

# Global Mining Group NEWSLETTER

## EDITOR'S NOTE



At the end of August we helped Eldorado Gold to ink a deal to acquire all the shares of Sino Gold it does not own and create a \$6.4 billion market cap mid tier gold producer with a significant position in China, which is the world's largest gold producer. Earlier in the quarter we were involved in the sale of Addax Petroleum to Sinopec for \$9 billion. Our government relations group is significantly involved in the opposition to a Canadian Parliament private members bill whose passage would create unnecessary difficulties and costs for Canadian incorporated participants in the international extractive sector in discharging their corporate social responsibilities. On the positive regulatory side, the British Columbia Securities Commission is streamlining its prospectus approvals for mining and oil and gas companies. The Government of Quebec recently introduced its new strategy "Preparing the Future of Quebec; Mineral Sector." We welcomed Keenan Hohol as a partner in our Vancouver office. Keenan comes to us from BHP Billiton, bringing with him a wealth of international mining and M&A experience coupled with fluency in Ukrainian, Russian and Spanish.

Finally, some exciting news for the Global Mining Group out of Paris. Fasken Martineau has opened an office in Paris, France, and will welcome Jean-Claude Petilon to head the mining and energy team there. Jean-Claude is one of the world's top Africa specialists and brings enormous mining, energy, infrastructure and other experience with him. The Global Mining Group welcomes Jean-Claude and the rest of the Paris team.

Let's hope that the last quarter of 2009 will show a continuing high level of activity for all sector participants.

**John S.M. Turner, Global Mining Group Leader, Toronto**

## A WELCOME B.C. INITIATIVE

Effective September 1st, 2009, mining companies can apply to the B.C. Securities Commission for an advance review of their technical disclosure to facilitate timely receipt of a short-form prospectus.

For more information, please see this latest bulletin from the Securities and Mergers & Acquisition Group at:

[http://www.fasken.com/sma\\_bulletin\\_july2009/](http://www.fasken.com/sma_bulletin_july2009/)

**Lata Casciano, Vancouver**

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## MISGUIDED CORPORATE SOCIAL RESPONSIBILITY INITIATIVE

The article on Bill C-300 published in CIM highlights the threats posed by a private members bill whose provisions would play havoc with established practices and are at variance with current

policies developed by the Canadian Government with input by and the support of sector participants.

To view the article, please use the

following link:

[http://www.fasken.com/bill\\_c-300\\_threatens\\_canadas\\_international\\_ext\\_ractive\\_sector/](http://www.fasken.com/bill_c-300_threatens_canadas_international_ext_ractive_sector/)

***Michael Bourassa, Toronto***

## PROTECTING YOUR INVESTMENT

The paper titled "Structuring and Protection of Foreign Investment in the Natural Resources Sector" given at the Rocky Mountain conference in July highlights the issues involved in trying to ensure that the playing field in a

jurisdiction where you make a substantial investment doesn't suddenly get tilted in the wrong direction. It focuses on the role of bilateral investment treaties in helping to get the right result.

To view the paper, please use the following link:

[http://www.fasken.com/rmmlf\\_sills\\_july\\_2009/](http://www.fasken.com/rmmlf_sills_july_2009/)

***Mark Sills, Toronto***

## ZIMBABWE TO RE-EVALUATE ALL MINING CONTRACTS AND MAY ADOPT FRIENDLIER MINING LAWS

*The Zimbabwean unity government of President Robert Mugabe and Prime Minister Morgan Tsvangirai has commenced a review of the nation's mining industry which will include a comprehensive review of all existing mining contracts.*

Tendai Biti, the Zimbabwean Finance Minister, recently stated that government would re-evaluate all mining contracts and introduce a "use it or lose it" policy for the mining industry aimed at those entities that have been sitting on mineral deposits for a long time without exploiting them. The Minister affirmed that the government is working on new mining laws that comply with modern standards for the nation's extractive industries. These standards are apparently a requirement to the receipt of funding from the World Bank to improve infrastructure. At present, growth in the mining industry is being

hampered by poor electricity supplies which are meeting only about 60% of miners' needs, according to Zimbabwe Chamber of Mines president Victor Gapare.

