built into the property right itself, as this would undermine bankability, which in turn would hinder efforts by junior companies run by historically disadvantaged persons. The revised Bill implements the thrust of the PDAC recommendations.

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Government Custodianship of Minerals

Under the new Bill, the South African government assumes “custodianship” of all mineral title and becomes the grantor of prospecting rights and mining rights. A schedule to the Bill provides a process for holders of old-order rights to apply for and obtain rights in the new regime. Holders of old-order prospecting rights will have two years to apply and holders of old-order mining rights will have five years to apply.

Designated Minerals

Prospecting rights and mining rights give the holder the exclusive right to prospect for and mine for a mineral in a designated area, except for possible information-gathering activity the Minister can initiate with respect to a mineral or geological formation. The Bill implies that a prospecting right or mining right only extends to the designated mineral, and not all minerals. Based on meetings with Ministry officials, we understand that the government was concerned about past hoarding and that it viewed mineral-specific rights as an important means to curb abuse. This raises obvious issues for exploration companies which identify minerals which are not designated in their property right.

Initial Application for Prospecting Rights

The application for a prospecting right is first-come, first-served. However, if more than one application is received on the same day, the minister must give preference to historically disadvantaged persons. The application must be made to the appropriate Regional Manager in prescribed form with a prescribed

application fee. No draft regulations have been provided in this regard. The Bill provides that the Regional Manager “must accept” an application if these requirements are met.

Within 14 days of receiving the application, the appropriate Regional Manager must either notify the applicant in writing that the application does not comply with the requirements, or notify the applicant to submit an “initial environmental impact assessment” within 30 days and to consult with any interested and affected persons. Although the details of these requirements are not provided, the new procedure is a substantial improvement over the previous Bill, which contemplated lengthy public hearings as part of the initial application process.

Requirements for a Prospecting Right

The Minister “must grant” a prospecting right if, *inter alia*, the applicant has the technical and financial capacity to conduct the proposed prospecting programme, the programme will not result in irreparable environmental impact, the applicant is not in contravention of other “relevant” provisions of the Act and the granting of such right “will further” the objects referred to in sections 2(d) and (f). Sections 2(d) and (f) state the objectives to expand opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from the exploitation of the nation’s mineral resources, and to promote employment and advance the social and economic welfare of all South Africans. The Minister “must refuse” a prospecting right if the application does not meet *all* the

requirements. If the Minister refuses, written reasons must be provided within 30 days. The Bill establishes a general internal appeal process and contemplates possible judicial review after exhausting internal appeal. While this leaves some uncertainty, it is at least some comfort that the right to appeal is better specified than in the previous Bill.

The Effect of a Prospecting Right

The prospecting right becomes effective upon the date the environmental management programme is approved. The prospecting right is effective for the period specified in the right (which appears to be determined at the discretion of the Minister), which period may not exceed five years.

Prospecting activities must be commenced within 90 days from the date on which it becomes effective and the holder must “continuously and actively” conduct prospecting operations, in addition to paying fees and other requirements. A holder may apply once for a renewal for a period not exceeding three years. A renewal application requires a detailed report of activities, a prescribed application form and prescribed fee and state the period for which a renewal is required. The Minister must grant the renewal if the application is in order and the applicant has complied with the Act and prospecting programme.

Information

The holders of prospecting rights and mining rights must keep records of results within South Africa and submit progress reports. No one may destroy records or bore-hole data without the written

direction of the relevant Regional Manager. In order to achieve the objectives of the Act, the Minister may direct that specified information or data be provided by applicants or holders. The Minister may use data and communicate data to any person to achieve the objectives in sections 2(c), (d) or (e)—equitable access, expanded opportunities for historically disadvantaged people and “to promote economic growth in the Republic”—subject to restrictions on disclosing trade secrets or competitively sensitive information.

Transfer of Rights

A prospecting right or mining right may not be transferred in any way without the written consent of the Minister. The Minister must grant consent if the proposed transferee is capable of compliance (with the Act, the terms and conditions of the right, the social plan in the case of a mining right, and the environmental obligations) and satisfies the requirements of an initial applicant for the grant of a prospecting right or mining right as the case may be. In particular, the choice of transferee must further the objects in sections 2(d) and (f) (see above).

To promote bankability, financial institutions recognized by the Republic may take security upon providing an undertaking that any sale pursuant to foreclosure would require the consent of the Minister as set out above.

Cancellation of Rights

The Minister has broad power to cancel or suspend rights if the holder is delinquent. The grounds include conducting any prospecting or mining operation in contravention of the Act, breaching

any material term or condition of the right, not prospecting for or mining the mineral resource “optimally” in accordance with the programme, contravening the environmental management programme or submitting inaccurate, incorrect or misleading information in connection with any matter required to be submitted under the Act. Before suspending or canceling a right, the Minister must give written notice with reasons and afford the holder a reasonable opportunity to show why the right should not be canceled or suspended. The Minister may direct the holder to take specified measures to remedy any such delinquency.

