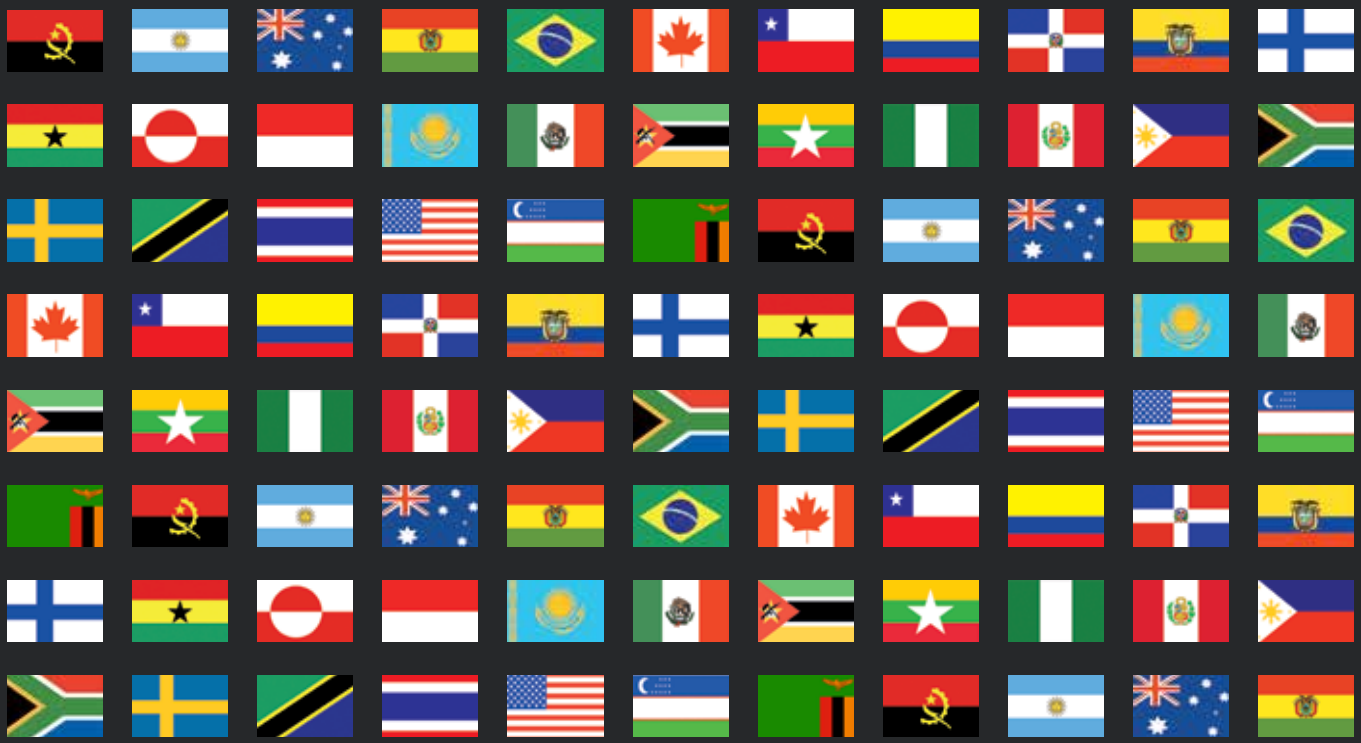
Mining

Contributing editors
Michael Bourassa and John Turner



2016

GETTING THE DEAL THROUGH

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Mining 2016

Contributing editors

Michael Bourassa and John Turner

Fasken Martineau

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Canada

Michael Bourassa and John Turner*

Fasken Martineau

Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining accounts for a significant portion of Canada's economy. Natural Resources Canada pegged domestic mineral production at C$43.9 billion in 2014, with production value declining 2.6 per cent to C$42.8 billion in 2015.

The Canadian mining and mineral processing industry employs more than 374,000 people in mineral extraction and related support activities, such as smelting, fabrication and manufacturing. It also accounts for more than half of Canada's rail freight and high portions of the country's port and marine cargo.

Canada's mining and exploration companies are also dominant players in the global mining industry. Canadian companies have interests in over 7,000 properties in more than 100 countries, including projects held domestically and those in locations such as the US, South America, Africa, Australasia and Europe. Canadian mining companies' assets abroad total an unprecedented C$153.2 billion.

Over 50 per cent of the world's public mining companies are listed on the Toronto Stock Exchange (TSX) and the TSX-Venture Exchange (TSX-Venture), with 29 new mining listings in 2015. In the past five years (2011–2015) 47 per cent of global mining equity financings value was raised on the TSX and the TSX-Venture, while in 2015 they handled 62 per cent of the equity capital raised globally for mining (C$6.8 billion) and 53 per cent of financing transactions.

2 What are the target minerals?

Canada is a leading global producer of several minerals and metals, ranking at the top in the global production of potash, and is a major producer of primary aluminium, cobalt, diamonds, gold, nickel, platinum group metals, salt, titanium concentrates, tungsten and uranium. Key exports include aluminium, coal, copper, diamonds, gold, uranium, nickel, potash, zinc, iron ore and steel.

3 Which regions are most active?

All provinces and territories produce minerals, but Ontario, Quebec, British Columbia and Saskatchewan are the largest producers.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Canada's legal roots are firmly entrenched in the systems of its founding nations: England and France. The federal government, nine of the 10 provinces, and the three northern territories have adopted a common law legal system similar to the common law systems in the UK, the US and Australia.

Quebec has adopted a civil law system similar to the legal system used throughout most of Europe, Asia, South America and parts of Africa.

5 How is the mining industry regulated?

Canada's legal, regulatory and policy environment promotes mineral exploration, mining operations and investment. Mining law is divided between the federal and provincial governments. Ownership of lands and minerals generally belongs to the province in which they are situated. The provinces have jurisdiction over mineral exploration, development, conservation and management. The federal government shares jurisdiction with the provinces on some related matters (for example, taxation and the environment) and has exclusive jurisdiction over areas such as exports, foreign investment controls and nuclear matters.