A previous mining bill, which was not signed into law, sought to seize 51% of all mine ownership for black Zimbabweans and the government. Naturally, this bill was not popular with foreign investors, many of whom commented that it would inevitably discourage investment in mining. Obert Mpofu, the Mines and Mining Development Minister, recently indicated that he was reviewing a bill "forcing foreign companies to sell stakes in their businesses to make it less harsh and attract badly needed foreign investment" (Reuters: 5 August 2009). The Minister further indicated that the "new proposals on changes to the laws will be submitted to the current sitting of parliament". However, he refused to comment on whether the government would remove the 51% local ownership requirement as the proposals were still being debated.

The existing Zimbabwean mining laws and policies have led to the withholding of badly needed investment to raise production as Zimbabwe tries to recover from economic collapse. However, Minister Mpofu recently told an investment conference in Johannesburg that the legal review would seek to strike a balance between attracting investors and indigenisation. He also stated that the review would include views from others in the region such as South Africa, which has adopted a policy of black economic empowerment to include blacks in the mainstream economy after years of exclusion under apartheid.

Zimbabwe's Chamber of Mines holds the view that, with proper incentives through the implementation of the above measures, gold output could rise to 50 tonnes per year by 2015 (from 3.5 tonnes last year), while platinum output could reach 1 million ounces a year after 15 years (from 170,000 ounces during the current year).

***Dimitri Cavvadas and Deenan Pillay, Johannesburg***

## CRIMINAL SANCTIONS INTRODUCED UNDER SOUTH AFRICAN COMPETITION LAWS

*A recent amendment to South Africa's competition laws (the South African Competition Amendment Act, 2009, amending the South African Competition Act, 1998) provides for criminal sanctions to be imposed against directors and certain managers who are involved with prohibited practises.*

Although common in other jurisdictions, this is a new development under South African competition law. In the past, only the actual companies involved in prohibited practices could be sanctioned (by means of fines imposed by the South African Competition authorities, the "Regulator").

On the other hand, the provisions relating to the prosecution of directors and managers places a higher burden of proof on directors and managers than would ordinarily be the case in criminal proceedings. This is likely to be challenged in the South African Constitutional Court, as it may be deemed to contravene an individual's constitutional right to a fair trial.

A less problematic amendment is the provision for the regulation of so called "complex monopolies", namely, where at least three quarters of goods and services in a particular market are supplied to or by five or fewer companies and these companies are acting in the same manner, whether or not by agreement. This amendment greatly

increases the powers of the Regulator to promote competition, but it is not clear what the Regulator's approach would be in circumstances where this situation arises from a change in market circumstances (for example, increased transport costs).

On the whole, the recent amendments to South Africa's competition laws are in line with the Regulator's recent policy of taking a more active role in opposing prohibited practises. Whilst these amendments would focus the minds of directors and managers, it remains to be seen how these provisions would be applied in practice given the sanctions involved and possible challenge from a constitutional perspective.

*Dimitri Cavvadas and David Kriel, Johannesburg*

## STATE-OWNED BUYERS OF CANADIAN BUSINESSES

*Pursuant to amendments made to the Investment Canada Act (the "Act") by Bill C-10, in force in March 2009, the pre-existing low \$5 million threshold for Industry Canada review of foreign investments in the uranium sector has been substantially increased.*

The new threshold for review for proposed foreign direct acquisitions of Canadian companies involved in uranium production activities is \$600 million in "enterprise value" for investments made in the first two years after entry into force of the amendments increasing progressively to \$1 billion by 2013 and thereafter increasing

under a formula contained in the Act.

A second major change to the Act is the introduction of provisions in Part IV.1 regarding "investments injurious to national security" which has been somewhat controversial in Canada owing to their vague nature. In particular, the phrase "injurious to national security" is not defined in the Act and the Canadian Government has not indicated its intention to pass any regulations or issue policy guidelines to clarify the legislative intent. This is in marked contrast to the situation in the United States where extensive written guidance on the nature and scope of US national security reviews of foreign

investment is readily available.

