

Topic: Risk Mitigation Through Legal Structures

Conference: Risk Mitigation and Corporate & Social Responsibility (CSR) in Africa:  
Striking a Balance

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## Introductory Remarks

- Canadian-based companies account for a dominant share of mineral exploration worldwide, over 60% by recent Canadian government estimates
- According to "Canada's Global Mining Presence - **GLOBAL MARKET FOR MINERAL EXPLORATION**"<sup>1</sup>,

"The programs that the larger Canadian-based companies planned to undertake during 2002 represent 32% of all larger-company exploration programs for the entire world. These Canadian companies account for the dominant share, by far, of all worldwide mineral exploration activity. Companies based in Africa account for 17% of the larger-company activity worldwide, while companies based in Europe and those based in Australia each account for 16%. In 1997, the exploration programs of the larger Canadian-based companies accounted for a record 35% of the value of all mineral exploration activity planned worldwide."

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<sup>1</sup> André Lemieux of the Minerals and Metals Sector, Natural Resources Canada in Canadian Minerals Yearbook 2003, Ottawa, Natural Resources Canada

## **Corporate Responsibility (and Liability)**

- Under Canadian corporate law, the Board of Directors has a stewardship role in respect of the business and affairs of the Company. In this capacity it is the responsibility of the Board to oversee the officers of the Corporation who are responsible for the management of the Company.
- In discharging its stewardship responsibilities, the Board must in particular:
  - have a full understanding of the principal business risks associated with the Company's business and operations;
  - ensure that management adopts appropriate risk management systems and internal financial controls;
  - monitor the effectiveness of managements' health, safety and environmental processes and procedures and ensure that the Company is fully compliant in respect of its obligations in these areas
  - otherwise, generally comply with all legal requirements.

## **Criminal Responsibility (and Liability)**

- Bill C-45 (the "Westray Bill") is federal legislation that amends the Canadian Criminal Code.
- Bill C-45 became law on March 31, 2004 and is now the new Section 217.1 in the Criminal Code which reads:

**"2.17.1** Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

- Creates rules for establishing criminal liability to organizations for the acts of their representatives.
- Establishes a legal duty for all persons "directing the work of others" to take reasonable steps to ensure the safety of workers and the public.

### **Limitation on the Oversight Role of the Board**

- Each member of the Board should be entitled, to the extent permitted by law, to rely on the integrity of those persons and organizations within and outside the Company from whom he or she receives financial and other information, and the accuracy of the information provided to the Company by such persons or organizations.
- Each member of the Board should be entitled, to the extent permitted by law, to rely on expert opinion.

### **Identifying Risk**

- Under Canadian securities laws, risk factors must be disclosed in a Company's initial offering documents and then on an ongoing basis in the Company's annual filings – usually in the annual information form for TSX listed companies and management discussion and analysis for TSX-V listed companies.
- Risk factors normally associated with any conduct of business in foreign countries are generally organized around the following issues:
  - acquiring and maintaining a new business;
  - dealing with licenses;
  - hiring and firing and dealing with other employee matters,
  - registering property,
  - getting credit,
  - protecting investors,
  - trading across borders,

- paying taxes, and
- enforcing contracts.

## **The Integration of Acquisitions and Expansions**

- A Company's success on acquiring a new business depends on its ability to identify suitable acquisition candidates, negotiate acceptable terms for the acquisition, and integrate the acquired operations successfully with those of the Company.
- Any new acquisition exposes the Company to new geographic, political, operating, financial and geological risks.
- There is an unavoidable risk in any acquisition regarding undisclosed or unknown liabilities.
- There are also issues about:
  - maintaining uniform standards and controls across the Company
  - obtaining the necessary approvals and licences
  - the costs and available terms of credit in the market in which the acquired business is located, and
  - uniformity of mining reporting standards.

## **Mitigating factors and strategies/best practices:**

- **Due diligence** - The Company must
  - Develop a detailed and systematic project review process to analyze the rewards/risks of all acquisitions and development expansions.
  - Conduct extensive due diligence reviews, both legal and financial.
  - Complete periodic assessments to update these reviews.
  - Allocate responsibility within the Company for undertaking foregoing.
- The Company should try to partner with reputable organizations with experience or a significant presence in the foreign country and that that have policies and controls consistent with their own, and conduct due diligence on those organizations.
- The Company should also try to hire personnel located in the foreign country or who have operating experience in the foreign country.
- Non-recourse project financing with consortiums of international banks should be obtained where appropriate and available.

## **A word about suppliers:**

- Before acquiring a new business, the Company must analyze supply conditions and confirm long-term availability of local supply.
- Contingency plans for supply downtowns should also be undertaken.
- Many companies apply their Codes of Conduct to suppliers or others in the supply chain..
- Barrick's Supplier Code of Ethics (available on the Barrick Gold website at <http://www.barrick.com>) states:

"Barrick wants to do business with suppliers that share its approach to business ethics and corporate social responsibility. Through its Supplier Code of Ethics Policy, Barrick asks suppliers to confirm their commitment to global social responsibility initiatives, including the UN Global Compact.