The exception is uranium, which is a strategic mineral regulated by federal laws. Exploration is a provincial matter, but the federal government regulates all downstream aspects, including mining and milling, processing, transporting and export.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

Federal and provincial legislation affecting mining operations tends to fall into two main categories. The first relates to the essentially private matters of title and taxation, while the second concerns economic, social and environmental policies. Significant decision-making powers are delegated to subordinate bodies or officers to deal with the complexity of the various matters dealt with under the second category.

Each province and territory has its own laws regulating mining activity (with varied names such as the Mineral Act, the Mining Act, the Mineral Resources Act, and the Mineral Exploration and Tenure Act). Some provinces have, over the years, amended their legislation to take into account current attitudes related to environmental protection, sustainable development and consultation with local communities, in particular, aboriginal communities (in the Canadian context, they are often referred to as 'first nation' communities). As examples of new legislation in this regard, the November 2012 regulations to Ontario's amended Mining Act provided for a new regime, which came into force on 1 April 2013. Similarly, in Quebec, the adoption of a law amending its Mining Act with most of such amendments in force since 10 December 2013, added a new chapter on provisions specific to first nation communities, including a provision whereby the government must draw up, make public and keep up to date a first nation community consultation policy specific to mining.

Federal and provincial or territorial laws and regulations related to environmental protection, labour and employment relationships, occupational health and safety matters, etc, also apply to mining activities.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Canada adheres to the CIM Standards, which were adopted in 2005 to establish definitions and guidelines for the reporting of exploration information, mineral resources and mineral reserves in Canada. They are incorporated by reference into the Canadian Securities Administrators' National Instrument 43-101 (NI 43-101), which sets the standards for all technical public disclosure for mineral projects. Mining companies listed on the TSX and TSX-Venture must comply with NI 43-101. The CIM is a member of the Committee for Mineral Reserves International Reporting Standards and the CIM Standards are consistent with other members: Australia, Chile (National Committee), South Africa, the UK (National Committee), the US and Western Europe.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

All lands and minerals that have not been granted to private persons are owned by the Crown (which in Canada refers to either the federal or provincial government in the name of Her Majesty the Queen), vested by the Canadian Constitution to the province where the minerals are located. The federal government owns minerals underlying reservations for aboriginal peoples, federal national parks and other federally owned lands (eg, certain public harbours), and in the Northwest Territories, Nunavut and underlying Canada's territorial sea and continental shelf.

Rights to Crown minerals are obtained through mining statutes (see question 6), often by staking claims, performing assessment work and then obtaining leases or similar forms of tenure to conduct mining operations. The provincial governments (and in some cases the federal government) set out operating terms and conditions on alienated Crown mineral lands and impose taxes and royalties. The contractual capacity of the Crown as owner provides a means by which governments supplement their authority as legislators.

Once private parties obtain the right to mine Crown minerals through the legislated leasing process, such minerals are held by the private party for the tenure of the lease. Subject to compliance with general laws and in some provinces, obtaining government consents, the leases can be encumbered for security purposes in financings, transferred and renewed.

There are significant areas in some provinces where mining rights are privately held, either because of land grants made in the 1800s and early 1900s (or in the case of Quebec, as early as the 1600s) when mining rights were attached to surface right grants, or earlier mining legislation that provided for grants of 'freehold' tenure or outright ownership of mineral rights. In those instances, if a company is interested in acquiring rights to explore or develop such private lands, it is a matter of private negotiation with the owner. Mining activities on those lands are, nevertheless, subject to the same environmental, labour and other laws as activities conducted on Crown leases.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Information and data related to exploration and mining activities in Canada are available through the following:

- provincial and territorial mining recorders' offices – these provide services related to staking, ownership and mining claim maintenance, including receiving 'assessment work' reports and filings of exploration activities;
- provincial geological surveys – most provinces gather geological information, and may conduct broad ground or aerial surveys and publish maps, reports and digital data on geology and other technical information (eg, www.geologyontario.mndm.gov.on.ca);
- provincial and territorial land title and registry offices – these record information about the title of leasehold and freehold property (including minerals). This information is available (usually online) for a fee; and
- Natural Resources Canada publishes Commodity Reviews (www.nrcan.gc.ca/mining-materials/markets/commodity-reviews/8360) and maintains a detailed listing of Canada's operating mines and mineral processing facilities (www.nrcan.gc.ca/mining-materials).

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Prospectors can explore 'open' Crown lands with a prospecting permit and can 'stake' the mineral rights if the land has not already been located and recorded by another party. These rights are acquired on a first come, first served basis. Land can be located on the ground through traditional staking methods (namely, cutting claim posts and blazing claim lines) but most provinces have now adopted 'map designation' in lieu of ground staking, where claims are delineated online on a grid system based on global positioning system technology (in either instance, claims that are 'ground staked' or 'map designated' are referred to as being 'located').

Mining claims that are located and recorded are generally referred to as 'unpatented mining claims' (in Quebec, merely 'mining claims') and are subject to certain payments and assessment work obligations. Failure to meet such requirements on an annual basis can result in automatic forfeiture of the claim and the area will become open for staking by others (a 'use it or lose it' type regime). Many provinces now allow for payments in lieu of assessment work requirements in order to renew mining claims. The conversion of an unpatented mining claim to a lease varies by province, but generally can be done after a specified assessment work requirement has been met (the need for a discovery prior to lease conversion is no longer required in most provinces). No other party can acquire a mining lease over the particular area other than the unpatented claim holder. Leases are usually for 21 years or longer with an opportunity to renew if mining activity is occurring or if it can be shown that the lessee is committed to developing the mineral potential on the leased area. In Quebec, the first lease term is for 20 years, renewable for a further 10 years but not more than three times, except at the discretion of the minister of mines.

