Law 394 Mining Law
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Fall 2010

By

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Note: The materials here may not be in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

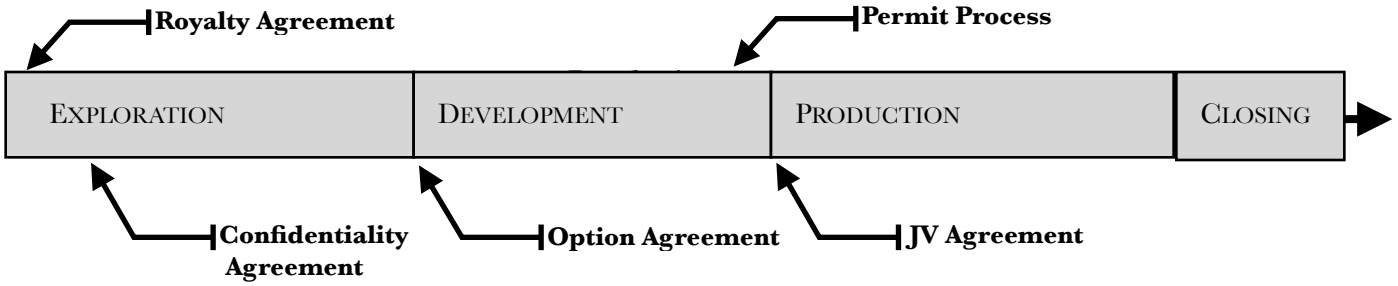
394.1 Introduction to mining

State of the Industry

- Vancouver is the world's mining exploration centre with more than 850 mining and exploration CO offices and most of them are junior mining COs.
- As of August 2007, 54% of Canada's exchange listed mining COs are based in BC.
- Mining COs are listed on the TSX and TSXV. As of June 30, 2010, 333 were listed on the TSX and 1,133 were listed on the TSXV.

Junior Exploration Companies: COs with no revenue and generally rely on selling securities to raise money
Major Exploration Companies: COs that rely on cash flows from mining operations and sometimes equity or debt financings. These usually rely on junior exploration companies to perform grass roots exploration. Some examples in Vancouver are Teck Resources and Goldcorp Inc.

The lifecycle of a mine run by a CO consists of four mages phases. From a point of view of a solicitor acting on behalf of a mining client, different stages of the process imply different forms of documents that require drafting.



Exploration

- The Exploration stage consists of the background research on a property or region of interest: review of past exploration work (assessment reports) and the geology of mineral areas, existing geological maps, scientific literature to match exploration techniques to the geology of the area, exploration conducted by geologists or geophysicists.
- The majority of mining COs in BC are engaged in the exploration stage activities.

- The commodities most often mined in BC are:
  - Precious metals (gold, silver, and platinum group elements such as platinum, palladium, osmium, iridium)
  - Base metals or non-ferrous metals: copper, zinc, lead, tin, aluminum.
  - Ferrous metals such as iron,nickel,molybdenum, chromium, cobalt, manganese, tungsten. The category is traditionally used to denote those metals that are mined for their alloying properties n the manufacturing of steel.
  - Fusionable metals and fuels: uranium, coal, oil sands.
  - Gems and gemstones: diamonds, rubies, etc.
  - Industrial minerals and rocks: a wide assortment of minerals and rocks with industrial uses:
    - Construction materials: building stone, clays and shales for brick manufacture,
    - Chemical applications: salt for de-icing and various chemical products,
    - Manufacturing processes: limestone and dolostone for iron and steel; paper production, ceramics, electronics.

Some Common Symbols					
Au	Gold	**Pb**	Lead	**Fe**	Iron
Ag	Silver	**Pt**	Platinum	**Mo**	Molybdenum
Cu	Copper	**Pd**	Palladium	**U**	Uranium
Zn	Zinc	**Nl**	Nickel	**Al**	Aluminum

Exploration techniques

- Geological techniques used by exploration COs include mapping, trenching and drilling.
- Geochemical techniques include analysis of rock, soil, and stream sediment materials.
- Geophysical techniques such as evaluating the electromagnetic, magnetic, and density properties of rocks and minerals
    - Stripping,trenching
    - Rock sampling
    - Grab sampling and chip sampling
    - Channel sampling
    - Soil and stream sediment sampling
    - Geophysical surveys
    - Drilling
    - Bulk sampling

From the point of view of a solicitor, the typical contracts involved in the exploration stage are as follows:

- Confidentiality agreements
- Option agreements
- Joint venture agreements
- Drilling contracts, which are Ks with a drilling CO for drill sampling, when the exploration CO doesn't have its own drill.
- Exploration services contracts. This is a way to contract out an entire exploration project.
- Contracts relating to camp services in remote locations.

Development

- The development phase includes feasibility assessments, geoscience and engineering studies, raising capital and construction of facilities. The permits required to build the mine will be applied for at this stage, and environmental assessment will be conducted.
- Scoping, pre-feasibility and feasibility studies are the transition from exploration to mining

As Defined by NI 43-101:

Preliminary Assessment (Scoping Study): A study that includes disclosure of forecast mine production rates that may contain capital costs to develop and sustain the mining operation, operating costs, and projected cash flows. As defined by NI 43-101. A preliminary assessment may be based on measured, indicated, or inferred mineral resources, or a combination of any of these. A preliminary assessment must be either in the form of a technical report or be supported by a technical report. Has a high degree of uncertainty. If the preliminary assessment includes inferred mineral resources, an issuer must provide the cautionary statement required by section 2.3(3)(b) of the NI 43-101.

Preliminary Feasibility Study: A more detailed study that a Preliminary Assessment. A comprehensive study of the viability of a mineral project that has advanced to a stage where the mining method, in the case of underground mining, or the pit configuration, in the case of an open pit, has been established and an effective method of mineral processing has been determined, and includes a financial analysis based on reasonable assumptions of technical, engineering, legal, operating, economic, social, and environmental factors and the evaluation of other relevant factors which are sufficient for a qualified person, acting reasonably, to determine if all or part of the mineral resource may be classified as a mineral reserve. One of these may range from $50,000 to $500,000.

Feasibility Study: A comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, economic, social, environmental and other relevant factors are considered in sufficient detail that it could reasonably serve as the basis for a final decision by a financial institution to finance the development of the deposit for mineral production. These typically involve the following components: Mineral resources and reserves, Mine design, Metallurgical and processing flow-sheet, Environmental assessment, Cash flow analysis. One of these may cost up to $2m and may take up to two years to complete.

Bankable Feasibility Study: Feasibility Study of sufficient detail, quality and scope of analysis for a bank to approve funding for a mine.

Production

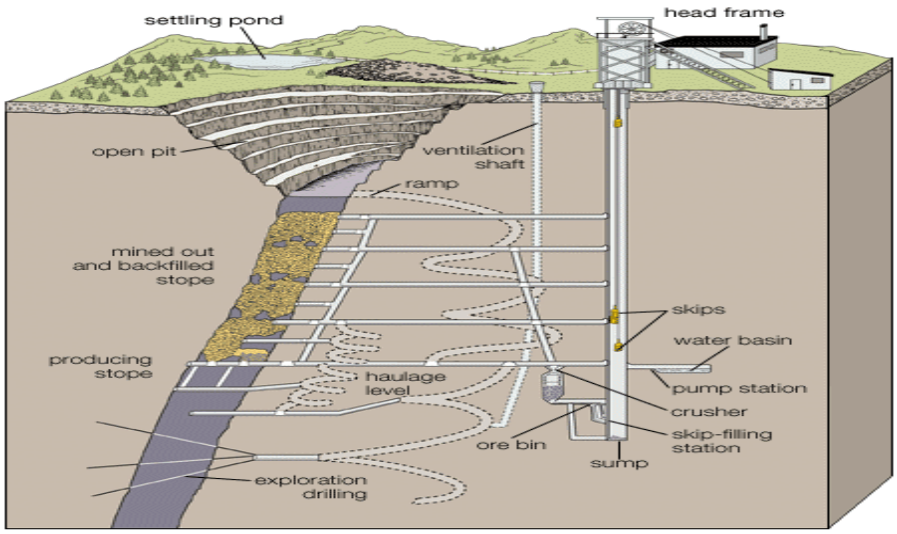
- The production phase includes extraction, milling and processing to produce coal, metals, industrial minerals and aggregate.

Surface mining

- Surface mining is used to extract near surface orebodies having substantial horizontal dimensions and little or no waste cover.
- This is done either by excavating industrial minerals in quarries, or by relying on shallow coal seams ("opencast"or"strip"mines).
- An Open Pit Mine typically has the following components:
  - Pits
  - Waste dumps for dumping waste rock.
  - Tailings for dumping the finer ground rock that is the leftover from the crushing and grinding.
  - Water collection ponds and channels, as well as treatment plans for filtering the dirty used water.
  - Conveyors, though ore can also be trucked around instead.
  - Mill buildings where ore is crushed.
  - Maintenance shops, labs, offices, accommodations, etc.

Underground mining

- The primary methods of accessing an underground mine are:
  - A shaft, either vertical or inclined, which essentially is an adit driven horizontally into the side of a hill or mountain.
  - A decline, which is also called a ramp, driven down into the earth at an angle.



Mineral Processing

- This is the process of recovering the metal or other valuable minerals from the ore.
- Though many COs are fully integrated throughout the production stream, it is not uncommon for smelters and processing facilities to be owned by COs other than the mining COs.
- Process plants or "mills" are generally located at the mine site whereas smelters and refineries are often located well away from the mine.
- Process plants for base metal ores are often known as concentrators, as their prime function is to produce a concentrate containing a high level of contained metal. These concentrates are then sent to a smelter for further treatment.

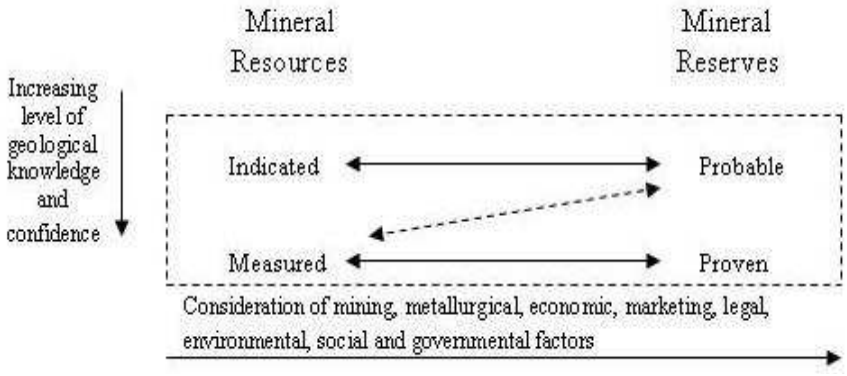
- First stage of the process is “comminution”.
- Ore is first crushed and then ground down into a fine sand-like material so that the particles of valuable minerals in the ore are separated from the waste material known as “gangue”. Crushing is a two stage process that involves:
  - Primary crushing using a jaw or gyratory crusher,
  - Secondary crushing using a cone crusher.
- Base metal concentrates such as copper, zinc and nickel need to be further processed in a smelter.

Closure and mineral resources and reserves

- When the mine has extracted all of the economically viable resources, the moves on to the closure and reclamation stage.
- Closure encompasses all aspects of shutting down a mine and returning the land to its pre-mining state.
- Reclamation is generally considered the part of closure that involves revegetating land to a useable and/or natural state.
- The economic viability of a mine and lifecycle of a mine are established by considering the mineral resources and reserves of a given property.

Grade: The concentration of metal or valuable mineral in a body of rock, usually expressed as a percentage or in grams per tonne or ounces per tonne.
Mineral Resource: A mineral resource is a mineral deposit that has sufficient grade and tonnage and other characteristics such that it has reasonable prospects of being economic to mine. A mineral resource is essentially a geological term. The transition from inferred to indicated to a measured resource is a process of increasing confidence in understanding the geology of the mineral deposit. A measured resource is very well defined with tight drill hole spacing and extensive studies of the grade, densities, shape and physical characteristics of the resource.
Mineral Reserve: A mineral reserve is the economically mineable part of a measured or indicated mineral resource as demonstrated in at least a pre-feasibility study. A mineral reserve requires establishing the mining, processing, metallurgical (i.e., process of extracting metals from ores), environmental, and economic aspects of mining the resource. A mineral resource is essentially a mining term. A mineral reserve is comprised of those parts of the resource that can be mined profitably considering all technical, economic, environmental, and social conditions.

- As exploration progresses on a mineral deposit, more geological information about the deposit is obtained.
- Over the past several years, the importance of using correct methods in the estimation, classification and reporting of mineral resources and reserves has increased (largely because of Bre-Ex).
- In definitions of these, NI 43-1001 defers to the Canadian Institute of Mining (CIM) guidelines, which were published in August 2000. The CIM guidelines define only the following categories:
  - Inferred, indicated or measured resources, the last of which has the highest degree of reliability.
  - Probable and proven reserves
- Quantity, or tonnage of mineralized material in a deposit can be calculated if the volume of the deposit is known
- Volume can be measured by the widths and depths of the drill holes, and the distance between them.
- Computer modelling programs show a three dimensional model on the screen.
- Resource estimates are calculated as:
  - “Inferred” is the estimate is based on information from widely-spaced drill holes.
  - “Indicated” if a significant amount of drilling has been done, but some presumed mineralized zones are fully tested.
  - “Measured” if the drill holes are closely spaced and the geologist is satisfied that the tonnage is reasonably certain,



Free miner system

Free Miner: A person who holds a valid and subsisting free miner certificate issued under MTA or any of the former Acts.

- Free mining (also called free entry) system, as established in BC, is comprised of the following principles:
  - A right of free access to lands in which the minerals are owned by the Crown
  - A right to take possession of them and acquire title by one's own act of staking a claim, and
  - Right to proceed to develop and mine the minerals discovered.
- As per s.7, a person must be a free miner to register a claim or a lease.
- But one does not need to be a free miner to hold a mineral title or engage in recreational hand panning (s.9)

8 Free miner certificate

(2) On application in the prescribed form and on payment of the prescribed fee, a free miner certificate must be issued to an applicant who is

(a) a person age 18 or over and ordinarily a resident of Canada for at least 183 days in each calendar year or authorized to work in Canada,

(b) a Canadian corporation, or

(c) a partnership consisting of partners who are persons that qualify under paragraph (a) or (b).

(3) A free miner certificate

(d) is not transferable,

(e) may be renewed, on application and on compliance with this Act and the regulations,

(4) Despite subsection (2), the CGC may issue a free miner certificate to an applicant who does not meet the eligibility requirements under subsection (2) if, because of legitimate circumstances acceptable to the CGC, the applicant requires a free miner certificate to conduct business in BC.

(5) Without limiting section 7, a person may hold a mineral title without holding a free miner's certificate...

- Free miner certificate can be cancelled in certain circumstances, such as contravening the *MTA*, the regulations, the *Criminal Code*, the *Heritage Conservation Act*, the *Mines Act*, the *Mining Right of Way Act*, or the *Health, Safety and Reclamation Code for Mines in B.C.*

Reservation of mineral rights under Land Act

- The great majority of mineral rights in Canada is owned by the Crown.
- In BC, the precious metals were declared to belong to the Crown as early as 1857.
- The current *Land Act* reserves, inter alia, minerals and placer minerals from dispositions of land from the Crown.
- So all fee simple owners in BC get the shaft. All that they get are surface right, whereas everything below is Crown-reserved.

