McCarthy Tétrault

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MINING PROSPECTS

We welcome you to our fall issue of *Mining Prospects*, the periodical of our global mining group.

The period covered by this issue has seen a near-unprecedented decline in both equity and commodities markets. While the ultimate effects of these changes remain to be seen, we will endeavour to keep you updated on important changes to the legal landscape as they occur.

The period covered by this issue also saw the real life drama of the decisions of the Québec Court of Appeal and Supreme Court of Canada in the BCE Inc. matter. While we were hoping to include an analysis of the Supreme Court's clarifications on the duties of directors of public companies under Canadian corporate law, as of press time the Supreme Court's reasons had not yet been released. We look forward to commenting on this important decision in a subsequent issue.

In addition to our roundup of recent regulatory and judicial actions and decisions, this issue includes (i) a primer on flow-through share financings, (ii) an article on the potential protections afforded by bilateral trade agreements for Canadians engaging in mining activities abroad, (iii) an article on the Equator Principles adopted by many of the world's leading lending institutions and their implications for mining companies seeking project finance, (iv) a summary of the recently introduced amendments to relax dissident proxy solicitation requirements, and (v) a commentary on two recent decisions of the Ontario Court of Appeal related to sentences imposed on Aboriginal protesters for disrupting mining project operations.

We hope you will let us know if you have any suggestions to make this publication even more helpful, or if there are topics or issues you would like to see covered in future editions. We were gratified with the feedback we received on our inaugural issue, and would like to thank those who took the time to provide us with that feedback.

Brian Graves and Gary Litwack (Editors)

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Flow-Through Shares: A Primer and More

By Nigel Johnston (Toronto)

The provisions of the *Income Tax Act* (Canada) (the *ITA*) relating to flow-through shares have a long history. In their current form, they permit a "principal-business corporation" (the eligibility criteria are described below) to renounce expenses that the corporation would otherwise treat as Canadian exploration expense (CEE) or Canadian development expense (CDE) to purchasers of shares so that the purchasers can claim the relevant deductions instead of the corporation. However, as is often the case with tax incentives, while the principle is easy to state, the devil is in the details. Although flow-through shares can be issued by corporations engaged in oil and gas exploration or in the development of certain renewable energy projects, this note is limited to flow-through shares issued by corporations engaged in mining or exploring for minerals.

While many investors (and others) think that flow-through shares are a separate and distinct class of shares in an issuer's capital, they are in fact simply common shares that are issued to investors accompanied by separate contractual rights to certain tax advantages.

Benefits and Effects of Flow-Through Shares for Issuers and Investors

Effect of Renunciation; Consequences of Acquiring or Issuing Flow-Through Shares

In general, CEE or CDE renounced by a principal-business corporation to an investor will be treated as CEE or CDE, as the case may be, incurred by the investor as of the effective date of the renunciation. As described below, flow-through share offerings may be made more attractive by providing for renunciation of CEE to investors effective in the tax year in which the investment is made, even though the CEE will be incurred by the issuer in the following year. Note that only the first holder of the share is entitled to the benefit of the renunciation. It is not necessary that the first holder actually hold the share on the effective date of the renunciation or the date that the renunciation is made. Conversely, a subsequent holder of the share will not be entitled to the benefit of a renunciation.

From the investor's perspective, the cost of a flow-through share is deemed to be nil. Such nil cost will be averaged with the adjusted cost base of any identical shares of the issuer owned by the investor. In particular, a common share of a principal-business corporation issued under a flow-through share agreement is identical to a common share of the principal-business corporation acquired in any other manner.

From the principal-business corporation's perspective, the amount that may be added to the paid-up capital of its shares on issuance of a flow-through share is generally reduced by 50% of the amount renounced in respect of the share.

Why Do Issuers Like Flow-Through Shares?

If a principal-business corporation is in a loss position, the issuance of flow-through shares is a means to monetize tax deductions that cannot otherwise be used immediately.

On the other hand, if the principal-business corporation is paying current taxes, it will seek to extract a premium compared to a conventional issue of common shares. In any event, flow-through offerings are generally priced higher than conventional offerings (or, in the alternative, issued at the same price but with conventional shares being issued as part of a unit that includes a warrant or similar "sweetener").

Why Do Investors Like Flow-Through Shares?

Investors receive the benefit of deductions for CEE and/or CDE that shelter income at the investor's marginal tax rate. These tax savings reduce the money at risk of the investor.

The entire sale proceeds of flow-through shares, assuming that the flow-through shares are capital property, will be taxed as a capital gain (because, as described above, the cost of the flow-

through shares is generally nil). In a simple example, if the share could be sold for the issue price, the investor benefits from (i) a deferral of tax (because of the "up front" deduction for CEE/CDE), and (ii) an absolute tax saving by taking a deduction for CEE/CDE at the investor's marginal rate yet paying tax on the same amount at capital gains rates on the sale of the share.

In addition, if the flow-through share is capital property to the investor, any capital gain on the disposition could be sheltered with any available capital loss carry-forwards.

Investors can also substitute donations of certain flow-through shares to registered charities for cash donations. Under recent changes to the ITA, if the flow-through shares are listed on a designated stock exchange (which includes the Toronto Stock Exchange and Tiers 1 and 2 of the TSX Venture Exchange) and are gifted in kind to a registered charity, the investor will be treated for tax purposes as having disposed of the shares for their adjusted cost base (so no capital gain or loss will be realized) yet will receive a charitable donation receipt for the full value of the shares.

