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MINING PROSPECTS

We welcome you to our June issue of *Mining Prospects*, the periodical of our Global Mining Group.

This issue deals with a number of important M&A themes raised by recent Canadian court and securities commission decisions — from directors' duties in situations involving competing stakeholder interests *(BCE)*, to when a publicly listed acquiror's shareholders have the right to vote on an acquisition *(HudBay/Lundin)*, to avoiding possible conflicts of interest involving financial advisers to an M&A transaction *(Rusoro/Gold Reserve)*. Other articles in this issue discuss the introduction at last of special purpose acquisition corporations as a financing vehicle on the TSX, the disclosure of material changes as they relate to mining rights, and the sharing of resource revenue with Aboriginal groups in Canada by mining companies.

The combined impact of the current credit crunch, economic recession and mining cycle are causing mining companies to face challenges both numerous and varied. Management and their advisers must be vigilant and well-prepared for the myriad pitfalls these difficult times can bring, but should also not ignore the potential (and often rapidly evolving) opportunities that can be found in such times.

To this end, we are hearing loud and clear from our clients that now, more than ever, there is no such thing as over-communication – with your shareholders, employees, creditors, suppliers, industry peers, advisors, and even humble editors of mining industry periodicals. We hope we will continue to hear from you with feedback on this publication, suggestions for future topics of interest, or anything else you might wish to discuss with us.

Brian Graves and Gary Litwack (Editors)

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BCE Leveraged Buyout in the Supreme Court of Canada: Clarification of the Duties of Directors in Take-overs and when Stakeholder Interests are in Conflict

By Robert D. Chapman, Frank A. DeLuca, James Farley, Garth M. Girvan, Geoff R. Hall, Robert O. Hansen, Edward P. Kerwin and Benjamin H. Silver (Toronto/Ottawa/Montréal)

For much of 2008, the Canadian legal and business communities were gripped by the saga of the proposed $52-billion leveraged buyout of BCE Inc. by a private equity consortium led by the Ontario Teachers' Pension Plan Board (Teachers').

In March 2008, the Québec Superior Court approved a plan of arrangement under Section 192 of the *Canada Business Corporations Act* (*CBCA*) which was to govern the transaction. In May, the Québec Court of Appeal reversed the trial judge in a somewhat surprising decision that, if upheld, would have had significant implications for Canadian corporate law. In June, the Supreme Court of Canada, considering the case on an accelerated timetable, reversed the Court of Appeal and restored the trial judgment. However, it did so with reasons to follow, leaving the basis of the reversal unclear.

In early December 2008, the underlying transaction came to an end when a solvency opinion that was required under the transaction agreement as a condition precedent to closing could not be obtained. A little over a week later, on December 19, 2008, the Supreme Court issued reasons for judgment explaining the basis for the judgment it had granted in June. The reasons were unanimous and without a specific author, issued in the name of "The Court."

While somewhat anti-climactic in that they relate to a transaction that did not proceed, the Supreme Court's reasons are a welcome clarification of several aspects of Canadian corporate law, including the test for approving a plan of arrangement under Section 192 of the *CBCA*, the test for oppression under Section 241 of the *CBCA*, and the fact that these two tests are separate and distinct. Most importantly, the Supreme Court clarified the duties of boards of directors, particularly in circumstances where the interests of its stakeholders are conflicting.

The Transaction and the Litigation

In April 2007, BCE was put "into play" when Teachers' filed a Schedule 13D report with the U.S. Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This resulted in BCE's board of directors deciding to seek competing acquisition proposals. BCE's board conducted an auction focused on maximizing shareholder value. Three bids, all highly leveraged, were made. The successful bidder was determined in June 2007 to be the consortium led by Teachers'. Its bid resulted in a significant premium to BCE shareholders but required Bell Canada Inc., a wholly-owned subsidiary of BCE, to provide guarantees of approximately $30 billion to support the purchaser's borrowings. These guarantees would result in the loss of investment grade status of Bell Canada's outstanding debentures and a reduction in their trading value.

Certain debentureholders (Debentureholders) attacked the transaction, arguing that the transaction was oppressive and failed to meet the "fair and reasonable" test required for court approval of a *CBCA* plan of arrangement. The trial judge dismissed the claim for oppression on the basis that the legal rights of the Debentureholders were not affected and that any reasonable expectation they may have had that BCE would not implement a leveraged transaction did not adequately form the basis of an oppression action. Having dismissed the oppression claim, the trial judge then determined after considering the competing interests of the shareholders and the Debentureholders, in the context of a process undertaken by BCE, that the arrangement was fair and reasonable, and approved it.

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The Québec Court of Appeal reversed the decision of the trial judge and concluded that BCE had failed to meet its onus for approval of the arrangement by failing to show that the arrangement was fair and reasonable to the Debentureholders. The Court of Appeal accepted the Debentureholders' arguments that certain public statements made by BCE had given rise to a reasonable expectation that the investment grade rating of Bell Canada debentures would be maintained and that BCE had not proven that it had adequately considered those expectations in its process and had not met its duty to consider whether the arrangement could be structured in a way that provided a satisfactory price to the shareholders while avoiding the adverse effect on the Debentureholders.

The Duties of a Board when the Interests of Stakeholders are in Conflict

While the Supreme Court's decision in BCE rested narrowly on its facts, the court did embark upon an important discussion of the duties of directors where the interests of a corporation's stakeholders are in conflict.

The Supreme Court reiterated its holding in *Peoples Department Stores Inc. (Trustee of)* v. *Wise* that directors owe their fiduciary duties to the corporation, not to the corporation's stakeholders or any particular group of stakeholders. Where the interests of stakeholders are in conflict, no one set of interests (such as the interests of shareholders or the interests of creditors) prevails over the others.

The interests of a corporation are not confined to short-term profit or share value. Where a corporation is a going concern, the directors' duties require looking to the long-term interests of the corporation. The list of interests that may be considered by a board in determining the corporation's best interests is long: the interests of shareholders, employees, creditors, consumers, governments and the environment, among others, may be considered.

At the same time, the Supreme Court strongly reaffirmed the business judgment rule. The business judgment rule requires courts to defer not only to the manner in which competing interests are balanced, but also to a board's reasonable judgment as to which interests to take into account.

Application to the Facts of the Case

Applying the foregoing principles to the facts of the case, the Supreme Court held that the trial judge had correctly held that when faced with conflicting interests, directors of a corporation might have no choice but to approve a transaction that, while in the best interests of the corporation, will benefit some groups at the expense of others. In this case, facing a certain take-over bid, BCE's board had acted reasonably in creating a competitive bidding process. With all three bids that were advanced being leveraged bids, there was nothing that BCE could have done to avoid the risk to the trading value of the Bell Canada debentures.

The Supreme Court overturned the Court of Appeal's decision, concluding that the approach of the trial judge and the principles he had applied in his analysis were correct. The Supreme Court held that the Debentureholders had not established that they had a reasonable expectation that BCE would maintain an investment grade rating for the debentures in the context of a buyout so that their trading price would not be negatively impacted. Statements by Bell Canada indicating a commitment to retaining investment grade ratings were accompanied by warnings that negated such expectation. Absent such reasonable expectation, the failure of BCE to maintain the rating was not sufficient to ground an action in oppression. While there was a reasonable expectation that the board would consider the interests of the Debentureholders, the Supreme Court held that that expectation had been fulfilled by BCE's board. Leveraged buyouts are not unusual or unforeseeable. The indentures governing the debentures could have provided for change of control or credit rating covenants but did not do so. The investment and return which the Debentureholders had contracted for remained intact, a decline in trading prices was a foreseeable risk, and the Debentureholders had not contracted against this contingency. Accordingly, the oppression claim of the Debentureholders failed.