50 Exceptions and reservations

(1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interests, rights, privileges and titles:

(i) a right in the government, or any person acting for it, to resume any part of the land that is deemed to be necessary by the government for making roads, canals, bridges or other public works, but not more than 1/20 part of the whole of the land, and no resumption may be made of any land on which a building has been erected, or that may be in use as a garden or otherwise;

(ii) a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources, minerals, whether precious or base, as defined in section 1 of the Mineral Tenure Act, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;

(b) conveys no right, title or interest to

(i) geothermal resources as defined in the Geothermal Resources Act,

(ii) minerals and placer minerals as defined in the Mineral Tenure Act,

(iii) coal,

(iv) petroleum as defined in the Petroleum and Natural Gas Act, or

(v) gas,

that may be found in or under the land, ...

Mineral tenure act

Mineral: An ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes:
- rock and other materials from mine tailings, dumps and previously mined deposits of minerals,
- dimension stone, and
- rock or a natural substance prescribed under s. 2(1) of the *MTA*,

But does not include
- coal, petroleum, natural gas, marl, earth, soil, peat, sand or gravel,
- rock or a natural substance that is used for a construction purpose on land that is not within a mineral title or group of mineral titles from which the rock or natural substance is mined,
- rock or a natural substance on private land that is used for a construction purpose, or
- rock or a natural substance prescribed under s. 2(2) of the MTA.

Talus Rock: Means rock that occurs in fragments or particles lying on or above or adjacent to the place or position in which it was originally formed or deposited.
Placer Mineral: Means ore of metal and every natural substance that can be mined and that is either loose, or found in fragmentary or broken rock that is not talus rock and occurs in loose earth, gravel and sand, and includes rock or other materials from placer mine tailings, dumps and previously mined deposits of placer minerals. Placer is Spanish word for *sandbank*, and this refers to minerals found in alluvial deposits of sand and gravel in modern and ancient stream beds.
Chief Gold Commissioner (CGC): The guy that you want to be friends with. Hard not to be cool with a title like that.

- MTA creates two major types of tenures: claims and leases.
- Note that the concept of claim and lease here is different from coal tenures, which are leases and licenses.

Claim: This is the most basic type of tenure. Claim is a chattel interest that conveys to the owner the minerals or placer minerals within and under its boundary. Production is allowed on a claim, but in limited amounts.
Lease: Lease is an interest in land that the free miner can register from the Crown for a set period of time. It conveys to the lessee the minerals or placer minerals within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim.
Legacy: when used in relation to a claim or lease means a claim or lease made before the coming into force of this definition.

Claims

Mineral Claim: A claim to the minerals within an area which has been located or acquired by a method set out in the regulations and includes a claim to minerals recorded under one of the former Acts.
Placer Claim: A claim to the placer minerals within an area which has been located or acquired by a method set out in the regulations.

6.3 Claims
A person may register a claim in accordance with the regulations.

28 Entitlement of minerals and nature of interest
(1) Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.
(2) The interest of a recorded holder of a claim is a chattel interest.

29 Continuation of claims
A recorded holder may hold a claim until the expiry date, and after that, in accordance with the regulations, may hold the claim from year to year by
(a) doing exploration and development and registering a statement of the exploration and development, or making payments instead of exploration and development, and
(b) registering a revised expiry date.

- So upon the expiry of the claim, the owner has to continue work on the property and file SoE, or pay fees instead, to maintain the claim in good standing.

35 Forfeiture

(1) Subject to subsection (2), if a recorded holder

(a) does not perform prescribed maintenance requirements, if any, for a mineral reserve established under section 22, or

(b) does not perform and register the exploration and development required by section 29,

the recorded holder's claim forfeits to and vests in the government at the end of the day which is the expiry date of the claim.

- ss.14 and 41 permit production on a claim, but *Regs* restricts production on a claim to a maximum of 1,000 tonnes of ore in a year from each unit in a legacy claim or each cell in a cell claim (or a bulk sample of up to 10,000 tonnes once every five years, but bulk sampling is, as the name suggests, not really production, it is exploration).
- That limit is not really practical for an operating mine, since an operating mine may well be producing 1,000 tonnes or more in a day.

Leases

Mining Lease: Means a mining lease issued under s. 42 and a legacy mining lease.
Placer Lease: Means a placer lease issued under s. 45 and a legacy placer lease.

42 Issue of a mining lease

(1) A recorded holder of a mineral claim who wishes to replace the mineral claim with a lease must do all of the following:

(a) comply with section 6.32 and pay the prescribed fee;

(b) if required to do so by the CGC have the mineral claim over which the mining lease will be issued surveyed by a BC land surveyor and have the survey approved by the Surveyor General;

(c) post a notice in the prescribed form in the office of the CGC stating that the recorded holder intends to apply for a mining lease;

(d) publish promptly in one issue of the Gazette, and once each week for 4 consecutive weeks in a newspaper circulating in the area in which the mineral claim is situated, a copy of the notice referred to in paragraph (c).

(4) If the CGC is satisfied that the recorded holder has met all of the requirements of subsection (1), the CGC must issue a mining lease for an initial term not longer than 30 years on conditions the CGC considers necessary.

(5) If the lessee complies with this Act, the regulations and any conditions of the mining lease issued under subsection (4), the lessee is entitled to a renewal of the mining lease for one or more further terms not exceeding 30 years each, subject to the approval of the CGC that the mining lease is required for a mining activity.

- Under s.6.32, an owner of a mineral claim who wishes to convert it to a lease must register an application for the lease.
- Placer leases have a different process under s.45, where there only thing that a placer claim holder has to do is deliver a survey of the area and wait for 28 days. The maximum initial term should not exceed 10 years.
- But placer minerals are pretty useless, so there is not need for me to write anymore about that shit.

48 Effect of leases

(2) A lease is an interest in land and conveys to the lessee the minerals or placer minerals, as the case may be, within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim or group of claims, but is subject to a valid charge registered against the record of the claim.

(3) Subject to subsection (2), if a lease is issued over a claim or group of claims, the title or titles of these claims are extinguished.

- For all intents and purposes, any claims that are economically viable should be converted into leases, as they have more longevity, give more rights under s.15, and allow unlimited mineral extraction.

50 Rental obligations

(1) It is a condition of every lease that before the end of a rental year the recorded holder must pay to the government the prescribed annual rental for the next rental year.

(2) If the recorded holder of a lease, ... does not pay the rental or fails to comply with the provisions of this Act or the regulations or conditions respecting the lease, the CGC must serve a notice on the holder requiring the holder to comply.

(3) If the holder does not comply within 30 days after service of the notice, the lease, if ordered by the CGC forfeits to and vests in the government as of the date specified in the order.

(4) Nothing in subsection (2) or (3) is to be construed to prevent the holder of a lease of placer minerals under the former Acts from having that lease forfeited under its terms.

Online claim registration

- Mineral Titles Online Registry is an online user-driven method of electronic submissions for acquiring and managing mineral and placer titles in BC. MTO was developed with these objectives:
  - Provide secure tenure for existing and new titles
  - Establish a fair and orderly system for allocating rights
  - Help reduce the cost of doing business in B.C.
  - Provide an effective and efficient titles system
  - Maintain a competitive investment climate for exploration
  - Replaced physical, on the ground staking with an Internet-based electronic map selection process
- Each 1:50,000 map-sheet was divided into a 10x10 grid, with each cell called a unit.
  - Each unit is divided into four Cells, which range from approximately 21 hectares in the south to approximately 16 hectares in the north of the province.
  - A Cell can contain a mineral claim or a lease, combined with either a mineral or placer claim or a lease as per s.6.7.
  - If there is a legacy claim in the Cell, you can only obtain that part of the Cell not covered by the legacy claim.
  - An individual claim may consist of up to 25 complete or partial adjoining cells, as per s. 4(1) of *MTA Regs.*
- So the process of claim registration is now done entirely online, in accordance with the *MTA Regs*.
- Under s.6.8, registration of the claim is effective from the time of payment of any prescribed fee.
- A claim can be abandoned or a lease surrendered by registering a discharge of the claim or lease.
- A recorded holder of a claim or lease can register a transfer of ownership to another person in accordance with the regulations.
- As per s.6.31(1)(2), any amendment to a claim or lease is not effective until registered.
  - A claim may be reduced in size by reducing it by increments of whole cells, provided that the reduced claim will have at least one cell and the reduction does not result in internal voids or open areas in the cell claim.
- Under s.6.31(3) the following documents may be registered against a claim or lease:
  - Notice of an order of the CGC, notice of a Court Order, notice of a complaint as to valid title to the Chief Gold Commissioner, any other documents specified in the regulations.
  - You can search claims and leases online and request from the MTO copies of the agreements registered against the title.
  - A claim may be subject to agreements or royalties that are not registered against the title to the claim.

Ground claim staking

24.1 Validity and priority of legacy claims

(1) A legacy claim continues until forfeited, cancelled, terminated, abandoned or converted to a lease.
(2) A legacy lease continues until it expires, is surrendered or otherwise terminates.

- Prior to the amendments to the *MTA* that came into effect on January 12, 2005, mineral claims were staked on the ground, a procedure that had been in effect in BC since 1858.
- Staking was performed either through staking a 2 post claim or a 4 post claim or modified grid.

Blazing: Involves cutting blazes on standing trees and clearing out the underbrush in the line between posts.

Two Post Claim:

- This is the process used since 1892 and perfected by grizzled old-time prospectors.
- Two posts are erected to stake this claim and between them is a "location line" that must be blazed.
- The line may be oriented in any direction and need not run north, south, east or west, but the line cannot exceed 1,500 feet in length.
- The inscription on the number 1 post describes how much of the claim lies on each side of the location line.
- The width of the claim can't exceed 1,500 feet, and the claim may lie on one side of the location line or the other, or be partly on one side and partly on the other.
- The number 1 post can also define two claims, one wholly on one side of the location line and the other claim wholly on the other side.
- This method is vulnerable to internal fractions, which would occur if more than one claim is staked in this method and the distance between the posts exceed 1,500 feet, causing a gap to open up between two claims when the number 2 post of one claim is repositioned.

Four Post Claim:

- Also known as modified grid, introduced in 1974. Apparently grizzled prospectors were not the best, and some new changes had to be implemented.

- A rectangular block of up to 20 "claim units" each of 25ha in size, for a claim of between 25 to 500ha, with boundaries running north, south, east and west. In one corner of the claim, the "legal corner post" is placed, which describes the claim on the post.
- Other posts are placed on the other three corners as closely as possible to the actual corners of the claim, but do not define the boundaries.
- One legal corner post can be used to identify four separate claims, so the total area staked using one legal corner post could be up to 2,000 ha. Blazing or marking the lines between the posts is required on all four sides of the claim.

Issues with ground staking

- Since ground staking is no longer ongoing in BC, most of the the mechanical issues are addressed in other jurisdictions' legislation.

Priority in Staking:
- Generally, the time of staking is relevant to determine priority, rather than the time of recording.
- s.24 of the *Northwest Territories and Nunavut Mining Regulations* states:
  (1) Subject to these Regulations, every locator of a claim or a person acting on his behalf shall make application to record the claim … within 60 days from the date of the locating of the claim.
- s.41 of the *Yukon Quartz Mining Act* states:
  (1) Every person who locates a mineral claim shall record it … within fifteen days after locating it, … if it is located within ten miles of the office of the mining recorder."
  (2) One additional day shall be allowed for every additional ten miles or fraction for recording a claim under subsection (1)."

Substantial compliance:
- Mining legislation that excuses the failure to comply exactly with staking requirements
- s.17 of the *Northwest Territories and Nunavut Mining Regulations*, states:
  (1) Failure on the part of a locator or a person who locates a claim on behalf of a locator to comply with the requirements of sections 13 to 16 shall not invalidate a claim if that person has
  (a) in good faith tried to comply with the requirements of those sections and his failure to do so is not of a character calculated or likely to mislead other persons locating claims; and
  (b) stated in his application to record the claim … in what respects he was unable to comply ... and the reasons therefor.
  (2) A Mining Recorder may, before recording a claim, order the locator thereof to comply with any of the requirements of sections 13 to 16 that have not been complied with and where the locator fails to comply with such order within the time specified therein, the Mining Recorder shall not record the claim."
- s.45 of the *Yukon Quartz Mining Act* states:
  (1) Failure on the part of the locator of a mineral claim to comply in every respect with the provisions of this Part does not invalidate the location, … that there has been on the part of the locator an honest attempt to comply with all the provisions of this Part and that the non-observance of any of the requirements of this Part is not of a character calculated to mislead other persons who desire to locate claims in the vicinity.
  (2) A mining recorder may, before granting entry, require the locator of a mineral claim to immediately remedy any material defaults committed …, and if the defaults are not remedied within a period ... and to his or her satisfaction, entry may be refused."

Right and obligations of a claim owner or lessee

Obligations of an owner

- As mentioned above, under s.29, the holder of a claim has to prove on an annual basis that exploration work is being conducted, or payment to the government needs to be made.
- This is demonstrated through filing a Statement of Work (through MTO) each year regarding exploration and development performed on the claim during the proceeding year.
- A portable assessment account for exploration and development expenditures to be attributed to future years.
- As per s.18(4) if the holder of the claims does not comply with a provision of MTA, regulations, or any other enactment in relation to mining, then the chief gold commissioner, after giving the fool a chance to correct himself, may cancel the claim.
- In respect of Leases, the holder must pay the government for annual rental for the next rental year. If the payment is not made or failure to comply with conditions of the lease, the CGC must serve a notice on the holder requesting compliance. Non-compliance within 30 days after service may result in the lease being forfeited.

Mineral Lands: Lands in which minerals or placer minerals or the right to explore is vested in or reserved to the government, and includes Crown granted 2 post claims, but excludes those listed in s.11(2).

RIGHTS OF AN OWNER

14 Surface rights

(1) Subject to this Act, a recorded holder may use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals or placer minerals, including the treatment of ore and concentrates, and all operations related to the exploration and development or production of minerals or placer minerals and the business of mining.

(2) Despite (1), no mining activity may be done by the recorded holder until the recorded holder receives the permit, ... under the Mines Act.

(3) Subject to the terms and conditions set by the issuing authority under the Forest Act, a recorded holder of a mineral title that is not in production must on request be issued either a free use permit or an occupant licence to cut under that Act at the option of the government.

(4) The recorded holder of a mineral title that is in production or being prepared for production must on request be issued an occupant licence to cut under the Forest Act, subject to terms and conditions set by the issuing authority.

(5) Unless the location is one of the following, a land use designation or objective does not preclude application by a recorded holder for any form of permission, or approval of that permission, required in relation to mining activity by the recorded holder:

(a) an area in which mining is prohibited under the Environment and Land Use Act;
(b) a park under the Park Act or a regional park under the Local Government Act;
(c) a park or ecological reserve under the Protected Areas of British Columbia Act;
(d) an ecological reserve under the Ecological Reserve Act
(e) a protected heritage property.

- This is pretty straightforward methinks. Since a mineral tenure gives you only rights to the underground minerals, you need additional rights to enter the property and work on it.
- *Forest Act* permits will be needed to cut down trees to clear parts of the site.

15 Disposition of surface rights

(1) If a person holds a mining lease that is located on land that

(a) is unreserved land owned by the government,
(b) is not lawfully occupied for a purpose other than for mining, and
(c) is not protected heritage property.

and the minister certifies that the surface rights are or will be required by the recorded holder for the purposes of a mining activity, the minister having responsibility for the Land Act must, on application of the holder, dispose of the surface rights to that holder.