The Essential Elements

As detailed below, the essential elements for a share to be a flow-through share under the ITA are:

- it must be issued by a "principal-business corporation" pursuant to a written agreement under which the issuer agrees to incur CEE and/or CDE and renounce it in favour of the investor,
- the incurring of CEE and/or CDE and renunciations must be within prescribed periods, and
- it cannot be a "prescribed share."

Expenses That Can be Renounced

In the mining context, CEE includes:

- expenditures made for the purpose of determining the existence, location, extent or quality of a mineral resource in Canada (grassroots CEE), and
- expenses incurred for the purpose of bringing a "new mine" in a mineral resource in Canada into production in reasonable commercial quantities and incurred before the new mine comes into production in such quantities.

In the mining context, CDE includes:

- expenses in sinking or extending a mine shaft, mine haulage way or similar underground work for a mine in a mineral resource in Canada, built or excavated after the mine came into production, and
- the cost of certain Canadian resource property, including rights to prospect, explore, drill or mine for minerals in a mineral resource in Canada.

CEE is generally eligible for a 100% deduction, while CDE is generally eligible for a 30% deduction on a declining balance basis.

Principal-Business Corporations

The issuer of a flow-through share must be a "principal-business corporation," defined as a corporation, the principal business of which includes mining or exploring for minerals. A principal-business corporation also includes a corporation, all or substantially all (interpreted by the Canada Revenue Agency to be at least 90%) of the assets of which are shares or debt of "related" principal-business corporations. This permits a holding company to qualify as a principal-business corporation and issue flow-through shares to investors; however, as the holding company will not incur CEE or CDE directly, it will be necessary for it to enter into a "back-to-back" flow-through share arrangement with an operating subsidiary in order that the subsidiary renounce CEE or CDE to the holding company that it in turn can renounce to investors.

Agreement in Writing

A flow-through share is a share issued pursuant to an agreement in writing between the investor and the principal-business corporation under which the principal-business corporation agrees to incur CEE and/or CDE at least equal to the consideration for which the share is to be issued. In addition, the principal-business corporation must agree to renounce, in prescribed form, CEE and/or CDE to the investor in an amount not greater than such consideration. The definition of flow-through share also contemplates that rights to acquire shares (for example, special

warrants exchangeable for flow-through shares) can qualify as flow-through shares, but this complexity is ignored for the purpose of this note.

The maximum period that flow-through agreements can provide for incurring CEE or CDE is for the period that begins on the date the agreement is made and that ends 24 months after the end of the month in which the agreement is made. The renunciation must be made not later than the end of February of the year following the year in which the 24-month period ends.

Periods in Which CEE/CDE Must be Incurred and Renounced

The first general rule is that only CEE or CDE incurred after the flow-through agreement is entered into between the issuer and the investor can be renounced.

A second general rule is that expenditures cannot be renounced as of a date earlier than they were incurred by the principal-business corporation (although an important exception is described below). For example, if a flow-through agreement was made on January 1, 2008, the principal-business corporation could renounce on June 30, 2008, effective as of May 31, 2008, expenditures made by the principal-business corporation from January 1, 2008 to May 31, 2008. However, it would not be possible to renounce on June 30, 2008 expenditures to be incurred after June 30.

There is, however, an exception to the second general rule that is commonly used to make offerings of flow-through shares more attractive to investors. This "look-back rule" provides that CEE to be incurred in a calendar year can be renounced as of December 31 of the preceding year (thereby allowing investors to deduct the CEE for their preceding tax year filings). A number of conditions must be satisfied. For example, in the case of an agreement pursuant to which expenditures to be incurred in 2009 are to be renounced effective as of December 31, 2008, the conditions would include the following: (i) the consideration for the share must be paid by the investor to the principal-business corporation on or before December 31, 2008 (although it is not necessary that the share in fact be issued by that date, and the payment can be deposited by the principal-business corporation in escrow), (ii) the expenditures to be incurred must be "grassroots CEE," (iii) the investor and the issuer must deal at arm's length for tax purposes throughout 2009, and (iv) in January, February or March, 2009, the principal-business corporation must renounce the expenditures as of December 31, 2008. Note that, in this example, if the principal-business corporation relies on the "look-back rule," it will effectively be subject to an interest charge to the extent that it does not incur all of the expenditures by the end of February 2009 and will be subject to a significant penalty if it does not incur all of the expenditures by December 31, 2009. If all of the expenditures that were to be incurred in 2009 are not in fact incurred by December 31, 2009, the CEE renounced to the investor will be reduced to the amount actually incurred.

The Shares Cannot be Prescribed Shares

The definition of flow-through share excludes a "prescribed share." The prescribed share definition is lengthy and complex and there is relatively little case law or administrative guidance as to its interpretation. The thrust of the prescribed share definition is that a flow-through share must be a "garden variety" common share and the investor must be fully at risk for his or her investment. Accordingly, redeemable preferred shares, shares that carry a fixed dividend entitlement, shares issued where there are arrangements to protect an investor from loss, etc. will be prescribed shares and cannot be flow-through shares. Terms for proposed offerings must therefore be carefully reviewed to ensure that any "bells and whistles" to be offered to investors do not inadvertently result in the loss of flow-through benefits to investors.

The prescribed share rules, however, do allow some agreements to sell the share at fair market value without tainting the share. Fair market value is to be determined without regard to the effect of the agreement (i.e., without regard to any increase in value that the liquidity afforded by the agreement creates). The rules also allow the investor to be indemnified by the principal-business corporation for the amount of taxes payable by the investor (but, it is important to note, not interest and penalties) if a renunciation by the principal-business corporation pursuant to the flow-through agreement is reduced or is not made.

Filing of Prescribed Forms

The flow-through share rules envisage numerous forms being filed by the principal-business corporation, including a form relating to the entering into of the flow-through agreement and a form relating to each renunciation.