As to the fairness of the arrangement itself, the Supreme Court concluded that the focus of the court in approving an arrangement should be on those whose rights are affected by the transaction. Except in "extraordinary circumstances," those rights are limited to legal rights and not economic interests. Having concluded that the effect of the arrangement on the Debentureholders' economic interests did not merit legal consideration in an analysis of whether the transaction was fair and reasonable, the Supreme Court noted that the trial judge did

in fact consider the effect of the arrangement on the economic interests of the Debentureholders and found no error in his conclusion that the arrangement should be approved.

Important Notes

BCE establishes that Canadian corporate law requires a board to look to the long-term best interests of the corporation and consider a broad set of stakeholder interests commensurate with the corporation's duties as a good and responsible corporate citizen — including the interests of shareholders, employees, creditors, consumers, government and the environment — with no one interest prevailing over the others. This stands in contrast to Delaware law under *Revlon v. MAC Andrew & Orbes Holdings Inc.* and the Delaware cases which have come after Revlon. This case law suggests that once a board initiates a sale process, the board must focus solely on the interest of shareholders and must act to maximize the price they achieve for their shares. The theory is that in a sale of a corporation, there is no longer any long-term interest, and a board's obligation becomes that of maximizing the premium to be paid to shareholders for sale of the control block. The Supreme Court, while not explicitly rejecting the *Revlon* doctrine, states clearly that the law in Canada requires a broader focus, even in a change of control context.

Like many Supreme Court decisions, the BCE decision takes a multitude of factors into consideration and then proceeds to balance those considerations without providing the certainty of a bright-line test that is often desirable in a commercial setting. The BCE decision involved a choice by the BCE board from three highly leveraged offers. It will be interesting to see the impact of the BCE decision in situations that might involve an offer from a leveraged buyer, where the alternative is a slightly lower offer from a purchaser choosing to finance its bid in another fashion, and how a board might approach the balancing of interests in that type of situation.

Notwithstanding the lack of a bright-line test in the decision, the Supreme Court strongly vindicates the application of the business judgement rule generally and in circumstances like those in which BCE found itself. Provided that a board is properly informed and follows a fair process in which relevant interests are considered, a court will show deference to the board's reasonable conclusions and will be reluctant to interfere with those conclusions.

It will be interesting to see whether the BCE decision, by requiring boards to consider the long-term best interests of the corporation and a broader set of stakeholders, will give a board more flexibility to consider options in the face of a hostile offer. It will also be interesting to see how this decision is reconciled with the views of the Canadian securities regulators expressed in National *Policy 62-202 Take-over Bids — Defensive Tactics* that shareholders should ultimately decide the fate of the corporation in the context of a take-over and that a board of directors should not frustrate that process.

TSX Overruled – OSC Requires Approval of HudBay Shareholders in Proposed Acquisition of Lundin

By Roger J. Chouinard and Graham P.C. Gow (Toronto)

On January 23, 2009, the Ontario Securities Commission (OSC) exercised its seldom-used statutory power to overturn a decision of the Toronto Stock Exchange (TSX). The OSC issued an order requiring HudBay Minerals Inc. to obtain the approval of the HudBay shareholders prior to proceeding with the issuance of HudBay common shares in connection with the then-proposed acquisition of Lundin Mining Corporation. The TSX's Listing Committee had previously determined that it would not require HudBay to obtain shareholder approval in granting listing approval for the HudBay common shares to be issued to Lundin shareholders as consideration for the acquisition. The OSC released full reasons for its decision on April 28, 2009.

On November 21, 2008, HudBay and Lundin jointly announced a business combination transaction pursuant to which HudBay would acquire all of the outstanding Lundin common shares on the basis of 0.3919 HudBay common shares for each Lundin

common share. The imputed price to be paid by HudBay was $2.05 for each Lundin common share, representing a premium of 103 per cent to Lundin's previous-day closing price of $1.01 and a 32 per cent premium to the 30-day volume weighted average trading price.

The proposed transaction was structured as a plan of arrangement of Lundin under the *Canada Business Corporations Act* that would require approval by Lundin's shareholders (but not HudBay's shareholders). This approval was obtained at a Lundin shareholders' meeting on January 26, 2009. The completion of the proposed transaction would have diluted the existing HudBay shareholders by just over 100 per cent and would have resulted in the existing shareholders of HudBay and Lundin each holding approximately 50 per cent of the combined entity.

The *TSX Company Manual* requires that a listed issuer obtain securityholder approval for the issue of securities as consideration for an acquisition where the number of securities issuable in payment of the purchase price exceeds 25 per cent of the outstanding securities of the listed issuer. However, this requirement does not apply where the listed issuer is acquiring a public company. Where a listed issuer proposes to acquire a public company, the *TSX Company Manual* requires securityholder approval of a transaction if, among other things, in the opinion of the TSX the transaction materially affects control of the listed issuer. The *TSX Company Manual* also provides the TSX with discretion to impose conditions on a transaction, having regard to the effect the transaction may have on the "quality of the marketplace."

In reversing the TSX's decision, the OSC concluded that the "quality of the marketplace" would be significantly undermined by permitting the proposed transaction to proceed without approval of the HudBay shareholders. The factors considered by the OSC included:

- *Level of dilution* — The OSC viewed the 100 per cent dilution as "extreme" and concluded that the transaction was more a "merger of equals" than an acquisition by HudBay of Lundin. The OSC observed that this level of dilution would directly affect the voting, distribution and residual rights of the current HudBay shareholders.
- *Economic impact of the transaction on shareholders of HudBay* — The OSC noted the precipitous 40 per cent decline in the HudBay share price following announcement of the transaction.
- *Board of the merged entity* — The board of HudBay would be substantially reconfigured as a result of the transaction, and the OSC believed that the shareholders of HudBay were being subjected to a "radical change" in board composition without their consent or concurrence.
- *Timing of shareholder votes* — The OSC voiced concern with the timing of the Lundin shareholders' meeting and a HudBay shareholders' meeting that had been requisitioned by HudBay shareholders to replace the HudBay board. The OSC noted that if the transaction had been completed before the requisitioned HudBay shareholders' meeting, the purpose of that meeting would have been frustrated. "That is manifestly unfair to the shareholders of HudBay," the OSC added.
- *Transformational impact of the transaction* — The OSC considered the proposed transaction to be transformational in nature for HudBay due to its significant impact on HudBay's business plan, risk profile, liquidity and other financial measures.

The OSC focused primarily on the fair treatment of the HudBay shareholders and concluded that the HudBay shareholders should be afforded the right to determine (by simple majority approval at a special meeting) whether the proposed transaction should proceed. The OSC's decision goes on to expressly emphasize the OSC's view that the fair treatment of shareholders is a key consideration going to the integrity and quality of Canadian capital markets.

Dealmakers and market participants should take note: the OSC's decision and additional observations may be a signal of the OSC's increasing receptiveness to fairness complaints from activist shareholders.