(2) For the purposes of subsection (1), the minister responsible for the Land Act may dispose of the surface rights to that holder

(a) in whole or in part,
(b) on the terms and conditions that minister considers to be in the public interest, and
(c) on payment of an amount set by that minister based on the value of the unimproved land.

(3) If the minister refuses to certify that the surface rights are or will be required, the minister must serve the recorded holder with a notice...

(4) Failure to certify under subsection (3) within 6 months from the date of the application for certification constitutes refusal.

- But if the land is not being used and you really want it, then you can apply for surface ownership too.

16 Priority of rights on Crown land

(1) If an application to acquire surveyed Crown land is received by a commissioner under the Land Act before a claim is located or registered on that land, and the application results in an acquisition under that Act, the rights with respect to the acquisition of the surface of the land have priority over the rights with respect to a claim subsequently located or registered on that land.

(2) If an application to acquire unsurveyed Crown land is received by a commissioner under the Land Act and

(a) staking of the land under that Act for the purpose of the application is completed before a claim is located or registered, or
(b) the application results in acquisition under that Act,

the rights with respect to the acquisition of the surface of the land have priority over the rights with respect to a claim subsequently located or registered on that land.

(3) If a disposition is made of surface rights to Crown land, whether surveyed or unsurveyed, and at the time of disposition there is a valid mineral title over the Crown land, the disposition of surface rights does not diminish the rights of the recorded holder except to the extent otherwise determined

(a) by order of the chief gold commissioner under section 13,
(b) by order of the minister under section 17,
(c) by order of the Surface Rights Board in a settlement under section 19 (4), or
(d) by a quit claim agreement between a recorded holder and a subsequent holder of the surface rights.

- Not sure how relevant this is, unless if there is some really bitchy fighting going on.

11 Land on which a free miner may enter

(1) Subject to this Act, only a free miner or an agent of a free miner may enter mineral lands to explore for minerals or placer minerals.

(2) The right of entry under subsection (1) does not extend to

(a) land occupied by a building,

(b) the curtilage of a dwelling house,

(c) orchard land,

(d) land under cultivation,

(e) land lawfully occupied for mining purposes, except for the purposes of exploring and locating for minerals or placer minerals as permitted by this Act,

(f) protected heritage property, except as authorized by the local government or minister responsible for the protection of the protected heritage property, or

(g) land in a park, except as permitted by section 21.

- The curtilage in s.11(2)(b) was determined in the case of *Cofrin v. Bicchieri* [1977] BCSC to be 75 meters.

19 Right of entry on private land and compensation

(1) A person must not begin a mining activity unless

(a) the person first serves notice, in the prescribed form and manner, on

(i) the owner, other than the government, of every surface area,

(ii) the holder of a lease of Crown land under section 11 of the Land Act granting the holder exclusive surface rights to the leased land, and

(iii) the holder, under Part 5 of the Land Act, of a disposition of Crown land,

on which the person intends to work or intends to utilize a right of entry for that purpose, and

(b) the prescribed period has elapsed from the date that notice was served under paragraph (a).

(2) A free miner or recorded holder, or any person acting under or with the authority of a free miner or recorded holder, is liable to compensate the owner of a surface area for loss or damage caused by the entry, occupation or use of that area or right of way by or on behalf of the free miner or recorded holder for location, exploration and development, or production of minerals or placer minerals.

- So before beginning a mining activity one must serve notice on the owner of every surface area
- The prescribed period is 8 days.
  - This requirement can be exempted upon written application to the CGC with satisfactory evidence that the person has attempted to serve notice but was unable to do so.
- *Bepple v. Western Industrial Clay Products Ltd.* [2004] BCCA held that the amount of compensation is the FMV of the property in the absence of any evidence that there are special factors which give it a greater value to the owner.
- If a dispute arises, the CGC on application must attempt to settle the dispute. If unable to settle, the Mediation and Arbitration Board under the *Petroleum and Natural Gas Act* has, on application by a party to the dispute, authority to settle the issues in dispute.
- If you own the surface and will need it for mining operations but someone else owns the mineral claims, you will need to negotiate with that claim holder.
  - If you can't come to an agreement with the claim holder, you can apply to the CGC under s.19(3), to settle the dispute.
  - If no economic mineralization is present, you'll likely get to use the surface for your mine facilities. The claim owner will have a right to proceed to the Mediation and Arbitration Board for another decision.

11.1 Certainty of access to mineral titles

(1) In this section, "mining exploration" does not include the collection of a bulk sample of more than 1 000 tonnes of ore.

(2) A recorded holder of a mineral title or an owner of a Crown granted 2 post claim must be issued a special use permit under the Forest Practices Code of BC Act, subject to any terms and conditions set by the issuing authority, for the construction of appropriate access to the area of that mineral title or Crown granted 2 post claim for mining exploration, if the recorded holder or owner

(a) is the holder of a permit under the Mines Act for the mining exploration,

(b) applies for and receives the written approval of the Chief Inspector of Mines to the issuance under the Forest Practices Code of BC Act of the special use permit, and

(c) applies under the Forest Practices Code of BC Act for the special use permit.

(3) For the purpose of this section, the Chief Inspector of Mines, after considering practicable alternative means of access, may grant or refuse the written approval referred to in subsection (2).

Restrictions on mineral tenures

17 Restrictions

(1) Despite this or any other Act, the minister may, by order, restrict the use of surface rights, or restrict the right to or interest in minerals or placer minerals, comprised in all or part of a mineral title if the minister considers that all or part of the surface area is or contains a cultural heritage resource or that the surface area, or the right to or interest in the minerals or placer minerals, should be used for purposes other than a mining activity.

(2) No compensation is payable as a result of an order under subsection (1).

(3) The CGC must serve the order on the recorded holder and register notice of the order in the registry.

(4) A person aggrieved of an order of the minister under subsection (1) may, within 30 days after service of notice of the order, appeal the order to a judge of the Supreme Court.

(5) An appeal lies from an order of the court under subsection (4) to the Court of Appeal with leave of a Justice of the Court of Appeal.

- Compensation for Expropriation under the *Park Act*, s.17.1 of which provides for compensation to be paid upon expropriation of the rights of recorded holder of a lease or claim or a Crown granted 2 post claim in an amount equal to the value of the rights expropriated, and sets out a mechanism for determining the amount.

21 No exploration in parks without consent

Despite any Act, agreement, free miner certificate or mineral title, a person must not locate a mineral title, carry out exploration and development or produce minerals or placer minerals in a park created under an Act of British Columbia or of Canada or in an area of land established as a Provincial heritage property under section 23 of the Heritage Conservation Act unless authorized by the Lieutenant Governor in Council on the recommendation of the person, corporation or government that is responsible for the park or the area of land.

- No strip-mining Stanley Park.

22 Mineral reserves

(1) Despite any other provision of this Act, the CGC may, by regulation, establish a mineral reserve on land specified in the regulation....

- CGC may establish a mineral reserve on land to prohibit or limit an exploration or mining activity, or the registration of any mineral titles, on such land. A recent example of this is the Flathead Valley.
- By the sounds of it, once can get compensation for the loss or restriction of title.

Administration of the MTA

3 Mining division

(1) The CGC may, by order, designate any portion of BC as a mining division and may establish a GC's office for it.

(2) If a designation is made under subsection (1), the CGC must, without delay, publish notice of the designation in the Gazette and publication is deemed to be notice to all persons concerned.

4 Appointment of CGC and gold commissioners

(1) A CGC and one or more GCs may be appointed under the Public Service Act.

(2) The CGC has general supervision of the CGs and persons appointed under subsection (5).

(3) The CGC may exercise a power given to a GC by this Act.

(4) A GC may, at any reasonable time, enter and examine land covered by a mineral title.

(5) There may be appointed for the proper administration of this Act mineral title inspectors and other persons

(a) whose remuneration is either by way of salary or by commission on fees collected, and

(b) having those powers and duties of a gold commissioner that are conferred on them in writing by the chief gold commissioner.

(6) The CGC may appoint one or more GC to be a deputy CGC, and may delegate to any person employed in the ministry some or all of the functions of the CGC other than powers to make regulations under sections 22 and 46.

- CGC to resolve disputes under s.13.
- CGC may make an order to comply with *MTA*, and if the order is ignored, the CGC may suspend or cancel the claim under s.18.
- An interested person or employee of the ministry of mines may lodge a complaint with the CGC that a claim has been located or recorded contrary to the *MTA* or regulations, made a false statement or report, or claim is being held for purposes other than a mining activity. There is a procedure set forth in s. 40 of the *MTA* for dealing and deciding such complaints.

Crown-granted mineral claims

- Crown Granted Mineral Claims derive either:
  - from the original Crown grant of fee simple land at a time when all mineral rights were granted by the Crown, or
  - were granted as such specifically after survey under the *Land Act* (the last one was in 1959).
- Crown granted mineral claims were introduced in BC in 1869 for base metals and silver, and in 1873 for gold.
- The option of obtaining a Crown granted mineral claims was eliminated, and the last Crown granted mineral claim was issued in 1959. From then on, the most secure form of tenure that could be obtained under the mining legislation was a mining lease.
- Many of these claims continue to exist in BC.
- The Crown grant of mineral claim conferred a permanent tenure of the claim in the nature of a freehold estate.
- The procedure to acquire a Crown granted mineral claim was the subject of frequent amendments to legislation until the turn of the last century, especially as to the amount of work that had to be done on the claim to "prove it up" in order to be entitled to a Crown granted mineral claim.
  - The most important part of the procedure was the application for a certificate of improvement, which could only be obtained after the necessary work had been done and a survey completed. The application had to be advertised and could be challenged by another miner commencing an "adverse action" in the Supreme Court.
- The extent of the estate passed by a Crown grant of a mineral claim changed considerably as the legislation was modified.
- The true extent of the Crown granted mineral claims over the surface and the various minerals can only be construed by referring not only to the grant itself, but the legislation in place at the time the claim was granted.
- The rights to use the surface (as granted by the mineral claim) cannot be severed and sold independent of the Crown granted mineral claim, because the rights to use the surface that are granted by the claim are restricted to using the surface for working the mineral claim: *Re Reliance Gold Mining & Milling Co.* [1908] BCSC.
- Crown granted mineral claims are registered in the BC Land Title System. Indefeasible title cannot be defeated, revoked or made void, and is intended to be conclusive evidence that the title holder has a right to the property that is good against the whole world.
  - Registration under the *Land Title Act* provides conclusive proof of ownership in the form of the Certificate of Indefeasible Title and people who deal with the property are able to rely on the Certificate and do not have to make an exhaustive inquiry as to the validity of the owner's title.
- Fee simple surface rights to the Crown granted mineral claims can be transferred separately from the undersurface rights. The mineral claim is subject to an annual tax assessment under the *Mineral Tax Act*. Non-payment of taxes results in forfeiture of the rights to the Crown. Once the mineral rights are in Crown hands, they will form part of the land base that is open to staking under the mining legislation.

Mining right of way act

- The *Mining Right of Way Act* ("*MRWA*") provides a recorded holder access to its mineral tenures by use of existing roads, either privately or publicly owned, or to expropriate land for access purposes under the provisions of the *Expropriation Act*.
- The *MRWA* deals with providing a "recorded holder" of a mineral title with a right of way across, over, under or through private land or Crown land for the purposes of "constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title (a claim or lease), or for the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title."

2 Power to take necessary right of way on private land

(1) Despite any other Act, a recorded holder who desires to secure a right of way across, over, under or through private land for the purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title, or for the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title may take and use private land for the right of way without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land.

(2) The power of a recorded holder to take and use land for a right of way under subsection (1) does not include the power to take and use existing facilities or other improvements in a right of way except... an existing road.

(3) If private land is taken under subsection (1) without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land, the Expropriation Act applies.

3 Acquisition of right of way on Crown land

(1) With the written consent of or a permit from the minister responsible for Crown lands or, if the land is within a Provincial forest, from the minister responsible for the administration of the Ministry of Forests and Range Act, a recorded holder may use Crown land for a right of way for the purposes referred to in section 2.

- Under s.3(2) there are a few things that the minister may request prior to the approval.
- The width of a right of way taken under the *MRWA* must not exceed the width reasonably required to accommodate the facilities to be constructed, as per s.4.
- Under s.5 (in respect of Crown land) unless stated otherwise, the recipient of the consent is deemed to be the owner of the road or other related improvements on the right of way until the written consent or permit expires.

Use of access roads

- Under s.6, subject to certain exceptions, every person can use the access road to access an existing mineral title, or for forest harvesting or another industrial purpose, provided that the deemed owner may require a reasonable payment in respect of actual maintenance costs of the access road, and a reasonable payment to reimburse the deemed owner for actual capital costs in order to accommodate any special needs of that person, or rebuilding the road to a higher standard.
- A deemed owner of an access road may require the recorded holder to make a reasonable payment to reimburse the deemed owner for a portion of the actual capital costs of constructing the road, if use of the access road is for the purpose of access to and from:
  - A producing mine for which a mining lease has been issued under s. 42 of the *MTA*, or
  - A mineral title from which production of ore exceeds or will exceed 10 000 tonnes.
- If disputes arise under this section, the mediation and arbitration board, on application by one of the parties, has jurisdiction to settle the issue and its decision is binding on the parties.

- Under s.7, an access road may be used for non-industrial purposes by a person who has a specific legal interest in the land or resources in the region tributary to the access road, or if the minister is satisfied that the person who wishes to use it requires access for a commercial purpose and the minister gives written consent to its use by that person.
- Compensation must not be charged for the use of an access road for non-industrial purposes.
- However, if use of an access road would likely cause significant damage to it or endanger life or property, the deemed owner may, with the consent of the minister responsible for Crown lands or the minister responsible for the administration of the *Ministry of Forests and Range Act*:
  - Close the access road by means of gates,
  - Restrict or prevent the use of the access road, and
  - At the expense of its owner, remove a vehicle or animal that is on the access road unlawfully.
- The minister may, with the concurrence of the minister responsible for Crown lands or the minister responsible for the administration of the *Ministry of Forests and Range Act*, restrict the use of an access road for non-industrial purposes.
- Employees and agents of the government may use and cross an access road and a right of way without paying.

- Under s.10, a holder of a mineral title who desires to use an existing road, whether on private land or Crown land, may use the road for the purposes of exploration, development and operation of a mineral title. To do this, the holder must:
  - Must serve written notice on the owner or operator,
  - If the road is an access road, must undertake use of the access road in accordance with the rights of the deemed owner and subject to payment of compensation in accordance with s. 6 of the *MRWA*,
  - If the road was not built under the *MRWA*, must compensate the owner or operator of the road in an amount or manner agreed on or settled between the parties.
- Similar for free miners under s.10(2), but does not have to serve notice or pay compensation.
- It has become more common for parties to enter into agreements with regard to the use of access roads, particularly with the forestry industry. In many cases the forestry industry requires as part of access agreements certain insurance requirements, contributions towards maintenance, load restrictions and use of road during specified periods of time.

9 Limited liability

Except for misfeasance no action lies against any of the following:
(a) the government, in respect of the condition of a road built under this Act;
(b) a recorded holder who builds and operates a road on private land under this Act;
(c) a deemed owner of an access road, in respect of the condition of the access road.