If the investor is a partnership, forms must be filed by the partnership in respect of the CEE/CDE it allocates to its partners.

Not a Tax Shelter

Note that a flow-through share is specifically excluded from the definition of "tax shelter," so that it is not necessary for a promoter to obtain a tax shelter identification number or comply with other requirements applicable to tax shelters. The carve-out does not, however, extend to partnerships established to acquire a portfolio of flow-through shares. Such partnerships may be tax shelters, depending on the facts (so that a tax shelter identification number may be required in respect of the interests in the partnership, even if not required for the flow-through shares in which the partnership will invest).

Other Considerations

Investors who are individuals may qualify for a 15% non-refundable federal tax credit in respect of certain flow-through mining expenditures renounced under a flow-through agreement. The 15% credit reduces the amount that the investor can claim as CEE and must be included in income in the following year if sufficient CEE is not incurred in the following year.

Individual investors resident in Ontario may qualify for a 5% investment tax credit against their Ontario taxes for mining expenditures renounced to the investor that qualify for the 15% federal credit if the expenditures are incurred in Ontario.

Individual investors resident in Québec may be entitled to additional deductions in their Québec tax returns in respect of certain CEE incurred by a principal-business corporation in Québec and renounced to the investor. Depending on the circumstances, 125% or 150% of the CEE renounced will be treated as CEE of the investor. In addition, for Québec tax purposes, in certain cases part of the capital gain realized by the investor on the sale of the flow-through shares may be exempt from tax. Despite these additional benefits for individual investors in Québec, however, issuers are often reluctant to renounce expenditures such that they qualify for the additional deduction. The principal reason is that, for Québec tax purposes, a corporation that renounces the expenses will lose the benefit of certain refundable tax credits. In addition, if the investor is a limited partnership and not all of the members of the partnership are Québec residents, the additional deductions are not relevant to the members outside Québec yet the corporation loses the refundable tax credits on the entire amount renounced. On the negative side for investors, for Québec tax purposes, up to 50% of CEE deemed to be incurred outside Québec may be added back to an investor's income if the investor does not have sufficient eligible investment income, thereby partially offsetting the deduction for CEE.

Bilateral Investment Treaty Protections Available to Investors in the Mining Sector

By Orlando Silva and John Boscariol (Toronto)

Mining projects, by their very nature, are commercially risky investments. There is never a guarantee that significant upfront expenses at the exploration stage will lead to commercially profitable operations at the exploitation stage for any given deposit. Add to this the fact that many of the most promising mining prospects in the world are found in countries that suffer from varying degrees of political and economic instability, and the risks can increase exponentially.

Traditionally, when their operations were subject to discriminatory measures, unfair treatment, or expropriation, foreign investors had only two means of addressing the problem: seek a diplomatic resolution of the issue between the investor's government and the host state government, or take action in the domestic court systems of the host state. However, achieving an effective diplomatic resolution of the matter requires strong support from the investor's government, and the investor has little, if any, control over the process. At the same time, the investor may view

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the domestic court system of the host state, for one reason or another, as being inadequate or biased towards the host government.

What are BITs?

Bilateral investment treaties (BITs), referred to as foreign investment protection and promotion agreements (FIPAs) in Canada, can serve to alleviate much of the political and non-commercial risk associated with mining ventures and are a powerful tool for businesses seeking protection for their investments in foreign jurisdictions. In the event of a dispute, BITs enable investors to seek monetary damages from the foreign government by bringing a claim before an independent arbitral tribunal.

Over the last decade or so, BITs have quickly emerged as a third option for businesses seeking protection for their investments in foreign jurisdictions. At the end of 2007, there were some 2,500 BITs in force worldwide, over eight times the number of BITs that existed in 1990.

Canada's BIT and FTA Activity

Within the last couple of years, Canada has stepped up efforts in negotiating BITs, or in some cases free trade agreements (FTAs) that provide for similar investor protections, with a variety of countries that have significant Canadian investment in the mining sector.

For example, on June 20, 2007, the Canada-Peru BIT[1] came into force, adding to the BITs that Canada already has with countries in the region where there is significant Canadian investment in the mining sector (such as Ecuador and Venezuela). Canadians are among Peru's largest foreign investors and the largest foreign investors in the mining sector. The Canada-Peru BIT was the first BIT to be negotiated by Canada in eight years and the first to be based on Canada's new Model BIT. It was followed by the signing of a comprehensive FTA with Peru on May 29, 2008. The investment chapter of the Canada-Peru FTA builds on and includes provisions from the Canada-Peru BIT.

On June 7, 2008, Canada announced the conclusion of FTA negotiations with Colombia. At the time of writing, the text of the Canada-Colombia agreement is not yet available as it is undergoing a final legal scrub, however it is being described as on par with the Canada-Peru FTA with similar investor protections provided under its investment chapter.

Canada is currently negotiating BITs with seven countries, including Tanzania, Madagascar and Mongolia (all countries with significant mining prospects), and has recently concluded BITs with India and Jordan. Canada expects to conclude BIT negotiations with China shortly. Within the last couple of years, Canada launched FTA negotiations with the Dominican Republic, the Caribbean Community and Jordan. In May of this year, Canada also agreed to participate in exploratory discussions on the possibility of FTA negotiations with Panama.

What Protections are Available Under Canada's BITs?