To address the situation raised by the decision, the TSX, on April 3, 2009, published for comment proposed amendments to the securityholder approval requirements for acquisitions currently contained in the *TSX Company Manual*. Under the proposal, an issuer would be required to obtain shareholder approval for the acquisition of a public company that results in dilution of its existing shareholders by more than 50 per cent. A number of investors have already argued that the TSX has set the threshold for approval far too high. By comparison, a similar requirement

exists under NASDAQ and NYSE rules for acquisitions resulting in dilution over 20 per cent.

Other Important Points for M&A Transactions

The OSC concluded its written reasons for the decision with two significant observations for M&A transactions.

Independence of Financial Advisor in Question

HudBay's financial advisor was retained on fairly standard terms. Among other fees, the financial advisor was entitled to a signing fee when the arrangement agreement was entered into and a much larger success fee payable upon closing of the transaction. The OSC questioned the independence of a financial adviser who delivers a fairness opinion where the financial adviser is entitled to a success fee. The OSC added that "a fairness opinion prepared by a financial adviser who is being paid a signing fee or a success fee does not assist directors comprising a special committee of independent directors in demonstrating the due care they have taken in complying with their fiduciary duties in approving a transaction."

Fairness opinions are generally considered an important element in demonstrating that the board made an informed and careful decision in deciding to approve a transaction. If the "primary" financial adviser to the board is to receive a success fee, as is usually the case, boards may now feel the need to retain a second financial adviser with the sole responsibility to deliver a fairness opinion, for a fixed fee not tied to the success of the transaction.

Forfeit of Voting Rights "as a Matter of Principle"

In connection with the proposed transaction, HudBay purchased a substantial number of Lundin shares (representing 19.9 per cent of Lundin's outstanding shares) directly from Lundin in a private placement. The shares were acquired following the announcement of the proposed transaction but before the meeting of Lundin shareholders to approve the transaction. Under the share subscription agreement, HudBay agreed to vote the shares in favour of the proposed transaction.

The OSC expressed the view that HudBay had a different, and potentially conflicting, interest in the outcome of the vote on the proposed transaction, relative to the other Lundin shareholders. As a result, despite the absence of any regulatory prohibition against HudBay voting its shares in favour of the proposed transaction, the OSC stated that HudBay should not, as a matter of principle, be permitted to vote those shares in favour of the transaction.

Court Stops Hostile Bid Due to Financial Advisor's Conflict of Interest

By Richard Miner (Toronto)

In February 2009, the Ontario Superior Court stopped a hostile bid by Rusoro Mining Ltd. for the shares of Gold Reserve Inc. because Rusoro's financial advisor, Endeavour Financial International Corporation, had a conflict of interest.

Background

Endeavour had acted as Gold Reserve's financial advisor since 2004, advising on potential business transactions and project financing for Gold Reserve's main asset, the Brisas gold and copper project in Venezuela, and making presentations to potential lenders and investors. Gold Reserve paid Endeavour fees of $1.2 million for its services over the four-year period preceding the bid.

In providing these services, Endeavour accessed Gold Reserve's confidential financial, technical and operational information, established a data room for Gold Reserve, and was involved in preparing confidential cash flow models for the Brisas project. Under its financial advisory agreement with Gold Reserve, Endeavour agreed not to disclose Gold Reserve's confidential information and not to use it for Endeavour's own purposes or to Gold Reserve's detriment.

The agreement contained an acknowledgement by Gold Reserve that Endeavour also acted as financial advisor to other mining companies whose interests might conflict with those of Gold Reserve. However, Endeavour agreed that it would not "knowingly

act against the interests of Gold Reserve in a material way" and would inform Gold Reserve of any conflict and then would either act solely for Gold Reserve, agree on another solution, or terminate the agreement.

In April 2007, Rusoro engaged Endeavour as its financial advisor. Key Endeavour employees who worked on Gold Reserve matters, and thus had access to Gold Reserve's confidential information, also worked on the Rusoro retainer. As part of their mandate, these employees provided Rusoro with a valuation opinion on Gold Reserve and advised Rusoro on the proposed bid. After its overtures for a friendly merger transaction were rebuffed by Gold Reserve, Rusoro launched an unsolicited bid on December 15, 2008. By e-mail to Gold Reserve minutes after Rusoro announced the bid, Endeavour purported to terminate its advisory agreement with Gold Reserve.

The Decision

The Ontario Superior Court held that in advising Rusoro in connection with the bid, Endeavour had breached its obligations under its advisory agreement with Gold Reserve not to disclose confidential information or use it to the detriment of Gold Reserve. Even absent the specific prohibitions in the advisory agreement, the court considered that professional advisory relationships give rise to fiduciary duties of loyalty and confidentiality. In the court's view:

> A person in Endeavour's position must avoid conflicting interests and must not act against the interests of the person confiding in him by utilizing confidential information without the informed consent of that person.

The court indirectly sanctioned the use of ethical walls where a conflict exists, stating that "in the absence of special measures such as institutionalized ethical walls," there is a presumption that confidential information will be used to the disadvantage of the provider of the information. Accordingly, in the court's view an advisor in possession of relevant confidential information from a client or former client cannot, in the absence of informed consent and appropriate ethical walls, act against that client in a hostile bid (and a requirement for informed consent from the target would, practically speaking, make it unlikely that an advisor could so act in the context of a hostile bid). As a result, the court granted Gold Reserve's motion for an injunction to stop Rusoro's bid.

Importance of the Decision

Because this was only a decision on a motion for an interim injunction (and therefore was based solely on affidavit evidence), the court did not need to finally decide whether Endeavour in fact had a conflict. This will be the issue in the subsequent trial, in which Gold Reserve will be seeking damages from both Rusoro and Endeavour. In order to grant the injunction, the court only had to be satisfied that there was a serious issue for trial. Nevertheless, the decision represents an important statement of the law on conflicts, as confirmed by a review panel of the court which, in subsequently denying Rusoro's request to appeal the granting of the injunction, stated:

> The motions judge was very much alive to all the issues raised by the moving parties and, in conducting his analysis, he carefully analyzed the facts, then applied well-established principles of law.

While both the rules of professional conduct governing lawyers, and various judicial decisions, have sensitized the legal profession to conflicts, this appears to be the first case to consider the existence and impact of potential conflicts of other advisors in M&A transactions. Accordingly, the case should serve as a warning to other professional advisors in M&A transactions (including financial, accounting and technical advisors) to be alert for, and to ensure they have internal systems to identify, potential conflicts.

If a conflict is identified, the advisor should proceed only after obtaining the informed consent of the parties and implementing appropriate ethical walls. Failure to do so could expose a conflicted advisor to damages. Depending on the circumstances, potential damages could include the expenses incurred by the acquiror in pursuing the failed transaction, the expenses incurred by the target in defending against it, compensating the acquiror for the lost opportunity to complete a transaction, and compensating the target for losses suffered as a result of improper disclosure of its confidential information.

A company retaining professional advisors should ensure that the retainer agreement, in addition to dealing with confidential information, contains the advisor's confirmation that a) it does not have a conflict, and b) if one does arise during the course of the retainer, it will not act contrary to the interests of the company.

Disclosure of Material Changes in the Context of Mining Rights Held by an Issuer

By Xenia Kritsos and Roger R. Taplin (Vancouver)

Public companies are required to inform the market of material changes in their affairs. Issuers listed on the Toronto Stock Exchange (TSX) or the TSX Venture Exchange must also disclose material facts that have a bearing on their business. Determining when a material change has occurred or when the time has come to disclose a material fact can involve difficult judgments by management.

