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The International Comparative Legal Guide to:

# Mining Law 2015

**2nd Edition**

A practical cross-border insight into mining law

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# Canada

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## 1 Relevant Authorities and Legislation

### 1.1 What regulates mining law?

Canada is a constitutional monarchy, a parliamentary democracy and a federation comprised of ten provinces and three territories. Canada's judiciary is independent of the legislative and executive branches of government. Responsibilities and functions under this democratic structure are distributed through a federal system of parliamentary government whereby the federal or central government shares governing responsibilities and functions with the provincial and territorial governments pursuant to the division of powers under *The Constitution Act, 1867* (see question 12.1). The Prime Minister, elected by the public, is the head of Government in Canada.

Certain areas within the federal government's jurisdiction may affect a mining project; for example: aboriginal rights; trade and commerce; railways; nuclear energy; and environmental matters that involve matters of federal jurisdiction, such as fisheries. However, most of the areas which will affect a mining project are within the provincial governments' jurisdiction.

### 1.2 Which Government body/ies administer the mining industry?

Pursuant to the division of powers under *The Constitution Act, 1867*, both the federal government and the provincial or territorial governments regulate mining activity in Canada (see question 12.1). Exploration, development and extraction of mineral resources, and the construction, management, reclamation and closure of mine sites are all within the jurisdiction of the provinces of Canada, the Yukon and the Northwest Territories (with some exceptions). In Nunavut and certain areas of the Northwest Territories, public lands and natural resources are governed and administered by the federal government. Other than Nunavut, each province and territory has its own mining legislation and other than the Northwest Territories and Nunavut, each province and territory has its own mineral tenure system. The provinces and territories own the majority of the mineral rights in Canada, though mineral rights may also be held by private entities, by Aboriginal groups and by the federal government. In Nunavut, mineral rights are owned by the federal government, by Aboriginal groups or are held by private entities.

Federal government involvement in the regulation of mining operations is limited to those undertakings that fall within federal jurisdiction. These specific undertakings include uranium in the context of the nuclear fuel cycle (i.e., from exploration through to the final disposal of reactor and mine waste), mineral activities related to federal Crown corporations, and mineral activities on federal lands and in offshore areas. The manufacture, sale, use, storage and transportation of explosives used in exploration and mining also all fall within federal jurisdiction. These are regulated under the *Explosives Act* (Canada). Federal jurisdiction also covers the export, import and transit across Canada of rough diamonds, which is regulated under the *Export and Import of Rough Diamonds Act*.

Any mining disclosure (whether oral or written) made available to the public in Canada is governed by National Instrument 43 101, Standards for Disclosure in Mineral Projects. This instrument was developed by the Canadian Securities Administrators and is administered by the relevant provincial and territorial securities commissions.

### 1.3 Describe any other sources of law affecting the mining industry.

The areas of contract law and tort law are generally regulated by the provinces pursuant to their "property and civil rights" powers delineated under *The Constitution Act*. These bodies of law are mostly "common law" (i.e., "judge-made" law, rather than law created under legislation by Parliament or legislatures). Common law can be superseded or changed by subsequent legislation.

Québec, unlike the other provinces, is governed by civil law. Civil law is a codified law that is written into statutes (ex. Civil Code of Québec) which are then strictly interpreted by the courts.

## 2 Mechanics of Acquisition of Rights

### 2.1 What rights are required to conduct reconnaissance?

Reconnaissance right requirements in Canada vary by jurisdiction. In the Northwest Territories, Nunavut, British Columbia, Manitoba, Ontario, Québec, New Brunswick and Nova Scotia, both individuals and companies are required to obtain a prospector's licence from the applicable provincial or territorial government in order to engage in prospecting for minerals, subject to certain exceptions.

Prospector's licences (or their equivalent) can be obtained in the majority of jurisdictions by contacting the applicable provincial or territorial governmental authority, completing the requisite form and paying a small fee. In most cases, prospector's licences expire

after a period of time (for example, one year in British Columbia), but can be renewed.

Prospector's licence requirements differ from jurisdiction to jurisdiction. In general, the government does not have discretion to refuse to issue a licence; prospector's licences are granted automatically if the applicant meets the statutory criteria. However, it should be noted, a prospector's licence can be cancelled or suspended for a contravention of applicable mining legislation.