11 What is the regime for the renewal and transfer of mineral licences?

In most provinces unpatented mining claims can be transferred by filing a simple transfer form and paying a fee to the government. The transfer and new owner would then be noted on the abstract or register for the mining claim. For lease transfers, consent of the government may be required from the particular mining department (eg, in Ontario, section 81(14) of the Mining Act restricts transfer of a lease until the consent of the Minister of Mines is obtained). No consent is required in Quebec.

12 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

There is no distinction in Canada between the acquisition of mining rights by domestic and foreign parties.

13 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by independent administrative tribunals. Appeals against these tribunals' decisions lie with the Canadian courts. Mineral tenures are generally granted by Canada's free-entry mining system, which limits the government's involvement in disputes over mining rights. In all other situations, the exercise of governmental discretion over mining rights and disputes is subject to the rules of Canadian administrative law.

The provinces have broad jurisdiction over most international arbitrations and have passed legislation governing the conduct and enforcement of international arbitral proceedings. Canada's federal Commercial Arbitration Act applies to arbitrations involving the federal Crown and Crown-owned corporations as well as to maritime and admiralty matters. In 1986, Canada adopted the UNCITRAL Model Law on International Commercial Arbitration and signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Canada signed the International Convention on the Settlement of Investment Disputes (ICSID Convention) in December 2006. After a seven-year delay, Canada ratified the ICSID Convention on 1 November 2013 and it came into force on 1 December 2013.

14 What surface rights may private parties acquire? How are these rights acquired?

In all but some very remote parts of Canada, the Crown lands available through the claim-staking and leasing process consist only of the mining rights because the surface rights are owned privately by another party. The owner of the mining rights is nevertheless entitled to conduct exploration and even mining activities on the leasehold interest, subject to compensation to the surface rights owner. Disputes arising in these situations can be settled through special tribunals (eg, the Mining and Lands Commissioner in Ontario) or through the courts. However, a mining rights lessee would be well advised to negotiate the acquisition of the surface rights privately.

15 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

Governments do not participate in mining projects in Canada and limit their role to one of regulation. However, in Quebec, there are government entities that do invest and sometimes retain ownership interests in such projects and, indeed, have sometimes acted as proponents of such projects (eg, Investissements Quebec).

16 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are general statutes dealing with expropriation in Canada, which provide for compensation. Mining tenure cannot be expropriated or cancelled unilaterally by governments. Instances of expropriation might include land needed for transportation corridors (road and rail), transmission lines and parkland.

17 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

Responsibility for environmental protection, including setting aside areas as parks and other forms of protection from development, is shared by the federal and provincial or territorial governments. Local governments can also protect certain areas from development by creating parks or specifically protected areas, or by limiting development through the enactment of by-laws and official community plans. Development is restricted according to the level of protection assigned to a protected area.

As of 2013, 10.3 per cent (over 1 million km²) of Canada's terrestrial area and 0.9 per cent of Canada's marine territory is protected. Larger protected areas are typically located in Northern Canada. Canada is contributing to the 2010 target set by the United Nations Convention on Biological Diversity to protect at least 17 per cent of terrestrial areas and inland waters and at least 10 per cent of marine areas by 2020.

Duties, royalties and taxes

18 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Corporations carrying on mining activities in Canada are subject to the general income tax rules applicable to all corporations. Federal income tax is levied under the Income Tax Act (Canada); the provinces and territories also have their own income tax statutes. A number of unique tax measures and rules also apply specifically to Canada's mining industry.

As a general matter, royalties and mining taxes are imposed separately from income taxes by the province or territory in which the minerals are mined. The rates and basis for calculation of royalties and mining taxes vary depending upon the type of mineral and the jurisdiction. In some jurisdictions, many minerals are not subject to provincial mining taxes or royalties. In other jurisdictions, the mining tax is levied on the basis of a progressive-rate system based on the mining profits or value of output, depending upon the particular jurisdiction. When the tax is computed by reference to mining profits, the rules for computing mining profits generally differ significantly from those applicable for income tax purposes. In many cases, an attempt is made to roughly calculate the mining profits at the pithead by permitting a processing allowance.

19 What tax advantages and incentives are available to private parties carrying on mining activities?

Recognising that mining is a highly cyclical and capital-intensive industry with a long lead time between initial investment and commercial production, the income tax systems and provincial mining taxes provide a generous treatment of exploration and other intangible expenses. They allow mining companies to recover most of their initial capital investment before paying a significant amount of taxes.

Canada's Income Tax Act segregates exploration and development expenses into various pools and permits deductions for the pools in a specified order. The classification of an expense into a particular pool depends upon the date the expense was incurred, the nature of the expense and certain other considerations. Precise rules govern how these exemptions can be calculated. Examples of these exemptions are as follows:

- Canadian Exploration Expenses (CEE) – expenses incurred to determine the existence, location, extent or quality of a mineral resource in Canada and expenses incurred prior to the commencement of commercial production to bring a new mine into production (recent changes to the definition of CEE will include the costs associated with undertaking environmental studies and community consultations that are required in order to obtain an exploration permit);
- Canadian Development Expenses (CDE) – expenses incurred prior to the commencement of commercial production to bring a Canadian mineral resource into commercial production;
- earned depletion allowance – certain depletion allowances are permitted as deductions from income since mineral resources are wasting assets;
- purchase and sale of resource properties – the cost of acquiring a Canadian resource property is generally deductible on an annual 30 per cent declining-balance basis as a CDE; and
- flow-through shares – corporations carrying out exploration in Canada can pass on the deduction associated with certain types of expenses to shareholders by issuing flow-through shares.

Most machinery, equipment and structures used to produce income from a mine or an oil or gas project are currently eligible for a capital cost allowance (CCA) rate of 25 per cent on a declining-balance basis.

In addition to the regular 25 per cent CCA deduction, accelerated CCA is provided for certain assets acquired for use in new mines or eligible mine expansions. The accelerated CCA takes the form of an additional allowance that supplements the regular CCA deduction.

