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## Introduction

The past year has seen huge growth in the Canadian mining industry. That reflects the growth of the industry elsewhere in the world, which has been driven by strong metals demand, increasing economic prosperity, the longer lead times, and higher cost of both locating and placing mineral projects into production.

## Aboriginal Consultation and Accommodation

Much of Canada is covered with treaties with the First Nations or Aboriginal groups and, as a result, these treaties govern the relationships between governments and First Nations. In the west, however, there are few treaties, particularly in British Columbia. As a result, there has been significant litigation over the rights of Aboriginal groups to address potential infringement of lands claimed by them particularly in the frontier areas where mineral exploration and development is taking place.

Under s. 35 of the *Constitution Act* of 1982, the “existing Aboriginal treaty rights of Aboriginal peoples of Canada are hereby recognized and confirmed.” The duty to consult and accommodate is an obligation of the Crown, both federal and provincial, and the duty arises when there is an actual or an asserted title to lands which may be impacted by a project development.

The duty to consult has to take into account such factors as the strength of the Aboriginal claim and the impact of the proposed action. The courts have imposed on the Crown an obligation to negotiate in good faith and the presence of an asserted right creates this obligation. More than the land mass of British Columbia is subject to asserted claims of Aboriginal groups and this imposes an

obligation on the Crown to consult and accommodate in every instance. It is further complicated by the overlapping claims of various First Nations groups particularly where a project is proposed as the obligation arises on the Crown to consult with all of the affected groups subject, of course, to the level of consultation being measured according to factors such as the strength of the claim and the impact of the proposed action. The obligation to consult is obviously less for exploration programs than production projects.

This obligation to consult and accommodate has a significant impact on mining project development and even in areas of Canada where treaties with the Aboriginal groups exist. This obligation has been applied by the courts particularly in the area of providing access routes to mining projects.

The Aboriginal groups do not have a veto right and that was established in the Supreme Court of Canada decision in *Delgamuukw*.<sup>1</sup>

There are two significant cases decided by the Supreme Court of Canada in *Haida*<sup>2</sup> and *Taku River*<sup>3</sup> which must be considered in any project development.

In the *Haida* decision, the Crown had agreed to transfer certain timber licenses in the Queen Charlotte Islands from MacMillan Bloedel to Weyerhaeuser, which had taken over MacMillan Bloedel. An obligation was imposed by the court on the Minister of Forests to consult the Haida as a result of the transfer. The lower court ruled that there was an obligation on Weyerhaeuser as well as the Crown to consult with and accommodate the Haida. The Supreme Court of Canada ruled that the obligation to consult and accommodate was not on the proponent of the project but rather on the Crown.

In this instance, there was an asserted title rather than an actual title, however, because the impact of this decision could be significant. The court held that the consultation obligation on the Crown

must also accommodate the concerns of the Haida. The Crown may delegate certain consultation actions to a proponent, but the ultimate obligation to consult and accommodate is with the Crown where it has actual or constructive knowledge of an Aboriginal land claim. There is a range of consultation which can be from an incidental impact of a project on an Aboriginal group through to a significant impact which requires a higher level of consultation.

In the *Taku* decision of the Supreme Court of Canada, the mining company was proposing an access route through traditional territory of the Taku Tlingit First Nation who were asked to participate in the planning process and did so. The First Nation was not satisfied with the decision from the environmental assessment process and produced a separate study and would not sign off on the report. The Crown was aware of the First Nation claim and was engaged in treaty negotiations with them. The court held that there had been an accommodation with respect to the First Nation interests and that the First Nation had participated in the process and their concerns had been addressed in a meaningful way. The court found that the Crown was not required to develop special consultation processes to address First Nation concerns outside of the process provided for in the legislation which required specific consultation with affected First Nations.

These decisions, while decided several years ago, continue to have a significant impact on mineral development. As can be appreciated, mineral exploration, because of its relatively low impact, is not subjected to the same level of consultation and accommodation imposed by the courts. The First Nation, as part of its asserted right, is required to establish some occupation of the land, exclusive use and substantial continuing connection with the land. These criteria are looked at by the courts in determining the level of

consultation that may be required.