In the Northwest Territories and Nunavut, a prospector may also obtain a "prospecting permit", which grants the holder exclusive rights to explore and have mineral claims recorded within the assigned boundaries of a given area for a specified period of time. Similarly, in Saskatchewan, holders of permits issued by the Minister of Environment are granted the exclusive right to explore the lands in question and subsequently can convert the permit into a mineral claim.

Reconnaissance right requirements are less stringent in the Yukon, Alberta, Saskatchewan, Prince Edward Island, and Newfoundland and Labrador, as one can conduct prospecting activities without a licence.

### 2.2 What rights are required to conduct exploration?

In Canada, any significant exploration by a prospector will require that prospector to hold the mineral rights to the area of interest. Mineral rights are obtained by "staking" a mineral claim, or "licence" or "permit" in some jurisdictions. The permitted methods for staking a claim vary from jurisdiction to jurisdiction, and include physically staking a claim on the ground, on a map or through an online computer registration system. Applicable fees and documents are often required to complete the staking and recordation process and in some jurisdictions (for example, the Yukon), there may be a requirement to notify or engage with Aboriginal groups prior to recordation.

The provinces and the Yukon each have their own mineral tenure system. The Northwest Territories utilise a mineral titles system administered by the federal government with respect to Crown lands, and a mineral titles system administered by the territorial government with respect to territorial lands. Nunavut (other than Inuit-owned lands) utilises a mineral titles system administered by the federal government.

With respect to federally owned lands within the provinces, the federal *Regulations Respecting the Leasing of Mineral Rights on Certain Public Lands* regulates the issuance of exploration and mining rights (in the form of a lease). The federal regulations differ from the provincial systems in that they provide for a competitive bidding process for mineral claims.

In order to retain a mineral claim, prescribed amounts of work must be conducted thereon. In addition to exploration, an "assessment report" describing the exploration and its costs must be filed each year with the relevant mining recorder. If the prescribed exploration costs are not incurred, most jurisdictions permit a claim holder to pay an amount of money *in lieu* of incurring exploration costs. If the assessment report is not filed or if money is not paid *in lieu* the claim will be forfeited by the holder.

The duration of a claim will differ from jurisdiction to jurisdiction. In some jurisdictions (such as British Columbia), a mineral claim may be renewed indefinitely. In other jurisdictions, a mineral claim may only be held for a limited period of time. For example, in the Northwest Territories and Nunavut, a mineral claim may be held for a maximum of 10 years and after such time, it will expire, unless it has been converted into a lease.

In general, a mineral claim or licence only entitles the holder to the right to conduct exploration and not any additional mining operations, subject to certain exceptions. The Yukon is an exception to this general proposition.

A mineral claim holder will generally have rights of access to explore the claim; however, if the surface is privately owned, notice to the surface owner will usually be required. The legislation in most provinces and territories provides for some form of tribunal or other dispute resolution mechanism to resolve disputes between the holders of mineral claims and surface rights owners (see question 7.2). If there are parties who hold other rights to the land, notice to such parties may also be required.

The above describes the situation where minerals are held by the applicable government. However, minerals may also be held by private entities and originate from either Crown grants or patents or freehold tenures that were issued as part and parcel of another type of grant, such as historic railway grants. The owner of such privately held minerals is entitled to conduct reconnaissance and exploration activities and develop those minerals, provided that he or she obtains the necessary surface access (in cases where the surface is separately held).

In some cases, Aboriginal groups may hold the surface rights and/or mineral rights, in which case it is necessary to negotiate with the applicable Aboriginal group the terms on which one can access the lands and conduct exploration activities thereon. Surface access may take the form of a licence or exploration lease and exploration activities may be governed by an exploration agreement.

### 2.3 What rights are required to conduct mining?

Generally, mineral claims must be replaced by mining leases prior to commencing mining activities, the Yukon being an exception. A mining lease is a longer term and more secure form of tenure than a mineral claim.

Mining leases permit full exploitation of the resource (subject to obtaining other required permits and authorisations for mining activities) and, depending on the jurisdiction, generally have a term of ten to thirty years and provide that rent is payable annually to the government that issued the lease. Mining leases are renewable for further periods, provided annual rent is paid and the terms and conditions of the lease are complied with.

The same comment as set forth above regarding privately held minerals is applicable to mining activities.

A mineral operator must acquire a government permit approving the proposed mining project. For a major mining operation the mineral operator will be required to submit a detailed mining plan and reclamation plan and may also be required to submit an environmental assessment (see question 8.1).