Another somewhat controversial feature of the new national security-related screening provision is its application to a number of investment categories that hitherto had been exempt from review. Examples of this include operating farms. From a foreign perspective, the good news is that the Canadian government has indicated that it intends to use the national security provisions sparingly. However, the lack of precise legislative or other definitions of the scope of the concept and the government's intentions in applying legislation has left a number of foreign investors somewhat confused.

*Mark Silis, Toronto*

## OVERVIEW OF QUÉBEC'S MINERAL STRATEGY

On June 29, 2009, the Government of Quebec launched its first mineral strategy entitled "Preparing the Future of Quebec's Mineral Sector" based on the following policy directions:

- creating wealth and preparing the future of the mineral sector;
- ensuring environmental-friendly mineral development; and
- fostering integrated, community-related mineral development.

The mineral industry constitutes an important part of Quebec's economy. In 2007, industry investment represented \$1.43 billion and exploration expenditures alone were \$476 million. Total shipments represented \$5.5 billion. Nearly 18,000 workers are employed in the mining sector. However, by nature, the mineral industry is cyclical. To deal with these cycles, the Government of Quebec wishes to strengthen the foundations for mineral developments as to ensure that the mining industry keeps contributing to Quebec's economic prosperity.

### Creating Wealth and Preparing the Future of the Mineral Sector

#### *Enhancing the Geoscientific Knowledge of Mining Regions*

Along with the *Plan Nord* by which the Government of Quebec announced its intention to develop the Northern Quebec region, the strategy provides that *Géologie Québec* will conduct work to enhance the geoscientific knowledge of

this area by mapping the region and conducting airborne geoscientific surveys. Similar work will be conducted in regions that are already mined.

#### *Providing Access to the Northern Quebec Region*

The Government of Quebec, as announced in its 2009-2010 Budget Speech, will invest nearly \$350 million over the next five years to improve existing roads and airports and to build new infrastructures. Some of these new infrastructures will be developed in partnership with mining companies.

One of the changes to be expected with the implementation of the new strategy concerns the exploration work required for mining companies to maintain their claims. Under the *Mining Act* (Québec) (the "Act"), in order to obtain the renewal of its claim, a claim holder must conduct exploration work and report back to the Ministry of Natural Resources and Wildlife (the "MNRW"). However, as provided by Article 73 of the Act, it may choose to make a payment in lieu of its performance of the required minimal exploration work. With the objective of spurring exploration work on claims and avoid them to become dormant, the government intends to amend the Act as to review claim renewal terms in order to enhance mineral activities on claims.

The Government also intends to review the mining royalties regime to ensure a fair return on mineral resource mining. In a report dated April 1, 2009, the

Auditor General of Quebec stated that 14 out of the 21 mines of Quebec have not paid any mining royalties between 2002 and 2008, although the value of their annual production was estimated at \$4.2 billion. In an open letter later published in the press, the Minister for Natural Resources and Wildlife, Mr. Serge Simard, stated that:

"[TRANSLATION] *From now on, the province of Quebec will receive a more important part of the benefits issued from the exploitation of its natural resources. One of the priority measures of this [mineral] strategy is no doubt the re-evaluation of the mining royalties regime. We will make sure that the mining sector, equitably, will bring its fair contribution to the collective wealth of the whole province of Quebec, while preserving the sector's competitiveness.*"

The reassessment will take into consideration, (i) the companies' competitiveness; (ii) the maximization of benefits; and (iii) a fair share return on resource mining. The Government also plans to adapt the mining royalties regime to the special characteristics of the diamond industry.

To support research projects in partnership with universities, institutions and industry, the Government intends to institute a program to provide assistance for research in priority areas of the province's mineral sector, such as deep exploration and mining, adaptation of technology to Quebec's geology, adaptation to climate change, mining in a northern environment, optimization of

## OVERVIEW OF QUÉBEC'S MINERAL STRATEGY CONTINUED

mining extraction practices and energy consumption, reduction of environmental impact from mineral activity and rehabilitation of mining sites. Through tax measures and funding from the Mining Heritage Fund, the Government will also continue to support the industrial component of research projects.