The Income Tax Act was amended in 2013 to phase out the additional allowance available for mining (other than for bituminous sands and oil shale, for which the phase-out was completed in 2015). The additional allowance will be phased out over 2017–2020. Taxpayers will be allowed to claim a percentage of the amount of the additional allowance otherwise permitted under the existing rules according to the following schedule:

Transition schedule						
Year	2013–2016	2017	2018	2019	2020	After 2020
Percentage	100%	90%	80%	60%	30%	–

The definition of CEE in the Income Tax Act was amended in 2013 to gradually remove certain pre-production mine development expenses from the definition of CEE and gradually treat such expenses as CDE. In accordance with the current definition of CEE, in addition to the expenses associated with the physical exploration for the resource, eligible expenses can include the cost of certain environmental studies and community consultations that are carried out for the purpose of facilitating the physical exploration, however, certain of these expenses have not qualified and have been treated as part of the cost of a licence. Provinces and territories are increasingly requiring mining, oil and gas companies to undertake environmental studies and community consultations (eg, with local communities, neighbouring landowners, traditional and recreational users of the land) as a pre-condition to obtaining a permit or licence to explore. However, where environmental studies and community consultations are a pre-condition to obtaining such permit or licence, the expenses may be treated as part of the cost of the permit or licence. As part of the 1 March 2015 Federal Budget, the Canadian Government announced that the rules would be amended to provide that CEE treatment would not be denied for the cost of otherwise eligible environmental studies and community consultations

solely because they are a pre-condition to obtaining an exploration permit or licence. The cost of obtaining a permit or licence does not qualify for CEE treatment and is not eligible for flow-through share treatment. As a result, certain expenses related to environmental studies and community consultations have been treated differently for tax purposes from one jurisdiction to another depending upon the requirements of the regulator. To ensure the appropriate treatment of such expenses, the definition of CEE has been amended for expenses incurred after February 2015 to include the cost of otherwise eligible environmental studies and community consultations required to obtain an exploration permit or licence.

20 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Canada does not have legislation for tax stabilisation and no tax stabilisation agreements are in force.

21 Is the government entitled to a carried interest, or a free carried interest in mining projects?

This is not the practice in Canada. The federal and provincial governments do not get involved by holding any interests in mining projects (with the exception of that noted in question 15, but such interest would never be carried).

22 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

Canadian residents are subject to income tax on gains arising from the transfer of leasehold interests.

23 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

Canadian residents are subject to tax on their worldwide income. A non-resident of Canada is subject to Canadian income tax on income from employment exercised in Canada, income from carrying on business in Canada and gains arising from the disposition of 'taxable Canadian property', which include any interest in resource properties in Canada. A non-resident corporation that carries on business in Canada is also liable to pay branch taxes equal to 25 per cent of its profits, to the extent such profits are not reinvested in the Canadian business.

Certain types of property income paid to a non-resident by a Canadian resident (including rents and royalties) are subject to a 25 per cent non-resident withholding tax. Canadian income taxes payable by a non-resident of Canada may be reduced or be eligible for exemptions under an applicable tax treaty. In some provinces, there is potential for non-residents to be subject to land transfer taxes and equivalent duties on the acquisition of mining properties in Canada at tax rates that are higher than those imposed on Canadian residents.

Business structures

24 What are the principal business structures used by private parties carrying on mining activities?

Canada's open, free-market economy allows for a wide range of business structures and forms, including corporations, partnerships, limited partnerships, joint ventures and trusts.

Corporations are popular with offshore investors because they are relatively simple to establish, can grow with the business, and offer flexibility in terms of business and tax planning. Corporations can be incorporated under the federal Canada Business Corporations Act or the laws of a province (each province has its own business corporations' legislation).

Offshore investors typically prefer to carry on business in Canada through a Canadian subsidiary because of concerns about limited liability, privacy, creditor protection and a local preference for dealing with a Canadian company. Financing options from Canadian lenders tend to be more favourable for locally incorporated subsidiaries compared with branch offices of foreign business concerns.

25 Is there a requirement that a local entity be a party to the transaction?

There is no such requirement, although for tax planning or other reasons, a foreign entity may choose to conduct Canadian activities through a local entity.

26 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Canada has developed an extensive network of bilateral and multilateral free trade and investment protection treaties, together with a network of double taxation agreements to promote and encourage foreign investment in the Canadian mining sector.

Canada is an original member of the World Trade Organization and is a signatory to numerous bilateral and multilateral free-trade agreements (FTAs), many of which contain both trade and investment protection provisions. The most influential in terms of day-to-day imports is the North American Free Trade Agreement (NAFTA) with the US and Mexico. Canada has 10 other FTAs that are in force. In August 2014, Canada and the EU signed the Canada–European Union: Comprehensive Economic and Trade Agreement (CETA). CETA contains a chapter protecting investors and their investments in Canada and the EU. Though CETA has been signed, it has not yet been ratified by Parliament. It is likely to come into force in 2016. In March 2014, after almost 10 years of negotiations, Canada finally signed an FTA with South Korea.

While Canada's FTA template calls for the inclusion of investor protection provisions in all such agreements, Canada has also concluded stand-alone foreign investment and protection agreements (FIPAs) with some 40 countries, 28 of which are in force. It is currently negotiating FIPAs with 11 additional countries including India, Indonesia and Vietnam. In 2014, the Canada–China FIPA entered into force.

Canada has some 90 bilateral taxation treaties with other countries, eight treaties that are under negotiation or re-negotiation and 11 treaties signed, but not yet in force. Such treaties are generally based on the Organisation for Economic Co-operation and Development (OECD) model for tax convention and alleviate double taxation of companies doing business in both jurisdictions. Among treaties of interest for foreign investors in the Canadian mining sector are the Canada–Barbados Double Taxation Agreement, signed in 1980 and the Canada–Cyprus Double Taxation Agreement, signed in 1984.