Although the substantive investment obligations imposed on host governments may differ from one BIT to another, they typically include the following:

- non-discriminatory treatment – the foreign investor must be accorded treatment no less favourable than that accorded in like circumstances to domestic investors (national treatment) and investors from any other country (most-favoured-nation treatment);
- standard of treatment – the foreign investor must be accorded fair and equitable treatment in accordance with international law, including full protection and security; and
- expropriation – expropriation or measures equivalent to expropriation must be for a public purpose, non-discriminatory, in accordance with due process of law, and accompanied by payment of prompt, adequate and effective compensation.

A BIT may include other obligations relating to transfers of profits and other amounts out of the host territory, performance requirements, and host government measures concerning the nationality of senior management and boards of directors.

The primary attraction of a BIT is its dispute resolution mechanism. In addition to government-to-government procedures, BITs also contain a private investor-state dispute mechanism

1 Prior to its BIT with Peru, Canada had concluded BITs with the following countries (entry into force date): Russia (1989); Poland (1990); Czech Republic (1992); Slovak Republic (1992); Argentina (1993); Hungary (1992); Ukraine (1995); Latvia (1995); Philippines (1996); Trinidad & Tobago (1996); Barbados (1997); Ecuador (1997); Egypt (1997); Romania (1997); Venezuela (1998); Panama (1998); Thailand (1998); Armenia (1999); Uruguay (1999); Lebanon (1999); Costa Rica (1999); and Croatia (2001).

enabling private foreign entities to sue host governments for damages arising out of their failure to comply with their BIT obligations. This mechanism is available regardless of whether the investor already has a contractual or arbitration arrangement with the host state or one of its governmental entities.

Under most BITs, the foreign investor has the option of proceeding with an *ad hoc* arbitral panel under the United Nations Commission on International Trade Law (UNCITRAL) Rules or proceeding with an institutional alternative, such as an arbitral panel established under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). Most BITs contain acknowledgements that each treaty government has consented to the submission of claims to arbitration under the BIT in accordance with the requirements of international conventions for the recognition and enforcement of arbitral awards, including the 1958 New York Convention.

Generally, BITs require that the arbitral proceedings be brought in a state that is party to the New York Convention. Under the New York Convention, contracting parties are required to enforce arbitral awards made in the territory of other state parties. The procedure for obtaining the enforcement of an arbitral award under the New York Convention is relatively straightforward.

The arbitral award does not have to be confirmed by the courts in the jurisdiction of the seat of arbitration. The investor seeking enforcement is only required to supply the court in the enforcing jurisdiction with a duly authenticated original award and the relevant BIT.

Conclusion

Given the significant risks associated with mining operations in foreign jurisdictions, it is critically important that companies understand the BIT protections available to them when considering investing in foreign operations. Certainly, when faced with discriminatory, unfair or expropriatory measures from host governments, BITs offer a potentially powerful means for mining companies to address these challenges, in addition to traditional government-to-government diplomacy or the pursuit of a remedy in the domestic court system.

There are currently at least six reported BIT cases involving the mining sector pending before ICSID and at least one reported BIT case pending under the UNCITRAL Rules against host governments in Burundi, Congo, Venezuela, Bolivia, South Africa and the Kyrgyz Republic. The claims range from in the hundreds of millions to over a billion dollars. Approximately a quarter of all BIT cases filed to date relate to mining or oil and gas exploration activities.

Overview of the Equator Principles for Project Finance Transactions

By Daniel Bénay, George Maziotis and Laurent Levac (Montréal)

Background

The Equator Principles (the Principles) are a set of 10 voluntary guidelines adopted by an increasing number of global banks and financial institutions. They are aimed at managing the social and environmental impacts of projects through voluntary requirements imposed on project financing. Financial institutions that have adopted the Principles are individually responsible for developing their own internal policies, practices and procedures to ensure that the projects to which they lend (or provide financial advisory services) are implemented in a socially and environmentally responsible manner. While they are voluntary, the Principles are becoming an industry standard in the project financing market.

First adopted in June 2003 by a group of 10 major financial institutions, the Principles (www.equator-principles.com) were revised in July 2006 and have now been adopted by a total of 60 banks and other lending institutions worldwide. The Principles are based on the policies and guidelines of the International Finance Corporation (IFC), the private sector lending affiliate of the World Bank. The IFC participated in drafting both the original and more recent version of the Principles.

Banks and other financial institutions that adopt the Principles (Equator Principles Financial Institutions or EPFIs) commit to develop internal policies and practices consistent with the Principles. These policies and practices allow the EPFIs to finance

only projects where borrowers demonstrate a capacity to comply with standards similar to those applied by the IFC in project-financing transactions. A number of Canadian banks and financial institutions have adopted the Principles, including BMO Financial Group, CIBC, Export Development Canada, Manulife Financial, RBC Financial Group, Scotiabank, and TD Bank Financial Group.

Application of the Principles

The Principles apply to all new project financing, including project finance advisory services, with a total project capital cost of US$10 million or more, and across all industry sectors. The Principles define project financing, in effect, as long-term financing where the revenue generated by the project is used to repay the loan, which is typically secured by some or all of the project assets. The Principles do not apply retroactively to financings entered into before an EPFI adopted the Principles. Nonetheless, they do apply to project financings for expansions or upgrades of existing projects if the scope of the expansion or upgrade could create significant environmental or social impacts, or significantly change the nature or scope of an existing impact of the project.

In particular, the Principles provide a uniform framework for assessing and managing social and environmental risks that arise from any stage of a project in all industry sectors, including the development of energy, mining, oil and gas, and infrastructure projects. As a result, sponsors in extractive industries, such as mining, oil and gas, and in the energy industries, should expect a careful examination of social and environmental issues related to proposed projects.