Where Aboriginal groups hold the surface rights and/or mineral rights, land tenure may take the form of a lease and the right to develop the minerals may take the form of a production lease. The Aboriginal group and mining company will frequently negotiate another agreement in parallel with these agreements: an impact benefit agreement. This agreement offers a negotiated means to mitigate detrimental impacts of the project and to provide economic benefits for the Aboriginal group and its members. It provides the mining company's social licence to operate.

### 2.4 Are different procedures applicable to different minerals?

Generally speaking, there are different sets of rules depending on the type of substances being mined. The rules governing hard rock

minerals (including precious metals), placer minerals, coal and industrial minerals are often set out in different legislation.

The federal *Export and Import of Rough Diamonds Act* provides for controls on the export, import or transit of rough diamonds across Canada, and for a certification scheme for the export of rough diamonds, established to meet Canada's obligations under the Kimberley Process adopted by the United Nations General Assembly in 2000 (see question 1.2).

The regulation of uranium and thorium includes additional rules with respect to their production, refinement and treatment. These rules are within federal jurisdiction for purposes of national security and to fulfil Canada's international obligations in respect of such minerals.

### 2.5 Are different procedures applicable to natural oil and gas?

In Canada, oil and gas licences or leases, which provide the holder with the right to produce oil and gas, are issued by the provinces and territories (and the federal government, with respect to Nunavut) through a competitive bidding process. This differs from the first-come, first-served basis on which mineral rights are obtained.

## 3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

### 3.1 Are there special rules for foreign applicants?

If an acquisition of an operating Canadian mining business exceeds certain financial thresholds, it will be subject to government review under the *Investment Canada Act* (ICA). For 2014, the threshold for review for investors or vendors, other than Canadians, residing within WTO member countries is 354 million Canadian dollars. The threshold for review is much lower for investors or vendors residing in non-WTO member countries (5 million Canadian dollars for direct investments and 50 million Canadian dollars for indirect transactions). In general, a proposed transaction that meets the review threshold cannot be completed until the federal Minister of Industry has made a determination that the proposed transaction is likely to be of net benefit to Canada. This ministerial review requirement does not apply to acquisitions of exploration properties or non-producing mines. In addition, the Canadian government has reserved the right to review any transaction if it considers that the investment could be injurious to national security.

There are special rules applicable to uranium mining. Federal government policy requires a minimum of 51 per cent Canadian ownership in uranium mining properties which are at the first stage of production, with exemptions from the policy if the project is *de facto* Canadian controlled or if Canadian partners cannot be found. Uranium mining properties at the exploration stage do not require Canadian ownership.

### 3.2 Are there any change of control restrictions applicable?

The "net benefit review" and "national security review" rules discussed in question 3.1 apply in all instances where a non-Canadian acquires control, directly or indirectly, of a Canadian business.

### 3.3 Are there requirements for ownership by indigenous persons or entities?

Please see question 9.1 regarding aboriginal and treaty rights of the Aboriginal peoples of Canada.

### 3.4 Does the State have free carry rights or options to acquire shareholdings?

No, it does not.

### 3.5 Are there restrictions on the nature of a legal entity holding rights?

Individuals and corporations are generally entitled to hold mining rights. In some jurisdictions however, such as the Northwest Territories and Nunavut, partnerships and limited partnerships are not permitted to acquire mineral claims or mining leases in their name.

## 4 Processing and Beneficiation

### 4.1 Are there special regulatory provisions relating to processing and further beneficiation of mined minerals?

Mineral processing and further beneficiation will generally be subject to the same legislative regimes that apply to mineral exploration and mineral extraction, as the provincial, territorial and federal statutes regulate all stages of the mining process. If mineral processing will be undertaken at the mine site, it will have been approved through the mine permit application and the environmental assessment process, where applicable.

The majority of jurisdictions do not require mineral processing to occur within the province or territory of extraction. However, Nova Scotia, New Brunswick and Newfoundland and Labrador are exceptions to that general proposition, unless an exemption is obtained from the appropriate Minister. The Ontario *Mining Act* provides that ores and minerals extracted in that province must be treated and refined in Canada.

Other than as noted above, there is no general prohibition on the export of un-beneficiated minerals. However, there are mineral specific exceptions. Pursuant to the *Nuclear Non-Proliferation Import and Export Control Regulations*, uranium may not be exported unless the Canadian Nuclear Safety Commission grants a licence. Similarly, diamonds may not be exported unless they have been issued a Kimberley Process Certificate and the transaction has been reported to the Federal Minister of Natural Resources (see question 1.2).

