

Mining in Canada: Living in the Strike Zone

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In 1997, telling anyone that you were connected to the mining industry in any way elicited much the same reaction as announcing that you are a professional cyclist today—just substitute “salting” for “doping.” A leading international finance periodical had proclaimed on its cover that “GOLD IS DEAD.” Central banks were selling gold left, right and center, thereby driving down the price. Geologists were jumping out of helicopters, and of course, there was a little thing called “Bre-X.”

Fast forward almost 10 years and metals prices are at record highs, everyone wants to bid to own Inco and the personal trainers at my local gym gossip knowingly about their favorite junior mining plays. Like the proverbial phoenix, the mining sector has risen from its own ashes to become a driving economic force for emerging, developing or just about any other nations.

The world is once again divided into the “haves” and the “have nots”—those who are resource-rich and those who are poor; those who finance resource plays and those who bring projects on stream; those who have the technical skills, access to capital markets and know-how, and those who have the raw natural resources in relatively undeveloped economies, those who...well, you get the picture. All this tension and activity means great opportunities for many market participants, but specifically for lawyers practicing in this area. The reason for this is simple: these transactions cut broadly across national lines, are often intrinsically complex and are highly regulated by disparate but international actors.

Key to appreciating the opportunities presented to the legal profession by this dynamic sector is an understanding of the principal trends that are influencing this cycle. The first section of this article, accordingly, identifies and briefly describes some of the more significant trends or characteristics of the sector at present, while the second section discusses some of the opportunities for the legal profession, which are new or emerging as non-traditional areas requiring legal services within the sector.

I am particularly proud that a number of these represent ways in which lawyers can use their professional skills to achieve results that affect more than just the two parties to a contract or the participants in a financing, but that can have a lasting effect on an economy, a village or the capital market structure of a country.

Key Trends and Characteristics

A legal mining practice is rather like the exploration mining cycle—when it’s hot, there seems to be no end of money being thrown at legal services to create new stories, acquire or dispose of properties, raise money, take companies public and the like. In the post Bre-X trough between 1997 and 2001, it really didn’t matter how fantastic your legal skills (or, for mining companies, their assets) were, there was virtually no activity in the sector. There is a certain lag effect, of course, but our practice tends to mimic the smoothed six-month moving average of a mining composite. Hence, to identify the potential opportunities for the legal mining practice, one must have a good grasp of what is happening in the sector as a whole. In my view, the key trends, influences on and characteristics of the sector at present are:

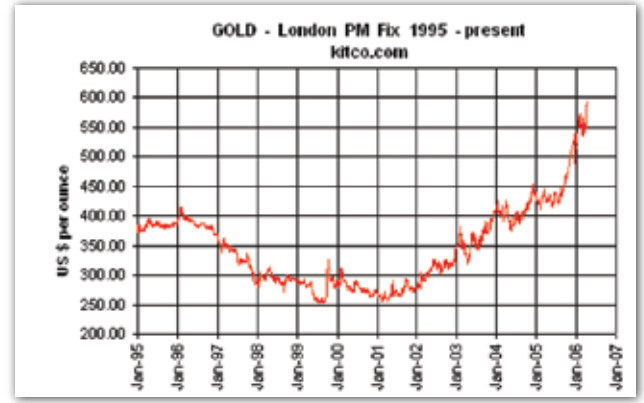
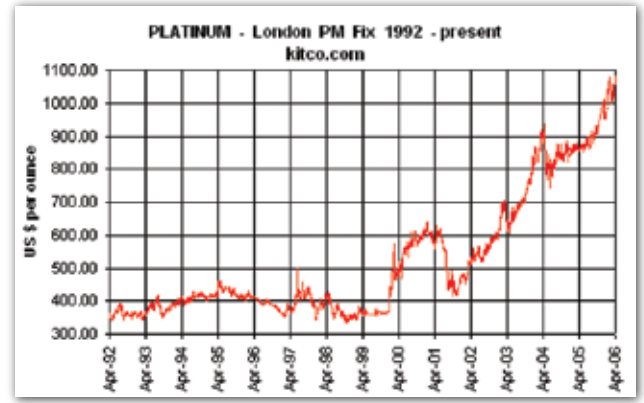
- record metal prices;
- increased perception and awareness of global geopolitical risk;
- increased institutionalization of the investor base in global mining markets;
- increased financing dollars available to projects;
- movements in a number of emerging or developing countries towards more active capital market structures; and
- global decline in skilled, experienced technical personnel.

Each of these will be examined in detail, and will serve as the genus for each of the exciting “new” opportunities for lawyers working in the sector, which are discussed in the latter part of this article.