Requirements Under the Principles

Pursuant to the Principles, as part of an EPFI's project funding approval process, the lender will categorize new projects according to their level of potential environmental and social risks based on the screening criteria of the IFC. The three categories are as follows:

- *Category A* — projects with potential significant adverse social and environmental impacts that are diverse, irreversible or unprecedented;
- *Category B* — projects with potential limited adverse social or environmental impacts, largely reversible and addressable through mitigation measures; and
- *Category C* — projects with minimal or no social or environmental impacts.

For Category A and B projects, the borrower must have conducted a social and environmental assessment to identify the relevant impacts and risks. Borrowers must also prepare environmental management plans that include strategies to mitigate, monitor and manage the identified environmental and social risks associated with any project. Projects in countries that do not belong to the Organization for Economic Co-operation and Development (OECD), and lower-income OECD countries, will be held to IFC performance standards. Projects in high-income OECD countries may be made subject to local laws, which generally meet or exceed such standards.

The loan documentation will be used as a contractual framework between the EPFIs and the project borrowers for the application of the Principles. As such, the loan documentation for a project would provide for undertakings by the project borrower with respect to compliance and reporting with the environmental management plan throughout the life of the project. For Category A and B projects, such undertakings would include:

1. compliance with host country social and environmental laws, regulations and permits;
2. compliance with the applicable action plan;
3. periodic reporting to the EPFI, including, where appropriate, by an external expert over the life of the project; and
4. adherence to an agreed decommissioning plan for the facilities.

Non-compliance with these undertakings, depending on their materiality, could constitute an event of default under the loan documentation.

Other provisions of the Principles require lenders to ensure appropriate consultation with affected communities and the implementation of a workable grievance mechanism through which those communities can seek redress and public reporting (subject to confidentiality arrangements) at least annually by EPFIs on their implementation processes and experience.

Benefits and Challenges

These contractual arrangements between the EPFIs and project borrowers should create strong incentives for borrowers to (i) document and manage identified social and environmental risks, and (ii) ensure compliance with national social and environmental laws or recognized international standards. Although not all lending banks are EPFIs, the presence of an EPFI in a lending syndicate should cause the non-EPFI members of the syndicate to either raise their review processes to a level closer to compliance with the Principles or otherwise benefit from the greater level of oversight required by the EPFIs. In addition to exemplifying corporate social and environmental responsibility, a key benefit for lenders of adherence to the Principles is to enable them to better assess, mitigate and monitor the credit risk and reputational risk associated with financing development projects.

The effectiveness of the Principles will depend largely upon the specific policies, practices and procedures adopted by the EPFIs, as well as upon their application to the circumstances of particular projects. The Principles are not policed by the IFC or any other organization, and do not contain punitive measures against EPFIs that breach them. The effectiveness of the Principles, therefore, is based entirely on the willingness of EPFIs to apply and enforce them. Despite this potential structural weakness, the extent to which lenders have adopted the Principles is evidence of an increasing awareness amongst lenders that social and environmental responsibility makes good financial sense. Corporate social responsibility and policies provide an additional impetus for financial institutions to adopt the Principles. This adoption results in a common framework EPFIs can use to assess and manage environmental and social risks relating to projects. In short, the Principles encourage responsible banking.

Loan Documentation

The Principles provide a common framework (or protocol) for EPFIs to (i) document and manage environmental and social risks, (ii) ensure compliance with applicable national environmental laws, and (iii) ensure compliance with the EPFI's own environmental and social standards applicable to relevant industry sectors. The Principles are generally reflected in the loan documentation, which provides for specific provisions dealing with these three basic objectives.

Normally, borrowers have to satisfy conditions precedent before drawing funds under a credit facility. These conditions precedent allow the EPFI to maintain a certain level of control and supervision over the social and environmental aspects of a project. They also provide confirmation that the environmental representations and warranties are satisfied, and that all material regulatory authorizations and approvals (including environment compliance and receipt of an environmental consultant's report) have been obtained (or will be obtained within an agreed period).

Specific required representations and warranties would normally reflect that all material environmental and social requirements are satisfied, including compliance with all permits and other government authorizations. The loan documentation would also require:

- notice of all material environmental matters reports and violations (actual or potential) to be provided to the EPFI, in addition to notice of all environmental and social claims (such as human rights abuses);
- compliance with national environmental laws; and
- establishment of a monitoring, supervision and reporting process to ensure compliance.

Moreover, to ensure compliance with these contractual arrangements, the Principles would be enforced by the use of events of default in the loan documentation. Such events would be triggered by any material non-compliance or violation with the provisions of the loan documentation.

Ultimately, the practical effect of the Principles will depend upon the individual internal practices adopted by each EPFI.

Activism Made Easier: Amendment to Dissident Proxy Solicitation Rules

By Gary Litwack (Toronto)

In July, 2008 amendments to National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) went into effect that permit dissident securityholders to solicit proxies for a meeting of securityholders of a reporting issuer (the Subject Company) without the requirement to mail an information circular to securityholders of the Subject Company. The amendments entirely do away with the requirement to even prepare a dissident information circular unless the dissident securityholder is proposing either (i) a significant acquisition or restructuring transaction involving the Subject Company at the time of the solicitation, or (ii) to nominate any individual for election as a director.

These changes (which are now found in Part 9 of NI 51-102) have the effect of harmonizing dissident proxy solicitation requirements under securities legislation with the requirements under the *Canada Business Corporations Act* and the *Business Corporations Act* (Ontario), which were amended in 2001 and 2007, respectively, to relax their dissident proxy circular rules.