### 4.2 Are there restrictions on the export of minerals?

Canada is a party to a number of international agreements relating to wastes and recyclable materials, pursuant to which it has various obligations on trans-boundary movements of hazardous wastes and hazardous recyclable materials. In addition to Canada's international obligations, the *Export and Import of Rough Diamonds Act* restricts the export, import and transit across Canada of rough diamonds.

## 5 Transfer and Encumbrance

### 5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

In general, prospector's licences are not transferable.

Mineral claims are transferable, though the transfer is often subject to provincial, territorial, and federal legislative requirements. A general

precondition to the transfer of a mineral claim is that it be in writing and executed by the holder of the claim. Several jurisdictions are more stringent and require the use of a prescribed form to validate a transfer and in Nova Scotia, the transfer of a mineral claim is also contingent upon the consent of the Minister of Natural Resources. Transfers of mineral claims in British Columbia are completed by the transferor and transferee through the online mineral title system.

Mining leases are generally transferable. The transferability of the lease will be governed by the terms of the lease in question and applicable legislation. A common requirement is that the transfer agreement be in writing and signed by the holder of the interest. In addition, in some jurisdictions, including for example, Ontario, government consent is required in order to transfer a mining lease.

Another general requirement related to the transfer of a mineral claim or mining lease is that the transfer must be recorded in a prescribed office. In some jurisdictions recordation of the mining lease is not required but is permitted.

### 5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged to raise finance?

Generally speaking, in Canada, indebtedness may be secured by all types of real and personal property under the real and personal property security regimes of each of the provinces and territories and by virtue of the common law. The nature of the charge granted to secure such indebtedness, for example, whether a mortgage, charge, pledge or other, will need to be considered in each circumstance.

There is some uncertainty as to whether a prospector's licence can be charged as security for indebtedness.

It is possible to create a charge against a mineral claim or mining lease. In some instances, consent of the applicable governmental authority will be required however, such as in Ontario where a mining lease cannot be mortgaged, charged, or made subject to a debenture, unless the applicable Minister consents in writing to the transaction.

Security documents granting such a charge are typically registered in the applicable mining registries against the mineral claims or mining leases, which registration will serve as notice to third parties of the grant of the charge. In many jurisdictions registration of documents purporting to charge mineral claims or mining leases is permissive while in other jurisdictions registration is mandatory in order to be given effect. Generally, the applicable legislation does not set a scheme of priorities for registered and unregistered charges or as between them. Whether the security document validly and effectively creates a mortgage or charge is a matter determined by the common law.

## 6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

### 6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

A prospector's licence cannot be subdivided.

In some jurisdictions, a mineral claim may be subdivided. For example, in British Columbia, which uses electronic mapping for mineral claims, claims made up of two or more mineral "cells" can be subdivided into claims that are no less than one cell in size.

With respect to the subdivision of mining leases, the state of the law is not uniform across Canada. Subdivision of mining leases is not possible in British Columbia; however, an application can be made to reduce the land area subject to the lease, which will reduce the lease rental payments. Where subdivision of mining leases is permitted the rules governing the subdivision vary by province and territory.

### 6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Mining activity in Canada can be structured in a variety of ways. A common structure is through a joint venture. Joint ventures can be formed through a variety of legal vehicles, including partnerships, corporations and unincorporated joint ventures.

Partnerships are governed by provincial and territorial legislation. General partnerships are generally defined as the relationship between two or more persons carrying on a business in common with a view to profit. Limited partnerships are a type of partnership created amongst partners of different classes: limited partners, who typically are not engaged in the management or control of the business and who, subject to certain exceptions, have limited liability in respect of the debts and liabilities of the partnership, and general partners, who operate and manage the business of the partnership and have unlimited liability. In some jurisdictions such as the Northwest Territories and Nunavut, partnerships and limited partnerships are not permitted to acquire mineral claims or mining leases in their name.

Parties may incorporate a corporation to conduct a joint venture project. Usually, the joint venture property and assets are transferred to, and held by, the corporation and a shareholders' agreement will govern the conduct and management of the joint venture corporation. Joint venture corporations are governed by the provincial, territorial or federal legislation under which the corporation was incorporated.