Record Metal Prices

The charts on the next page really say it all: gold prices have doubled over the past six years, silver and platinum are both up almost one-and-a-half times over the same period, copper has increased five times over its levels five years ago and lead is three times as high as it was over the same period.

The reasons most frequently given to explain these price levels are encouraging, insofar as they fundamentally support the continuation of the cycle beyond the short term and, many would argue, into one of the longest bull runs in the sector. These reasons include the significant ongoing demand as the Chinese Dragon and Indian Tiger awake from their slumber and require massive inputs of base metals to fuel their indus-



trialization and construction booms. In addition, as both those societies develop more significant middle classes, and greater wealth distribution, demand for jewelry and precious metals increases.

In the case of gold, specifically, as will be discussed below, with reference to geopolitical risk, a number of economic factors contribute to the heightened demand for gold. They include the weakening of the US dollar, the increase in oil prices (with which gold is generally strongly correlated) and the cessation of central bank selling. Additionally, during the trough of the sector between 1997 and approximately 2001, diminished additional supply arose either by way of the lack of new production coming on stream or the lack of new discoveries as exploration came to a virtual halt during that period, so that the gap now between supply and demand cannot be bridged in the short term until additional supply can be delivered to the market.

Increased Perception and Awareness of Global Geopolitical Risk

Between Bre-X and the present, another significant event divides the geopolitical landscape: 9/11 was, in many ways, the catalyst for the prevailing geopolitical instability. As I write this article, news flashes are flying and my phone is ringing with the news of a potential terror plot to create explosions on flights between the United Kingdom and the United States. The wars in Iraq and Afghanistan show no signs of ending and the Middle East situation is escalating almost daily.

Gold, in particular, loves chaos, and there certainly is plenty of that at present. The United States economy is demonstrating inflationary tendencies, which, when coupled with world tension, is a great breeding ground for increasing gold prices. Furthermore, the recent weakening of the US currency is good for gold, as gold performs inversely to the US dollar.

Another factor, which, although nascent, is interesting in this context is the scheduled opening this September of the new Iranian oil bourse, which will only accept Euros and not US dollars for oil. It has been alleged that this may have the effect of reducing US dollar world dominance, which again, would be good for gold. We've come a long way from the "GOLD IS DEAD" headline, which heralded the demonetization of gold. I'd say gold is alive and well and its role as a security and monetary hedge is as strong as ever.

Increased Institutionalization of the Investor Base in Global Mining Markets

This trend merely reflects the decline of the retail component, which has traditionally supported resource stocks,

particularly in Canada, as individual investors now increasingly hold mutual funds, income trusts, indexed products, and other more portfolio-type securities as investments than they do individual stocks. This means that financing mining companies in the principal markets in North America and Europe are largely focused on institutions with sophisticated investment knowledge. This naturally has implications for the volatility and liquidity of the trading of individual stocks.

Increased Financing Dollars Available to Projects

While a comprehensive statistical discussion is beyond the scope of this article, a cursory review of annual financings and comparative year-to-date financings for Canadian exploration companies alone bear out this proposition: total announced financings for 2005 were C\$9.3 billion compared with C\$4 billion in 2004, and total confirmed financings for 2005 were C\$5.1 billion compared with C\$3.5 billion in 2004. Cumulative year-to-date financings (to April in each case) announced in 2006 exceed 2005 by 167 per cent and confirmed financings for 2006 exceed 2005 by 159 per cent. (The source for these figures comes from the April 2006 MECO report of financings in the minerals industry prepared by Gamah International Limited.) Add to this the emergence of the Alternative Investment Market (AIM) in London as a significant competitor to the North American and Australian equity markets for mining issues, and the need to advance projects stalled during the post Bre-X years, which are now greatly needed by the neo-industrial economies of China and India as discussed above, and one can see the basis for significant financing dollars chasing mining projects around the world.

Movements in Emerging or Developing Countries Towards More Active Capital Market Structures

Traditionally, vibrant capital markets, such as those in North America, have been crucial in the development of the resource sectors. Canada arguably can be credited with one of the original dynamic junior resource capital markets, which has been essential to the growth of the sector and the ability to source funds domestically for the development of Canadian and now, increasingly, international projects of companies based in Canada and inextricably linked with the Canadian capital markets.

This trend can be traced initially through Australia and now to London, both of which have developed active junior resource capital markets. But other countries such as Chile, Argentina, Peru and South Africa are exploring methods of creating local junior capital markets, which have historically not played a role in those countries. That also means increasing local general and investor education and participation in the junior markets and the resource sector of those countries.