At present, the environmental review process for projects must take into account First Nation concerns. A recent decision of a joint federal provincial environmental assessment review panel (British Columbia) ruled that the proposed Kemess North project of Northgate Minerals Corp. met most, if not all, the scientific, engineering and technical concerns but would not approve because of First Nation concerns with regard to the disposal of tailings in a lake within the traditional territories claimed by four different Aboriginal groups.

### NI 43-101

National Instrument 43-101, Standards for Disclosure for Mineral Projects<sup>4</sup>, is a national securities policy in Canada of the Canadian Securities Administrators, which consists of all 13 securities commissions in Canada.

This policy covers all forms of mining disclosure by reporting issuers whether it is oral or written. In addition, it applies to issuers' websites and to foreign issuers as well as domestic issuers where the foreign issuer has its shares listed on a Canadian stock exchange.

The policy is the subject of regular review and an advisory panel has been established which is known as the "CSA Mining Technical Advisory and Monitoring Committee." This committee consists of regulatory and industry representatives and part of its mandate is to serve as a forum for continuing communication between the mineral industry and the CSA, to advise the CSA on the application and amendment of NI 43-101, to evaluate foreign professional associations and reporting systems and to advise and update the CSA on industry and professional developments related to securities regulatory issues as well as promote industry feedback on NI 43-101 issues.

In addition to the policy, which sets out the various requirements as to the

application including requirements for disclosure, there is also a Form 43 101F1 which sets out the required disclosure in the technical report. There is a companion policy (43-101CP) which addresses the application of the policy, and such matters as the author of a report who must be a "qualified person" and the preparation of the report. The qualified person is a person who is a member of a self regulatory organization and has sufficient experience to comment and prepare a report based on his professional qualifications and experience in the subject matter of the report. The report must be prepared using the format in the policy and apply certain reporting codes regarding disclosure of resources and reserves such as the Institution of Materials, Minerals and Mining in the United Kingdom (IMM Reporting Code), the Australasian Code for reporting of mineral reporting of mineral resources and ore reserves (JORC Code), the South African Code for reporting of mineral resources and mineral reserves (SAMREC Code) and the United States SEC Industry Guide 7 may also be used. Any differences in the foreign codes which are used in a report with the Canadian Institute of Mining, Metallurgy and Petroleum definition standards on mineral resources and mineral reserves must be reconciled to the use of the foreign code.

Under SEC Guideline 7, only proven and probable reserves can be reported; however, in Canada resources must also be disclosed and these include measured, indicated and inferred categories. SEC Guideline 7 does not allow this disclosure and where issuers are reporting in both Canada and the United States they must include cautionary language to the effect that certain information is required by CSA policies which is not in compliance with the SEC policies in order to meet the requirements of both jurisdictions. There are other significant differences as well in that the SEC Guideline 7 does not allow

disclosure of data on nearby or adjoining properties whereas 43-101 does. There are also significant technical differences between the two disclosure requirements and where there are differences, these must be clearly identified in the disclosure documents.

The policy also sets out certain recognized foreign associations and designations as being considered qualified persons under the policy and additional professional organizations are being considered on a regular basis for inclusion in the policy.

The resources and reserves in the policy are those as identified by the CIM committee on the definition of standards for mineral resources and reserves which is a committee of the CIM created specifically to define those standards.

### Confidentiality Agreements

A recent decision of the British Columbia Court of Appeal in June 2007 in *Aquiline v. IMA*<sup>5</sup> addressed the provisions of a confidentiality agreement which incorporated many of the provisions commonly found in confidentiality agreements and, as a result, this decision may create some uncertainty in commonly used confidentiality agreements. In the normal course of events, cases such as this would only have local impact but because of the extensive use of confidentiality agreements with similar language to that used in this agreement and the global reach of Canadian mineral explorers, the implications of this decision may be more far-reaching than is initially obvious. IMA has sought leave to appeal the decision to the Supreme Court of Canada but as of Nov. 2007, leave has not been granted.