Unincorporated joint ventures are formed and governed by a contract. A benefit of the unincorporated joint venture is that parties to the contract have considerable flexibility in setting out the terms of an agreement. Typically, the joint venture property is held by one of the joint venture parties on behalf of the joint venture and operations are managed by one of the joint venture parties or in some cases, a third party. In some cases, depending on the applicable legislation, the property and/or assets may be held as tenants in common. Income and losses of the mining activity conducted by unincorporated joint ventures are computed and taxed in the hands of the individual joint venture parties.

### 6.3 Is the holder of a primary mineral entitled to explore or mine for secondary minerals?

The applicable legislation under which the mineral tenure in question has been obtained will often circumscribe the minerals that the tenure covers (e.g. hard rock minerals, placer minerals, coal, industrial minerals). For example, in British Columbia, the *Mineral Tenure Act* regulates the exploration and, in part, the development and mining of hard rock minerals and placer minerals and the definition of what constitute "minerals" is very broad. Similarly, a holder of a placer claim is entitled to explore for placer minerals. Other examples include the British Columbia *Coal Act* that regulates the exploration and production of coal, and the British Columbia *Land Act* that regulates earth, soil, sand, gravel, rock and other natural substances used for a construction purpose.

### 6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The entitlement to tailings and waste dumps depends on a determination of whether such materials belong to the mineral owner or the surface owner. Some provinces expressly address the rights over tailings and waste dumps in legislation. For example, in British Columbia, tailings and waste dumps become part of the rights to a mineral or placer claim.

In provinces and territories where residue deposits such as tailings and waste dumps are not explicitly dealt with in legislation, the instrument that separates mineral rights from surface rights must be interpreted in order to determine the rights over such materials.

### 6.5 Are there any special rules relating to offshore exploration and mining?

Pursuant to international law, Canada has exclusive sovereignty over the territorial sea (12 nautical miles seaward from the low water line along the coast) and the exclusive right to explore and exploit the mineral resources of the continental shelf (the area extending beyond the territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles from the low water line, whichever distance is greater). Canada has made partial submissions to the Commission on the Limits of the Continental Shelf, pursuant to Section 76(8) of the United Nations Convention on the Law of the Sea, to delineate an extended continental shelf beyond the 200 nautical mile limit in the Arctic.

The *Oceans Act* (Canada) provides that provincial laws do not apply to the territorial sea or the continental shelf, unless regulations are enacted to make provincial laws apply.

Unlike in the oil and gas sector, there is no federal legislation currently in place that provides for the issuance of offshore mining rights.

## 7 Rights to Use Surface of Land

### 7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

Most often, pursuant to the applicable mining legislation, the holder of a prospecting permit will be permitted to access the surface where the Crown holds the underlying mineral rights. Where the surface rights are privately held, a notice of access is usually required to be given to the surface owner. In some jurisdictions, there are provisions in the applicable legislation requiring the surface owner to be compensated in certain circumstances. The legislation usually contains dispute resolution provisions to resolve disputes between a mineral rights holder and the surface owner.

In the Northwest Territories and Nunavut (other than Inuit-owned lands), surface rights are not granted as part of a mineral claim or lease. A land-use permit may be required for any work under a mineral claim. Work conducted under a lease will also require a land-use permit or a surface lease. On Inuit-owned lands, a licence or lease may be required to gain access to the surface.

### 7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

As most mining activity in Canada occurs outside of population settlements, mineral operators usually deal primarily with the Crown, rather than with private owners. In situations where a mineral operator wants to enter privately held land, the operator's obligations are set out in applicable legislation and the common law (and civil law in Québec). The obligations of mineral operators in relation to surface owners are detailed in the applicable mining legislation. Generally, a mineral operator must obtain either the permission of the owner to enter their land, often in the form of a lease, or an order from the prescribed authority allowing the operator to proceed without the owner's permission. However, in British Columbia, permission from the owner is not a necessary requirement. Under the *Mineral Tenure Act*, an operator cannot begin mining activity unless the operator first serves notice to the owner of the surface.

The general common law rule requires the mineral owner to use his or her property so as not to injure his or her neighbour, the surface owner. Legislation also addresses the rights as between mineral owners and surface owners. For example, in British Columbia an operator is liable to compensate the owner of a surface area for loss or damage caused by mining operation.