Earlier in 2008, the Ontario Securities Commission (OSC) provided guidance on when the fact of contractual negotiations becomes a material change, in the matter of AiT Advanced Information Technologies Corporation. Recently, the OSC considered whether a mining company should have publicly disclosed that it was experiencing difficulties with a government authority in relation to its mineral tenure.

The Facts

Rex Diamond Mining Corporation (Rex) was listed and trading on the TSX until October 2006. It has mining operations located in Paraguay and a number of African countries, including Sierra Leone.

During the period from January to June 2003, Rex received a series of three warning letters from a department of the Sierra Leone government, which advised that two mining leases relating to its diamond mining operations in Sierra Leone might be cancelled because Rex had not complied with the conditions set out in the leases.

During that period and through November 2003, Rex made its required periodic Management's Discussion and Analysis and Annual Information Form filings, but made no reference to the possibility that the leases were in danger of being cancelled.

On December 15, 2003, Rex became aware of a notice of tender that announced that the Sierra Leone government was seeking tenders with respect to certain mining rights previously held by Rex pursuant to one of the leases.

On February 19, 2004, Market Regulation Services (RS) contacted Rex upon identifying fluctuations in Rex's share price. Counsel for Rex advised RS that he was aware only of a pending private placement, and that he had verified with Rex that there were no other corporate developments.

On March 30, 2004, the Sierra Leone government issued a tender evaluation declaring that a third party had been granted mining rights in an area covered by one of Rex's leases — and stated that Rex's leases had been cancelled in October 2003. Three days later, Rex issued a news release acknowledging that Rex had learned its leases had been cancelled, but did not file a material change report.

In October 2004, RS requested Rex to provide a chronology of events leading up to the news release, and to state when Rex had first become aware that its leases had been cancelled. Rex provided RS with an incomplete chronology that was inconsistent with certain documents, and failed to disclose certain correspondence. RS was ultimately left with the impression that Rex had not become aware of the cancellation of the leases until January 30, 2004. During the subsequent OSC staff investigation, Rex explained its failure to disclose to RS on the basis that since negotiations with the Sierra Leone government were ongoing, that information was not material and did not require disclosure.

The OSC's Decision

The OSC found that a material change in the business, operations or capital of Rex likely occurred when Rex received each of the first and second warning letters. It found that material changes certainly did occur in the business, operations or capital of Rex when Rex received the final warning letter, when Rex became aware of the notice of tender of certain of its mining rights, and when the Sierra Leone government issued the tender evaluation.

The OSC held that Rex should have issued news releases and filed material change reports following the receipt of each of the warning letters. By failing to do so, Rex breached the disclosure requirements in Section 75 of the *Securities Act* (Ontario) and acted contrary to the public interest. The OSC also found that Rex

had acted contrary to the public interest by providing inaccurate and incomplete disclosure regarding its operations in Sierra Leone in a number of its public filings throughout 2003, and by providing RS with an inaccurate and incomplete chronology of events.

The OSC emphasized the following points in its decision:

- A determination of materiality is not always straightforward and there is no "simple bright-line standard or test." The assessment of whether a material change has occurred is a fact-specific exercise.
- The test for materiality is objective and is one of market impact. An investor wants to know the facts that would reasonably be expected to significantly affect the market price or value of securities.
- Abnormal fluctuations in share prices, volume and the number of trades per day demonstrate market impact, and indicate that the market is reacting to something.
- The concept of material change requires an exercise of judgment. Best disclosure practices dictate that when in doubt, an issuer should consider the information to be material and err on the side of public disclosure.
- The value of mining assets is highly relevant in a material change determination. In the mining industry, mineral properties are constantly being assessed to determine whether there is a change in the characterization of the property. From the point of view of investors, new information relating to a mining property bears significantly on the question of that property's value.

SPACs Come to Canada and a Powerful Acquisition Tool is Born

By Jane Askeland and Gary Litwack (Toronto)

The Toronto Stock Exchange (TSX) has adopted new rules governing the listing of special purpose acquisition corporations (SPACs). These rules became effective as of December 19, 2008. In contrast to the TSX listing requirements for a company pursuing a traditional IPO (in which the listing entity is required to have an existing business and prescribed operating profits or prospects), a SPAC is essentially a publicly traded shell company or "blank-cheque company." TSX approval of the listing of SPACs follows similar approvals of the New York Stock Exchange (NYSE) and NASDAQ earlier in 2008. SPACs also trade on AMEX, AIM and Euronext.

The SPAC structure should give seasoned mining industry participants with successful track records an excellent opportunity to establish a clean, publicly listed "war chest" that can be used to make attractive acquisitions, as well as the opportunity to provide investors with a lower risk investment avenue to back these participants.

Comparison of SPACs and Capital Pool Companies

Canadian investors will be familiar with the TSX Venture Exchange's (TSXV) Capital Pool Company (CPC) program. SPACs are similar to CPCs in that both involve a newly created shell company raising money through an IPO and the requirement to use the net proceeds to acquire an operating business within a certain timeframe. If a qualifying acquisition is not completed within the timeframe, the CPC or SPAC is liquidated and funds returned to investors.

CPCs operate in the smaller cap market sector and must raise a minimum of $200,000, but can only raise a maximum of $1.9 million in their IPOs. By contrast, SPACs are required to raise a minimum of $30 million (with no stipulated maximum) in order to list. The fifteen-fold (or more) difference between the IPO size for a CPC and for a SPAC, and the ability of a SPAC to arrange for debt financing and/or additional equity financing contemporaneous with the closing of its qualifying acquisition, results in SPACs having the potential financial wherewithal to make a truly significant acquisition (or a series of acquisitions that are collectively significant). Equity offering structures such as

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special warrants or subscription receipts may be particularly useful for these purposes.

Another key difference between SPACs and CPCs relates to investor protections. While the TSXV must approve a CPC's qualifying acquisition (with shareholder approval only being required in certain circumstances, such as non-arm's-length transactions), a SPAC must go further and give its investors the right to vote on any proposed qualifying acquisition.

The SPAC Process

There are two distinguishable stages in the life of a SPAC: (i) completing its IPO and TSX listing, and (ii) completing a qualifying acquisition.

IPO and TSX Listing

For a SPAC to become public, a prospectus relating to its securities must be cleared with the relevant securities regulators and a listing application cleared with the TSX, followed by a successful public offering of a minimum of $30 million in SPAC securities.

To obtain approval for a SPAC listing, the SPAC structure must include the following investor safeguards: (i) 90 per cent of the gross proceeds of the IPO must be held in escrow; (ii) investors have the right to vote on any proposed acquisition and also have a 'conversion right' under which any investor who votes against a proposed acquisition has the further right to receive a return of his or her pro rata share of the escrowed funds; and (iii) the SPAC must complete a qualifying acquisition within 36 months of its IPO, valued at a minimum of 80 per cent of the IPO proceeds held in trust.

SPAC securities can be either shares or units of securities but must be offered at a minimum price of $2. Units, if offered, must comprise one share and no more than two share purchase warrants. Warrants do not participate in any liquidation event and cannot be exercised until after the SPAC's qualifying acquisition is completed. However, the warrants can be listed and traded prior to a qualifying acquisition.