394.3 Mines act and the permit process

Operations of a mine

- Some general sections that regulate the running of the mine. These are enforced by the Chief Inspector of Mines.

11.1 Acquisition of a mine

If a person acquires a mine, before the person engages in mining activity the person must apply to the chief inspector to

(a) obtain a permit, or

(b) amend an existing permit for the mine to identify the applicant as the holder of the permit.

21 Appointment of manager

An owner or agent must,

(a) before work begins, appoint a manager and ensure that there is a person acting in that capacity at all times,

(b) immediately after each appointment, notify the inspector in writing, of the name of the manager, and

(c) provide the manager or the manager's designate with every facility for conducting the operation of the mine in accordance with the requirements of this Act, the regulations and the code.

22 Manager's qualifications and responsibility

(1) Each manager and designate must possess qualifications established by the regulations or the code.

(2) The manager or designate must attend daily at an operating mine.

23 Manager's absence

Each manager must appoint a qualified person to be responsible during the manager's absence to ensure compliance with this Act, the regulations, the code and the permit.

24 Compliance

(1) The owner, agent or manager must take all reasonable measures to ensure compliance with this Act, orders issued under it, the regulations and the code.

(2) Every supervisor and employee must take all reasonable measures to ensure that the requirements of this Act, the regulations, the code and orders applicable to the work they perform or over which they have supervision are followed.

25 Contractors

(1) If work in or about a mine is let to a contractor, the contractor and the contractor's manager, as well as the owner, agent and manager of the mine, must take all reasonable measures to ensure compliance with the provisions of this Act, the regulations, the code, the permit and orders under this Act pertaining to the work over which they have control.

(2) In a case of noncompliance with subsection (1), the contractor and the contractor's manager commit an offence that is punishable in the same manner as if the contractor and contractor's manager were the owner, agent or manager of the mine.

26 Supervision required

Each manager must ensure that every person employed at a mine, if required by the regulations or the code, is under the daily supervision of a person who holds a valid and appropriate certificate as required by the regulations or the code.

27 Mine plans

Each manager must keep in the office at the mine site accurate plans that

(a) are updated every 3 months,

(b) are prepared on a scale that accords with good engineering practice, and

(c) contain particulars established by the regulations or the code.

Permit application process

- As per 14(2) if the *MTA*, no mining activity may be done by the recorded holder until the recorded holder receives the permit under the *Mines Act.*
- *Mines Act.* applies to all mines during exploration, development, construction, production, closure, reclamation and abandonment.
- The Act is administered by the Mining Operations Branch of the Ministry of Energy, Mines and Petroleum Resources (MEMPR).
- But project review is conducted under the *Environmental Assessment Act*.

10 Permits

(1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.

(2) Despite subsection (1), if the chief inspector is satisfied that, ... it is not necessary to obtain a permit, the chief inspector may exempt in writing the owner, agent or manager from the requirement to comply with this section with respect to the proposed work.

(3) If the chief inspector considers the application for a permit is satisfactory the chief inspector may issue the permit, and the permit may contain conditions that the chief inspector considers necessary.

(4) The chief inspector may, as a condition ... require that the owner, ... give security in the amount and form, and subject to conditions, specified by the chief inspector

(a) for mine reclamation, and

(b) to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine.

(5) If required by the chief inspector, the owner, ... in each year, must deposit security in an amount and form satisfactory to the chief inspector so that, together with the deposit under subsection (4) and calculated over the estimated life of the mine, there will be money necessary to perform and carry out properly

(a) all the conditions of the permit relating to the matters referred to in subsection (4) at the proper time, and

(b) all the orders and directions of the chief inspector or an inspector respecting the fulfillment of the conditions relating to the matters referred to in subsection (4).

(8) If the owner, ... fails to perform and complete the program for reclamation or comply with the conditions of the permit to the satisfaction of the chief inspector, the chief inspector, after giving notice to remedy the failure, may do one or more of the following:

(a) order the owner, agent, manager or permittee to stop the mining operation;

(b) apply all or part of the security toward payment of the cost of the work required to be performed or completed;

(c) close the mine;

(d) cancel the permit.

Mines act permit application process

Two types of applications can be made to obtain a permit:

- For exploration work and small mines: a Notice of Work is filed with the Mining Operations Branch District Manager for coal or mineral exploration programs and for approvals of placer mining, or sand and gravel pits and quarries.
- For major mines: a detailed 'Mine Plan and Reclamation Program' must be submitted to the Mining Operations Branch Regional Manager for proposed coal or hardrock mineral mines, major expansions or modifications of producing coal and hardrock mineral mines, and large pilot projects, bulk samples, trial cargoes or test shipments.

- Permit applications for projects under the *BCEAA* may be submitted concurrently with the Project Report; however, a Project Approval Certificate under *BCEAA* must be obtained prior to *Mines Act* permit issuance.
- No work is permitted on a mine site without a valid Mines Act Permit (MAP).

Major MAP application information requirements

In general, the information requirements under the *Code for a Major Mine Mines Ac*t permit application include:

- A map or airphoto showing the location and extent of the mine;
- Particulars of the design, construction, operation and closure of mine components, taking into consideration the safety of the public, mine workers, and the protection of the environment;
- Particulars of the nature and present uses of the land to be used for the mine;
- Particulars of the nature of the mine and the extent of the area to be occupied by the mine;
- A program for the protection and reclamation of the land and watercourses during the construction and operational phases of the mining operation;
- A conceptual final reclamation plan for the closure or abandonment of the mining operation;
- An estimate of the annual cost of outstanding reclamation obligations over the planned life of the mine including the cost of long-term monitoring and abatement; and
- Any other relevant information that may be required by an Inspector.

Appendix I to the Code contains an Information Checklist which outlines those items which must be addressed in a Major MAP application (or amendment) in compliance with the Code. This Table of Contents is based on the Code requirements, and should therefore serve as a checklist, modified as necessary to suit the particular mine plan and reclamation program.

In addressing applicable information items listed in Appendix I, the proponent should ensure that:
- The mineral resource is extracted to the maximum feasible extent;
- The pre-mine environment is adequately characterized to enable determination of whether or not various reclamation objectives have been met at closure;
- The key conditions for reclamation success are created - i.e. appropriate waste rock dump and tailings design, and soil salvage and replacement;
- Acid rock drainage and metal leaching, and other impacts to the receiving waters are prevented; and
- Plans allow for proper plant and equipment decommissioning and salvage.

The submission, review, and appeal of the MAP application are quite complex, and I can't be bothered with them atm.
- Review sequences and procedures for MAP applications are summarized in Figure 3.3-1 of the Application Requirements for a Permit Approving the Mine Plan and Reclamation Program Pursuant to the Mines Act.
- Part 10.1.2 of the Code requires submission of sixteen copies of the MAP application.

The Regional Mine Development Review Committees ("RMDRCs"): Include representatives of other government agencies - both federal and provincial - who may be affected by the proposed mine plan/reclamation program. First Nations (and local government) may also be invited to be members of the RMDRCs. The proponent may be offered one or more opportunities to make presentations and/or meet with the RMDRC during the review period. MAPs generated following RMDRC and public reviews are normally circulated to the Committee members and the proponent in draft form for final comments prior to finalization.

Public Consultation

- An applicant for a MAP may be required to publish a 'notice of filing' application in the BC Gazette and in local papers.
- At the discretion of the Mining Operations Branch Regional Manager (or the Manager, Reclamation and Permitting), a Major MAP application may be required to undergo an 'enhanced' *Mines Act* review process involving a greater level of public consultation. In addition to the normally required advertising and gazetting, public consultation may include:
  - Holding one or more open houses in local communities;
  - Invitations to representatives of public interest groups which have indicated an interest in a mine proposal to make presentations to and/or attend RMDRC meetings pertaining to the project;
  - Establishment of a public liaison committee to review the proposed mine development and/or monitor mine development through construction, operations and closure. Concerns/conclusions of public liaison committees are presented to the RMDRC's for consideration in approvals and permitting, and key government agency representatives. Mining Operations Branch and Ministry of Environment, Lands and Parks representatives normally sit on both committees.
  - Although consultation requirements vary from project to project, the objective is to ensure that all stakeholders receive adequate information regarding projects within their communities, and have the opportunity to register their views and have their questions answered.

Communication with First Nations

- A broad function of the MAP review process is to complement the BC's stated desire to foster its relationship with First Nations. In the context of the Environmental Assessment process, the BC is approaching this goal in two main ways:
  - Inclusion of First Nations whose traditional territory encompasses, or is near, the proposed project as full and equal members of project review committees (as mandated by the *BCEAA*);
  - Through the project review committees, to identify areas where projects can, in the long term, have more positive than negative effects on First Nations (as mandated by a provincial policy).
- A narrower, but extremely important function of the assessment process, is to determine through consultation with First Nations whether aboriginal rights exist within the project area, and the extent to which they may be infringed by the proposed project. Any unjustifiable infringements will likely require compensation, mitigation or avoidance of those infringements.
- First Nations may now be involved in the review of proposals not meeting the *BCEAA* thresholds through participation as full and equal members of the RMDRC's. First Nations would be involved only in those meetings and reviews associated with projects which could potentially affect their rights. Proponents may be required to conduct additional consultation with First Nations in relation to RMDRC reviews - particularly where the First Nations involved have opted not to participate in the RMDRC reviews.

Permit conditions and amendments

- Major MAPs are normally issued with provision for reassessment following five years (or earlier if there are significant mine plan changes or other extenuating circumstances).
- Submission of an annual mine plan and reclamation report is required as a standard permit condition to update reviewers on the project status and compliance.
- Compliance with health, safety and reclamation standards will be a condition of every MAP.
- A detailed projection of reclamation costs, including provisions for long-term monitoring, maintenance, and mitigation of environmental impacts, is required in an application for a MAP
- The Ministry security policy for any mine in BC seeks to provide 'reasonable assurance' that government funds will not be used for mine reclamation.
- A security deposit is required, which is held for the purposes of the reclamation fund.

- Mines in BC are regulated under contaminated sites laws under the *Environmental Management Act* and the Contaminated Sites Regulation. These laws provide the definition of a contaminated site, instruments used to establish a site's status, the setting of remediation standards and procedures, and the determination of liability. It also contains regulations to manage a site registry, collect fees and establish protocols.

Environmental assessment process

- Most provinces and the federal government have legislation in place requiring that an environmental impact assessment be conducted before certain types of industrial projects (including mining projects) can be undertaken.
  - *The BC Environmental Assessment Act* is the BC provincial statute.
  - *Canadian Environmental Assessment Act* is the corresponding federal statute.
  - *Fisheries Act:* A federal statute that applies Canada-wide to any bodies of water that may bear fish and confers broad powers on the Department of Fisheries and Oceans. Basically, anyone carrying on any activity that may use water frequented by fish, or located near such waters, is likely to engage the *Fisheries Act*.
  - *Navigable Waters Protection Act* is another federal act the overall purpose of which is to protect navigable waters, which includes a canal or any other body of water created or altered as a result of construction of any work. The Act prohibits work from being built on or through any navigable water unless approved by the Minister and also prohibits the throwing or depositing of stone, gravel, or other material or rubbish that is liable to sink to the bottom of navigable waters.

- If both federal and provincial environmental assessments are required, there is a cooperation agreement in place to avoid duplication in the Environmental Assessment ("EA") processes by implementing a single review process that meets the requirements of both governments.
- However, both governments maintain control over final approval of the project and independent decisions will be issued.
- Thresholds under the *BCEAA*:
  - Under ss.6-7 of the *BCEAA*, even though a project does not constitute a reviewable project under the regulations, the minister by order may designate the project as a reviewable project, or a project proponent may request the Environmental Assessment Office to designate the project as reviewable.
  - B.C.'s EA process provides a mechanism for reviewing major projects to assess their potential impacts and is important to ensure that major projects meet the goals of environmental, economic and social sustainability.
  - The assessment process is also needed to ensure that the issues and concerns of the public, First Nations, interested stakeholders and government agencies are considered. Aside from evaluating environmental impacts, economic, social, heritage and health effects are also included in the evaluation.
- In general, the EA includes four main elements:
  - Opportunities for all interested parties, including First Nations and neighbouring jurisdictions, to identify issues and provide input;
  - Technical studies of the relevant environmental, social, economic, heritage and health effects of the proposed project;
  - Identification of ways to prevent or minimize undesirable effects and enhance desirable effects; and
  - Consideration of the input of all interested parties in compiling the assessment findings and making recommendations about project acceptability.

MiningWatch Canada v. Canada (Fisheries and Oceans) [2010] SCC

Environmental assessment track be determined according to the project as proposed; it was generally not open to a federal authority to change that level.

Facts: Appeal by PL from the FCA's decision to set aside the decision allowing the PL's judicial review application of a decision by the DFO. Red Chris, a mining CO sought to develop a copper and gold open pit mining and milling operation in north-western BC. Red Chris submitted a project description to the BC Environmental Assessment Office, which issued an assessment certificate after conducting an environmental assessment and concluding that the project was not likely to cause significant adverse environmental and other effects. Red Chris also submitted applications to the DFO for dams required to create a tailings impoundment area. After initially advising that it would conduct a comprehensive study of the project, the DFO wrote a letter to the Canadian Environmental Assessment Agency advising that it had scoped the project such that it excluded the mine and the mill. Consequently, the DFO determined that a comprehensive study was not necessary and the assessment would proceed by way of screening. A report was ultimately released finding that the project was not likely to cause significant adverse environmental effects and the Red Chris was allowed to proceed. PL filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study, alleging a breach of duty under the *CEAA* to conduct a comprehensive study and consult the public on the scope of the assessment. The FC found that the language of s.21 of the *CEAA* made public consultation mandatory for comprehensive studies and that there was a breach of the duty under the *CEAA* by scoping the environmental assessment to include only those aspects of the project that fell under federal jurisdiction.

Issue: Whether the environmental assessment track was determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority.

Discussion:

- s.21 of the Act initiated the set of procedures that had to be followed.
- Parliament's intent, the statutory definition of the word "project" and the relevant regulations suggested that the correct interpretation was "project as proposed" and not "project as scoped".
- This meant that the determination of whether a project required a comprehensive study was not within the discretion of the responsible authority.
- The responsible authority's discretion was in determining the scope of the project for the purposes of assessment once the appropriate track was determined, not in determining the assessment track itself.
- While the minimum scope was the project as proposed by the proponent, the responsible authority or Minister had the discretion to enlarge the scope when required by the facts and circumstances of the project. However, they could not reduce the scope.
- The mining company would be prejudiced by that order despite having done nothing wrong.
- The appropriate relief in this case was to allow the application for judicial review and declare that the responsible authorities erred in failing to conduct a comprehensive study
- Something about the decision being amended by Bill C-9, which got royal assent July 12, 2010.

Ruling: Appeal allowed.

EA process overview

There are three possible stages in the Environmental Assessment Process, though most projects will go through a two stage process of assessment. Board Hearing is the third stage, and is typically only present in controversial proposals.

Application Stage

Review Process

- The first step involves the proponent's submission of an Application for a Project Approval Certificate to the Executive Director of the Environmental Assessment Office.
- The Project Committee reviews the application and considers comments from the public and other interested agencies.
- For issues related to the mine plan and reclamation program under the *Mines Act*, the Application stage of the review process focuses on issue identification and capacity for mitigation.

Project Report Stage

Project Report: A more detailed report that would include assessments prepared by independent professionals.