In this instance, a confidentiality agreement was entered into between a property owner (Newmont) which identified the area of interest as being two kilometers around the specific property in Argentina. The agreement also identified

timeframes for confidentiality on the information. The geologist visiting Newmont's office for the purpose of discussing the specific properties noticed a map on the wall for an area some 60 kilometers away from the specific property and recognized the potential value of this data on the other property (Navidad). Another party, Aquiline, also entered into a confidentiality agreement with respect to the specific property and alleged that the information used by IMA to acquire the Navidad property was subject to the confidentiality agreement. In the interim IMA had developed the Navidad property and spent a significant amount of money in doing so. At the time of the disclosure of the data of what became the Navidad property to IMA's geologists, there was no discussion of confidentiality; however, IMA's geologists did subsequently express some concern that the information on Navidad might be subject to the confidentiality provisions.

The trial court found that the words "relating to" and "concerning the project" are words of broad interpretation and that nothing in the confidentiality agreement compelled a more narrow meaning and, therefore, the use of the words "confidential information" was to be given its broadest definition. As a result of this case, it is likely prudent that future confidentiality agreements consider inclusion of some of the provisions as follows:

- it might be useful to attach maps to the confidentiality agreements;
- the timeframe for confidentiality on data or property acquisitions should be clearly spelled out;
- the property and specific area of interest, if applicable, must be clearly identified and, if intended, no other information which arises should be subject to the confidentiality agreement;
- all data supplied in whatever form should be clearly identified as such and related only to the property in question

and perhaps there should be a specific exclusion of information which comes to the attention of the parties unrelated to the property in question;

- if information does arise which is potentially not covered by the agreement, then it would be preferable to have a letter between the parties acknowledging whether or not such information outside the subject property area is subject to confidentiality;
- selection of the jurisdiction of the law to be applied is significant because foreign jurisdictions in many instances operate on a civil rather than a common-law code;
- the parties should agree to be bound by certain jurisdictions otherwise there is a risk that a foreign court may simply ignore the decision of the domestic court on mineral tenures that fall within its jurisdiction;
- remedies available under Canadian law might not necessarily be available under foreign law;
- if more than one property is being considered for acquisition, or disclosure of the information, then perhaps separate confidentiality agreements should be prepared for each property;
- use of words like "project" or "area" should be avoided unless they are specifically defined by identifiable claims, geographic areas or better still on maps or known coordinates;
- standard form confidentiality agreements should be avoided; and
- if there is any question as to whether or not information is confidential, it should be addressed by way of letter or amendment to the confidentiality agreement between the parties.

The main concern with respect to this case is that the form of agreement used is one generally used in the industry and it may lead to situations where many existing confidentiality agreements will be called into question and the original intentions of the contracting parties may

not be recognized, particularly where control of either the property or a contracting party has changed.

### Environmental

Canada's mining industry will be subject to a number of initiatives which arise in dealing with climate change, including greenhouse gas emissions. Canada is a signatory to the Kyoto Accord, however, the federal government has established its own guidelines for addressing emissions using a baseline year of 2006 whereas the Kyoto Accord has a baseline year of 1990. In addition, a number of the provinces have either initiated legislation or proposed legislation to address greenhouse gas emissions and these provisions appear somewhat aggressive in their outlook in terms of greenhouse gas reduction. The current situation is such that the criteria, baselines, and a number other factors create a situation whereby the ability to meet the criteria established under Kyoto, federal and provincial guidelines are likely not reconcilable.

### Changes

There are a number of areas in which changes are likely to occur or have occurred in the recent past with regard to matters which may have a significant impact on the mining industry in Canada.