### 7.3 What rights of expropriation exist?

In every Canadian jurisdiction, pursuant to the applicable legislation, the Crown is authorised to expropriate lands or interests in land. Depending on the legislation of the relevant jurisdiction, this authority of the Crown may enable a mineral owner to acquire surface rights. For example, under the British Columbia *Mining Right of Way Act*, a miner has a right to expropriate private land for access to a mine site where the owner of the land, or a person with an interest in the land, does not grant a right of way.

In exceptional circumstances, mineral rights have been effectively expropriated by the Crown, though, in such cases, compensation has generally been paid.

## 8 Environmental

### 8.1 What environmental authorizations are required in order to conduct reconnaissance, exploration and mining operations?

In most Canadian jurisdictions, there are statutorily prescribed environmental assessment requirements that apply to certain classes of projects that are over a threshold size. Most major mining projects trigger the impact assessment requirements. For example, the British Columbia *Environmental Assessment Act* requires an environmental assessment of any proposed new mine that will have a production capacity equal to or greater than 75,000 tonnes per year of mineral ore.

While the process is not uniform across Canada, in some jurisdictions there may be a requirement for a public hearing. Other environmental authorisations or permits issued by provincial or territorial governments may be required.

In addition to the aforementioned potential environmental assessment, the federal government may also conduct an environmental assessment if a proposed project is of a prescribed type and size. In certain circumstances the federal legislation allows the Minister of Environment to make a decision on a project based upon a provincial assessment process, thus making it possible to avoid redundant assessments.

### 8.2 What provisions need to be made for the closure of mines?

The approval of mine closure plans to rehabilitate and restore properties after the completion of mining operations is provided for in the mining legislation of most Canadian jurisdictions. Most jurisdictions require financial security or a guarantee and an approved closure plan to be filed prior to the mine production. Certain jurisdictions require the closure plan to be filed prior to any exploration activities being undertaken.

### 8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Generally, the provincial government will need to approve rehabilitation, restoration, reclamation or closure plan submissions prior to any mining activities pursuant to provincial mining laws and regulations. Upon the closure of operations, the approved plans must be executed so as to restore the site to an acceptable condition. Additionally, in certain jurisdictions, the closure of mining activities may be subject to contaminated site remediation obligations.

### 8.4 Are there any zoning requirements applicable?

In some jurisdictions, specific reserves for areas of land, such as agricultural or environmental reserves, will require additional authorisations or approvals for proposed undertakings that fall outside the specified uses. In circumstances where a mining project is located within the boundaries of a municipality or other local government, the applicable municipal laws such as zoning bylaws will need to be adhered to.

## 9 Native Title and Land Rights

### 9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In Canada, *The Constitution Act, 1982* protects Aboriginal and treaty rights of the Aboriginal peoples of Canada. Aboriginal rights themselves are not strictly defined. The Supreme Court of Canada has defined these rights in relation to a spectrum dependent on the degree of connection with the land, the highest level of right being Aboriginal title. Aboriginal rights can also be defined by treaty. Where Aboriginal rights remain undefined, they can continue to exist until a treaty is reached with the Crown or until they are proven by claimants and defined by the Courts.

In certain circumstances the Crown owes a duty to consult with the Aboriginal peoples and to accommodate them where appropriate, even where Aboriginal rights have not been proven. The level of consultation and accommodation required of the Crown will vary depending on the circumstances. The impact of consultation obligations and Aboriginal rights with respect to reconnaissance, exploration and mining operations rights will thus depend on the individual circumstances of a given case.

## 10 Health and Safety

### 10.1 What legislation governs health and safety in mining?

In general, worker health and safety falls within provincial jurisdiction unless the subject matter of the undertaking falls within federal jurisdiction. For example, federal government employees are governed under the *Federal Government Employees Compensation Act*. Generally this Act is administered by provincial and territorial workers' compensation boards and commissions.

The federal government also has jurisdiction over competency of workers dealing with uranium and thorium. The qualifications and training of certain workers who deal with uranium and thorium are governed by the federal *Nuclear Safety and Control Act*. The Act also creates offences relating to inadequate staffing and work practices at a uranium or thorium mine.

Each province and territory in Canada has its own workers' compensation board or commission, although the Northwest Territories and Nunavut have a combined workers' compensation board. These boards or commissions generally provide a preventative function by administering occupational health and safety laws, and an administrative function by administering insurance schemes for injured workers.

