Investing in Canada, Legal Updates
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GENERAL – Investment Background

- Financial Crisis Impact in Canada
  - Asset Backed Commercial Paper ("ABCP")
    - Liquidity issue
    - Being restructured under Court Order
    - Not yet fully implemented
GENERAL – Investment Background

- Financial Crisis Impact in Canada
  - Canadian Banks – OECD Ranking as Safest in World
    - *(The Vancouver Sun, October 10, 2008 – “Canada’s Banks ranked the soundest; Survey of Executive Ranks US 40th)*
  - Canadian Government Securities – recently rated as least likely to default
GENERAL – Investment Background

- First Nations Consultation
  - Number of disputes re resources claims is reduced
  - Obligation on Government to consult with First Nations when issuing Government rights, leases, tenures, concessions, etc. is now clear and more prevalent
  - Typically build into environmental assessment processes
GENERAL – Investment Background

- First Nations Consultation
  - Seeing increased use of participation and benefit agreements so First Nations people in the area of a project benefit from it on an ongoing basis (employment levels, supply agreements, other).

Resource Industry

Multinational and continues to be open to foreign direct investment. Note: Uranium Industry is subject to maximum 49% foreign ownership and takeover are subject to Investment Canada Act (“ICA”) review if asset value of target exceeds $5 million. Other industries generally subject to indexed review threshold currently $295 million in 2008. Some industries, e.g. transportation undertakings, financial services cultural industries, etc., have separate or additional review threshold; or approvals.
Resource Industry

State owned enterprises (“SOE”) – Guidelines have been adopted for ICA for SOE’s. “Net benefit” test will also consider whether an SOE can operate on a normal commercial basis. Factors will include SOE’s governance structure, independence of management, and commercial decision making regarding expenses, processing Canadian participation in operations, research and development and capital expenditures. Formal undertakings may be utilized or required.
REGULATORY – Investment Canada Act

 opioids MDA Satellite Division Sale Disallowed
 opioids First disapproval under ICA under ‘no net benefit’ to Canada test
 opioids Sale of satellite division to U.S. entity
 opioids May 8, 2008 - Industry Canada rejects sale of information systems and geospatial services business of MacDonald, Dettwiler and Associates Ltd. to Alliant Techsystems Inc. pursuant to Investment Canada Act.
Proposed National Security Test

- Proposed change to ICA would be different criteria than ‘net benefit’. Aim at strategic assets while were important for national security.

- Could be similar to test in U.S. Committee on Foreign Investment in the U.S. (CFIUS)

  - For comparison of treatment Dubai Ports was ultimately pressured into divesting New York container terminal as part of its acquisition worldwide of P&O.
REGULATORY – Investment Canada Act

Proposed National Security Test

- But in Canada that was not required and assets retained
- Subsequently the purchase of the Prince Rupert terminal by RREEF Infrastructure unit of Deutsche Bank was approved, and Port Metro Vancouver chose AP Moller as preferred bidder on the Roberts Bank T2 container terminal expansion.
REGULATORY - Investment Canada Act

- Competitiveness Report
  - Wilson Committee Competitiveness Report
  - Proposals for additional changes to various regulations to make Canada more competitive.
  - Proposes revising the test under Investment Canada regarding FDI. To be permitted unless agency can show valid objection. Removes the ‘net benefit’ test.
REGULATORY

- Competitiveness Report
  - Suggests liberalizing foreign ownership of uranium production provided source country furnishes reciprocal benefits such as access to markets or technologies.

- National Securities Regulator Proposal
  - Public Companies regulated at Provincial level – total of 13 jurisdictions
  - Passport System
  - National Instruments – increased consistency
REGULATORY

- National Securities Regulator
  - e.g. Prospectus exemptions, private placement rules
  - Based on long standing debate (30 years) and current global financial crisis, Federal Government is proposing national security regulator (similar to SEC in U.S. or FSA in Britain).
  - Provinces may now support it this time, provided there is also some Provincial role.
  - Decentralized office?
  - Provincial investor protection laws?
ENVIRONMENTAL

Western Climate Change Initiative

Joint program among Western Canadian Provinces and Northwest United States to develop a regional ‘cap and trade’ system regarding carbon emissions and credits.

The Western Climate Change Initiative – FMD Bulletins - July 31, 2008 – Western Climate Change Initiative Releases New Details on Regional Cap and Trade Program:

ENVIRONMENTAL

- Western Climate Change Initiative
  - Montreal Exchange recently started a market in carbon credits.
  - Federal Government has advised post-election of willingness to work with the incoming U.S. Administration to develop national environmental programs regarding carbon.
MERGERS & ACQUISITIONS

Filled: In past two years significant consolidation in Canadian Mining sector at major company level, as well as smaller companies.

Teck Cominco Limited Acquisition of Fording Canadian Coal Trust Assets

October 30, 2008 - Teck Cominco Limited acquires the assets from Fording Canadian Coal Trust (formerly Elk Coal Valley Corporation).

http://www.teckcominco.com/Generic.aspx?PAGE=Medita+Pages%2fMedia+Detail&releaseNumber=08-36-TC&portalName=tc
HudBay Minerals Inc. business combination with Skye Resources Inc.

August 22, 2008 – HudBay Minerals Inc. completes acquisition of Skye Resources Inc. under plan of arrangement.

MERGERS & ACQUISITIONS

Rio Tinto acquisition of Alcan Inc.