Review Process

- If a Project Report is requested, draft specifications are developed by the Project Committee.
- The happens Project Report screening by the Environmental Assessment Office Executive Director and the Project Committee to determine if it has met the specifications provided from the Application review.
- The Ministers review the application and recommendations, and decide whether or not a Project Approval Certificate should be issued.
- The proponent may opt to file permit applications concurrently with the Project Report.
- Upon successful completion of the process, the applicant gets an EA certificate, and can go on with the MAP application.

Mine Plan and Reclamation Program Information Requirements for the Project Report

- The Project Report should address all items required for the *Mines Act* permit application.
- Baseline information should typically be provided.
- The proponent should submit a mine plan and reclamation program detailed enough to assure technical reviewers that the proponent has the necessary understanding, resources, technical capability and intent to develop the mine in a safe and environmentally sound manner, and that there are no major issues or concerns which have not been addressed or cannot be adequately mitigated.
- The reclamation program presented in the Project Report should be consistent with the mine plan.

Confidentiality agreement

- A usual business model for a junior development CO which acquires a portfolio of exploration properties is to conduct an exploration program to sufficiently reveal the economic potential of each property.
- As junior development COs rarely have the money needed for a full exploration program, they often seek involvement of a large CO that would contribute the money to a project in exchange for rights or future profits.
- The involvement that the junior is interested in attracting can take one of several different forms, but the most common forms are:
  - Most often it will be an option/joint venture arrangement.
  - An equity investment by the senior CO into the junior, thus giving senior partial control and ownership of the junior.
  - Less common is the outright acquisition of the junior CO by the senior company.
  - Finally, there can be "hybrids" or variants on the above.
- As a first step to enticing a senior mining CO to get involved in a mining project, there's a due diligence phase, where senior CO conducts its own investigation into the property and establishes whether it is worth their time.
- This usually requires some disclosure by the junior. Often the information disclosed is otherwise confidential.
- The confidentiality of this information and the limitations on its use is governed by the CA.

Lac Minerals v. International Corona Resources Ltd. [1989] SCC
Breach of confidence is a distinct form of action.

Facts: This appeal and cross-appeal raised important issues relating to fiduciary duty and breach of confidence. Also at issue were the nature of confidential information and the appropriate remedy for its misuse. PL Corona was a junior mining CO that entered into negotiations for a joint venture with a D CO Lac, which was much larger. PL told D about their 17 mining claims and about their research into the adjoining Williams property consisting of 11 claims. PL told D about their intention to buy Williams property, which according to their predictions will be very lucrative. They showed them research information beyond that available to the public, and conducted site visits. The plan was to enter into a JV for purchase and development. At no point in their discussion was there any mention of confidentiality in their discussions. When, goaded on by D, PL made an offer, they found out that D has already made an offer on their own, bought the property, and went on to build on it the biggest gold mine in Canada. PL sued, saying that D was in breach of confidence, and a breach of a fiduciary relationship. For the remedy, they sought that D should hold the property in trust for them. It is also worth noting, that some of the information was disclosed to the public in a newsletter and a broker presentation, but this was only a small part, and the majority was only presented to D.
Issue: Did D misuse confidential information obtained by it from PL and thereby deprive PL of the Williams property?
Discussion:
- PL pursued under three heads: contract, breach of confidence and breach of fiduciary duty. ONHC and ONCA find breach of confidence and breach of fiduciary duty, and rule that either the property is transferred to PL minus D's outlay, or that D pay damages of $700m.
- There is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.
- <u>There are three criteria in determining whether a breach of confidence had been made out by the respondent</u>
  - Information must have a quality of confidence to it
  - Communication of the information must occur in circumstances in which an obligation of confidence arises
  - The breaching party must misuse or make an unauthorized use of the information.
- When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain.
  - Based on the facts, D has heavily relied on the confidential information conveyed solely to them.
- Where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a JV, the recipient has a heavy burden if wishes to disprove the existence of confidentiality.
- three elements of breach of confidence were made out at trial, affirmed on appeal, and notwithstanding the able submissions for the appellant, I find the decision of the trial judge and the Court of Appeal unassailable on this branch of the case.
- Accordingly, with respect to liability for breach of confidence, the appeal fails.

Ruling: Constructive trust in favour of PL

Option agreement

- One of the ways that a junior CO may use to bring in participation of major CO with exploration funds to explore the property.
- This formalizes a grant by the optionor (the owner of the property) to the optionee, for a period of time, of the right to elect to acquire the property, or an interest in it, for an agreed consideration, coupled with a licence to enter the property and carry out exploration activities.
- An OA is a unilateral contract, in that the optionee has no obligation to take steps to exercise the option, and importantly, the optionor may withdraw the offer at any time prior to acceptance.
- The Courts do have an equitable jurisdiction to override an optionor's purported withdrawal of the offer if it occurs after the performance of the Option has commenced.
- The best way for the optionee to secure its option rights is to ensure that the preliminary agreement states that the optionee has paid the optionor a sum of money in exchange for bring granted the Option.

Prior to the agreement

Due diligence

- Optionee will want to satisfy itself that the optionor owns the mineral interests it is offering in the Option. It will inquire into unrecorded interests in the property, whether there is anyone whose consent is required before the optionee can participate, and whether such persons have working or carried interests. This is part of the "due diligence" process.

Representations and warranties

- Possible representations and warranties of the optionor can be quite broad. For example:
  - The mineral claims were validly staked, recorded and have been kept in good standing.
  - There are no pending proceedings relating to bankruptcy, dissolution or winding up of the optionor.
  - The Property is not the whole or substantially the whole of the undertaking of the optionor.
- Representations and warranties of the optionee are usually much more limited.

Registration of option agreement

- In BC, OAs need not be registered against title to a mineral interest.
- There are many occasions when parties prefer to keep confidential the private financial information that is contained in their agreements, and therefore do not record the agreements.
- Even if the option agreement is recorded, it does not make the optionee's rights indefeasible.

While option is outstanding

Ownership of mineral interests

- By default, the optionor retains all interest prior to the exercise.
- Optionee is better protected if title to the mineral interests is transferred into its name.
  - Optionor won't fraudulently transfer the claims or refuse to convey them once the Option is exercised.
- The OA may state that the transfer of legal title is for administrative convenience only and/or that the optionee holds it in trust for the optionor or holds it subject to the option agreement.
- If the Option is not exercised, the optionee will transfer the properties back to the optionor. .
- In the alternative, the optionee can hold an executed transfer in escrow or hold recorded title and a transfer back to the optionor in escrow, but it is safer to have the claims transferred into the name of the escrow holder (so the optionor cannot transfer the claims before the Option is exercised, notwithstanding the pre-signed transfer held by the escrow agent).
- Another alternative is that the optionee can register a notice of caveat against the title, essentially providing notice on the mineral claims registry that the optionee has an interest in the claims through the option agreement.
- The recorded holder of the mineral interests (whether the optionor or optionee) usually undertakes in the OA to keep title to the claims free of any liens or charges, but since unpaid contractors can register liens no matter who holds the title, the OA may provide that both parties undertake to keep title clear.

- Usually, the OA will permit the optionee to drop certain mineral interests comprised in the Property, provided they first offer to transfer such mineral interests to the optionor.
- The OA may allow the optionee to transfer its rights, usually to an affiliate, or to other unrelated parties with the consent of the optionor. Usually, the rights of the optionee cannot be transferred unless the transferee signs a covenant to fulfill all of the optionee's obligations to the optionor, and even then may require the optionee to continue to be bound.
- The rights of the optionor to transfer its interest may be restricted if the optionor is maintaining a substantial interest in the property.
- Optionors and optionees may have a right of first refusal over the interests of the other.

Right of the optionee to enter the property

- To carry out the exploration work, the optionee requires a right to enter the property and perhaps to erect buildings or other facilities. A right of entry can include rights to erect buildings, to bring onto the property machinery and equipment and to remove ore.
- The optionor may have the right to approve exploration work plans, in which case the procedures and contents of the plans will be spelled out in the agreement along with the procedure in the event of non-approval.
- The optionor may require specific exploration work to be carried out.
- The parties often agree not to compete with each other, including an area of interest around the mineral interests.

Keeping the option in good standing

- Usually the OA is restricted to a specific period of time, sometimes with a right of renewal if the Option is in good standing, for additional periods, up to a maximum duration.
- For the option to be valid, it has to be kept in good standing all the way until the time the exercise, or lapse of OA.
- Keeping the Option in good standing means that the payments are made to optionor and the exploration expenditures are made on time (subject to force majeure).
- The Option can be exercised unilaterally by the optionee at any time, provided that the exercise conditions are satisfied and the Option is in good standing.

Termination of option

- The optionee can drop the Option at any time, but will lose the option payments made to date.
- Option agreements are commonly drafted so that an optionee's rights lapse if they are not exercised by performance of its optional or obligatory requirements. It is common to have a default clause in which the optionor gives the optionee notice of a default and time to rectify it (30 days is common).
- The optionee also usually agrees to leave the mineral interests in good standing for set period, usually a year, after termination of the option agreement, to allow work to be done in the next work season to keep the claims in good standing.

After the exercise

Interest to be Earned on Exercise

Purchase Option: Optionee has the right to acquire 100% of the property. Sometimes the optionor reserves a royalty interest. Usually no joint venture is entered into following exercise of the Option.
Participation Agreement: An agreement between two or more parties to share in the cost and production of a property.
Farm-In (Farm-Out) Agreement: A K with an owner who holds a mineral interest to assign all or part of that interest to another party in exchange for fulfilling contractually specified conditions. The farm-out agreement often stipulates that the other party must commit to an exploration program, within a certain time frame. The assignor of the interest usually reserves a specified overriding royalty interest, with the option to convert the overriding royalty interest to a specified working interest upon payout of exploration and production expenses, otherwise known as a back-in after payout (BIAPO).

- Purchase Options are not common.
- Instead the Option will usually permit the optionee to earn an interest of less than 100% in the property. Usually exercise of this type of Option will result in the parties entering into a joint venture relationship. These are known as the "participation agreements", "farm-in agreements" or "farm-out agreements", in which the optionee carries out work on

the property or contributes the funds to earn a partial interest in the property (50% or 70%), then the parties proceed to develop and produce from the property together.
    - The interest earned may be earned at one time or in stages over time, for example 30% after one year, an additional 21% after two years.
- The details of the interest depend on the development strategy and the timing of exercise:
- Where the Property is to be developed through to production prior to the Option being exercised, the optionor will normally retain only a carried interest which will normally be a royalty of some type (e.g., a net profits royalty or a net smelter return royalty).
- Where the Property is to be developed to a point where a production decision is to be made prior to the Option being exercised (note: this is not the case in the precedent agreement, where the Option will be exercised before any production decision is made), the agreement could provide for any of the following situations:
    - After the Option is exercised, the optionor must fund its proportionate interest of costs going forward to maintain its working interest in the Property;
    - After the Option is exercised, the optionor must either fund its proportionate interest of costs going forward to maintain its working interest in the Property or convert its working interest into a carried interest (NPI or NSR), if optionor elects not to participate; or
    - If the optionor has not spent much money on the Property prior to the Option being exercised, the optionor may need to pay back the optionee a percentage of the optionee's expenses in order to maintain a certain percentage working interest in the Property.
- Where the Property is to be developed to a point where a production decision is to be made sometime after the Option is exercised, the optionor and optionee will usually enter into a joint venture to further explore the Property and, if warranted, to commence commercial production.

If a joint venture is contemplated

- If upon exercise of the Option each of the optionor and the optionee maintain a working interest in the Property, the OA will usually provide for the formation of a JV between the parties.
- Some option agreements may simply state that upon the optionee exercising the Option, the parties will enter into an "industry standard JVA", attach a full JVA as a schedule or just a schedule of basic terms of a JVA.
- If you are attaching a list of terms, the following, at a minimum, should be in the OA:
    - The object of the JV;
    - How the JV will be controlled (management committee) and specify the constitution of the committee;
    - The method of voting on the management committee;
    - Who will be the "operator" of the joint operations;
    - The joint operations come into play automatically at the time when the Option is exercised, whether or not a formal JVA has been entered into, and that no work will be carried out on the Property after the time of exercise of the Option without having related programs and budgets first approved by the management committee;
    - The consequence of a party not participating in an approved program and budget; and
    - The whole Property may be mortgaged for the purpose of raising production funds.

Joint Venture Agreement

Joint Venture: A relationship (not an actual legal entity) between or among persons who agree to combine their money, skills, property, knowledge, or some other resources for a limited purpose, or for a limited time. In mining industry, usually, a junior CO with a promising property will enter into a JV with a medium or major mining CO to further explore the property and, if warranted, develop the property into a mine. The junior CO provides the property while the major CO usually provides financing or access to financing and skills related to building and operating a mine.

- JVs may be conducted through a JV CO Ltd., where each participant is a SH (in which, it is not only a relationship as described above). In such case, an agreement similar to a JVA will take the form of a Shareholders' Agreement.
- The contractual (unincorporated) JVs are more common:
    - The parties are tenants in common with several liability as between themselves, and their rights and duties to each other are fixed by the contract.
    - The agreement seeks to avoid joint liability and avoid partnership, for tax and liability reasons in an attempt to limit each party's liability to its proportionate interest. Stating there is no partnership is in part an attempt to avoid one

participant acting in such a way with a third party that could result in the participant legally binding all participants to the JV.
    - The participants usually agree to take the minerals in kind, although participants may enter into agency sale agreements, such as concentrate agreements.
- In Canada, the contractual JV is commonly the preferred form because the JV is usually a long way away from generating income and the parties to the JV wish to be able to deduct their share of the expenses and depreciation from the start. This is because in Canada, a contractual JV is not recognized for tax purposes as a separate legal entity.
    - Hence, unlike a partnership, the JV does not have a separate Business Number and each JV partner can claim its own tax deductions for exploration and development expenditures and mine financing costs against its existing taxable income, instead of having them applied to the business or a jointly-held subsidiary CO.
- However, for project lending purposes, it may be desirable to structure the JV as a CO, which may simplify loan documentation or may be advantageous for tax reasons.

Interests of participants

Participating Interests: Usually, the initial interests of the parties are fixed in the initial agreement usually referred to as Participating Interests. The initial Participating Interests will be based on certain actual or deemed expenditures.
Carried Interest: A Royalty such as NSR or NPI. The reduction of participating interest to carried interest is called dilution.

- Thereafter, the parties' interests may change according to their respective participation in funding the JV.
- Most exploration JVs allow a participant to elect not to subscribe, or contribute, to its share of the work program in both the exploration phase and the production phase.
- Usually, a JVA will provide that, if a party's interest is reduced below a certain minimum percentage level its working or participating interest in the JV is terminated and its interest is converted into a carried interest, such as a NSR or NPI. The process of a party having its interest reduced is referred to as dilution.
- Sometimes, dilution can be overcome by a "claw-back right", which can be allowed only once in some cases or more than once.
- If the JV is conducted through a CO, each party holds shares in the CO, with the Proportionate Interests reflected in the number of shares each party holds. If there are changes to the Proportionate Interests of the parties due to dilution, the CO will need to issue more shares to increase the percentage of the party not being diluted.