### Ensuring Environment-Friendly Mineral Development

Currently, mining lease holders are obligated to rehabilitate mine sites after the closure of a mine; to file a rehabilitation plan at the start of the project's planning process and to deposit a sum equivalent to 70% of the estimated rehabilitation costs for the accumulation areas as a security for the performance of their obligation. However, as the strategy points out, "if mining companies go bankrupt before all payments are made, the government can be stuck with bills into the millions and have to pick up the tab for the 30% of unsecured rehabilitation costs". In its financial statement as at March 31, 2008, the Government of Quebec recorded \$264 million in environmental liabilities for contaminated mine sites.

With the objectives of diminishing the risk for the government to become responsible of new abandoned sites and to ensure mine sites rehabilitation after closure, the strategy proposes the following:

- increase coverage for estimated costs

in the rehabilitation plan from 70% to 100%;

- extend the scope of the security deposit to cover all exploration work, including exploration camps, not just tailing accumulation areas;
- revise the security payment schedule to accelerate payments, making the first payment due as of the first year; and
- introduce a five-year transition measure for existing mines.

### Fostering Integrated, Community-Related Mineral Development

With the objective of fostering integrated, community-related mineral development and with a view of transparency, social acceptability and respect for sustainable development principles, the Government proposes to amend the Act as to require the promoters of any metal or chrysotile mining project that is expected to generate less than 3,000 tons of ore per day to hold community public consultations before the beginning of mining operations.

The Native Fund Assistance Program which aims to encourage community development in mineral development has been extended until 2013. It pursues the following objectives:

- develop prospecting and mineral exploitation activities in less explored areas;

- develop first-rate expertise in aboriginal communities that helps job creation; and
- encourage the creation of aboriginal businesses in the mineral resources sector.

Agreements between mining companies and aboriginal communities help ensure that mining projects will benefit aboriginal people. For this reason, the government of Quebec encourages mining companies and aboriginal communities concerned by the development of a mining site to establish a dialog with a view to possible negotiation of such agreements. However, the strategy does not include any mention of measures reflecting such encouragement.

The strategy includes proposed amendments to the Act as to ensure the balancing of land uses, such as:

- granting to the Minister the option of invoking regional land uses plans in order to increase his ability to reserve or to withdraw land to reduce disputes over land use;
- giving the Minister the power, where public interest warrants, to refuse to grant leases for surface mineral substances and terminate mining titles for these same substances;
- giving the Minister the power to refuse the granting of pit and quarry leases; and
- clarifying the right of expropriation.

*Jean M. Gagné and Émilie Nadeau, Québec City*

## CHINESE RULES CHANGES MEANS MORE MINING ACQUISITIONS

China's appetite for foreign mining and energy companies continues to grow. Outbound foreign direct investment (OFDI) from China reached US\$55 billion in 2008, a 19.4 percent increase compared to 2007, with the bulk of this investment aimed at mining and energy companies. The pace has continued into 2009. Deals or takeover announcements have included:

- the Sinopec takeover of Addax Petroleum in an \$8 billion friendly takeover that recently closed;
- a passive investment by China Investment Corporation (CIC) via the purchase of a 17% subordinated share interest (which excludes board representation) in Teck Resources;
- a \$148.5 million unsolicited takeover bid for Canadian Royalties Inc. by state-controlled Jilin Jien Nickel Industry Co. Ltd in August.