November 14, 2007 – Rio Tinto Canada Holding Inc., a wholly-owned subsidiary of Rio Tinto completes acquisition of all of the common shares of Alcan Inc.

MERGERS & ACQUISITIONS

Vale acquisition of Inco Limited

January 5, 2007 – Vale completes amalgamation of Inco Limited with its wholly-owned subsidiary of Companhia Vale do Rio Doce

MERGERS & ACQUISITIONS

- Xstrata plc acquires Falconbridge Limited

  - November 1, 2006 – Xstrata plc completes acquisition of outstanding common shares of Falconbridge Limited.
  
MERGERS & ACQUISITIONS

Barrick Gold Corporation takeover of Placer Dome Inc.

March 15, 2006 – Barrick Gold Corporation completes acquisition of all of the common shares of Placer Dome Inc.

http://www.barrick.com/default.aspx?SectionId=e1655d8c-6398-4251-8ebc-d0c02928bacb&LanguageId=1&PressReleaseId=1652a3d3-1e0c-408c-b47e-52cce3841fee
MERGERS & ACQUISITIONS

- Next Developments?
  - Consolidation of smaller entities.
  - Strategic mid-level purchasers acquire smaller companies.
- Multi-lateral Instruments 61-101 and 62-104, and corresponding Provincial legislation when applicable, adopted by Canadian Securities Administrations as of February 1, 2008. Intended to provide a consistent approach across the country. Government take-over bids and minority shareholder protection requirements.
EQUITY INVESTMENT

» No IPO’s on TSX in 3rd Quarter 2008

» Public Investment in Private Equity ("PIPE")
  » TSX Manual Sec. 607 – Private Placement
  » TSX Rule 607 – Governs pricing and maximum discounts from market (between 15 – 25% depending on share price). If investment is at a discount from market price and exceeds 25% of issued stock in a private placement
EQUITY INVESTMENT

㊞ Public Investment in Private Equity (“PIPE”) – Cont’d
㊞ then need shareholders vote. Manual Sec. 607(e).
㊞ But in Staff Notice 2008-0005 issued November 3, 2008 the TSX reminded the market of an existing exemption from securityholder approval requirements under section 604(e) of the TSX Manual when issuers are faced with financial difficulty.
EQUITY INVESTMENT

- Public Investment in Private Equity ("PIPE")
  - May facilitate acquisition by recapitalization transactions.
  - S. 607 effectively provides maximum of 45 day price protection, so may be difficult to clear all regulatory approvals in time unless obtained prior to notification.
Ainsworth Lumber Co. Ltd. recapitalization

July 29, 2008 – Ainsworth Lumber Co. Ltd. completes recapitalization transaction, involving issuance of 100 million new common shares under plan of arrangement approved by the Supreme Court of British Columbia on July 25, 2008.

Elimination of Withholding Tax on arms-length loans from Off-shore Lenders

Amendment of Section 212(1)(b) of the Income Tax Act (Canada)

Interest payments on loans from non-Canadian banks will not be subject to withholding tax if:
- Borrower and lender deal at arm’s length; and
- Interest payable on the loan is not participating debt interest (all or a portion of the interest is contingent or dependent on the use of or production from property in Canada or computed by reference to revenue, profit,
FINANCE / TAX

- Elimination of Withholding Tax on arms-length loans from Off-shore Lenders
  - cash flow, commodity price or any other similar criterion or by reference to dividends paid or payable to shareholders of any class of shares of the capital stock of a corporation).
  - Replacement of so called “5/25 debt” or “five-year money” rule.
  - Thin capitalization rule remains applicable: No deduction of interest on loans owed to certain non-resident shareholders exceeding a 2:1 debt-to-equity ratio.
Ratification of Fifth Protocol to the Canada–United States Income Tax Convention effective January 1, 2008

- Treaty benefits are extended to Limited Liability Companies ("LLC") and partnerships.
- Income earned by a U.S. resident through a LLC will be treated as earned directly by U.S. resident.
- A company owning shares of another corporation through a partnership will be considered to own the shares held by the partnership in proportion to the company’s interest in the partnership. As a result, the benefits of the 5% withholding tax rate on dividends.
Treaty benefits no longer available to “Hybrid Entities”

- become available where the company owns at least 10% of the shares of the corporation, whether directly or through a partnership.

- Payments to and by certain hybrid entities will no longer enjoy treaty benefits

- Hybrid entities are entities treated differently for Canadian and U.S. tax purposes

- Canadian unlimited liability companies (“ULC”) are hybrid entities:
Treaty benefits no longer available to “Hybrid Entities” – Cont’d

- Canada – ULC treated as corporations for income tax purposes
- U.S. – ULC treated as flow-through entities for income tax purposes
- Measure will enter into force January 1, 2010
- Use of hybrid entities should be reviewed
Additional FMD Presentation

“Working Through Challenging Times in the Mining Sector” by Gregory Ho Yuen

http://www.fasken.com/files/Event/b58de820-5a33-40ba-a785-dce34fdb9a8a/Presentation/EventAttachment/b5c85f01-52ab-4b18-9e6e-06338d4673ab/Working%20Through%20Challenging%20Time%20in%20the%20Mining%20Sector.pdf
Additional FMD Presentation

“Mining Joint Ventures in Canada” by Greg Powers and K.C. Miu

http://www.fasken.com/files/Event/f3ed3a3d-5b63-4455-bf50-1c3cae577455/Presentation/EventAttachment/50881b4b-1cfd-48d5-bc28-1ceea6c155d7/Pacific_Mining_Asia_Pacific.PPT