Operators and Management

- Two key concepts in a JV's workings are the management committee and the operator.
- Management Committee:
    - Usually, a management committee is formed with representatives from both parties, although the party with the largest interest will usually have more votes on the committee.
    - The management committee of a contractual JV will perform the same role as a BoD in a incorporated JV.
    - Many decisions of the management committee will be set by simple majority rule and the party with the largest interest will usually prevail, although some key decisions will require unanimous or supermajority agreement between the parties and these circumstances will be spelled out in the JVA (which avoids abuse of the party with the smaller interest by the other party).
- Operator:
    - JVs normally appoint one of the parties (usually the party with the largest interest) to act as operator to be responsible for carrying out the actual programs.
    - The JVA may include provisions to replace the operator.
    - The JVA should lay out the duties of the operator in some detail, but the overriding duty will be to follow the directions of the management committee.
    - The operator usually prepares annual work programs and submits them to the management committee for approval. The operator maintains the accounts and a bank account, and is responsible for paying the bills of the JV.
- Usually, the JVA provides that each party must contribute to the JV activities and JV liabilities in proportion to its Participating Interest.
- Usually, the agreement provides for the operator to send each party a cash call notice when it needs cash to fund a stage in the approved program.

Ownership of Property in a JV:
- In some jurisdictions, all parties can co-own the interests, while in others, only one owner can hold the interests.
- In many foreign jurisdictions (including in most US States) the property interests must be held by a resident CO or individual, so in some cases, the parties will set up a CO in that jurisdiction, which is either owned by one of the parties or co-owned by all parties in proportion to their JV interests.
- If the properties are in Canada, the operator will usually hold the property interests. But the property can be held in the name of the Operator in trust for the parties in proportion to their respective Interests.

- Parties should specify the purpose of their venture and what assets each party is contributing to the JV.
- The JVA should state that each party retains its independent right to carry on its mineral exploration business free from the doctrine of corporate opportunity.
- If project financing is required, the financier may require a first charge on the assets of the JV, and other parties who hold security interests may need to subordinate their interests to the project financier. Also, a JV party may need to borrow funds to pay its portion of a cash call, and may need the ability to charge its interest in the JV separate and apart from the other party.
- There are some confidentiality issues. For some junior public COs, the property may be "material", while it may not be material to a JV partner who is a large CO. The junior CO will need to be allowed to publish news releases and material change reports to comply with its legal disclosure obligations.
- Termination of Mining Operations. Note that the concept of suspension of operations is commonly referred to in the industry as putting the mine on "care and maintenance". The JVA also contemplates permanent termination of operations, which requires a "Mine Closure Plan" (including reclamation and rehabilitation).

Royalties

- A royalty is a quantity of money or minerals to which the holder of the Royalty is entitled upon the production of minerals from the property to which the Royalty pertains.
- There are no "industry standard" Royalties.
- Royalties are usually set up for one of the following reasons:
  - As partial consideration for the purchase of a mineral property;
  - As a result of dilution of a participating partner in a JV below a set threshold;
  - As a means of financing a mineral project; or
  - As part of the consultation or treaty process with aboriginal peoples.
- Royalties can be grouped into three categories:
  - Gross Overriding Royalty – more common in the oil & gas industry; best applied to mineral products that can be extracted and sold with minimum processing.
  - Net Smelter Return Royalty ("NSR") – based on the revenue generated from the sale of mineral products.
  - Net Profits Interest Royalty ("NPI") – based on the income generated from the sale of mineral products.

NSR Royalty

Net Smelter Return Royalty: A percentage of gross receipts realized from the sale of mineral products produced from the property, less allowable deductions from the sale. This does not include the capital and operational expenses of the mine itself.
Gross Receipts: The amounts actually received from the buyer of mineral products produced from the property or those received from a refinery or smelter where concentrates are sold.

- An NSR is likely to run with the land.
- Generally, the costs deducted from the gross receipts are:
  - Transportation costs to the buyer, smelter or refinery;
  - Insurance and security costs;
  - Smelting and refining costs;
  - Marketing costs (including sales commissions) incurred in selling the mineral product; and
  - Taxes relating to severance or sale of mineral product (but not the seller's income taxes).
- Based on the recovery of metal and not the metal content mined, since there may be some metal in the ore that cannot be extracted in smelting process.
- Because the NSR royalty is payable no matter what the economic performance is (that is regardless whether the sale of ore is profitable after deducting capital and operational costs), it is more appropriate for properties with high profitability

potential. This means properties with either low costs, such as heap leaching, or high grade or high metal prices for a conventional mining operation.
- A NSR that is too high could result in a decision that a new mine would be uneconomic, or result in the premature closing of an existing mine.

NPI Royalty

Net Profit Interest Royalty: Royalty taken from gross proceeds realized from the mining operation less allowable costs. Typically referred to as "Net Proceeds Interest" in the United States. But some lawyers who think themselves witty pun it to mean No Profits Intended.
NPI is paid after the Operator recoups from [Net Profits] its pre-production costs ([Gross proceeds] − [Operating costs]).
Operating Costs: All costs incurred after the commencement of commercial production. As long as the property is realizing an operating profit, those profits will go towards paying down the Operator's pre-production costs (initial capital outlay) until they are paid down, after which, the NPI royalty will be payable.
Net Proceeds: Gross Proceeds less costs, where costs are broadly defined to include pre-production costs and post-production costs. Once all such costs are paid from gross proceeds, the Royalty becomes payable.
Taking in Kind: The royalty holder may, if permitted under the Royalty, take a certain percentage of the mineral product, but the price of the product taken in kind must be valued in order for the Operator to be able to withhold certain amounts of its in order to pay for the allowable deductions. The Royalty holder must remember that the receipt of the mineral product will be treated as taxable income valued at the time the taking takes place; if the market value falls between when the Royalty holder receives the product and when it is sold, the holder may suffer a loss.

- NPI is generally only payable after the Operator has recovered at least a portion of the costs generated in putting the property into commercial production.
- The Operator gets to recoup costs poorly made as well as those incurred in a miner-like fashion.
- Capital costs are expensed when incurred, not depreciated or amortized, and this delays payment of the Royalty because all costs must be paid from gross proceeds before a Royalty is payable.
- Generally, the costs deducted from the gross receipts are:
  - Operator's overhead charge, which is a stated percentage, such as 5% - 10% for expenses incurred prior to commencing commercial production, and 3% - 5% thereafter, or allocate a set amount per month or per year.
  - Direct charges by related parties to the Operator. If Operator carries out work through related COs, insure the work is done at competitive market rates, not inflated rates.
  - Interest charged on Costs.
  - Capital Expenditures prior to commercial production. Consider whether capital costs following commencement of commercial production should be depreciated or amortized (over time) rather than expensed (all at once).
    - Depreciation or amortization would have less of an impact on the payment of the royalty.
  - Reclamation Fund is usually considered to be a Cost.

Clauses to Consider in Royalty Agreements

- Commingling. Operators will likely want to commingle ore from the area subject to the Royalty with ore from other surrounding areas. If the Royalty holder thinks the ore from the Royalty property is of higher grade than that of surrounding areas, it may want to add a provision that sets out procedures for valuing the ore before commingling.
- Tailings. One may want to consider a provision that the Royalty will apply to the mining of tailings.
- Property Warehousing. The Royalty holder will want to ensure the Operator is motivated to explore the property, not "warehouse" it. Provisions that provide incentive to explore are: minimum property expenditures, advance annual royalties (which are credited towards actual Royalty payments when they become payable), and return of the property to the Royalty holder if it is abandoned by the Operator.
- Area of Interest. The Royalty could include an area of interest, so the Royalty holder gets a royalty payment on ore mined from the AoI as well. If you act for the Operator, consider giving a reduced royalty in the AoI.
- Access to Information. The Royalty holder will not have a right to information about the property unless it is provided for in the Royalty agreement. If you act for the Royalty holder, consider adding provisions to be provided with information sufficient to (1) ensure the Royalty payments are being accurately calculated by the Operator, (2) if the Royalty holder is subject to NI 43-101, for reporting under that instrument, and (3) to have sufficient information to provide a potential purchaser in the event the Royalty holder wants to sell the Royalty.
- Assignability - can the Royalty be assigned? If it can be assigned, it can be sold. There are several large companies, such as International Royalty Corporation, whose business it is to buy Royalties.

Negotiation agreements and impact benefit agreements

- The Crown has the legal duty to consult, but it may delegate procedural aspects of consultation to industry proponents seeking a particular development. This is typically done and the government, before issuing a MAP, will need to see that the aboriginal groups are "on side". The aboriginal groups will typically not be "on side" with a proposed mine unless an Impact Benefits Agreement has been entered into.
- So exploration COs contemplating developing a mine will often enter into Impact Benefit Agreements with aboriginal bands that hold or claim aboriginal rights to the area of the proposed mine.
- Usually, the parties will enter into a Negotiation Agreement first. The mining CO will agree to pay the band a sum of money to negotiate with the mining CO an Impact Benefits Agreement. At this stage, the mining CO may agree to have performed an archeological survey.
- There are no "standard form" agreements, but many Impact Benefits Agreements in BC share similar features.

- The agreements are typically between the mining CO and the aboriginal groups. However, it is not always easy to determine who speaks for the affected people - the band, tribal council or "nation"?
    - Also, more than one band or other entity may be involved.

Impact Benefit Agreements will typically include provisions similar to the following:
- Employment opportunities, that may also include training, education or apprenticeship for band members.
- Business opportunities for aboriginal-owned businesses
- Financial consideration, which is a fancy term for monetary payments to the band
- Communication mechanism: often, a liaison person from the band is appointed, or a committee is formed between the Operator and the band
- May include a Royalty from production to the band
- Environmental Protection
- Protection and use of Indigenous Knowledge
- Social and Cultural Protection
- Dispute Resolution
- Usually, the agreement is confidential for a period of time to give the aboriginal group an opportunity to explain it to the community, then it becomes non-confidential (except for a schedule explaining the financial terms, which remains confidential).
    - Some more recent agreements allow the mining CO to disclose the existence of the agreement but not the terms.

- Industry objectives here are:
    - To obtain legal certainty
    - To put the Operator in a more favourable position than it would be without the agreement

Corporate finance and securities in a mining context

Introduction

- The following will focus on equity, rather than debt financing.
- The focus for this course is on what is likely to be of most practical, everyday use for a lawyer working for, or representing, mining COs in British Columbia.
- Of the mining COs based in Vancouver, the overwhelming majority are exploration stage COs with little or no revenues, so debt financing is not an option for them at all. These COs literally survive on equity financing.

Reporting Issuer: Means an issuer that
- has filed a prospectus or statement of material facts and the executive director has issued a receipt for it under this Act,
- has any securities that have been at any time listed and posted for trading on any exchange in British Columbia.

Prospectus: Legal document that institutions and businesses use to describe the securities they are offering for participants and buyers. A prospectus commonly provides investors with material information about shares, such as a description of the CO's business, financial statements, biographies of officers and directors, detailed information about their compensation, any litigation that is taking place, a list of material properties and any other material information.

Circular: The information booklet that is distributed during the TOB. Separate circulars are issued by the offeror (62-104F1), issuer (62-104F2), and the directors of the offeree CO (62-104F3). Those issuing the circular are liable for misrepresentation in it.

Notice: A formal or written notification required by law.

- Canadian Securities law is a closed system. This refers broadly to our registration and prospectus requirements. The Closed System is based on two very broad prohibitions
  - The registration requirement - "every person who trades securities must be registered with the SecCom."
  - The prospectus requirement - "every person who distributes previously unissued securities (i.e., new securities being issued for the first time) must file and obtain a receipt for a prospectus with the Commission."
- The key exception to those two requirements is that one need not satisfy the registration requirement or the prospectus requirement if there is an exemption available from the registration and prospectus requirements.
- A whole host of disclosure and other obligations are imposed on a CO as a result of being a reporting issuer, some of the key ones being:
  - The requirements to file and deliver to SHs annual audited and interim unaudited financial statements and MD&As
  - The requirement to issue press releases and file material change reports when material changes occur in the company's business or operations;
  - For the CO's AGM, a company has to prepare and deliver to SHs a management proxy circular in the required form;
  - If the company is listed on the TSX or wants to access the short form prospectus system (discussed below), the company has to prepare and file an AFI.

Some basic information about stock exchanges in Canada:
- There are two equity exchanges in Canada these days: the TSX, which is considered the senior exchange. And the TSX Venture Exchange, which is the junior exchange.
- The most important difference between the two is that the TSX's initial listing requirements are more stringent.
- The stock exchanges are odd creatures from a regulatory perspective, in that they are commercial enterprises that make money on listings by collecting various fees from listed COs and from traders, but at the same time they are SROs and are thus regulatory delegatees of our SecComs.
- Acting for a junior to mid-size mining CO, as either external or in-house counsel, your duties or workload would typically consist of:
  - Ongoing securities law compliance with continuous and periodic disclosure requirements, filings with the stock exchanges and the SecComs;
  - General corporate and commercial work (e.g., negotiating option agreements);
  - Financings; and
  - Mergers and Acquisitions.

Equity financing

- Broadly speaking, the two most common financing options are:
  - A prospectus financing, which is always brokered

- An exempt market financing, which is most commonly called a Private Placement.

Long form prospectus financing

- Also known as a "public offering", which is really just indicating that the securities can be sold to any member of the public, albeit through a broker. The purchasers do not have to be any particular type or meet any particular tests, etc.
- By default a prospectus has to be long form.

Procedurally speaking:
- CO retains the services of an underwriter to sell the offering which is evidenced via an underwriting agreement;
- CO announces the offering, applies for TSX approval and for listing of the shares, and then prepares and files with the SecCom a preliminary prospectus, which is then vetted by SecCom staff;
  - SecCom approval does not actually check the materiality of the information in the prospectus, merely the presence of all the information required by the NI.
- SecCom issues deficiency comments in a Comment Letter, the CO enters Clearance Period when it works to resolve those deficiency comments and once that process is complete SecCom staff gives the CO clearance to file the final prospectus.
- CO files the final prospectus, and once it has a receipt for the final prospectus from the SecCom, then the CO is free to close the offering.
- The closing consists of a cheque being delivered from the underwriters, less the commission, in exchange for the certificate or certificates representing the shares.

Short form prospectuses

- As per Part 3 of NI 41-101, an issuer that is qualified to file a short form prospectus may file a short form prospectus.
- The details of qualification are explained in NI 44-101.
  - Issuer must be a reporting issuer in at least one jurisdiction of Canada. That is it must have filed a long form prospectus in an IPO.
  - The issuer has filed a current AIF in at least one jurisdiction.
  - The issuer has filed with the securities regulatory authority in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed in that jurisdiction
  - The issuer has filed current financial statements in at least one jurisdiction.
  - The issuer's equity securities are listed and posted for trading on a short form eligible exchange

Benefits of a short form prospectus.
  - Faster as there is a shorter review process.
  - Cheaper as there is less printing costs, and issuer doesn't have to include annual financial statements & material change reports, which are incorporated by reference, "info available on SEDAR"
- It used to be that only "senior" COs could use the short form prospectus, because there was a minimum market capitalization threshold (CAD$75 million). But a few years ago, the CSA decided to get rid of that requirement.
- Therefore now, the result is that we see very few issuers filing long form prospectuses, except in the context of IPO. Many COs are being persuaded by investment bankers to use the short form system, because generally it is considered to be a faster process, and speed is everything in capital markets.

Brokered private placement

- Like a prospectus offering, the CO does retain an agent or underwriter to help sell the offering to investors. But the offering is sold not pursuant to a prospectus, but pursuant to one or more prospectus exemptions, as governed by *NI 45-106 Prospectus and Registration Exemptions* (see below).