To ensure alignment of interests, a SPAC's founders are required to make an initial investment in the SPAC prior to the IPO. Instead of fixing a minimum and maximum allowable range, the TSX will use its discretion when determining what is an appropriate level of insider or management investment for any particular SPAC. The founders' equity interest should reflect the credentials of the founders and their financial contribution to the SPAC, and the TSX expects such investment to range between 10 per cent to 20 per cent of the outstanding equity of the SPAC (post IPO completion) but acknowledges that it could be higher or lower. Founders may subscribe for shares, warrants or units of securities but may not transfer any of their founding securities before the completion of a qualifying acquisition, following which the TSX's escrow requirements relating to SPACs, described below, will apply. The TSX also requires that the underwriters of a SPAC's IPO agree to have 50 per cent of their commission held in escrow along with the IPO proceeds and released upon successful completion of the qualifying acquisition. This requirement is unique to the TSX's SPAC rules, and not found in the US.

Qualifying Acquisition

A SPAC has 36 months following its IPO to complete a qualifying acquisition, which must use at least 80 per cent of the IPO proceeds held in trust but may comprise one large acquisition or a series of concurrent smaller acquisitions.

A non-offering prospectus relating to the proposed acquisition must be filed with relevant securities regulators. Following approval of such prospectus, the TSX must give its "pre-clearance" to a proxy circular (in relation to the SPAC shareholder vote on the proposed qualifying acquisition) that also contains prospectus-level disclosure. Majority approval of the SPAC's shareholders is then required followed by approval of a majority of the SPAC's directors who are unrelated to the proposed qualifying acquisition.

If a qualifying acquisition is not completed within the 36-month timeframe following its IPO, the SPAC will have 30 days to distribute the escrowed funds to investors. A SPAC's founders do not participate in any liquidation events in respect of their initial equity investment.

Additional Considerations

Since the SPAC process is not intended for use by entities that should be proceeding through a conventional IPO and listing process, at the time of its IPO a SPAC should not have identified a target for its qualifying acquisition. However, the TSX rules do permit a SPAC to have entered into

confidentiality agreements or non-binding letters of intent with targets in respect of potential acquisitions.

There are also restrictions on a SPAC's ability to undertake further debt or equity financings prior to successful completion of its qualifying acquisition. A SPAC cannot issue any further securities unless it is by way of a rights offering to existing investors, nor can it undertake any debt financing prior to completion of the qualifying acquisition. While a SPAC is permitted to enter into a credit facility, it can only draw upon the facility contemporaneously with, or following, the completion of its qualifying acquisition.

In an effort to further align interests of investors and insiders, the TSX has revised its Escrow Policy Statement to provide that in respect of SPAC insiders, 10 per cent (instead of the usual 25 per cent) of insiders' securities will be released at the completion of the qualifying acquisition, with the remaining escrowed securities released over the following 18 months.

Some Considerations for Stakeholders in the SPAC Process

Investments in SPACs have certain benefits for investors, including flexibility, transparency and significant investor rights. SPACS are flexible because they are publicly traded, and are transparent because they are regulated by relevant securities regulators. Further, investors have a voice, exercised through their vote on proposed qualifying acquisitions. To investors, a SPAC investment has a more limited downside (thanks to both the required conversion feature and liquidation feature, which are described above), should an investor elect to vote against a proposed qualifying acquisition and to exit the SPAC.

Target companies, too, can benefit from doing transactions with SPACs. In the case of a private target company seeking to obtain a TSX listing, doing a qualifying transaction with a SPAC, which by definition is a "clean" shell, should make the process of going public less costly and time-consuming than if the target were to undertake a traditional IPO. On the other hand, the target of a SPAC's proposed qualifying acquisition does face some deal certainty risk, since the transaction can be somewhat more prolonged and more uncertain. Once a deal has been signed between the SPAC and the target, the SPAC must still clear its non-offering prospectus with the relevant securities regulators, and the SPAC would need to ensure that all relevant public company filings were complete and that other required materials, such as financial statements, were prepared for inclusion in the non-offering prospectus. Even after securities regulatory approval, the SPAC must obtain pre-clearance from the TSX for its circular and must obtain the approval of a majority of shareholders and of directors unrelated to the acquisition. Somewhat mitigating the cost and delay that could be associated with the additional 'pre-clearance' requirement, the TSX has advised that it expects proxy circulars to "wrap around" the previously approved non-offering prospectus to reduce time and expense and ensure consistency in disclosure.

A further point for consideration by potential target companies is that customary deal protections usually found in acquisition agreements may not be present in a SPAC deal. A SPAC can walk away from the purchase agreement and a target would have no recourse to the escrowed IPO funds even where a reverse termination fee in favour of the target is included in the purchase agreement. Ultimately, however, since investors in a SPAC's IPO are, in essence, investing in the experience of management, it would seem unlikely that there would be significant risk of shareholders rejecting a management recommended acquisition.

The Bigger Picture

SPACs have been an area of significant listing activity in the US for several years, and one hopes SPAC listings will inject much-needed activity into the TSX. However, the recent economic challenges facing all companies and investors have not left the SPAC market in the US untouched: 2008 saw a dramatic decline in SPAC listings there compared to the 2007 boom.

In the US, since 2003, 161 SPACs have completed an IPO for aggregate gross proceeds of approximately US$22 billion, with an average deal size of US$136 million. Average deal size peaked in 2008 at US$226 million while the number of SPACs listed peaked at 66 in 2007, dropping to 17 in 2008. Of the 161 SPACs that have completed an IPO since 2003, 66 have completed a qualifying acquisition, 37 are still looking for an acquisition, 15 have announced a target, and 43 have been liquidated.[1]

If we see a slow start to SPAC activity in Canada in 2009, it can likely be blamed on the challenging economic climate rather than any corporate or investor disfavour towards SPACs. Only time will tell whether SPAC listings will be welcomed by the market in Canada — however, if the US experience is any indication, they may soon gain acceptance.

1 www.spacanalytics.com

Recent Developments in Resource Revenue Sharing with First Nations

By Tom Isaac, Rob Miller, Kristyn Annis and Sam Adkins (Vancouver/Toronto)

Aboriginal groups across Canada have been advocating for a share of the resource revenue derived from their asserted traditional lands. Historically, the provincial and federal governments have allowed industry and Aboriginal groups to reach their own agreements in respect of projects developed on such lands. In recent times, resource revenue sharing (RRS) has become accepted in principle by a number of governments as another means of addressing Aboriginal concerns, and various RRS proposals are being actively developed.

Introduction to Resource Revenue Sharing

The precise meaning of "resource revenue sharing" is elusive, as its meaning depends on the perspectives of those with an interest in defining it. For example, governments will often have a narrower view of what constitutes "resource revenue" than will other beneficiary stakeholders.

The magnitude of the task in addressing RRS was succinctly summarized in a discussion paper prepared for the Prospectors & Developers Association of Canada in 2006:

> Resource revenue sharing is an extraordinarily complex and contentious issue, one which messily intrudes into a broader set of political, constitutional, jurisdictional, economic, and policy considerations. Fiscal relationships, equalization, federal-provincial relations, resource management and ownership, the so-called "fiscal imbalance," interpretation and renovation of historic treaties, modern land claim and treaty processes, self-government, consultation and accommodation, along with a host of governance, program delivery and capacity issues, are but some of the areas affected by any serious discussion on resource revenue sharing.[2]

Recently, industry and governments have appeared to align their views with Aboriginal groups that RRS, if properly implemented, is in each of such parties' mutual interest. Several jurisdictions in Canada have attempted to address RRS comprehensively. In this article, we address RRS proposals recently announced by the provincial governments of Ontario, Manitoba and British Columbia.

