

BILL 79 AMENDING THE *MINING ACT*: STIMULATING THE INDUSTRY OR ANOTHER CAUSE FOR CONCERN?

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INTRODUCTION

The Québec mining industry is currently at the forefront of discussion, particularly in light of:

- ▶ the publication of a study on the mineral industry cluster's contribution to socio-economic development in Québec, which occurred during the Mining Week (April 25th to May 2nd) organized by, among others, the Québec Mining Association and the Québec Mineral Exploration Association; a copy of this study is available on their website;¹
- ▶ the Fraser Institute Annual Survey of Mining Companies, whose results were unveiled on April 14th, grouping together responses of 670 mining business leaders from around the world and, for the third consecutive year, establishing the Province of Québec as the number one jurisdiction world-wide for mining investment;² and
- ▶ public hearings (since May 12th) held by the Committee on Agriculture, Fisheries, Energy and Natural Resources as part of a general consultation on Bill 79 amending the *Mining Act* («**Bill 79**»); more details on these hearings are provided on the National Assembly's website.³

Bill 79 was adopted on December 2, 2009 and is a part of Québec's Mineral Strategy, the broad outlines of which were published in June 2009.⁴

On behalf of a client, a major actor in Québec's mining industry, we recently prepared a submission to the secretary of the parliamentary committee for the above-mentioned public consultation. In this context, we believe it is useful to sum up, for the time being, the proposed new regulatory developments for Québec's mining industry.

We note beforehand that the mining industry generally supports the direction of the Québec Mineral Strategy and the general objectives of Bill 79, as stated by the Minister responsible for Natural Resources and Wildlife when Bill 79 was passed.⁵ Bill 79 appears to reflect an intention to implement a legislative framework responding to the electorate's concerns whereas the industry's main concern is for such framework to remain flexible and effective. Yet, a number of industry's advocates believe that numerous provisions of Bill 79 may impose additional constraints on mining activities, without really permitting the stated objectives to be achieved.

Thus, it is interesting to follow the evolution of the parliamentary committee's work and to eventually see to which extent the industry's concerns will be addressed. After briefly outlining the current mining context in Québec, we will review certain provisions of Bill 79 that cause concern within the industry and provide some thoughts.

CONTEXT

It is generally accepted that mining is essential to Québec's development because it generates tens of thousands of jobs whose average wages exceed the general average wage in Québec. Other benefits include the purchase of goods and services in Québec, the permanent occupation of large parcels of Québec's immense territory and its impact on regional dynamics, and the development of know-how that can be exported throughout the world.

From the government's perspective, Bill 79 is structured around the three following main points:

- ▶ generating wealth (economic dimension);
- ▶ ensuring environmentally friendly mineral development (environmental dimension); and
- ▶ fostering integrated, community-related mineral development (social dimension).

From the industry's perspective, any mining investment decision in Québec by any enterprise is invariably made on the basis not only of the distinct characteristics of the relevant project, but also the regulations that will apply to such project, as compared with other projects of such enterprise throughout

¹ <http://www.amq-inc.com/> and <http://www.aemq.org/>

² <http://www.fraserinstitute.org/researchandpublications/publications/7276.aspx>

³ http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CAPER/consultations/consultation-65_20100317.html

⁴ <http://www.quebecminier.gouv.qc.ca/>

⁵ <http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPQF/Decembre2009/02/c7183.html>

the world. Indeed, all mining enterprises are faced with the following realities:

- ▶ mineral resources are distributed randomly around the world and their discovery involves exploring very large geographical areas at many locations around the world;
- ▶ a project's mineral resources are not renewable; therefore, the lifespan of each operation is limited, which drives an enterprise to explore on a permanent basis;
- ▶ the discovery and development of economically profitable reserves require an enormous capital contribution even before the enterprise can benefit from production revenues; and
- ▶ the potential operating income is subject to variations in the price of metals and fluctuating exchange rates, which the enterprise cannot control.

To this day, Québec still has a strong power of attraction for the mining industry based on the wealth of its diversified mineral potential and a reliable regulatory framework conducive to investment. However, although the Fraser Institute survey confirmed this power of attraction, numerous advocates are of the opinion that Bill 79, if it comes into force as presently drafted, combined with the increase in the royalty rates announced in the last budget, could cause Québec to lose its number one rank as of next year.

All in all, in an industry where prices are set in accordance with international commodity markets, a mining company's competitiveness is dependent on its ability to produce at a low cost. Accordingly, in consideration of the widespread belief that the Québec mining industry produces at a relatively high cost because of known factors such as the cost of labour, the harsh climate, the location of mining sites in remote areas, *etc.*, the Québec legislator must take them into account if it intends to support the competitiveness of the local industry.

EXAMINATION OF BILL 79 AND ANALYSIS

We cannot review all the amendments set forth in Bill 79 and this Newsletter will assess only those that triggered many reactions, based on the three above-mentioned main dimensions.

ECONOMIC DIMENSION

The legislator states that the amendments focusing on this theme will stimulate mineral exploration and enhance awareness of the mineral potential in the vast Québec territory. The industry seems to approve the latter objective because it could eventually benefit from it as exploration work would be better targeted. On the other hand, many questions have been raised as to whether enterprises will have an incentive to conduct more exploration work on their claims in view of new provisions that could entail the opposite reaction.

Main Amendments

- ▶ **To section 65** : requires a claim holder to notify the surface owner or lessee of such holding.
- ▶ **To section 72**: mandatory report to the Minister on all the exploration work performed and for which an exploration allowance or additional exploration allowance was granted.
- ▶ **To sections 73 and 75**: significant amendments to the terms and conditions allowing payment in lieu of minimum work required for claim renewal.
- ▶ **To section 76**: significant reduction of the area in respect of which excess statutory work on mining titles may be applied to renew peripheral claims.
- ▶ **To sections 77 (repealed), 78 and 119**: repeal of the right to use excess amounts from work under a mining lease or concession; elimination of the option of making payments to renew claims.