Financing

27 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

At the exploration stage, mining activities not financed by 'grubstakers' (a term used by Canada's mining industry for private funds) or under a farm-in arrangement are often financed by the issuance of common shares (stock exchange listed or otherwise), the sale of limited partnership units or the sale of flow-through shares.

At the extraction stage, financing is more frequently by debt instruments, which are often in the form of syndicated loans from chartered banks or their overseas agencies. Some production financing is also done by means of business unit, unit issuance, production payments, advances against the purchase price, offtake agreements, streaming arrangements and royalties.

28 Does the government, its agencies or major pension funds provide direct financing to mining projects?

Governments will sometimes provide funding of infrastructure required to regions requiring transportation in order to make projects in the area viable. More importantly, various pension funds in Canada have actively invested in projects across Canada and internationally. In December 2015 the Boston Consulting Group released a study following a survey commissioned by, and which focused on, the ten largest public sector pension funds (ranked here by size of net pension assets under management): the Canada Pension Plan Investment Board (C$265 billion), the Caisse de dépôt et placement du Québec (C$192 billion), the Ontario Teachers' Pension Plan Board (C$154 billion), PSP Investments (C$112 billion), the British Columbia Investment Management Corporation (C$104 billion), the Ontario Municipal Employees Retirement System (C$73 billion), the Healthcare of Ontario Pension Plan (C$61 billion), the Alberta Investment Management Corporation (C$50 billion), the Ontario Pension Board (C$22 billion) and the OPSEU Pension Trust (C$18 billion).

29 Please describe the regime for taking security over mining interests.

The land registry and title regimes are regulated by province and are similar in many respects. The following is an example from Ontario: in respect of patented freehold and leasehold title, the land registry system governs title and registration matters. A lender can take security over the subject property and register a mortgage, charge or debenture against the subject property in the relevant land registry office by submitting a mortgage, charge or debenture, together with the requisite fee, electronically. Under the Mining Act (Ontario), there is an additional requirement in connection with charging leasehold interests. Prior to registration, a lender is required to submit a full copy of the executed mortgage, charge or debenture together with the requisite fee and confirmation that all rents have been paid to the Ministry of Northern Development and Mines (MNDM) and obtain the consent of the Minister or an officer duly authorised by the Minister prior to registration of a mortgage or charge over the subject leasehold property. The consent process generally takes between four and six weeks. In respect of unpatented mining claims, a lender can record a mortgage, charge or debenture over the subject property with MNDM by submitting a fully executed copy of such with the requisite fee.

Restrictions

30 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Canada does not control or restrict the importation of industrial machinery or equipment. Most goods from most countries of origin can be imported upon the payment of the applicable customs duties and taxes. As a general rule, the applicable customs duties are relatively low or, in many cases, no duty is assessed. The exact amount of duty payable is dependent on the classification of the equipment and its value.

Anyone importing goods into Canada must register with Canada Border Services Agency to obtain an importer number. A non-resident can register and can act as the importer of record into Canada.

Foreign workers coming to perform work in Canada require permits from the Federal Government and, if coming to provide services in the Province of Quebec, an authorisation from the latter. Qualified technical workers are exempt from the requirement to obtain a work permit if they come temporarily to perform installation, set-up or training work in association with the sale of equipment to a Canadian company. In other circumstances, when a work permit is needed, the requirements vary depending on the nature of the work and the nationality or country of permanent residence of the incoming worker. Certain professionals from countries with which Canada has signed a free-trade agreement, such as NAFTA, benefit from facilitative provisions to obtain work permits.

31 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

Some provinces require extracted minerals to be processed domestically, notably in Canada by Ontario's Mining Act (section 91), and in-province by Newfoundland's Mineral Act (sections 31(5) and 31.1) and as a requirement of the lease. In the absence of legislation, some provinces may attempt to negotiate processing requirements for a specific period of time as part of the general approvals process. In Quebec, for example, as a condition for the granting or renewing of a mining lease, the lessee will have to provide studies regarding processing in Quebec. In addition, there may be requirements that the economic spin-offs from mining on the lease be maximised within Quebec.

32 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Canada imposes no controls on the import or export of capital and has no repatriation, domestic use or export performance requirements.

Environment

33 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Both federal and provincial (and, in Canada's North, territorial) environmental laws apply to the mining industry.

The federal government has legislative jurisdiction over fisheries, navigable waters, federal lands (including Indian reserves and federal national parks) and environmental matters of international and interprovincial concern. Certain projects may be required to complete a federal environmental assessment under the Canadian Environmental Assessment Act, 2012 (CEAA 2012). The CEAA 2012 is most generally administered by the Canadian Environmental Assessment Agency, although the National Energy Board and the Canadian Nuclear Safety Commission may be in charge of the federal environmental assessment depending on the nature of the project (eg, some uranium mines projects require an environmental assessment under CEAA 2012, which would be administered by the Canadian Nuclear Safety Commission).

The provinces and territories are generally responsible for matters within their boundaries. Each province and territory has adopted laws dealing with environmental protection to regulate effluent discharges, atmospheric emissions, water resources, waste management and other environmental impacts. These laws provide a regulatory framework to prohibit and limit the discharge of contaminants into the environment. This regulatory framework provides for a permitting system to authorise, subject to various conditions, activities that may have an impact on the environment. Most provincial and territorial jurisdictions require that mining projects be subject to an environmental impact assessment prior to the issue of the required authorisations.

Whether a project will be subject to an environmental assessment under provincial, territorial or federal environmental laws typically depends on the type and size of the project, the types of approvals required for the development of the project and the significance of the potential environmental and socio-economic impacts that could arise from the project.

The provinces and territories have also adopted requirements with respect to mine reclamation and closure as well as the requirement to provide financial guarantee. These are generally administered by provincial or territorial ministries responsible for mines or natural resources.