Ontario

Ontario does not yet have a formal RRS policy. However, the Ontario Government recently proposed several policies that are intended to affect how RRS is developed and implemented.

On July 14, 2008, Ontario announced a plan known as the "Far North Planning Initiative" (FNPI), to protect roughly half of northern Ontario's vast tract of Boreal forest. Ontario has committed to protect more than 225,000 square kilometres of northern Boreal lands.

In announcing the FNPI, Ontario made clear its desire to ensure that First Nations and Métis communities share in revenues that stem from permitted development in the protected portions of the Far North, and stated its intention to create a new system to share resource benefits with Aboriginal communities. More particularly, in press releases around the FNPI, Ontario suggested that an RRS policy could include benefits such as: (i) sharing of Crown revenues from natural resources development with Aboriginal communities; (ii) ensuring Aboriginal communities have natural resource allocations; (iii) involving Aboriginal communities in the management of natural resources; and (iv) private sector collaboration and cooperation with Aboriginal communities.

Subsequent to announcing the FNPI, Ontario released its discussion paper, entitled *Modernizing Ontario's Mining Act — Finding a Balance* (2008 Discussion Paper), on August 11, 2008 — concurrently with an announcement that it would review the Ontario *Mining Act* to ensure resource development benefits Aboriginal communities. The 2008 Discussion Paper outlined five principal areas in which the *Mining Act* needed to be reformed. Four pertain directly to Aboriginal issues and include: (i) how to develop a mineral tenure system that takes into account Aboriginal community concerns; (ii) Aboriginal rights and interests related to mining development and how to develop a flexible

2 Cornish, Christopher, *Mapping the Road Ahead: Finding Common Ground On Resource Revenue Sharing*; discussion paper prepared for the Prospectors & Developers Association of Canada, December 2006.

consultation framework; (iii) how to mitigate the impact of early stage exploration activities on Aboriginal communities; and (iv) the mandatory inclusion of new mines in community land use plans (such plans to be developed as part of the FNPI) supported by Aboriginal communities. The 2008 Discussion Paper also served as the basis for consultations with stakeholders and Aboriginal communities on *Mining Act* reforms. The consultations started in September 2008 and the public comment period ended on January 15, 2009.

Although the 2008 Discussion Paper does not directly address RRS, it appears that Ontario intends to use the *Mining Act* reforms to fast track the implementation of an RRS policy before concluding the FNPI, which could take up to 15 years to complete. As stated on the Ministry of Aboriginal Affairs' website, Ontario hopes that "the review will lead to more partnerships between First Nations and mining companies like the Attawapiskat-DeBeers Impact Benefits Agreement."

On the same day the 2008 Discussion Paper was released, the Ontario Mineral Industry Cluster Council (OMICC) presented its recommendations on RRS. The recommendations were derived from the OMICC's 2006 report, entitled *Resource Revenue Sharing Between Government and Aboriginal Communities*. Key recommendations in this OMICC report include:

(i) establishment of a First Nations Trust Fund into which Ontario would contribute $50 million annually, such revenue to come from existing mining tax streams; and

(ii) contribution of one per cent of gross revenue from all new mines to the First Nations Trust Fund.

It remains unclear as to whether Ontario will implement the recommendations put forth by the OMICC, although it should be noted that the OMICC report is the most comprehensive set of public recommendations Ontario has received to date. If Ontario decides to implement the OMICC recommendations, however, it will have to address some key issues, such as:

- Who benefits from a RRS policy – all Aboriginal communities in the province or only those directly affected by mining?
- How is "gross revenues" defined? Does this include the gross revenues of the mining companies or the gross revenues of Ontario? Does it refer to revenue from mineral taxation exclusively, or does it also include indirect benefits such as wages and non-mineral taxes?
- What are the criteria for RRS entitlement, such as a consideration of the impact that mining may have on asserted Aboriginal and treaty rights?

Ontario tabled proposed amendments to the *Mining Act* at the end of April 2009. If the *Mining Act* reforms are eventually to include RRS, Ontario must be clear on the purpose of any proposed RRS policy. For example, is RRS to be compensation for infringement of Aboriginal and treaty rights, revenue for the benefit of Aboriginal people, or both? Clear policy objectives will be essential in setting expectations of both the mineral sector and Aboriginal communities, and will dictate the success of an effective RRS regime in Ontario.

Manitoba

Manitoba has not, to date, initiated a province-wide RRS framework. Rather, the RRS planning they are engaged in is specific to the east side of Lake Winnipeg (East Side). The East Side encompasses approximately one-seventh of the entire land mass of Manitoba.

Manitoba's RRS planning is linked to the broad area planning process it is engaged in with the First Nations and Métis peoples residing on the East Side. This process was launched in July 2000 as the "East Side Planning Initiative" and was subsequently renamed "Wabanong Nakaygum Okimawin." This planning initiative has been implemented with the goal of ensuring the direct involvement of the First Nations in resource planning, resource allocations and sustainable development of the East Side.

On April 3, 2007, Manitoba and certain East Side First Nations entered into the Wabanong Nakaygum Okimawin Council of Chiefs Accord. In signing this Accord, the parties have agreed to work together to implement the recommendations contained in the status report compiled and published by the East Side Planning Initiative, *Promises to Keep*. This publication made a recommendation that an RRS framework be developed for the East Side in respect of resource removal from traditional lands. It also stated that agreements for land use decisions should include RRS provisions.

Manitoba and the East Side First Nations have not yet published the specifics of the RRS model they plan to employ.

British Columbia

On October 23, 2008, British Columbia announced that it had authorized its provincial negotiators to include RRS with First Nations on new mining projects.

British Columbia has issued few details regarding its model of RRS. What appears to be evident is that the BC model is specific to each new mining project, with the process for RRS decided on a case-by-case basis. There is no set threshold for the amount of revenue to be shared, and no definition of what specifically constitutes "revenue." Factors that British Columbia will consider in determining the amount of revenue to be shared will include the size of the mine, the size of the First Nation, and the economic needs of both the First Nation and the area as a whole. It appears that the revenue to be shared will be from mineral tax revenue collected by British Columbia.

Resolving RRS specifics on a project-by-project basis will allow British Columbia negotiators the flexibility to avoid many of the perceived problems commonly associated with RRS when applied broadly without thought to project specifics. Of course, the real test of the British Columbia proposal will occur with the first new mining project to undergo RRS negotiations.

Certainty

The various provincial governments' adoption of RRS policies and models in relation to Aboriginal peoples signals their desire for a greater level of certainty with respect to resource development and other projects. From the perspective of mining companies seeking to develop projects, however, it remains unclear how RRS will factor into broader issues of consultation and accommodation typically associated with such projects — and how RRS will actually lead to greater certainty for project proponents. For example, the current formulations of RRS policies do not address key issues such as whether the acceptance of RRS by a First Nation will constitute recognition of the sufficiency of the Crown's consultation efforts or whether it is simply a component of the overall consultation process. Additionally, it is unclear how RRS policies will engage with those procedural aspects of the Crown's duty to consult, which are typically delegated to project proponents.