Some provinces and territories also have legislation and regulations that specifically apply to the mining industry in addition to workers' compensation legislation. For example, British Columbia has the *Health, Safety and Reclamation Code for Mines in British Columbia* (Code), which applies to both exploration and production mine sites in British Columbia. The Code sets out obligations for owners to develop a health and safety plan, and to establish a joint management-worker health and safety committee. In addition, the Code prescribes reporting requirements for accidents, deaths and dangerous occurrences and the maximum hours of work at a mine site.

### 10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Generally, the governing health and safety legislation of the province or territory where the work is conducted will impose obligations on owners, supervisors and employees. While these obligations are not uniform across the country, in general, mine owners are obligated to ensure that applicable laws and regulations are followed, and to take all reasonable precautions to ensure the health and safety of employees. Supervisors generally have a duty to ensure that proper training is given to employees on site and to ensure the safety and well-being of employees. Employees have an obligation to inform supervisors of any potential risks or dangers on the worksite as well as to protect their own personal health and safety (see question 10.1).

## 11 Administrative Aspects

### 11.1 Is there a central titles registration office?

There is no central titles registration office in Canada. With the exception of Nunavut, which is primarily regulated by the Federal Department of Aboriginal Affairs and Northern Development Canada, and the Northwest Territories, which is regulated by both the federal and territorial governments, each of the provinces and territories is responsible for issuing prospector's permits (if applicable) and registering mineral titles.

### 11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

All provinces and territories, with the exception of the Yukon and Saskatchewan, include a dispute resolution mechanism in their respective mining legislation. In general, all decisions made by a tribunal or official carrying out a statutory function are subject to judicial review by the courts in the relevant jurisdiction.

Certain provinces like Manitoba, New Brunswick, Newfoundland and Ontario have created distinct tribunals that are separate from the department in charge of administering the mining legislation. Other provinces (for example, British Columbia) have internal dispute resolution systems with appeals to the courts.

The Yukon and Saskatchewan have not developed distinct dispute resolution systems, and as such the dispute resolution mechanisms available are those normally provided by the court systems in those jurisdictions.

## 12 Constitutional Law

### 12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The jurisdictional powers of both levels of government, provincial and federal, are set out in *The Constitution Act, 1867*. *The Constitution Act, 1867* provides the federal government with the power to create laws in relation to trade and commerce, banking, navigation and shipping, sea coasts and inland fisheries as well as other matters. On the other hand, the provincial Legislatures have the power to create laws in relation to property and civil rights (including laws relating to property, contracts and torts), natural resources, and local works and undertakings, among other matters. There are, however, some matters that fall within the purview of both federal and provincial jurisdictions. In such a case each level of government may create laws in respect of a particular subject matter in so far as it relates to their jurisdiction. For example, both the federal and provincial governments have their own form of environmental legislation. The federal government may regulate approvals for a proposed mine in an effort to protect fish, and the province may regulate that same proposed mine for reasons relating to emissions that could pollute the environment. Federal and provincial statutes which deal with the same subject matter may co-exist, though if there is conflict or inconsistency between federal and provincial law, in the sense of impossibility of dual compliance or frustration of federal purpose, the federal statute prevails.

Canada's three territories, the Yukon, Northwest Territories and Nunavut, do not yet have provincial status and are at different stages in terms of devolution of powers to their territorial government from the federal government. Their legislative powers are enumerated in specific federal statutes (*the Yukon Act, the Northwest Territories Act* and *the Nunavut Act*). From a practical perspective, the territorial legislative powers are quite similar to those of the provinces under *The Constitution Act, 1867*, but the relevant statute must be consulted in each case.

### 12.2 Are there any State investment treaties which are applicable?

Please refer to question 3.1 with regard to the *Investment Canada Act*.

## 13 Taxes and Royalties

### 13.1 Are there any special rules applicable to taxation of exploration and mining entities?

In Canada there are both federal and provincial statutes that provide a number of deductions, allowances, and credits to a taxpayer engaged in qualifying mining activities and to a taxpayer who invests in certain mining companies. A specific tax incentive that is unique to the resource sector in Canada, found in the *Income Tax Act* (Canada) (ITA), is the use of flow-through shares which enables junior mining companies to raise money for exploration and development by providing the investor with tax relief in exchange for their investment. Costs incurred for the purpose of determining the existence, location, extent or quality of an oil, gas or mineral resource in Canada are characterised as a "Canadian exploration expense" or "CEE" under the ITA. A taxpayer can deduct from their reported income up to 100 per cent of its cumulative CEE. However, junior mining companies often have little to no net income and accordingly, they are left with CEE deductions which they are unable to use. As a solution to this problem, Canada introduced flow-through shares, a uniquely Canadian tax concept that allows corporations to monetise expenses that they are unable to use by entering into an agreement with an investor, whereby the investor subscribes for shares of the company and the company agrees to use the subscription proceeds to incur qualifying CEE which it then renounces to the investor. Under the ITA, the CEE is deemed to have been incurred by the holder of the flow-through shares rather than the mining company, so the investor is able to deduct the CEE from the investor's income for tax purposes. Additionally, the ITA and other provincial statutes offer other investment tax credits to taxpayers for certain types of mining-related expenditures.