34 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Depending on the type, location and size of a mining project, it may be subject to both federal and provincial or territorial permitting requirements and environmental assessment processes. In Canada's North (Yukon, Northwest Territories and Nunavut), the federal environmental assessment legislation generally does not apply. In Canada's North, environmental assessments are regulated by local laws, namely the Mackenzie Valley Resource Management Act (Northwest Territories), the Yukon Environmental and Socio-economic Assessment Act (Yukon) and the Nunavut Land Claims Agreement (Nunavut).

In all jurisdictions, where a proposed project is subject to environmental assessment, the project may not proceed before the environmental assessment process is complete and a positive determination is granted.

The environmental assessment process typically requires the preparation of an environmental study (potentially also a social impact study) and public information or consultation. The thresholds for triggering the process and requirements for information disclosure and public consultation vary depending on the particular jurisdiction in which the assessment takes place. Generally, the process seeks to identify impacts so that they can be addressed through the implementation of mitigation measures. The provincial and federal governments are also required to consult with aboriginal communities whose rights may be impacted by the proposed project.

The time required to complete the process varies depending on the location and can be lengthy in certain jurisdictions. One should anticipate at least two years to complete the environmental assessment process, although the timing can vary depending on the level of assessment required and the complexity of the proposed project.

The federal government has introduced measures to avoid duplication of the environmental assessment process in circumstances where both federal and provincial environmental assessment processes are triggered with

respect to the same project. Eight provinces and territories (not including Northwest Territories, Nunavut, Prince Edward Island, Nova Scotia and New Brunswick) have entered into cooperation agreements with the federal government with a view to avoiding duplication.

35 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Canada's provinces and territories impose mine closure and reclamation obligations. Generally, this requires the preparation and filing of a mine closure plan before mine production can proceed. As part of the plan, mine closure costs are estimated and financial guarantee must be provided to the government to cover the closure costs. Increasingly, progressive reclamation obligations are being considered. The method used to calculate the amount and the acceptable forms of financial guarantee (eg, letters of credit, government bonds, cash, mine-reclamation trusts) vary depending on the jurisdiction.

In addition, a federal environmental assessment may be required for the decommissioning and abandonment of projects that meet the 'designated project' thresholds under the CEAA 2012.

Health & safety, and labour issues

36 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Canada's Constitution divides the authority to enact labour and employment laws between the federal government and the provinces and territories. Approximately 90 per cent of employees in Canada fall under the jurisdiction of provincial or territorial laws. While the laws and statutes vary between jurisdictions, there is a fair amount of uniformity across the country regarding basic labour and employment matters.

Employment statutes regulate matters such as minimum employment standards, labour relations, human rights, occupational health and safety, workers' compensation, universal health insurance and privacy.

Minimum employment standards laws cover minimum wages, hours of work, overtime hours and premiums, rest and meal periods, mandatory holidays, holiday periods and pay, leaves (pregnancy, parental, emergency, family medical), termination notice and severance pay and unjust dismissal hearings (in some jurisdictions).

Labour relations statutes govern how employees may become represented by a trade union, as well as the rights and obligations of unions and employers once a union is designated to represent a group of employees. Such union 'bargaining units' are generally limited to a particular business establishment in a defined location or locations.

In addition to these statutes, many non-union employment rights are governed by common law and enforced through the courts. Unionised employees' rights are generally enforced through tribunals.

The principal federal law governing occupational health and safety matters is part II of the Canada Labour Code. Most of the provinces and territories have specific statutes and regulations dealing with mining operations.

37 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Any processing of mining waste products generally would need to be conducted pursuant to approvals issued under provincial environmental protection legislation or in some instances pursuant to the Federal Transportation of Dangerous Goods Act. Regarding the ownership rights to tailings (for purposes of the remainder of this paragraph, may include waste piles), these rights often still remain with the companies who originally processed and mined the minerals and deposited the tailings on their own, or adjacent, properties. In other circumstances, the rights might be held by the owner of the property where the tailings currently lie (and not with the mining company that processed such ore). In either instance, ownership depends on the contractual arrangements and intention of the parties at the time the tailings were deposited. In situations where the Crown owns the tailings, the lands are not likely to be open for staking and would be subject to a remediation process. Any company wishing to process such tailings would need to obtain a special lease or permit from the Crown and to file a closure plan which contemplated long term remediation of the site.

38 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Canada's rules for foreign workers and business visitors apply to the mining industry. To work in Canada, a foreign national needs to apply for a work permit. The federal government administers the Temporary Foreign Worker Program through Immigration and Citizenship Canada, the Ministry of Employment and Social Development Canada (ESDC) and the Canada Border Services Agency.

Generally, a labour market impact assessment (LMIA) from ESDC is needed before issuance of a work permit. ESDC ensures that the employment of foreign workers does not deprive Canadian workers of an employment opportunity. Quebec Immigration also participates in decisions in Quebec. There are several exemptions to the LMIA requirement, including the intra-company transfer exemption and the NAFTA professionals' exemption. In the latter case, issuance of a work permit follows a simpler procedure.

Business visitors from visa-exempt countries can be admitted to Canada to participate in business meetings without having to go through any particular formalities. Those from non-visa-exempt countries need to apply for a temporary resident visa to a Canadian embassy or consulate abroad.

Social and community issues

39 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

While Canada does not have an overarching CSR law, myriad federal, provincial and territorial laws apply, including health and safety, labour relations, environmental protection and assessment and in a few rare cases agreements with aboriginal people. Some form of environmental assessment is usually required to develop a mining project. When first nation communities assert aboriginal rights, aboriginal title or treaty rights to a particular area, the Crown may owe a duty to consult with them or seek a workable accommodation in respect of any Crown decisions that may infringe those rights. While the duty to consult or seek a workable accommodation with aboriginal peoples is a legal duty imposed on the Crown and not on private parties, many private parties have consulted with and sought to accommodate aboriginal peoples' interests by entering into agreements with them.