Global Decline in Skilled, Experienced Technical Personnel

There is a critical shortage of technical experts at all levels, but above all at the senior end of the spectrum. This is

due in part to the exodus of many skilled technical personnel from the sector during the last downturn, and the relatively small number of students graduating from mining engineering, earth sciences and similar technical programs compared with the demand for the same.

Opportunities for Exploration

Now let us consider how these various trends and characteristics translate into some “cutting-edge” and unique opportunities for lawyers practicing “in the strike zone.” These opportunities can be categorized into five areas, in addition to the core elements of working in this sector as a lawyer:

- aboriginal peoples and local population considerations;
- export of international environmental and operational “best practices”;
- export of technical standards;
- application of Canadian capital markets principles to other jurisdictions;
- increased need for infrastructure; and
- the “global mining camp.”

At first blush, a number of these areas do not appear to be primarily legal areas. In my view, one of the aspects of practicing in the strike zone is the inextricable integration of legal with international economic, social, political and environmental considerations. What each of these areas has in common with the others is that the Canadian experience, coupled with the analytical framework provided by our legal training, uniquely positions us to take advantage of these opportunities.

Aboriginal Peoples and Local Population Considerations

Canada has had significant experience in identifying and addressing issues concerning aboriginal peoples. I do not imply that we have always correctly or ideally identified or addressed aboriginal issues, merely that we have a modicum of experience in this area. In particular, in the context of mining and resource projects generally, there are examples of extensive, and I would say, reasonably successful negotiations and operations involving aboriginal peoples, such as the diamond operations involving the Innu in northern Canada, and more recently, in the Attawapiskat region.

The lessons learned from such experiences are extremely valuable and can be translated not just to foreign aboriginal issues, but to local population considerations more generally. Issues such as relocation of villages, addressing the preservation of archeologically or historically significant areas that are within or adjacent to proposed or operating projects and, generally, how mining projects should co-exist with existing local populations in a harmonious and beneficial manner to the local population are coming to the forefront of many project development agendas.

Such peaceful co-existence necessarily has a number of legal implications from specific regulatory compliance issues both locally and at corporate head office to, on many occasions, prolonged negotiations with local population representatives. Canadian lawyers armed with experience with aboriginal peoples have the opportunity to contribute meaningfully to this dialogue.

Additionally, with the advent of corporate responsibility legislation in Canada and a growing awareness of these issues on the international scene, there is a clear need for lawyers to expand their skills and use their relevant experience to address these issues in the international mining context.

Export of International Environmental and Operational “Best Practices”

Canadian companies, geologists, engineers, institutions and, yes, even lawyers have combined to establish the internationally recognized standard for environmental best practices. Spearheaded a few years ago by the Prospectors and Developers Association of Canada (PDAC), E3 is perhaps the most well-known of these initiatives. E3, Environmental Excellence in Exploration, is one of the principal international standards, and is currently being translated into a number of languages, including French and Spanish. A number of other institutions, such as the Canadian Diamond Drilling Association, the Association of Professional Geoscientists of Ontario and the Mining Association of Canada have also contributed to this body of knowledge in areas such as sustainability and exploration best practices.

All of this information is available to anyone free of charge (e.g., www.pdac.ca/pdac/good-practices.html). There are tremendous opportunities for environmental lawyers and mining lawyers with environmental expertise to assist companies and governments internationally to adopt and follow the highest international standard. Additionally, remediation of historical mine sites and mine closure plans are areas where Canadian experience and best practices can be exported to mining projects and legislative initiatives in other countries.

Most jurisdictions (both within Canada and abroad) are now requiring that a comprehensive mine closure plan be prepared before a mine goes into production. The closure plan will show how the mined area is to be rehabilitated and stabilized so that it will not represent a danger to the public or a threat to the environment.

The closure plan covers obvious items such as the removal of mine and mill buildings and other surface structures. It also addresses stabilization of underground features such as crown pillars to minimize any threat from surface movements. Environmental remediation includes the removal of acute risks such as mining and milling chemicals. The handling of

mining residues such as mill tailings is also important. Some tailings and waste rock can generate acidic residues (“acid mine drainage”), while other tailings can be sources of toxic heavy metals such as arsenic and lead.

Financial Assurances

The mine closure plan will typically require some form of funding or financial assurance to be provided to the appropriate regulatory authority. Larger entities may be able to satisfy mine closure liabilities on the basis of a strong balance sheet. Smaller and newer entities will typically be required to provide financial assurances in the form of insurance bonding, cash or letters of credit.