Procedurally speaking,
- CO retains the services of the broker via an agency agreement to sell the offering,
- CO announces the offering, applies for stock exchange approval and listing of the shares, and the lawyers working on the deal draft a subscription agreement (which is entered into between the CO and each of the investors) which will then be sent out to the investors for their review and execution.
  - The subscription agreement is key to establishing the investors' eligibility for the exemptions. For a subscription agreement to work properly, there need to be representations, warranties and certifications of the subscribers which establish that they qualify for the relevant exemption or exemptions.
- The next stage in the process is that the subscription agreement is completed, returned and signed back by the CO.

- Then the closing is similar to the closing of a prospectus deal, in that a cheque is delivered from the agents, representing the gross proceeds less the commission, and that is delivered to the CO against delivery by the CO of the share certificates.
- Because the securities have a hold period attached to them (see below), unlike in a prospectus transaction the share certificates will, and must by law, have legends on them alerting the investors (and any potential transferees) to the existence the hold period.

Non-brokered private placement

- Like it sounds, this is a private placement, so an exempt transaction, but no broker is retained by the CO to market and sell the offering to investors.
- Procedurally, because no broker is involved, there is no agency agreement, and thus the sole major transaction document is usually the subscription agreement entered into between the investor and the CO. Once an agreement in principle between the CO and the investor is reached (either via a letter of intent, term sheet or the subscription agreement itself), the CO announces a transaction, applies to the stock exchange for approval and listing of the shares, the subscription agreement is settled and signed, and then the parties proceed to close the transaction. Unless a "finder" is involved, the company receives the entire proceeds of the subscription (i.e., no commission is deducted against the gross proceeds).

Flow-through shares

- These are regular common shares (that is they are not a separate class of shares in the CO's capital) which, as an added feature, offer tax advantages to the purchasers. The tax advantages are conferred via separate contractual rights, usually via a subscription agreement.
- Flow through shares are premised on the fact that junior mining exploration COs have exploration expenditures on the one hand, with little or no revenue against which to offset those expenses. So the CO, via contract agrees to "renounce" expenses that the CO would otherwise treat as Canadian exploration expense (CEE) or a Canadian development expense (CDE) to purchasers of shares so that the purchasers can claim the relevant deductions instead of the CO.
- Because of the tax advantages, which essentially act as a "sweetener", flow through shares are usually priced higher than regular common share offerings.
- The big bonus for the investor is that it gets to shelter income at the investor's marginal tax rate.

Pros and Cons of Various Forms of Financing

	Pros	Cons
Prospectus Offerings	• The shares which are distributed under a prospectus are "free trading" from the date of issuance and have no resale restrictions. This is attractive from a marketing perspective. • Any investor can purchase the shares, there are no qualification criteria. • Usually the best way to raise a large amount of money, because of the broad distribution that can be made under the offering. • COs that have weak or inadequate distribution sometimes use a prospectus offering to broaden their SH base.	• A prospectus offering is expensive. • A long form prospectus in particular can take a long time to prepare. • Vetting/review by SecCom staff: the deficiency comment process can result in delays, and sometimes SecCom staff will insist that certain documents be remedied and re-filed. • Prospectus offerings are necessarily brokered, so the CO has to pay commission.
Brokered Private Placement	• Usually less expensive than a prospectus offering. • There is no need to prepare a prospectus and - unless going under the offering memorandum, rights offering exemption or the SFOD exemption - there is no need to prepare any disclosure document at all. • Because there is no prospectus being filed, the company does not really engage SecCom staff in the process.	• You can only sell the securities to certain persons, as per NI 45-106 • Any securities sold have a four month hold period attaching to them from the date of distribution, as per NI 45-102. So this is naturally less attractive to investors than shares which are free trading. Furthermore, as a quid pro quo for the hold period, the shares are often sold at a discount for the prevailing market price. • Narrower distribution.

Pros and Cons of Various Forms of Financing		
Non-Brokered Private Placement	• No commission is payable (unless there is a finder involved). • It has the advantages listed above of a brokered private placement, and in fact it is usually considerably less expensive than a brokered private placement because there is no agency agreement that has to be negotiated, and there is usually less due diligence (though not always). • It is usually the simplest, cheapest, least amount of paper.	• All of the cons of the brokered private placement noted above, except with respect to commission and expenses. • With no agent or broker retained to market the offering, the company is left to its own devices to find purchasers. • There are usually very few purchasers or only one purchaser, so the offering usually has no effect on enhancing the company's distribution, if that is a goal.
Flow Through Shares	• Easy to market, as everybody wants them • Or at least everybody with a need, or ability, to shelter taxable income at a high marginal rate.	• Only available for CO to the extent that they have Canadian mineral properties. • You cannot fund general and administrative expenses with them. • There is a bit more expense involved compared to a "plain vanilla" share offering with respect to drafting the subscription agreement which needs the additional flow through language, and in addition you have to pay tax advisors to vet the documents

NI 45-106 Prospectus and registration exemptions

- This is the NI that deals with the private placement distributions.

Accredited Investor: Includes the following:
(a) a Canadian financial institution, or a Schedule III bank, or a subsidiary of such;
(b) a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer. Such must have a designated partner, director or officer, who has passed certain courses dealing with securities and have specified amount of previous experience in the business.
(c) investment bank, mutual fund, or a pension fund;
(d) ...
(j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1 000 000,
(k) an individual whose net income before taxes exceeded $200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year
(l) an individual who, either alone or with a spouse, has net assets of at least $5 000 000,
(m) trust COs and such
(n) registered charities that have obtained advise
(o) a person that is recognized or designated by the securities regulatory authority or, except in ON and QB, the regulator as an accredited investor;

Eligible Investor: For the purposes of an offering memorandum, this includes the following:
(a) a person whose
  (i) net assets, alone or with a spouse, in the case of an individual, exceed $400 000,
  (ii) net income before taxes exceeded $75 000 in each of the 2 most recent calendar years and who reasonably expects to exceed that income level in the current calendar year, or
  (iii) net income before taxes, alone or with a spouse, in the case of an individual, exceeded $125 000 in each of the 2 most recent calendar years and who reasonably expects to exceed that income level in the current calendar year,
(b) a CO of which a majority of the voting SHs are eligible investors or a majority of the directors are eligible investors,
(c) a GP or LP of which all of the partners are eligible investors,
(d) an accredited investor,
(e) a person described in section 2.5 [Family, friends and business associates], or
(f) a person that has obtained advice regarding the suitability of the investment and, if the person is resident in a jurisdiction of Canada, that advice has been obtained from an eligibility adviser;

Part 2, division 1: capital raising exemptions

2.1 Rights Offering
- Issuer generally doesn't need to file prospectus for distribution of rights to existing SHs.
- But in case there is some info relevant to the investor, there is a requirement for written notice sent to a regulator, outlining date, amount, nature, conditions of trade, net proceeds, etc. to which the regulator has 10 days to object.
- The issuer has to be in compliance with the NI 45-101 Rights Offerings.
- For resale refer to App. E of NI 45-102.

2.2 Reinvestment Plans
- Issuer doesn't need to file prospectus if the distribution is under a reinvestment plan, such as a dividend in the form of a security.
- But the securities distributed thus cannot exceed 2% of issued and outstanding shares of the class per year.
- And such plan has to be available to every SH to whom a dividend is available.
- For resale refer to App. E of NI 45-102.

2.3 Accredited Investor
- The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor, which requires a degree of financial sophistication.
- Applies only if purchasing as principal. So one can sell to CIBC as exempt purchaser, but not if CIBC is just acting as agent for other non-accredited investors. Thus no back-door underwriting gets through.
- Purchasers are subject to both seasoning and holding periods.
- For resale refer to App. D of NI 45-102.

2.4 Private Issuers
- The prospectus requirement does not apply to a distribution of a security of a private issuer to a person who purchases the security as principal, and is a:
  - Director, officer, employee, founder, control person of the issuer or affiliate, or spouse/family member of such
  - A close personal friend or a close business associate of a director, executive officer, founder or control person of the issuer;
  - A SH of the issuer;
  - An accredited investor;
  - Person that is not the public. Essentially, you can solicit from an individual person, but can't offer to general public.
- For this section, an issuer is a private issuer if:
  - It is not a reporting issuer
  - The securities are beneficially owned by no more than 50 persons
  - The securities will have a legend (are subject to restrictions on transfer)
  - And their securities will be distributed only to exempt purchasers who buy as principal
- For resale refer to App. E of NI 45-102.

2.5 Family, Friends and Business Associates
- Except in ON and SK the prospectus requirement does not apply to a distribution of a security to a person who purchases the security as principal and is
  - A director, executive officer or control person of the issuer, or of an affiliate of the issuer,
  - Their family (spouse, parents, grandparents, kids), close friends and close business associates;
- For ON look at 2.7
- For resale refer to App. D of NI 45-102.

2.8 Affiliates
- The prospectus requirement does not apply to a distribution by an issuer of a security to an affiliate of the issuer that is purchasing as principal.
- Wouldn't take advantage, or have a remedy under breach of fiduciary duty
- For resale refer to App. D of NI 45-102.

2.9 Offering Memorandum
- The prospectus requirement does not apply to a distribution by an issuer of a security to a purchaser if there the distribution is accompanied by an offering memorandum, and the purchaser signs an acknowledgement of risk.

- In some jurisdictions outside of BC, the purchaser also has to be an eligible investor.
- For resale refer to App. D of NI 45-102.

Offering Memorandum: Slim disclosure document that contains a disclaimer and a signed acknowledgment of risk. It is not filed with or vetted by the regulator, send it to investors. It states that it doesn't contain misrepresentations, and is signed by CEO and CFO, two directors, and a promoter. These are most useful for small local and highly risky COs, usually in mining and exploration business. Note that there is a civil liability for misrepresentation in this document under s.132.1.

2.10 Minimum Amount Investment

- The prospectus requirement does not apply to a distribution of a security to one person if the security has an acquisition cost to the purchaser of not less than $150 000 paid in cash at the time of the distribution.
- Multiple investors can't pool small investors together to meet this threshold, and a CO made for the purpose of this will be seen as a sham.
- For resale refer to App. D of NI 45-102.

PART 2, DIVISION 4: EMPLOYEE, EXECUTIVE OFFICER, DIRECTOR AND CONSULTANT EXEMPTIONS

2.24 Employee, executive officer, director and consultant

- Subject to s.2.25 , the prospectus requirement does not apply to a distribution by an issuer in a security of its own issue, or by a control person of an issuer of a security of the issuer or of an option to acquire a security of the issuer, to an employee, executive officer, director or consultant of the issuer, (or of related entity of the issuer) if participation in the distribution is voluntary.
- For resale refer to App. E of NI 45-102.

2.26 Distributions among current or former employees, executive officers, directors, or consultants of non-reporting issuer

- The prospectus requirement does not apply to a distribution of a security of a non-reporting issuer by a current or former employee, executive officer, director, or consultant of the issuer or related entity of the issuer to an employee, executive officer, director, or consultant of the issuer or a related entity of the issuer.
- For resale refer to App. E of NI 45-102.

NI 45-102 RESALE OF SECURITIES

- The purchaser of securities under NI 45-106 can re-sell those exempt securities to anyone who is within the exempt market bubble.
- But when they want to re-sell their exempt securities outside of the exempt market bubble to the public, the re-sale is deemed "distribution" and so subject to prospectus requirement.
- Note that these only apply to the securities of a reporting issuer.

2.3 Section 2.5 Applies

- If a security was distributed under any of the provisions listed in Appendix D, the first trade of that security is subject to section 2.5.
- This is the standard default section that applies most of the time.
- This applies to the following:
  - Accredited Investors
  - Family, Friends and Business Associates
  - Affiliates
  - Offering Memorandum
  - Minimum Amount Investment

2.4 Section 2.6 Applies

- If a security was distributed under any of the provisions listed in Appendix E, the first trade of that security is subject to section 2.6.
- This applies to the following
  - Rights Offering
  - Reinvestment Plans
  - Private Issuers
  - Employee, executive officer, director and consultant

2.5 Restricted Period

- To not be deemed a "distribution", the resale has to meet all of the following conditions:
  - Seasoning Period
    - The issuer is a reporting issuer and has been for 4 months before the trade
    - Then all sorts of info will be available to the public via continuous disclosure;
  - Hold Period
    - A period of at least 4 months has elapsed since the date of issuer's exempt distribution;
    - This is to avoid "backdoor underwriting" (so that one can't buy under exemption and shortly after sell to non-exempt as a way of by-passing prospectus process);
  - Legend
    - The security certificate of ownership stmt must bear a legend setting out the hold period
    - This assures that hold period is satisfied
- Not a re-sale to public by a control person, to which separate rules apply under "Control Block Exemption"
- No extraordinary or unusual effort to sell must be present;
- No extraordinary commission or consideration
- Trade should be on the basis of information already disclosed, not on basis of private individual's biased representations
- This discourages promotional campaigns that pressure investors and make representations other than in statutorily required docs
- They must have no reasonable grounds to think the issuer is in default of securities legislation

2.6 Seasoning Period

- This is applied largely to the transactional exemptions.
- To not be deemed a "distribution", the resale has to meet all of the following conditions:
  - These are the same as above minus the Hold Period and the Legend.
  - The has been a reporting issuer in a jurisdiction of Canada for the 4 months immediately preceding the trade.
  - The trade is not a control distribution.
  - No unusual effort is made to prepare the market or to create a demand for the security that is the subject of the trade.
  - No extraordinary commission or consideration is paid to a person or company in respect of the trade.
  - If the selling security holder is an insider or officer of the issuer, the selling security holder has no reasonable grounds to believe that the issuer is in default of securities legislation.

Disclosure

NI 51-102 Continuous disclosure obligations

Material Change: If used in relation to an issuer other than an investment fund, it is

- A change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer, or
- A decision to implement such change made by the directors of the issuer (or senior management if they believe that directors' approval is imminent).
  - 51-102 also expands this to "a decision by persons acting a similar capacity to the BD"

Material Fact: Means, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

This applies to all reporting issuers:

7.1 Publication of Material Change

- If a material change occurs in the affairs of a reporting issuer, the CO must
  - Immediately issue and file a news release authorized by an executive officer disclosing the nature and substance of the change; and
  - As soon as practicable (within 10 days of the change), file a Form 51-102F3.
- If issuing a news release is "unduly detrimental" to the CO's interest (in the opinion of the issuer arrived in a reasonable manner), or if a material change decision has been made by a senior management, but has not yet been approved by the BD and as long as nobody is trading on the information, a mere confidential filing to SecCom will suffice, explaining the reasons why disclosure would be harmful.
- The confidentiality of this filing is to be reviewed every 10 days.

The Bre-X scandal

Since NI 43-101 is essentially a direct result of the Bre-X scandal, it is worth taking a look at how this all unfurled.