Initial Application for Mining Rights

The holder of a prospecting right for a mineral in an area has the exclusive right to apply for a mining right. The application must be made to the appropriate Regional Manager in prescribed form with a prescribed application fee. The Regional Manager “must accept” an application if these requirements are met. Within 14 days of receiving the application, the appropriate Regional Manager must either notify the applicant in writing that the application does not comply with the requirements, or notify the applicant to submit an “initial environmental impact assessment” within 30 days.

Requirements for a Mining Right

The Minister “must grant” a prospecting right if the listed requirements are met. These include the following: the mineral can be mined “optimally” in accordance with the mining work program (optimally is undefined);

the applicant has the technical and financial capacity; the mining will not result in irreparable environmental impact; the applicant has provided the “prescribed social plan”; the applicant is not in contravention of any provision of the Act; and the granting of such right will further the objectives in sections 2(d) and (f) (see above). The Minister “must refuse” a mining right if the application does not meet *all* the requirements. If the Minister refuses, written reasons must be provided within 30 days. Again, there is internal appeal and possible judicial review after exhausting internal appeal.

The Effect of a Mining Right

The mining right becomes effective upon the date the environmental management program is approved. The mining right is effective for the period specified in the right (which appears to be determined in the discretion of the Minister), which period may not exceed thirty years. The renewal process is similar to the renewal process for a prospecting right; however, the mining right may be renewed for periods up to thirty years and may be renewed more than once.

The holder of a mining right must commence mining operations within one year from the date the right becomes effective and must “actively” conduct mining in accordance with the mining work program. The Act imposes a vague requirement that any person who intends to beneficiate any minerals mined in South Africa outside the Republic must obtain the written permission of the Minister. The term “beneficiate” is undefined and therefore it is not clear precisely which activities would be caught.

Optimal Mining and Profitability

The Minerals and Mining Development Board may recommend to the Minister to direct the holder of a mining right to take corrective measures if the Board establishes that minerals are not being mined “optimally” and that continuation of such practice will detrimentally affect the objects referred to in section 2(f)—to promote employment and advance the social and economic welfare of all South Africans. The Board is to consider the technical and financial resources of the holder and the prevailing market conditions. If the Minister agrees, she must notify the holder in writing of required corrective measures. The holder has 60 days to make representations in respect of the notice. The Minister may, on the recommendation of the Board, suspend or cancel a mining right for noncompliance.

The holder of a mining right must also notify the Board where prevailing market conditions cause the profit-to-revenue ratio of the mine to be less than six percent on average for a continuous period of 12 months, or if any mining operation is to be scaled down with the possible effect that 10 percent or more of the labour force, or more than 500 employees, are likely to be retrenched in any 12-month period. The parameters of the “profit to revenue” ratio are not

defined and this of itself creates some uncertainty. The Board must investigate the socio-economic and labour implications of this and make recommendations to the Minister. The Minister may, on the recommendation of the Board and after consultation with the Minister of Labour, order “corrective measures.”

Retention Permit

The Minister “may grant” the holder of a mining right a retention permit of up to three years where the property has been prospected, a feasibility study has been completed and there are mineral reserves with mining potential, but mining would be uneconomical due to prevailing market conditions. The Minister “may refuse” to issue a retention permit if (based on research conducted by the Minerals and Mining Development Board) it is established that the mineral resource can be mined profitably, or if the applicant has not completed the prospecting programme and feasibility study, or if the issuing of such permit would result in an “exclusionary act,” prevent fair competition, or result in the concentration of mineral resources in the hands of the applicant. “Exclusionary act” is defined to mean any act or practice that impedes or prevents any person from entering the mineral and mining industry, or from entering

any market connected with that industry, or from making progress within such industry or market.

The holder of a retention permit must make reports every six months indicating prevailing market conditions and efforts undertaken to ensure that mining operations will commence before the expiry of the retention permit. A retention permit may be renewed once if the same conditions prevail, for a period of up to two years.

A retention permit may not be transferred in any way whatsoever. The Minister is not given discretion to approve transfers of retention permits.

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The short term of prospecting rights, the continuous activity requirements, the optimal mining requirement and the strict retention permit requirements make it plain that the South African government is serious about implementing a use-it-or-lose-it system. The South African government has moved some distance in removing discretion to favour historically disadvantaged persons and the apparent quid pro quo is that mineral rights have been designed to become available quite quickly compared to other regimes.

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