As can be seen, Chinese enterprises – whether state owned or private – are employing a wider range of tactics in order to achieve acquisition objectives. The Chinese government is also simplifying the approvals process required for foreign acquisitions and is implementing policies enabling financing alternatives for Chinese enterprises that are carrying out overseas takeovers in the mining and energy sectors. The following are several changes which could enable further Chinese take-over activity in the mining and energy sectors:

**MOFCOM Approvals.** On March 16, 2009, the Ministry of Commerce ("MOFCOM") promulgated the *Rules for the Administration of Outbound Investments*

(the "New Outbound Rules"). The New Outbound Rules delegate approval for deals under US\$100 million to local MOFCOM authorities, whereas previously all deals required central approval from MOFCOM in Beijing. Where deals fall below the US\$100 million threshold applicants will be able to file applications on-line and approvals will be reviewed within three working days. In practice this means that a significant delay for deals involving mining companies where the dollar value is under US\$100 million will be removed. While other approvals are still required (such as National Development and Reform Commission approval), the simplification of MOFCOM approvals will make transactions easier to carry out. In addition to the big strategic mineral deals expect to see a flurry of smaller, off-the-radar-screen, resource deals.

**SAFE Capital Controls.** The State Administration of Foreign Exchange ("SAFE") issued the *Administrative Rules for the Foreign Exchange Administration of Domestic Enterprises' Overseas Direct Investments* (the "Foreign Exchange Rules") on July 13, 2009. In addition to simplifying the approvals process, the Foreign Exchange Rules relax capital controls and provide for easier access to foreign exchange for Chinese companies and creates more opportunities to raise capital.

**Debt Financing.** On December 9, 2008, the China Banking Regulatory Commission ("CBRC") issued the new *Guidelines for Risk Management of Merger and Acquisition Loans by Commercial Banks* (the "Guidelines"). The Guidelines are significant because they allow Chinese commercial banks to lend money for cross-

border mergers and acquisitions. In addition to Chinese bank financing, the issuance of dollar denominated bonds in China by Chinese companies was permitted for the first time in 2009 with the issuance by China National Petroleum Company of up to US\$3 billion in 3-year floating bonds in the Shanghai interbank market. Practically speaking, this means that more financing options are available for Chinese companies engaged in overseas takeovers of mining companies.

**Investment Arm.** The China Development Bank ("CDB") announced recently that it would set up a US\$5.1 billion investment arm (the "Unit") to focus on private equity deals. A number of assets would be rolled into the Unit including CDB's Chinalco and Jinchuan Group (China's largest nickel producer) stakes. This is a significant development as traditionally Chinese policy banks, such as CDB, have been passive investors preferring small non-active stakes in target companies. The creation of the Unit could allow for a more aggressive pursuit of mining company targets in line with overall state objectives of natural resource acquisitions.

The combination of loosened state controls over overseas investments (especially over investments of under US\$100 million), the introduction of new entities having the remit to invest and act aggressively in the natural resources sphere and the employment of a wider variety of tactics including hostile take-overs by Chinese entities in deals involving mining companies means that mining companies should be more aware than ever about opportunities involving Chinese companies and plan accordingly.

**Andrew Derksen, Toronto**

## AFRICAN MINING SEMINAR – SEPTEMBER 16

*Dianne Prupas and Sarah Lafleur, from Fasken Martineau's Johannesburg office, discussed the following issues on September 16, 2009 at an African Mining Law Seminar held at the Toronto offices of Fasken Martineau:*

**South Africa:** General elections were held on April 22, 2009, in which the ANC, led by newly appointed President Zuma, won a third successive term. In April 2009, the Department of Minerals and Energy issued a new Code of Good Practice (the "Code") which could potentially destabilise accepted Black Economic Empowerment principles presently applied in the mining industry. Most notably, non-compliance with the Code now renders license holders vulnerable to possible suspension or cancellation of mining permits. The Code requires 26% black ownership of mining industry assets by 2014.

**Democratic Republic of the Congo (the "DRC"):** One estimate puts the mineral wealth of the DRC at US\$24 trillion. However, the country's unstable security situation, weak institutions and lack of infrastructure have contributed to a less than optimal development of its mining resources and created obstacles to private investment. A 2008 study by the World Bank ranked the DRC the very last among 181 countries worldwide in terms of ease of doing business, although - in our experience - the ability to explore, develop

and produce ore from a mine there is easier than in many other African countries, such as Angola, the Central African Republic and Zimbabwe. Many companies have successfully built mines in the DRC, such as First Quantum and more recently Metorex Resources. The presence of mining majors, such as Freeport-McMoRan and Glencore International, will help stabilize mineral and investment policy over time.