The Amendments

As a result of the amendments, a dissident securityholder can solicit proxies from registered securityholders without sending them an information circular if:

- the solicitation is made by public broadcast, speech or publication (including, for example, by a newspaper advertisement or over the internet),
- solicitation by such means is permitted by the law under which the Subject Company is constituted, and
- the solicitation contains prescribed information (and such information is filed on SEDAR) relating to the Subject Company, the identity of the dissident securityholder, the percentage securityholding of the dissident securityholder in the Subject Company and the interests of the dissident securityholder in the matter for which proxies are being solicited.

If the dissident securityholder is proposing either (i) a significant acquisition or restructuring transaction involving the Subject Company at the time of the solicitation, or (ii) to nominate any individual for election as a director, then such dissident may only rely on the exemption from sending an information circular if, in addition to the requirements set out above, the dissident securityholder prepares and files on SEDAR (but need not mail to solicitees) an information circular or other document that includes information relating to the acquisition/restructuring or the proposed director nominee(s), as applicable, and the solicitation specifically refers to such information circular or other document and states that such document has been filed on SEDAR.

The Companion Policy to NI 51-102 has been amended to provide guidance on what constitutes a "solicitation to the public" referred to in Section 9.2(4) of NI 51-102 (being a component of the first of the conditions for the exemption as described above). Section 9.3 of the Companion Policy provides that a solicitation to the public would generally include a solicitation made by (i) a speech in a public forum, or (ii) a press release, statement or advertisement provided through a broadcast medium, a conference call or other electronic communication generally available to the public, or appearing in a newspaper, magazine, website or other publication generally available to the public. A solicitation would generally not be considered to be made to the public, however, if it was made by phone, mail or e-mail to only a select group of securityholders. Separate exemptions from the requirement to prepare and send a dissident information circular to solicitees may be available for solicitations not made publicly where the number of solicitees is small.

While we would not anticipate that these rule changes will unleash a flood of new dissident shareholder actions, they will lower some of the economic and logistical hurdles faced by activist shareholders who are already minded to challenge actions or proposals by management. This may be the case particularly in the already hot area of executive compensation in circumstances (such as changes to a company's stock option plan) where shareholder approval is required.

Recent Judicial Developments Relating to Aboriginal Rights in the Context of Ontario's *Mining Act* and its Reform

By Marc-Alexandre Hudon (Montréal) with Ann Bigué

The Platinex Case

On May 28, 2008, the Ontario Court of Appeal granted an appeal by eight Aboriginal leaders seeking to reduce the sentences that the Ontario Superior Court had imposed on them after finding them in contempt for organizing a protest at a potential platinum mining site. In its submissions to the appeal court, the mining company, Platinex Inc. (Platinex), had acknowledged that the matter "would ultimately be settled only through negotiation, and that no good purpose would be served by keeping the appellants in jail any longer." The original sentences were to be for six months, and the leaders were released after having served 68 days of their sentences.

The Court of Appeal's judgment in *Platinex Inc.* v. *Kitchenuhmaykoosib Inninuwug First Nation* is the most recent episode in a judicial saga involving Platinex, a junior exploration company, and the Kitchenuhmaykoosib Inninuwug First Nation (KI), an Ojibwa/Cree First Nation occupying a reserve on Big Trout Lake in northern Ontario. The initial action was instituted in 2006, following seven years of negotiations between Platinex and KI concerning an exploration program to be conducted on Platinex's unpatented mining claims located on traditional non-reserve KI land. During the negotiations, which occurred in 2001, KI had adopted a moratorium on all mineral activities until proper consultations had taken place.

In July 2006, an interim order was granted by the Ontario Superior Court barring Platinex from engaging in its exploration program for five months, conditional upon KI setting up a consultation committee to draft an agreement that would allow Platinex to conduct its exploration activities. This injunction was later extended by a few months, but the court thereafter refused to renew the injunction. In so doing, the judge acknowledged KI's perspective but observed that no concrete evidence supported KI's assertion that Platinex's exploration program could threaten KI's culture and heritage. The court also praised Platinex for its proposal to act cautiously, with constant consultation and attention to KI concerns. In October 2007, the court issued an order (the Permission Order) allowing Platinex to proceed with the first phase of its exploration program.

In December 2007, the court found eight KI community leaders in contempt of the Permission Order for having prevented Platinex's employees from beginning the first phase of the exploration program. The evidence was that these leaders, along with other community members, had prevented Platinex's drilling staff from entering the village's airport and that Ontario Provincial Police First Nation police officers had threatened them with arrest if they did not leave KI's land.

In March 2008, the court sentenced the eight KI leaders to six months' imprisonment for contempt. Significantly, the court stated that the desire of Aboriginal communities to protect their land, cultural heritage and way of life does not supersede a court order granting a corporation the right to proceed with economic development activities on its land. Among the aggravating factors found by the court was the fact that the eight individuals were community leaders who had used their position of authority to incite other community members to repeatedly and continuously defy the order. In the court's view, such flagrant and repeated defiance warranted a severe prison term.

The Frontenac Case

The judgment sentencing the eight KI leaders in March 2008 followed an earlier decision of the Ontario Superior Court in *Frontenac Ventures Corporation* v. *Ardoch Algonquin First Nation* sentencing two Aboriginal leaders of the Ardoch Algonquin First Nation to six-month prison terms and fines of $15,000 and $25,000, respectively. The court found them in contempt for organizing a peaceful protest at a potential uranium mining site. These sentences were later set aside by the Ontario Court of Appeal on July 7, 2008, at the same time as it released its decision on the *Platinex* appeal. In reversing the lower court's decision, the Court of Appeal stated that the sentencing principles developed by the Supreme Court of Canada for the sentencing of Aboriginal people convicted of criminal offences were "applicable

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when fashioning a sentence for civil or criminal contempt on the part of aboriginal contemnors." In a passage that has potentially far-reaching implications for companies involved in mining activities across Canada, the Court of Appeal emphasized the implications of enforcing injunctive relief based on the *Mining Act* (Ontario) on land subject to Aboriginal land claims. In the Court of Appeal's view, such injunctive proceedings inherently create disadvantage for Aboriginal communities because of the absence of any consideration about Aboriginal land claims or interests in the *Mining Act*. In this context, according to the Court of Appeal, "the use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of Aboriginal law and Aboriginal rights."