A number of jurisdictions have legislated the requirement for private parties to consult and even enter into agreements. More still are contemplating regulations that will try to push some of the Crown's obligations onto project proponents. The decision of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* SCC 44 (2014) recognised the Tsilhqot'in Nation as holding aboriginal title to approximately 1,900km² of territory in the interior of British Columbia. Consent of an aboriginal group having proven aboriginal title is a practical requirement (although governments may act without consent, the bar is set very high to justify such action). This decision represents the first successful claim for aboriginal title in Canada and may lead other first nations in British Columbia to pursue aboriginal title in their traditional land-use areas.

On 1 November 2012, the Ontario government's new consultation regulations under the Mining Act came into effect. Mining companies are required to submit exploration plans or obtain exploration permits prior to conducting activity on mining claims or leases as of 1 April 2013. A necessary component of such plans or permits is to satisfy the government that the company has consulted with aboriginal peoples in the vicinity of the property. Ontario is the first Canadian jurisdiction to incorporate consultation requirements in its mining statute.

40 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

While many aboriginal peoples have signed treaties with the Crown and have constitutionally protected treaty rights, many have not. Large parts of Canada are, therefore, subject to claims based on aboriginal title or aboriginal rights. Although mineral rights can often (but not always) be obtained without involvement of aboriginal people, in most of Canada any exercise of mining rights will involve a Crown licence or permit, which, in turn, is likely to engage the Crown's duty to consult with any affected aboriginal group. Additionally, a recent Supreme Court of Canada case has

established that consent of an aboriginal group having proven aboriginal title is a practical requirement (although governments may act without consent, the bar is set very high to justify such action). Only one first nation in Canada has proven aboriginal title, and much of Canada is covered by treaties that already deal with the aboriginal title issue.

Additionally, there are specific (and usually not expansive) areas of Canada set aside for the use and benefit of aboriginal communities called Indian reserves. There are Indian reserves in most parts of Canada. Management and control of the reserve land is provided for under the Indian Act, with some powers being vested in the band and some powers in the Federal Department of Indigenous Affairs and Northern Development.

Property rights and rights to minerals on reserves are governed primarily by two provisions of the Constitution Act of 1867. The pattern of rights to minerals on Indian reserves is complicated and very uneven, both between and within provinces. The various federal–provincial agreements affecting minerals were concluded more for administrative expedience than for legal clarification. Provincial assertions add to the doubts that the agreements leave unresolved.

Moreover, the returns to Indian bands from mineral development, to the extent that development occurs, are often meagre. The combination of complexity, contested legal entitlement and inadequate returns has had a dampening effect on mineral exploration on reserves.

41 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

Canada has adopted a number of voluntary aspirational conventions regarding CSR that, because of their nature, are not directly applicable within Canada, including:

- the UN Declaration on the Rights of Indigenous Peoples (2007);
- the UN's Guiding Principles on Business and Human Rights (2011);
- Voluntary Principles on Security and Human Rights (2000);
- the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011); and
- OECD Guidelines for Multinational Enterprises (1976).

These documents are used as touchstones by civil society in judging mining operations within Canada and mining operations undertaken internationally by Canadian companies. The Government of Canada has recently indicated that it will implement the UN Declaration on the Rights of Indigenous Peoples in Canada, however there is no decision yet on how that will be accomplished.

Anti-bribery and corrupt practices

42 Describe any local legislation governing anti-bribery and corrupt practices.

Generally, The Corruption of Foreign Public Officials Act (CFPOA) is Canada's principal law aimed at prohibiting bribery and corruption of foreign public officials for the purpose of obtaining or retaining business in foreign markets. Violation of the law can result in fines of up to any amount at the discretion of the court or up to 14 years' imprisonment. The CFPOA applies to a transaction or attempted transaction when it is committed in whole or in part in Canada or when there was a 'real and substantial' link between the offence and Canada. The CFPOA also applies to Canadian citizens wherever those Canadians are located and to permanent residents who return to Canada after committing an offence under the CFPOA. The CFPOA also includes a separate criminal offence for illicit accounting for the purpose of hiding a bribe to a foreign public official.

Specific to the mining sector, in 2013, the G8 summit leaders issued a communique agreeing that raising global standards of transparency in the extractive sector will reduce opportunities for corruption. The Canadian government committed to launching consultations with stakeholders to develop a mandatory reporting regime for extractive companies. Arising from this, the Extractive Sector Transparency Measures Act (ESTMA) became law on 1 June 2015. The purpose of ESTMA is to deter corruption of both Canadian and foreign public officials in the mining (and oil and gas) sector. As of this date, ESTMA imposes on Canadian extractive issuers and certain privately held companies in the extractive sector a detailed reporting requirement for payments made to Canadian and foreign governments including any corporation established to perform government duties or functions. Reporting obligations will not apply to aboriginal governments and corporations established to perform aboriginal government functions until 1 June 2017.

Payments to government payees must be publicly reported no later than 150 days after the end of the company's fiscal period if the total of all payments in a particular category of payment is at least C$100,000 for a financial year. ESTMA defines 'payments' to include taxes (excluding consumption and personal income taxes), royalties and fees.

ESTMA's reporting obligation applies to all entities listed on a stock exchange in Canada, engaged in the 'commercial development' of minerals (and oil and gas), including their exploration or extraction. It also applies to the acquisition or holding of a licence or other authorisation to carry out any of these activities. It also applies to any other corporation engaged in the commercial development of oil, gas or minerals that has a place of business in Canada or does business in Canada or has assets in Canada and meets two of the following three conditions in one of its two most recent fiscal years: at least C$20 million in assets, at least C$40 million in revenue and at least 250 employees.

Penalties for noncompliance can be severe. Failing to meet ESTMA's reporting obligations is a criminal offence punishable by a fine of up to C$250,000 per day that the offence continues. A reporting violation of six months' duration subjects a company to criminal liability of up to C$45 million. Moreover, any officer, director, or agent of a company subject to the reporting obligations that directed or authorised or participated in this reporting failure is equally liable to the same criminal punishment.