The inclusion of RRS policies and models may ultimately provide greater certainty regarding the consultation and accommodation necessary for approving projects. Nevertheless, the details and mechanics of such policies will be key to understanding the impact that RRS will have on the expectations of First Nations and, ultimately, the level of certainty created for developers of mining projects.

Regulatory Roundup

Listed below are recent initiatives and decisions of Canadian securities regulatory authorities (and one from the U.S. Securities and Exchange Commission) and Canadian courts that we believe will 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.

Decisions of Courts and OSC in M&A Cases

- The Supreme Court of Canada issued its detailed reasons for overturning the decision of the Québec Court of Appeal in *BCE Inc.* Please see the article discussing the Supreme Court's reasons in this issue of *Mining Prospects*.
- The Ontario Securities Commission (OSC) overturned a decision of the Toronto Stock Exchange (TSX), which had previously granted approval for HudBay Minerals Inc. to acquire Lundin Mining Corporation where the purchase price was to be paid through the issuance of a number of shares that would have exceeded 100 per cent of the then currently outstanding shares of HudBay. The result of the OSC's decision was to require HudBay to seek shareholder approval for the proposed acquisition (this approval was not ultimately obtained). In addition to the implications of this decision on the TSX's approach to significant share issuances for a TSX-listed issuer to acquire another public company (proposed changes to the *TSX Company Manual* in this regard are described below under "Canadian Stock Exchanges"), the detailed reasons of the OSC's panel included concerns with the practice of providing shareholders with a fairness opinion prepared by a firm whose compensation may be tied to the success of the proposed transaction. Please see the article discussing the OSC's decision in this issue of *Mining Prospects.*

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- The Ontario Superior Court issued an interim injunction to stop a hostile take-over bid by Rusoro Mining Ltd. for the shares of Gold Reserve Inc. because Rusoro's financial advisor had a conflict of interest (it had previously acted as financial advisor to Gold Reserve). This appears to be the first case in Canada to consider the existence and impact of potential conflicts of advisors (other than lawyers) in M&A transactions. Please see the article discussing the court's decision in this issue of *Mining Prospects.*
- The OSC denied an application by Pala Investments Holdings Limited (Pala) to cease trade two shareholder rights plans implemented by NEO Material Technologies Inc. (NEO). The first plan had been previously approved by NEO's shareholders. The second was a "tactical" plan adopted by NEO's board in response to a partial bid launched by Pala, and specifically prohibited partial bids such as Pala's. Prior to the expiry of Pala's bid, NEO's shareholders, other than Pala, overwhelmingly approved the second plan at a shareholder meeting. After such shareholder approval, the OSC denied Pala's requested relief. As of the time of printing, full reasons for the OSC's decision have yet to be released. The OSC has indicated that its reasons will expand upon the considerations it will apply when reviewing cease trade requests in respect of such plans.

Corporate Governance

- The Canadian Securities Administrators (CSA) have proposed changes to National Policy 58-201 *Corporate Governance Principles*, National Instrument 58-101 *Disclosure of Corporate Governance Practices*, and National Instrument 52-110 *Audit Committees.* These changes are designed to provide for a regulatory approach that is more principles-based and broader in scope. The specific disclosure requirements would be replaced with more general requirements, and the determination of independence (for purposes of determining which directors are eligible to serve as members of an audit committee) would be more principles-based. These changes could result in more discretion for board members in respect of certain fundamental matters of corporate governance.
- The U.S. Securities and Exchange Commission has proposed rule amendments that would allow shareholders meeting certain thresholds (including holding between one per cent and five per cent of the outstanding voting securities of an issuer, depending on the circumstances) to have their nominee for election as a director included in the issuer's proxy materials.

Canadian Stock Exchanges

- The TSX published a notice providing guidance on amendments to shareholder rights plans adopted after a take-over bid has been announced or initiated. Among the items in the notice, the TSX reminds issuers that they must obtain TSX approval for a proposed amendment, and that in cases where a plan amendment is reasonably perceived to have been proposed in response to a take-over bid, the TSX will treat the amendment as a new plan.
- The TSX published proposed changes to its *Company Manual* that would require shareholder approval for issuances of shares in payment of the purchase price for an acquisition of another reporting issuer if the number of shares would exceed 50 per cent of the issuer's then currently outstanding shares, on a non-diluted basis. The *TSX Company Manual* currently provides an exemption from shareholder approval for issuances of shares (no matter the number) to acquire a "public company," so the TSX is proposing to narrow this exemption to cap the number of shares (as a percentage of the outstanding shares on a non-diluted basis) that can be so issued without shareholder approval. The existing exemption has been brought under scrutiny in a number of recent transactions, including most recently the proposed acquisition by HudBay Minerals Inc. of Lundin Mining Corporation (as described above).
- The TSX has amended its *Company Manual* to provide for the listing of special purpose acquisition companies (SPACs). This issue of *Mining Prospects* includes a detailed discussion of the TSX's rules related to SPACs, which are quite similar to capital pool companies on the TSX Venture Exchange, but have significantly higher market capitalization. SPACs have been permitted for some time in the United States, and have served as significant acquisition vehicles in the United States.
- The TSX issued a notice of temporary relief relating to the remedial review process that extends the maximum period an issuer has to remedy deficiencies that trigger a delisting review from 120 to 210 days. This relief will continue until September 30, 2009. The TSX also reminded issuers of the

potential to issue securities under the financial hardship exemption of the *TSX Company Manual*. This exemption allows issuers who establish that they are in serious financial difficulty to proceed with offerings of listed securities in excess of otherwise applicable maximum percentages, and below the otherwise applicable maximum permitted discount to market price, without the need for shareholder approval if they can demonstrate significant benefit in alleviating the financial hardship. The TSX has also provided further guidance on what will be required in order to rely on the exemption.

Canadian Securities Administrators

- The CSA has launched a project to review National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (NI 43-101). The project is being led by the British Columbia Securities Commission, and has been initiated in response to industry and regulatory concerns that have developed since the 2001 implementation of NI 43-101. The CSA has indicated that potential areas for consideration include: reducing the regulatory burden of consents of qualified persons (QPs), reducing the QPs' liability and responsibility for issuer disclosure, reassessing technical report triggers, creating broader and more flexible rules for disclosing previous resource/reserve estimates, fixing perceived disclosure irregularities, introducing a separate form of technical report for advanced mineral projects, and updating accepted foreign professional associations.
- The CSA adopted new expanded requirements for executive compensation disclosure, through changes to National Instrument 51-102 *Continuous Disclosure Obligations*. Among the changes is the introduction of a requirement to include a discussion of: the objectives of an issuer's compensation program, what the compensation is designed to reward, the elements of compensation packages provided, the rationale for such elements, and how the elements of the compensation package fit into the issuer's overall compensation objectives.
- The *Derivatives Act* (Québec) has been proclaimed in force. This Act is the first comprehensive stand-alone derivatives legislation to be adopted in Canada, and regulates exchange-traded and over-the-counter derivatives. It is expected that this Act will serve as a template in the effort to provide for uniform derivatives legislation across Canada.

Recent McCarthy Tétrault Mining Engagements

Set out below is a list of selected mining financings, M&A transactions and other engagements announced or completed between January 1, 2008 and March 31, 2009 in which McCarthy Tétrault was involved.