Other mitigating factors reviewed by the Court of Appeal included that (i) the Aboriginal leaders were first-time offenders; (ii) the protests were peaceful; and (iii) the community had already purged their contempt by the time the sentence was imposed, having undertaken not to continue their protests and blockade activities. In light of these factors, the Court of Appeal decided that incarceration and substantial fines were inappropriate. In a possible allusion to *Platinex*, the Court of Appeal in *Frontenac* did, however, leave open the possibility for courts to impose incarceration and fines on those found guilty of contempt, including Aboriginal people, in other circumstances:

> That is not to say that incarceration is always out of place in civil contempt cases. In some cases, including potentially this case down the road, incarceration and substantial fines may be necessary. However, it would be wrong to cross this bridge now for these first offenders in a situation that cries out for dedicated negotiation among Ontario, the AAFN and Frontenac with a view to reconciliation of the competing interests.

Indeed, in a Statement of Claim filed on May 8, 2008, Platinex is now claiming $10 million from KI alleging that "as a result of threats, intimidations and breaches of Court orders by the leadership and members of the KI communities, it has not been able to access its Big Trout Lake property since February 2008." Platinex is also claiming $50 million from the Ontario Government alleging that it failed its duty to consult KI and for its failure to warn Platinex of its inability or unwillingness to enforce the rule of law in Platinex's claims. The outcome of these recent claims remains to be seen.

Implications of these Decisions

Albeit from different standpoints, the recent judicial developments in *Platinex* and *Frontenac* may be relevant to the reform of Ontario's *Mining Act*, at least with regard to the inclusion of provisions mandating broader consideration of Aboriginal and treaty rights, and related issues. The Ontario government is committed to modernizing its *Mining Act* and is currently conducting public consultations in this regard.

On August 11, 2008, the Ministry of Northern Development and Mines (MNDM) released a discussion paper titled "Modernizing Ontario's *Mining Act* – Finding a Balance." This document states that the main purpose of the reform is to achieve a balance between economic interests and other interests, especially those of Aboriginal communities. It identifies five critical policy issues that must be taken into consideration in the review of the *Mining Act*. Four of these issues directly address Aboriginal issues: (i) adjustment to the mineral tenure system, including free entry, to assure investment security while taking into account other interests; (ii) consultation and accommodation relating to Aboriginal and treaty rights; (iii) regulatory processes for exploration activities on Crown land, including consultation and accommodation with Aboriginal communities; and (iv) land use planning in Ontario's Far North.

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Regulatory Roundup

Set out below is a list of recent initiatives and decisions of Canadian securities regulatory authorities and courts that we believe would be of interest to mining companies and their public markets advisors. Please contact us if you would like additional information about any of these items.

- The Canadian Securities Administrators (the CSA) have harmonized the form (and filing) requirements for prospectuses through the implementation of National Instrument 41-101 *General Prospectus Requirements*.
- The CSA have released CSA Staff Notice 52-321 *Early Adoption of International Financial Reporting Standards, use of U.S. GAAP and reference to IFRS-IASB*.
- The CSA published for comment a revised version of proposed National Instrument 52-109 *Certification of Disclosure – Issuers' Annual and Interim Filings*. The proposals would provide significantly more onerous obligations for issuers whose securities are listed on the Toronto Stock Exchange or a senior non-Canadian exchange relative to "venture issuers" (i.e., issuers whose securities are not listed on one of those "senior" exchanges).
- The CSA implemented amendments to National Instrument 51-102 *Continuous Disclosure Obligations* so as to permit dissidents to solicit proxies without sending an information circular to shareholders and, in certain circumstances, without the need to even prepare (or file) an information circular.
- Canada's Minister of Finance released draft tax rules that will facilitate the conversion of income trusts into corporations.
- The Supreme Court of Canada overturned the decision of the Québec Court of Appeal in *Hydro Québec* v. *Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro-Québec, section locale 2000*, and in its reasons provided clarification on certain important aspects of an employer's duty to accommodate.
- Of particular importance to capital markets, the Supreme Court of Canada overturned the decision of the Québec Court of Appeal in *BCE Inc.*, thereby allowing the proposed acquisition of BCE Inc. to proceed. The Supreme Court's reasons have not yet been released, but are widely expected to provide guidance to directors of public companies in terms of their duties in the context of proposed acquisition transactions. We will, of course, provide you with detailed analysis in our issue of *Mining Prospects* that first follows the release of the Supreme Court's reasons.

Recent McCarthy Tétrault Mining Engagements

Set out below is a list of selected mining financings, M&A transactions, and other engagements announced or completed during the twelve months ended May 31, 2008 on which we acted.