43 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Yes. The US Foreign Corrupt Practices Act, like the CFPOA, prohibits the offering, promising, or authorising or the giving of anything of value to a foreign official for the purpose of obtaining or retaining business. It also has an extraterritorial reach: it not only applies to US corporations or any person acting on behalf of such corporations or US citizens, nationals, or residents, it also applies to foreign and US issuers or foreign persons and entities while in the territory of the US. Companies also pay attention to the UK Bribery Act, which has a similar coverage.

Also, the 11 December 2015 announcement by the US Securities and Exchange Commission (SEC) of proposed rules issued under the US Dodd-Frank Wall Street Reform and Consumer Protection Act requires certain issuers to disclose payments made to the US federal government or foreign governments for the commercial development of oil, natural gas or minerals is a mandatory reporting regime for extractive companies. Once the SEC adopts the final version, these rules will be similar to the ESTMA: extractive issuers must disclose payments of at least C$100,000 during the same fiscal year to the US government or any foreign government regarding the commercial development of oil, natural gas or minerals or the acquisition of a licence for any such activity, and categories of payments match the type of payments covered in the ESTMA. This means that any Canadian companies listed in the US will be required to publicly report payments made to any government including payments to any level of Canadian government.

44 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

Canada has also signed the OECD International Convention on Combating Bribery of Foreign Officials (1997), which, although not directly applicable, is the genesis for the Corruption of Foreign Public Officials Act, 1999 that criminalises the bribing of foreign officials. Additionally, on 16 December 2014, Canada enacted the Extractive Sector Transparency Measures Act, and brought it into force on 1 June 2015. This act fulfils an EITI-like role by requiring extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.

Foreign investment

45 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

The Investment Canada Act (ICA) is a law of general application. While it does not set out specific foreign ownership limits or restrictions with respect to the mining industry, it contains provisions requiring pre-transaction approval of certain investments in Canada by

Update and trends

Over the course of 2015, legislation was implemented across Canada to increase transparency in the mining industry. On 1 June 2015 the federal government brought into force the Extractive Sector Transparency Measures Act. This act requires companies that are engaged in (or that control companies engaged in) the exploration or extraction of oil, gas or minerals to report annually on payments made to all levels of governments both in Canada and abroad. Payments to aboriginal governments and organisations in Canada will be subject to this act from June 2017. Similar pieces of legislation were adopted by some Canadian provinces to address payments made to all levels of local or provincial governments.

In October 2015, an act respecting transparency measures in the mining, oil and gas industries came into force in Quebec. The government's objectives in enacting the legislation were to prevent and detect corruption and to foster public acceptance of natural resource exploration and development projects. To a certain extent, the Quebec Act mirrors Canada's Extractive Sector Transparency Measures Act, and imposes annual reporting and disclosure requirements for certain payments by qualified entities in the mining, oil and gas industries.

On 16 February 2016 the Quebec Minister of Energy and Natural Resources and Minister responsible for the Plan Nord tabled in the national assembly a green paper setting out guidelines for the Ministry of Energy and Natural Resources regarding social acceptability. Social acceptability has become a key element to any promoter's strategy in designing and implementing mining projects in Quebec. First and foremost, promoters must include in their strategy an effective and workable participatory process for local communities, including aboriginal communities.

non-Canadians. Under the ICA, acquisitions of Canadian businesses by non-Canadians may be subject to a 'net benefit to Canada' review if certain specified thresholds are exceeded or a 'national security' review at the discretion of the Minister of Innovation, Science and Economic Development, or both.

The Non-Resident Ownership Policy in the Uranium Mining Sector, as set out in a letter issued by the then Minister of Natural Resources in 1987, remains the current statement of Canadian policy with respect to the foreign ownership of Canadian uranium-producing mining properties. The policy provides that:

- a minimum of 51 per cent Canadian resident ownership is required for uranium-producing mining properties in Canada;
- resident ownership for uranium-producing properties in Canada of less than 51 per cent may be permitted if control in fact by Canadians can be established (as defined in the ICA); and
- exemptions to the ownership restrictions may be granted by cabinet only if Canadian partners in a mining development cannot be found.

The policy does not apply to foreign participation in uranium exploration in Canada but will apply if such exploration activities result in a uranium-producing mine.

While comments have been made from time to time regarding the general need to liberalise the policy, there has been no formal announcement by Canada that it has any immediate intention to do so. However, under the CETA between Canada and the EU, Canada has agreed that European investors, in seeking an exemption to the policy, will not be required to demonstrate that a Canadian partner cannot be found.

International treaties

46 What international treaties apply to the mining industry or an investment in the mining industry?

Canada is a signatory to numerous FIPAs and many of its FTAs, including NAFTA and the latest agreements with the EU and South Korea, contain investment protection chapters. As a general rule, these provisions protect investments in the mining industry by requiring national treatment for foreign investments and prohibiting expropriation without compensation, restrictions on the repatriation of funds and performance requirements. As noted in question 26, Canada has 30 bilateral FIPAs now in force including one with China that came into force in 2014. On 29 February 2016, the legal review of the Canada and EU CETA was completed. As part of that review, Canada and the EU agreed to modify the investment protection and investment dispute resolution provisions, and to set up a permanent dispute settlement system.

Some of the information contained in this chapter was drawn from Fasken Martineau's 2014 *Canadian Mining Law*, which was edited by Chuck Higgins (www.fasken.com/canadian-mining-law-book-2014).

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FASKEN MARTINEAU

Michael Bourassa **mbourassa@fasken.com**
John Turner **jturner@fasken.com**

Bay Adelaide Centre
333 Bay Street, Suite 2400
PO Box 20
Toronto, ON M5H 2T6
Canada

Tel: +1 416 865 5455 / 4380
Fax: +1 416 364 7813
www.fasken.com

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