- Bre-X Minerals Ltd. was a junior mining exploration company which was originally listed on the old Alberta Stock Exchange in May of 1988. Its original listing price was $0.30 per share.
- It acquired certain rights to the Busang property in Indonesia in 1992 to 1993. That's when VP Exploration John Felderhof and Geologist Michael de Guzman came on board.
- By 1995 Bre-X was reporting encouraging drill results, and in October 1995 Bre-X announced that Busang's reserves were in the neighbourhood of 10 million ounces of gold and could contain 30 million ounces of gold. Analysts raised their share price target and issued "buy" reports on the stock. Bre-X stock climbed to more than $50 per share.
- In April of 1996 Bre-X began trading on the TSX. The stock hit $180 per share.
- By May of 1996 Bre-X's stock price topped $200 at which point the stock was split 10 per 1 and soon reached a high of $28 ($280 pre-split). That gave the company a net market capitalization of over $6 billion.
- In June of 1996 Bre-X announced that Busang contained 39,000,000 ounces of gold and a month later it upped the estimate to 47,000,000 ounces.
- On February 16, 1997, after a 10-month dispute with the Indonesian government, Bre-X and Freeport McMoRan reached an agreement to develop Busang. Bre-X would get 45%, Freeport 15% and the Indonesian government and well-connected private Indonesian interests would get the other 40%. The next day Bre-X increased its Busang reserve estimate to 71,000,000 ounces.
- Just two days later on February 19, 1997, Bre-X President David Walsh publicly said that the Busang deposit may contain as much as 200,000,000 ounces.
- On March 12, 1997 Freeport indicated that its own due diligence testing was turning up only minor amounts of gold at Busang. Freeport demanded a meeting with de Guzman later in the month to discuss the core sample results.
- On March 19, 1997 de Guzman fell to his death from a helicopter over the Indonesian jungle. Reports said a suicide note was found, but speculation swirled that de Guzman was either murdered or may have even faked his death.
- On March 26, 1997 Bre-X trading was halted after a report issued by Freeport McMoRan indicated that the Busang deposit contains "insignificant amounts of gold".
- On March 27, 1997 Bre-X shares plunged to $2.50 per share when trading resumed. The trading volume crashed the TSX computers as panicked investors sold their shares.
- May 5, 1997 - a report (which had been commissioned by Bre-X) by an independent mining firm, Strathcona Minerals, confirmed that there was virtually no gold in Busang, and concluded that the core samples had been tampered with. The report calls the Bre-X debacle "without precedent in the history of mining anywhere in the world". The following day, Bre-X shares fell to $.80 and continued to plunge. The stock is soon delisted, and investors lose everything.

R. v. Felderhof [2007] ON PC

Insider trading is a pretty hard offence to nail someone with

Facts: AC was hired as Bre-X's in their infamous scam, and eventually became Bre-X's VP of exploration and the vice-chair of the Board. After shit hit the fan, AC was charged with four counts of selling securities with knowledge of material facts that had not been generally disclosed.
Issue: Can they prove anything?
Discussion:

- With respect to the insider trading charges, the court was satisfied that
  - AC was in a special relationship with Bre-X, a reporting issuer, as he was held the position of director, officer and employee at the requisite times and that
  - AC sold securities of Bre-X through his accounts.
- However, the court found that the third element had not been fulfilled, namely that AC had knowledge of material information about Bre-X.
- Specifically, the court found that the facts alleged to be "material facts" that had not been generally disclosed and of which AC had knowledge, were not proven to be "material".
- Regarding the misleading press release, the court found that F took all reasonable care made a due diligence defence.
- Thus, AC was found not guilty of all charges.

Ruling: AC is acquitted.

TSE/OSC Mining Standards Task Force

- Because of the severe reputational damage caused by the Bre-X scandal, Canadian regulators felt compelled to act in a very decisive and visible way.
- In July 1997, in a joint initiative, ONSecCom and the TSX formed the Mining Standards Task Force to examine the need for higher standards relating to the conduct of mineral exploration and mining activities as well as disclosure of results from those activities.
- Probably the four most significant recommendations from the Task Force were as follows:
  - That a "qualified person" be responsible for producing technical reports, ensuring that the field practices of mineral exploration and mining companies follow generally accepted industry standards and reviewing all public disclosure relating to exploration and development programs, mining operations and resource and reserve estimates;
  - That within two years all qualified persons be required to join self-regulatory organizations with entrance, educational and licensing standards and disciplinary procedures;
  - That all assay laboratories be accredited; and
  - That the Canadian Institute of Mining, Metallurgy and Petroleum (CIM) definitions of resources and reserves be used in all technical reports and disclosure documents.

NI 43-101 Standards of Disclosure for Mineral Projects

- Most of the ideas and recommendations in the Task Force's report ended up making their way into NI 43-101.
- The CSA issued a notice and request for comment relating to the first proposed version of NI 43-101 on July 3, 1998.
- NI 43-101 came into force on January 12, 2001.

Mineral Project: Means any exploration, development or production activity, including a royalty interest or similar interest in these activities, in respect of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal, and industrial minerals; Note that what is there is an extremely wide definition. This is wide enough to include a property into which somebody is in the process of earning an option, which is very often the only property interest which junior mining exploration companies have.
Mineral Resource: In this Instrument, the terms "mineral resource", "inferred mineral resource", "indicated mineral resource" and "measured mineral resource" have the meanings ascribed to those terms by the Canadian Institute of Mining, Metallurgy and Petroleum, as the CIM Definition Standards on Mineral Resources and Mineral Reserves adopted by CIM Council, as those definitions may be amended. The different gradations reflect levels of evidentiary assurance that the resource in fact exists.
Mineral Reserve: In this Instrument, the terms "mineral reserve", "probable mineral reserve" and "proven mineral reserve" have the meanings ascribed to those terms by the Canadian Institute of Mining, Metallurgy and Petroleum, as the CIM Definition Standards on Mineral Resources and Mineral Reserves adopted by CIM Council, as those definitions may be amended. There is gradation in the definitions there as well, in that a mineral reserve can either be a probable reserve or a proven reserve, with the latter naturally indicating a greater level of evidentiary assurance that the reserve in fact exists.

Qualified Person: means an individual who
- Is an engineer or geoscientist with at least five years of experience in mineral exploration, mine development or operation or mineral project assessment, or any combination of these;
- Has experience relevant to the subject matter of the mineral project and the technical report; and
- Is in good standing with a professional association...

Independence: In this Instrument, a qualified person is independent of an issuer if there is no circumstance that could, in the opinion of a reasonable person aware of all relevant facts, interfere with the qualified person's judgment regarding the preparation of the technical report.

Part 2 requirements applicable to all disclosure

- Note that since this applies to all disclosure, it covers oral statements.

2.1 Requirements Applicable To All Disclosure.
- This is probably the most central requirement of the whole Instrument.

- All disclosure of scientific or technical information made by an issuer, including disclosure of a mineral resource or a mineral reserve, concerning a mineral project on a property material to the issuer, must be based upon information prepared by or under the supervision of a qualified person.

2.2 All Disclosure of Mineral Resources or Mineral Reserves

- Sets out some particular requirements relating to disclosure of mineral resources and mineral reserves.
- You are only allowed to use only CIM definitions.
- You must report each category of resources and reserves separately, and state the extent, if any, to which reserves are included in total resources;
- You are not allowed to add inferred mineral resources to the other categories of mineral resources.
- You must state the grade or quantity and the quality for each category of the mineral resources and mineral reserves if the quantity of contained metal or mineral is included in the disclosure.

2.3 Prohibited Disclosure

- An issuer must not make disclosure of reserves or resources that have not been categorized.
- Unless accompanied by a disclaimer re conceptual nature, if it is as a part of preliminary assessment disclosure.

2.4 Disclosure of Historical Estimates.

- This relates to the aforementioned requirement in section 2.2 that you may only use approved categories of resources and reserves. The problem this presents for people in the industry, however, is how to deal with technical work that was done prior to the implementation of NI 43-101.
- Thus section 2.4 allows you to deal with that sort of information, somewhat in the manner of a "consumer warning".

PART 3 ADDITIONAL REQUIREMENTS FOR WRITTEN DISCLOSURE

- Parts 2 and 3 of NI 43-101 will generally be what a securities lawyer looks at when reviewing a press release for 43-101 compliance. Note that unlike Part 2, this applies only to written materials.

3.1 Written Disclosure to Include Name of Qualified Person

- This is another one of the key provisions of NI 43-101.
- If an issuer discloses in writing scientific or technical information about a mineral project on a property that is material to the issuer, the issuer must include in the written disclosure the name and the independence of the QP who prepared or supervised the preparation of the information that forms the basis for the written disclosure.

3.2 Written Disclosure to Include Data Verification

- Sets out that written disclosure of technical information is to include certain information relating to data verification, such as who was the QP, and which methods were used to verify the data.

3.3 Requirements Applicable to Written Disclosure of Exploration Information

- This section comes up frequently, because it applies to drilling and assay results, which is probably the most common thing that mining exploration companies disclose by way of press release.
- If an issuer discloses in writing exploration information about a property material to the issuer, then include:
  - The results, or a summary of the material results, of surveys and investigations regarding the property;
  - A summary of the interpretation of the exploration information; and
  - A description of the quality assurance program and quality control measures applied.
- If an issuer discloses in writing sample, analytical or test results on a property material to the issuer, then include:
  - A summary description of the geology, mineral occurrences and nature of mineralization found
  - A summary description of rock types, geological controls and dimensions of mineralized zones, etc.
  - The location, number, type and spacing or density of the samples collected and the dimensions of the area sampled,
  - Any drilling, sampling, recovery or other factors that could materially affect the accuracy or reliability of the data;
  - A summary description of the type of analytical or testing procedures utilized, sample size, the name and location of each analytical or testing laboratory used, and any relationship of the laboratory to the issuer; and
  - A summary of the relevant analytical values, widths and, to the extent known to the issuer, the true widths of the mineralized zone.

3.4 Requirements Applicable to Written Disclosure of Mineral Resources and Mineral Reserves

- This specifically relates to resource and reserve disclosure.
- The most common example that we deal with where this comes into play is a press release which discloses for the first time a resource or which discloses an increase in a resource estimate.
- This also covers first time disclosure of reserve or first time disclosure of an increase in reserve estimates.
- Such disclosure must include:
  - The effective date of each estimate of mineral resources and mineral reserves;
  - Details of quantity and grade or quality of each category of mineral resources and mineral reserves;
  - Details of the key assumptions, parameters and methods used to estimate the mineral resources and mineral reserves;
  - A statement that mineral resources that are not mineral reserves do not have demonstrated economic viability, if the results of an economic analysis of mineral resources are included in the disclosure.

3.5 Exception for Written Disclosure Already Filed

- Sets out an exception to most of these requirements in sections 3.2, 3.3 and 3.4 if you include in the written disclosure a reference to the title and date of a previously filed document that complies with those requirements.

PART 4 OBLIGATION TO FILE A TECHNICAL REPORT

- This section generally deals with the triggers for filing a technical report.
- This is extremely important to a public mining CO, because technical reports cost a considerable amount of money and can take a considerable amount of time to produce. And delay can sometimes be fatal to a financing.

4.1 Obligation to File a Technical Report Upon Becoming a Reporting Issuer

- Requires that you file a technical report on becoming a reporting issuer "in a jurisdiction of Canada".

4.2 Obligation to File a Technical Report in Connection with Certain Written Disclosure About Mineral Projects on Material Properties

(1) An issuer must file a technical report to support scientific or technical information in any of the following documents filed or made available to the public in a jurisdiction of Canada describing a mineral project on a property material to the issuer ...

(a) a preliminary prospectus, other than a preliminary short form prospectus filed in accordance with NI 44-101;

(b) a preliminary short form prospectus filed in accordance with NI 44- 101 that includes material scientific or technical information about a mineral project on a property material to the issuer but not contained in

(i) an annual information form, prospectus, or material change report filed before February 1, 2001; or

(ii) a previously filed technical report;

(c) an information or proxy circular concerning a direct or indirect acquisition of a mineral property where the issuer or resulting issuer issues securities as consideration;

(d) an offering memorandum, other than an offering memorandum delivered solely to accredited investors...

(e) for a reporting issuer, a rights offering circular;

(f) an AIF that includes material scientific or technical information about a mineral project on a property material to the issuer but not contained in

(i) an annual information form, prospectus, or material change report filed before February 1, 2001; or

(ii) a previously filed technical report;

(g) a valuation required to be prepared and filed under securities legislation;

(h) an offering document that complies with and is filed in accordance with the TSX Venture Exchange policy;

(i) a TOB circular that discloses a preliminary assessment or mineral resources or mineral reserves on a property material to the offeror if securities of the offeror are being offered in exchange on the take-over bid; and

(j) a news release or directors' circular that contains

(i) first time disclosure of a preliminary assessment or mineral resources or mineral reserves on a property material to the issuer that constitutes a material change in respect of the affairs of the issuer; or

(ii) a change in a preliminary assessment or in mineral resources or mineral reserves from the most recently filed technical report that constitutes a material change in respect of the affairs of the issuer.

- Note that there are a number of different triggers, and at the time of the original implementation of NI 43-101, these technical report triggers represented a huge increase in the regulatory burden for public mining COs, as compared to the pre-NI-43-101 world (where a prospectus filing was the main trigger).
- Subsection 4.2(1)(j) is a real cunt. This is a common trigger that lawyers deal with.
- Subsection 4.2(5) gives you 45 days to file the technical report from the date of your press release.

- Subsection 4.2(8) is an important exemption that is available if there has been no material change in the property, and the QP is willing to file consents and certificates to that effect.

PART 5 AUTHOR OF TECHNICAL REPORT

5.1 Prepared by a Qualified Person

- A technical report must be prepared by or under the supervision of one or more QP.
- The regulator takes the position that one or more QPs have to take responsibility for the entire report. That is you cannot cite another report and use that as fulfilling the requirements for a particular section.

5.3 Independent Technical Report

(1) Subject to subsection (2), a technical report ... must be prepared by or under the supervision of a QP that is, at the date of the technical report, independent of the issuer:

(a) section 4.1;

(b) paragraphs (a) (preliminary prospectus) and (g)(valuation)of subsection 4.2(1); or

(c) paragraphs (b), (c), (d), (e), (f), (h), (i), (j) of subsection 4.2(1) if the document discloses

(i) for the first time a preliminary assessment or mineral resources or mineral reserves on a property material to the issuer, or

(ii)a 100 percent or greater change, from the most recently filed technical report prepared by a QP who is independent of the issuer, in total mineral resources or total mineral reserves on a property material to the issuer.

(2) A technical report required to be filed by a producing issuer under paragraph (c) of subsection (1) is not required to be prepared by or under the supervision of an independent QP

PART 6 PREPARATION OF TECHNICAL REPORT

6.2 Current Personal Inspection

- This is one of the new requirements brought in by NI 43-101.
- At least one of the QP who is responsible for preparing or supervising the preparation of the report must complete a current inspection on the property that is the subject of the technical report.

6.4 Limitations on Disclaimers

- An issuer must not file a technical report that contains a disclaimer by any QP responsible for preparing or supervising the preparation of the report that disclaims responsibility for, or reliance on, that portion of the report the QP prepared or supervised the preparation of, or limits the use or publication of the report in a manner that interferes with the issuer's obligation to reproduce the report by filing it on SEDAR.

PART 8 CERTIFICATES AND CONSENTS OF QP FOR TECHNICAL REPORTS

- By the sounds of it, along with each technical report, the issuer has to file certificates of each QP.
- These certificates and consents are required whenever a technical report is filed, and they can also be required in connection with the aforementioned 4.2(8) exemption.
- In practice, whenever you are dealing with a CO which is about to file a technical report, make sure you review the QP certificates and consents before they are filed, because they result in an incredibly large amount of deficiencies when you are undergoing a prospectus offering. I am specifically talking about, for certificates, the requirements set out in section 8.1(2) (a) to (i), and with the consents, section 8.3 (a) and (b).