British Columbia has introduced a Mineral Titles Online system which is a method of acquiring mineral tenure electronically and this has eliminated the need to physically stake ground with the result, at least in part due to the simplification of mineral tenure, that significant amounts of Crown land in British Columbia have been electronically acquired. The obligation to carry out and file assessment work remains and, like other parts of Canada which have implemented electronic mineral tenure acquisition procedures, this is likely to become much more prevalent in the next number of years and the process of

acquiring ground by actually putting stakes or posts in the ground and identifying the boundaries is likely to disappear. A significant advantage of electronic acquisition is that it is instant, easy to do from the explorer's perspective, cheaper from the government perspective as less paper is involved, it clearly identifies the ground to be acquired because it is based on electronic coordinates and eliminates the issue about disputes as to ownership or where the boundaries of a property may lie.

Canada is comprised of 10 provinces and three territories, each of which has its own mineral tenure acquisitions systems and the advent of the electronic acquisition age will likely result in significant simplification of those systems once they are fully adopted.

With the advent of increased mineral exploration across the country, disputes with private land owners and other stakeholders have become more common and some jurisdictions are introducing notice requirements whereby notice must be given to interested parties before mineral exploration can take place. The practice of requiring notice to private land owners is likely to increase across the country because of the expansion of urban areas into the hinterlands and the continued growth of the population particularly with regard to areas being used for recreational purposes.

The federal government also indicated its intention to create a single securities regulator with jurisdiction to address all securities matters in Canada. At present there are 13 securities commissions across the country and while they are members of the CSA (Canadian Securities

Administrators), their policies differ. There is a so-called "passport" system in place at the moment, however, the largest securities regulatory agency (the Ontario Securities Commission) is not part of the system. As a result, there is patchwork of systems in place across the country and this is believed to be a hindrance to raising capital particularly by junior mining explorers and other companies in their formative stages. The single regulator may also assist in enforcement activities because a "patchwork system" may make it less easy to regulate wrongdoers.

One of the major issues that would have to be addressed by having a single securities regulator is respecting the regional differences particularly with respect to junior mining exploration companies and their ability to raise capital for operational and administrative purposes. The concern expressed by many in the junior mining industry is that the imposition of a single regulatory structure would impede relatively fast change in recognition of changing market conditions and also potentially impose on junior companies corporate governance provisions more applicable to large multinational corporations. The cost to administer such junior companies if provisions are not made with a single national regulator to recognize such differences and the requirements for ongoing change would be greatly increased.

It is likely that the events of the last couple of years regarding takeovers of Canadian companies by foreign entities will continue. The recent acquisition of Inco by CVRD and Falconbridge by Xstrata are examples. Canada does have

an *Investment Canada Act* and such takeovers are subject to review by the federal agency; however, this is not likely to slow down the mergers and acquisitions. In addition, there has been a significant consolidation in the domestic mining industry, including Barrick's takeover of Placer, Gold Corp.'s takeover of Glamis, Yamana's takeover of Meridian and the recently announced takeover by Rio Tinto of Alcan, which is a further example of a takeover by a foreign company of a Canadian entity.

### Conclusion

There are numerous factors which affect the health of not just the Canadian mining industry, some of which are set out above, and others which affect the global mining industry. There is likely to be increased regulation of the industry both in an environmental and social aspect. Securities regulation is likely to increase particularly with the advent of additional corporate governance provisions. The current crisis in the lack of technical and skilled people, which is partly the result of a greying of the industry's population and many years of lack of growth which resulted in no new people coming into the industry, has created a situation which is likely not to be resolved for some years to come. The demand for skilled people is not likely to be filled in the short term, nor will the growth in demand for metals be addressed for some time to come and this, combined with the longer lead times for development of mining projects in Canada and elsewhere, is likely to sustain higher metal prices and continued demand for goods and services within the sector. n

1. *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 at para. 114.
2. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
3. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 SCR 550.
4. NI 43-101, CSA Standards of Disclosure for Mineral Projects.
5. *Minera Aquiline S.A. v. IMA Exploration Inc. and Inversiones Minera Argentina S.A.*, 2007 BCCA 319.



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