While today one can acquire exploration and mining licences without a parastatal partner in certain parts of the country, most of the difficulties in the DRC - from a foreign investor perspective - have arisen as a result of the historic public-private joint venture arrangements with state-owned companies, such as Gécamines, in areas conferred by the state to such parastatals. In 2008-2009 the government implemented a program of "revisitation" of these joint venture agreements and negotiated changes to many of them because some of these early agreements were considered to have conferred significant resources to private and foreign companies at a fraction of their value (exacerbated by the fact that many were granted during times of civil conflict). Nevertheless, the legal basis for the revisitation is often weak or lacking, frustrating foreign investors at the lack of certainty and transparency.

As recently as August 2009, the DRC is reported to have advised a Canadian mining company of its intention to cancel its joint venture agreement with Gécamines owing to the company's position on certain government requests that arose during the

contract revisitation process. The revisitation of the joint venture agreements has had some international support, with a view to careful management of the country's undeveloped resource wealth. Nevertheless, investor sentiment in Europe and North America is critical to the ongoing development of the country's resources and foreign investors are quite wary of the scope, duration and legal foundation for the various reviews that have been undertaken to date. It is critical for the rebuilding of credibility with foreign investors that the review process come to an end soon and that mineral title and the right to mine be consistently reaffirmed under the revised arrangements.

**Zambia:** A U.S. Geological Survey valued Zambia's copper and cobalt exports at approximately US\$4bn in 2006. It is estimated that Zambia's exports of these resources account for more than 85% of the country's total exports. The Zambian state has adopted a mineral policy designed to augment investments in the mining sector and state-owned mining companies have been actively privatized since the year 2000. Investments in Zambia's mining industry for 2007 were estimated at US\$1bn. Nevertheless, the decline in the price of copper (from US\$8,800 a tonne in 2006 to below US\$4,000 a tonne by October 2008, since recovered to US\$6,000) has significantly impacted investment in the country. In response to pressure from mining companies struggling with a global economic slowdown and the fall in metal prices, the Zambian government abolished a controversial 25% windfall tax on mining introduced a year earlier.

## AFRICAN MINING SEMINAR – SEPTEMBER 16 CONTINUED

**Zimbabwe:** Mining has become the leading source of foreign exchange in Zimbabwe, with gold accounting for one third of exports, but political turmoil, lack of energy and an unfavourable regulatory

environment has led to several mines closing. The government is presently working on a new mining law aimed at compliance with modern standards for the extractive industries, in order to receive

funding from the World Bank. The law will introduce a “use it or lose it” policy in respect of all existing mining claims, and will make provision for the re-evaluation of mining contracts in Zimbabwe.

*Dianne Prupas and Sarah Lafleur, Johannesburg*

## NEWS & PUBLICATIONS

### Keenan Hohol Joins Our Team

We were delighted to have [Keenan Hohol](#) join the Global Mining Group in July as a partner in our Vancouver office. Keenan has a wealth of experience in international mining and M&A transactions, gained as a member of law firms in New York, Toronto, Kiev and elsewhere and most recently as General Counsel-Exploration and a member of BHP Billiton’s global mergers and acquisitions group. Among his many accomplishments, he speaks Ukrainian, Russian and Spanish.

### Bonjour, Paris!

On September 22, Fasken Martineau announced that we have opened an office in Paris, France through the addition of eleven French qualified lawyers. These new additions bring a wealth of expertise, in both English speaking and francophone Africa, in mining as well as in oil & gas, energy and telecom. This initiative adds depth and quality to the Global Mining Group's currently strong ability, through our Johannesburg office, to assist our clients in Africa. Heading the mining and energy team out of Paris will be [Mr. Jean-Claude Petilon](#). Mr. Petilon is one of the top Africa specialists in the world and was previously the head of Dewey & Leboeuf's Parisian African practice.

To read more, please go to the following link:

<http://www.fasken.com/paris-merger-with-gravel-leclerc/>

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