### 13.2 Are there royalties payable to the State over and above any taxes?

There are a range of additional taxes imposed by the provinces and territories on mining operations within their boundaries. Newfoundland and Labrador, Ontario, Québec and Manitoba impose a profits tax ranging generally from 10 per cent to 16 per cent. British Columbia and Nova Scotia generally impose a tax based on net revenue from mining operations of 2 per cent. The remaining jurisdictions, other than Prince Edward Island, impose graduated royalties where the royalty rate increases with revenue running as high as 14 per cent. The foregoing is applicable to most minerals, but taxes or royalties on certain minerals, for example coal, are dealt with differently.

## 14 Regional and Local Rules and Laws

### 14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Generally speaking, a mining company will be governed by either federal or provincial laws in respect of its projects. Provincial legislation that should be considered by mining companies has been discussed in several of the above sections. There may also be circumstances where municipal laws can affect a proposed mining project. For example, if a proposed operation is located within municipal boundaries, applicable municipal laws such as zoning laws and property taxes will need to be adhered to.

It should be noted that Québec has recently amended its *Mining Act*, providing municipalities with more legislatively prescribed powers in relation to mining exploration and projects. The amendments provide that a claim holder must notify the relevant municipality that it has acquired a right on municipal land and that it intends to carry out work on that land prior to developing a mining site and allow regional county municipalities to designate portions of their lands as "incompatible" with mining activity or subject to specified conditions.

However, other jurisdictions have not followed suit in adopting similar laws and recent developments in British Columbia have taken a different direction. In a recent British Columbia Court of Appeal decision, municipal laws were found to be subordinate to conflicting mining legislation. The court held that municipal bylaws that frustrated the terms of the British Columbia *Mines Act* permits issued by the British Columbia Ministry of Energy, Mines and Petroleum Resources were invalid.

### 14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Canada's free trade agreements reduce the costs of exporting Canadian mined minerals and related value added products. Such agreements should be taken into account by exploration or mining companies as they can result in incentives for establishing production in Canada.

The Canada-China Foreign Investment Protection and Promotion Agreement (FIPPA) is an important step in expanding Canada's reach into the Chinese market. Under the agreement, both Canada and China agree to a most-favoured-nation commitment. This commitment ensures investors from both countries are not to be discriminated against relative to other foreign investors. The effect of this agreement in Canada is that Chinese State Owned Enterprises (SOE) seeking investment in Canada will be treated on a merit basis, with considerations of business orientation and the extent of political influence over its affairs as significant factors.

The FIPPA also provides for protections to both prospective and existing investments by allowing investors to benefit from protections found in their home country. Under the FIPPA, Canadian investments will benefit from Canadian protection measures against risks of investor discrimination, expropriation without compensation and arbitrary decisions from the government, among others.

However, the FIPPA does not affect the Government of Canada's ability to review or reject investments from China for reasons of national interest. "Net benefit" decisions under the *Investment Canada Act* are expressly excluded from the FIPPA.

## Note

This chapter is not a compendium of Canadian mining law, as the topic is simply too large for the scope of this chapter. Canadian mining law is location-dependent, and there are many, many locations: ten provinces and three territories, each with its own laws, and within each province or territory areas within Aboriginal land claim settlement areas or reserves; areas in which the surface is owned by the Crown or by Aboriginal groups or privately; and areas in which the minerals are owned by the Crown or by Aboriginal groups or privately. Canadian mining law is also commodity-dependent, with different laws applicable to hard rock minerals, coal, industrial minerals, petroleum and natural gas, uranium, etc.

As a cautionary note, all of what is set forth above is intended to be indicative only. Even where topics are discussed in some detail they are not intended to be complete, and nothing in this chapter should be relied upon as legal advice.

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