On an annual basis, Barrick asks all suppliers to review the Supplier Code of Ethics Policy and complete an online declaration that they have understood the Code and agree to fully comply with its provisions. In addition, suppliers are requested to review Barrick's Code of Business Conduct and Ethics and complete an online declaration stating that they are aware of all its provisions. Each supplier must complete a self-assessment scorecard, which is kept on file by the company. The scorecards are monitored on a regular basis to ensure completion and regular updating. "

## **Royalties and taxes**

- The expropriation of mining proceeds from an investment is basically achieved by two alternative means:
  - the imposition of new taxes and royalties, or
  - the reworking of signed contracts.

- Governments that have recently changes to their tax regimes:

### Zambia –

- In 2001, when mines were privatized, government offered fixed tax rate agreements to offset losses and investments, as well as low royalty taxes, with no mechanism to adjust for the rise in copper prices

- In January 2008 the Zambian government proposed to increase taxes on foreign mining companies and to boost copper royalties
- This was partly initiated by the International Monetary Fund which pressed Zambia to review its mining concessions and review tax holidays to generate more resources for development
- Governments that have recently announced the reworking of existing contracts:

#### Democratic Republic of Congo –

- Worried that many contracts with mining companies were entered into during the civil war and gave away too much, the DRC reviewed some 61 contracts and announced in February 2008 that "the vast majority" had to be revised in some form
- A recent government statement says that it was going to find a way for companies to appeal the process without having to resort to litigation or international arbitration.

### **Bribery and corruption**

- Bribery and corruption issues, frequently endemic in the developing nations in which many mining companies operate, are of significant impact.
- A similar issue is political contributions made by a Company or its employees, either in the company's country of incorporation or in the nations in which it operates.

## **Mitigating factors and strategies/best practices.**

- Adopting effective disclosure controls and procedures generally means, under Canadian securities laws, that systems are in place to provide reasonable assurance that information required to be disclosed by the Company in its continuous disclosure documents are effective. A Company with effective disclosure controls and procedures can reduce (but not eliminate) the risk of errors and fraud.
- The trend within the mining sector is to develop strong policies opposing bribery and other forms of corruption – Such policies:
  - limit the value of acceptable gifts or entertainment
  - disallow the payment or receipt of gifts if doing so would create an appearance of impropriety, and
  - apply the same policy to both employees and agents of the Company.
- There is also a trend that contributions are only allowed to the extent permitted under applicable law, and many companies increasingly ban political contributions altogether.
- An important initiative regarding corruption is the "Publish What You Pay" campaign (<http://www.publishwhatyoupay.org/english/>). This is a coalition of 300 NGOs, including Transparency International, the Open Society Institute, Global Witness, Oxfam and a number of other NGOs, which calls on industrialized nations to take leadership steps to require stock market regulators to make oil, gas, and mining companies publish net taxes, fees, royalties, and other payments to all national governments as a condition for being listed on international stock exchanges and financial markets.

## **Environment, health, & safety (EH&S)**

- Environmental, health and safety and security risks are typical of those found throughout the mining supply chain.

- Risks include:
  - physical injury to employees and agents
  - environmental contamination
  - human exposure from chemical releases and accidents, and
  - security of people and property.

### **Mitigating factors and strategies/best practices:**

- Have an EH&S Policy and update it for relevancy on a regular basis.
- Ensure strong board and executive leadership on EH&S matters.
- Understand legal obligations.
- Adopt as a best practice a “no blame” approach to ensure excellent communication between employees and management on health and safety issues.

### **Dealing with uncertain political, economic and legal environments.**

In any less developed legal system there will be the following risks:

- It may be difficult to obtain effective legal redress in the courts of such jurisdictions, whether in respect of a breach of law or regulation, or in an ownership dispute
- Governmental authorities may exercise wider discretion on legal matters
- A newer or more undeveloped system may lack judicial or administrative guidance on interpreting applicable laws, or
- The courts may be inexperienced.

## **Mitigating factors and strategies/best practices:**

- Contracts can select arbitration as the preferable alternative for most international disputes
- Contracts can also contains agreements between the parties as to:
  - the choice of forum for settlement of disputes (for example, a neutral country such as the UK or Sweden)
  - a choice of procedure (for example, arbitration), and
  - the applicable law under which the contract will be interpreted (which does not have to be the law of the foreign country in which the Company is operating).
- The most significant advantage arbitration has over litigation is enforceability. Today, a large majority of developing and transitional countries have signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), whereby they agree to recognize and enforce arbitration awards of other signatory states.
- Prior to investing or operating abroad, inquiry should be made whether the host country for a foreign investment is a signatory state to this convention or whether it has assets in a convention signatory state against which an arbitration award can be enforced.
- For arbitration forums and procedures, consider:
  - United Nations Commission on International Trade Law (UNCITRAL)
  - World Bank (WB) International Centre for the Settlement of Investment Disputes (ICSID).