Finite Risk Transfer

The insurance industry has become involved in mine closure matters in the last decade. Insurance companies such as AIG that issue policies covering environmental risk have put together insurance programs described as “finite risk transfer” where they will assume the mine closure obligations in the place and stead of the mining company. A notable example is the Iron Mountain mine in California, where the California Environmental Protection Agency accepted a finite risk transfer program to satisfy liabilities arising from heavy metal discharges into a river system. The extent of the risks transferred amounted to US\$950 million. Regulators will accept such a program as the basis for a release of the mining company from its statutory obligations. The finite risk transfer package will typically include a liability insurance component, a bonding element, and a sinking fund to cover projected expenses.

These programs are especially useful in situations where the original mining enterprise has moved its activities to other mine sites or other jurisdictions. The mining company will have the funds available to cover the liabilities in these situations but may not have any personnel left to actually manage the job so the transfer of the risk and the release by the regulatory authority is highly desirable.

Export of Technical Standards

One of the areas of greatest opportunity for Canadians to have an impact on the development of international mining laws and standards, ironically, has its roots in the Bre-X scandal. It led to the development by the Canadian Securities administrators, in conjunction with numerous interested parties from within the industry, of a set of standards that have been embodied in National Instrument 43-101 Standards of Disclosure for Mineral Projects.

The concept was to require disclosure related to mineral projects to conform to a series of norms, and in particular, to be “blessed” by a designated and accredited technical person, known in the legislation as the “qualified person,” and affectionately in the industry as a “QP.”

The QP must be a member of a finite list of international professional associations designated by NI 43-101, as amended from time to time. It is interesting to note that markets such as AIM in the United Kingdom and the Securities and Exchange Commission in the United States, arguably on either extreme on the regulatory continuum as compared with the Toronto Stock Exchange (TSX) and the TSX Venture Exchange, have adopted standards concerning technical mineral disclosure.

Certain additional countries, such as Peru, Chile and Argentina, are looking closely to the Canadian standard in their current efforts to develop their own standards. This is an area where Canadian lawyers operating in such jurisdictions have a unique opportunity to pass along the experience gained in this area in Canada. The added benefit for the sector is that with the standardization and international recognition of technical accreditation associations, which is the touchstone of the Canadian model, technical personnel in countries that have adopted these standards will become available to assist with the worldwide lack of technical personnel to assist in the exploration and development of mining projects in accordance with best practices.

Application of Canadian Capital Markets Principles to Other Jurisdictions

Similarly with technical standards, Canadian lawyers are well-positioned to assist in the application of Canadian capital markets principles to enable other jurisdictions to develop projects utilizing a greater proportion of financing from their own local markets. A key arrow in such a quiver would be the export of the “flow-through” shares government expenditure concept that has been a cornerstone in Canada of the ongoing support of the exploration segment of the Canadian economy. Several South American countries have demonstrated interest and willingness to further the development of their own capital markets and have looked to the Canadian exchanges and Canadian lawyers to assist them in this endeavor.

Increased Need for Infrastructure

As discoveries and development projects grow increasingly large and remote, infrastructure issues encompassing a broad range of matters arise. Issues, including access, hydro, energy water rights and generation, enlarge the project dynamics and involve lawyers in a myriad of related sectors, regulatory compliance and project construction and logistical matters, which will find their way into a variety of contracts and negotiations for the international mining lawyer.

The “Global Mining Camp”

The global mining camp, like the global village, refers to the international network of legal, technical and finance professionals, organizations and government actors who are stakeholders in the sector. Being involved in the mining sector is necessarily an international undertaking—one that has grown more integrated globally over the years.

It is not unnatural for a Canadian-based company, listed on the AIM in London, to be putting a project into production that is located in West Africa, with key equity stakeholders in the United States and Canada, project financing out of Europe and principal technical consultants out of Australia. Absorbing as much of the international mining landscape as possible and developing a reliable and knowledgeable network of

experts throughout the world are necessary attributes of the successful mining lawyer.

One cannot provide state-of-the-art service to clients in this area without these two elements. Besides, developing them is fun—and how often do you hear a grown professional say that?



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Carmen's practice is focused on international corporate finance, mergers and acquisitions and natural resources. Carmen also enjoys working for clients in the industrial, technology and biotechnology sectors. She advises Canadian and international clients in connection with a wide range of public and private equity and debt offerings, as well as international project financing. Fluent in English, French and Spanish, Carmen also has considerable experience in Africa and South America, where she has assisted clients in structuring and implementing acquisitions and projects and working with emerging market governments. Carmen has acted for public and private companies at all stages of development and has advised agents, underwriters as well as venture capitalists and merchant bankers.