Financings

Alturas Minerals Corp.	Private placement of units comprising common shares and warrants
American Creek Resources Ltd.	Two non-brokered private placements of units comprising flow-through shares, common shares and warrants
American Creek Resources Ltd.	Private placement of flow-through shares and units comprising common shares and warrants
Aura Silver Resources Inc.	Non-brokered private placement of flow-through units comprising flow-through shares and share purchase warrants.
Avalon Ventures Ltd.	Private placement of flow-through shares and units comprising common shares and warrants

Baffinland Iron Mines Corporation	Private placement of flow-through shares
Baffinland Iron Mines Corporation	Bought deal private placement of common shares and flow-through shares
Baffinland Iron Mines Corporation	Public offering of common shares
Chaarat Gold Holdings Ltd.	Admission to AIM and private placement of ordinary shares
Crew Gold Corporation	Private placement of common shares
Cunico Resources N.V.	Bought deal private placement of ordinary shares in Canada as part of European public offering
First Quantum Minerals Ltd.	Corporate debt financing secured as tradeable securities
First Quantum Minerals Ltd.	Project financing for the Kolwezi tailings project in the Democratic Republic of Congo
Gemfields Resources Plc	Admission to AIM and private placement of ordinary shares
Gold Fields Limited	Staged investments and joint venture option arrangements with Lero Gold Corp. (now Orsu Metals Corporation) for the Taldybulak gold project in Kyrgyzstan
Goldcorp Inc.	Secondary offering of common shares of Silver Wheaton Corp. — the largest bought deal in Canadian history and third-largest mining secondary offering globally
Grizzly Diamonds Ltd.	Private placement of flow-through and non-flow-through units comprising shares and warrants
IAMGOLD Corporation	Credit facility to finance the development of new mines in French Guyana and Africa
Nuinsco Resources Limited	Bought deal private placement of flow-through shares
Oriel Resources Plc	Private placement of ordinary shares
Patrician Diamonds Inc.	Private placement of units comprising common shares and warrants
Rio Tinto Plc	Provision of convertible credit facility to Ivanhoe Mines Ltd. to finance the development of the Oyu Tolgoi copper/gold project in Mongolia
Scorpio Mining Corporation	Bought deal private placement of convertible debt securities
Shear Minerals Ltd.	Private placement of flow-through shares
Shear Minerals Ltd.	Private placement of flow-through shares and units comprising common shares and warrants
Sherritt International Corporation	Project financing for the Ambatovy nickel project in Madagascar — awarded "African Mining Project of the Year" by Euromoney *Project Finance* magazine
Sidex Limited Partnership	Private placement investments in debt and equity securities of selected TSX Venture Exchange-listed companies with exploration properties in the Province of Québec
Sunkar Resources Plc	Admission to AIM and concurrent private placement of shares
Taseko Mines Limited	Bought deal public offering of common shares
Ur-Energy Inc.	Non-brokered private placement of flow-through common shares
U.S. Silver Corporation	Bought deal private placement of units comprising common shares and warrants
Zazu Metals Corporation	Private placement of special warrants (exercisable for common shares)
Zazu Metals Corporation	Initial public offering of units comprising common shares and warrants

Mergers And Acquisitions

Aluminum Corporation of China Ltd. (Chinalco)	Take-over bid for Peru Copper Inc. for $750 million
American Creek Resources Ltd.	Purchase of optional interest in the Treaty Creek project for shares and $5 million in expenditure commitments
Anglo American plc	Acquisition of 50% of the Pebble Project Partnership in Alaska with Northern Dynasty Minerals Limited for commitments to make a staged cash investment of up to US$1.5 billion
Anglo American plc	Acquisition of 100% of the Minas Rio iron ore assets in Brazil for US$5.5 billion through the acquisition of a company spun out by MMX S.A.
Anooraq Resources Ltd.	Acquisition of majority ownership of the Lebowa Platinum Mine and the Ga Phasha, Boikgantsho and Kwanda PGM exploration projects in South Africa from Anglo Platinum Limited for $500 million, together with related equity and debt financings
CDC Group Plc	Sale of 14% of its interest in Platmin Limited for $134 million
Central African Mining & Exploration Company Plc (CAMEC)	Take-over bid for Katanga Mining Limited for $1.8 billion
Committee Bay Resources	Acquisition of Niblack Mining Corp. by plan of arrangement valued at approximately $10 million
Crew Gold Corporation	Purchase of 17.5% minority interest in Nalunaq Gold Mine A/S from Nunaminerals A/S for $4.7 million
Gold Fields Limited	Sale of Venezuelan gold mining assets to Rusoro Mining Ltd. for US$532 million
Gold Fields Limited	Sale of 60% interest in the Essakane gold project to Orezone Resources Inc. for $200 million
European Minerals Corporation	Acquisition of Lero Gold Corp. by plan of arrangement
LionOre International Mining Ltd.	Take-over bid by Xstrata Plc and acquisition by MMC Norilsk Nickel for $6.8 billion
Mantle Resources Inc.	Take-over bid for Ecstall Mining Corporation for $30 million
Niger Uranium Limited	Acquisition of uranium assets in Niger for approximately $20 million
Rio Tinto PLC	Acquisition of 100% of common shares of Alcan Inc. for approximately $38 billion in cash
Shear Minerals Ltd.	Purchase of interest in the Churchill diamond project from BHP Billiton Diamonds Inc. for $4 million
Xstrata Nickel	Sale of Canadian exploration properties to Pure Nickel Inc. for $15 million plus securities, royalty interest and off-take rights

Other Mandates

Anglo American Exploration (Canada) Ltd.	Project to adopt standard documentation in all jurisdictions related to procurement and marketing of the company's technical products
Shear Minerals Ltd.	Joint venture agreements in respect of the company's Afridi Lake property
Teck Cominco Limited	Ongoing strategic and project-specific advice on Canadian Aboriginal-related matters
Ur-Energy Inc.	Ongoing strategic advice regarding permitting issues and Aboriginal groups associated with the Screech Lake uranium exploration project

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