Financings

Atlas Precious Metals Inc.	Private placement of subscription receipts exchangeable for units comprising common shares and warrants (C$15 million)
Aura Silver Resources Inc.	Non-brokered private placement of flow-through common shares and common share purchase warrants (C$500,000)
Baffinland Iron Mines Corporation	Public offering of common shares (C$193 million)
Baffinland Iron Mines Corporation	Private placement of flow-through shares (C$20 million)
Canadian Royalties Inc.	Private placement of convertible senior unsecured debentures (C$137.5 million)
Centenario Copper Corporation	Private placement of convertible debentures (C$12.5 million)
Centenario Copper Corporation	Project financing for the Franke copper project in Chile (US$40 million)
Crew Gold Corporation	Private placement of common shares (US$63 million)
Crew Gold Corporation	Rights offering of common shares (US$20 million)

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European Nickel Plc	Private placement of ordinary shares (£4.3 million)
First Quantum Minerals Ltd.	Corporate debt financing secured by tradeable securities (C$250 million)
First Quantum Minerals Ltd.	Project financing for the Kolwezi tailings project in the Democratic Republic of Congo (US$400 million)
First Quantum Minerals Ltd.	Public offering of common shares (C$345 million)
First Quantum Minerals Ltd.	Refinancing of corporate debt facility secured by tradeable and other securities (C$250 million)
Gemfields Resources Plc	Admission to AIM and private placement of ordinary shares (£27.5 million)
Goldcorp Inc.	Secondary offering of common shares of Silver Wheaton Corp. (C$1.566 billion) – the largest bought deal in Canadian history and the third largest mining secondary offering globally
IAMGOLD Corporation	Revolving credit facility to finance corporate activities and acquisitions (US$140 million)
Mavrix Explore 2008-I FT Limited Partnership	Public offering of limited partnership units (C$32 million)
Mavrix Explore 2008-II FT Limited Partnership	Public offering of limited partnership units (C$12.5 million)
McWatters Mining Inc.	Private placement of common shares to International Royalty Corporation (US$160 million)
Metanor Resources Inc.	Private placements of flow-through common shares (C$7.0 million)
Osisko Exploration Ltd. (renamed Osisko Mining Corporation)	Private placement of unsecured convertible debt and warrants (C$20 million)
Osisko Mining Corporation	Lease financing from Caterpillar Financial Services Limited for heavy equipment for the Malartic gold project (US$83 million)
Scorpio Mining Corporation	Bought deal private placement of unsecured subordinated convertible debentures (C$20 million)
Sherritt International Corporation	Project financing for the Ambatovy nickel project in Madagascar (US$3.3 billion) — Awarded "African Mining Project of the Year" by Euromoney's *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 Quebec
Sunkar Resources Plc	Admission to AIM and concurrent private placement of ordinary shares (£33.6 million)
Taseko Mines Limited	Public offering of common shares (C$25 million)
Ur-Energy Inc.	Non-brokered private placement of flow-through common shares (C$2.75 million)

Mergers And Acquisitions

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.
Anglo American plc	Sale of a 40% interest in a Chilean company, Minera Santa Rosa S.C.M., to Kinross Gold Corporation for US$140 million
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 C$500 million, together with related equity and debt financings

Boart Longyear, Limited	Acquisition of Britton Bros. Diamond Drilling, a provider of exploration drilling services
Brilliant Mining Corp.	Sale of its 25% joint venture interest in the Lanfranchi nickel mine to Panoramic Resources Ltd.
CDC Group Plc	Sale of 14% of its interest in Platmin Limited for C$134 million
Committee Bay Resources	Acquisition of Niblack Mining Corp. by plan of arrangement valued at approximately C$10 million
Companhia Vale do Rio Doce	Acquisition of 50% interest in the assets of TEAL Exploration & Mining Incorporated for C$81 million, and related acquisition by African Rainbow Minerals Limited of all of the shares of TEAL by plan of arrangement
European Minerals Corporation	Acquisition of Lero Gold Corp. by plan of arrangement to form Orsu Metals Corporation with a market capitalization of US$463 million
Forsys Metals Corp.	Proposed C$579-million acquisition by George Forrest International Afrique S.P.R.L. by plan of arrangement
Genco Resources Ltd.	Proxy contest for control of board of directors
Gold Fields Limited	Joint venture with Orsu Metals Corporation for the development of the Talas licence area in northwest Kyrgyzstan
Major Drilling Group International Inc.	Acquisition of Forage à Diamant Benoit Limitée for $21 million
Mansfield Minerals Inc.	Plan of arrangement and spin-off of Pachamama Resources Inc.
Quadra Mining Ltd.	Acquisition of Centenario Copper Corporation by plan of arrangement for C$57 million in Quadra shares
Richmont Mines Inc.	Acquisition of Patricia Mining Corp. by plan of arrangement for C$17 million in cash and Richmont shares
Rockwell Diamonds Inc.	Defence of hostile take-over bid by Pala Investments Holdings Limited
Royal Gold, Inc.	Acquisition of royalty portfolio from Barrick Gold Corporation for US$181.5 million
Severstal Resources	Acquisition of PBS Coals Corporation for US$1.3 billion
SGS Canada Inc.	Acquisition of Geostat Systems International Inc.
SGS Canada Inc.	Acquisition of Canadian Environmental and Metallurgical Inc.
WGI Heavy Minerals Inc.	Sale of Transworld Garnet (India) Ltd. to V.V. Mineral for US$19.5 million.
WGI Heavy Minerals Inc.	Defence of proxy contest for control of board of directors
Xstrata Zinc Canada	Sale of New Brunswick mineral properties to Kria Resources Inc. for $20 million in cash and shares

Other Mandates

Anglo American Exploration (Canada) Ltd.	Standardization of documentation in all jurisdictions related to procurement and marketing of technical products
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

Global Mining Group Key Contacts

Vancouver

Richard Balfour	604-643-7915	rbalfour@mccarthy.ca
Cameron Belsher	604-643-7985	cbelsher@mccarthy.ca
Tom Isaac	604-643-5987	tisaac@mccarthy.ca
Tony Knox	604-643-7916	tknox@mccarthy.ca
Roger Taplin	604-643-5922	rtaplin@mccarthy.ca
Michael Urbani	604-643-7189	murbani@mccarthy.ca

Calgary

Owen Johnson	403-260-3655	ojohnson@mccarthy.ca
Debra Poon	403-260-3743	dpoon@mccarthy.ca

Toronto

Ian Arellano	416-601-7520	iarellan@mccarthy.ca
Garth Girvan	416-601-7574	ggirvan@mccarthy.ca
Graham Gow	416-601-7677	ggow@mccarthy.ca
Brian Graves	416-601-8153	bgraves@mccarthy.ca
Gary Litwack	416-601-7591	glitwack@mccarthy.ca
Richard Miner (Head of Global Mining)	416-601-7910	rminer@mccarthy.ca

Ottawa

Virginia Schweitzer	613-238-2174	vschweitzer@mccarthy.ca

Montréal

Daniel Bénay	514-397-4168	dbenay@mccarthy.ca
George Maziotis	514-397-7810	gmaziotis@mccarthy.ca
Benjamin Silver	514-397-4154	bsilver@mccarthy.ca

Québec

Pierre Boivin	418-521-3012	piboivin@mccarthy.ca

London, UK

Robert Brant	+44 20 7 489 5701	rbrant@mccarthy.ca
Mark Frewin	+44 20 7 489 5714	mfrewin@mccarthy.ca

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