Our Analysis

The proposed change to section 65 may entail practical problems, namely (without limitation) because claims do not correspond to surface rights. Moreover, only the claim holder has this obligation to notify whereas some believe that surface owners should reciprocally have the same obligation toward claim holders, which would prove useful in the event surface rights are transferred.

The industry seems also concerned about the mandatory reporting requirement (section 72) because information relating to a company's exploration work may have key strategic value and, consequently, public disclosure thereof could adversely affect such company's competitive position.

The amendment suggested in Bill 79 should undoubtedly be accompanied by a commitment from the authorities to maintain the full confidentiality of any information received during a reasonable period of time.

This being said, new provisions regarding claim renewal are the industry's main concern, in particular the ability, now restricted by Bill 79, of using excess credits from statutory work on a mining lease or concession, and the inability of a mining concession holder to make cash payments to renew a claim. Note that the purpose of these proposed amendments is to stimulate exploration.

On the one hand, it is not seldom, in the industry, that major exploration work is carried out on claims while mining of the deposit must be deferred because of the economic situation (for instance, due to a downward cycle affecting the relevant mineral). The value of this exploration work could be lost if it can no longer be used as a result of the restrictions introduced by Bill 79.

On the other hand, as regards any operational mine site, the operator will commonly postpone exploration on the claims surrounding any such site (the "peripherals"), even if these claims are an integral part of the operator's strategy, since exploration can be reactivated if necessary, in order to extend mining operations (and employment).

The holding of peripherals is current practice in the industry. This enables holders to rely on the space and access necessary to possibly exploit all the mineral potential of the territory bounded by the peripherals. This is why the reduction of the surface area (section 76) of the peripherals that may benefit from the surplus work on the operational site for purposes of renewal, is particularly severe.

Indeed, operators who value the integrity of the territory covered by the peripherals will likely have to renew their rights on a larger number of such peripherals (*i.e.* those that no longer benefit from the said surplus credits). This situation will add pressure on them to use capital to carry out work on peripherals solely to preserve the title thereto, which will reduce the possibility of investments on work genuinely conducted for the purpose of

acquiring greater knowledge of the mineral potential of the main site, particularly given that operations on the main site already require considerable investments.

Furthermore, the time limit on cash payments or use of excess credits from statutory work poses similar problems as the peripherals are often essential to extending the lifespan of a mine. The industry would like the payment based on the excess work credits to correspond to the lifespan of the mine rather than a predetermined number of renewal periods.

Finally, the repeal of section 77, which enables the operator to make use of the excess work credits on a mining lease or concession, and of the second paragraph of section 119, which repeals the concession holder's right to make payments for claim renewal, will likely entail the loss of peripherals. Yet, maintaining all peripherals under the same holding as the main deposit increases the likelihood that any extension of the main deposit on these peripherals be realistically exploited since it is more likely to be profitable thanks to the infrastructure (of the same operator) that is already in place.

All in all, if the industry's concerns about the additional financial constraints prove to be founded, it is difficult to see how the above-mentioned amendments will stimulate exploration and increase the knowledge of Québec's mineral potential.

SOCIAL DIMENSION

Principal Amendments

To section 101: requires the prior approval of a rehabilitation and restoration plan and prior public consultations in the relevant region will be required to obtain a mining lease or concession. Also, the mining lease can be subject to conditions designed to avoid potential conflicts over the use of the territory or to follow up on comments received during the public consultations.

To sections 140 and 142 (addition of 140.1, 142.0.1 and 142.0.2): the Minister may, "in the public interest", refuse a lease application for surface mineral substances ("SMS") or terminate a lease in respect of the SMS (subject to compensation).

To section 304: addition of provisions concerning the power of the Minister to withdraw or restrict mining operations in certain areas.

Our Analysis

The industry understands the government objectives of (i) conducting regional planning for the uses of a given territory (and withdrawing any portion thereof from mining) and (ii) involve the regional community more closely with mining development.

Based on previous experience, the industry remains nevertheless concerned that there are no clear guidelines or monitoring process. Consultations have been known to lose sight of their primary objective when several well-organized groups have used a given project as a touchstone for a global strategy. It would seem moreover that the proposal to hold public consultations for all mining projects would set a unique precedent in Québec, particularly in comparison with other industrial sectors.

In particular, the industry believes that holding public consultations at the time a mining lease is issued is early on in a mining project's development process since, at this stage, the project may have yet to undergo a feasibility study (which is a prerequisite to any commercial production decision). It seems that it would be more effective to include such consultations at the stage of the application for an authorization certificate or the filing of a project notice.

The industry recognizes that obtaining social acceptance is essential for any large-scale project and is not opposed to public consultations for improving a mining project and its social integration. However, a consultation should not lead to the suspension or abolition of the right to operate a mine in authorized territories when the technical, social and environmental criteria and conditions are met.

The introduction of new provisions enabling the Minister to refuse a lease for the SMS or terminate it "in the public interest" raises concerns in the industry, which would like the concept of "public interest" to be clarified in Bill 79 and the Minister's authority to rely on it to be rigorously controlled.

In the industry's opinion, section 304 is already comprehensive as to the scope of the powers granted to authorities for managing the multiple uses of a particular area, more particularly with respect to their authority to make portions of such area unavailable for mining operations. Moreover, the industry wishes that already-acquired mineral titles be recognized.

ENVIRONMENTAL DIMENSION

Bill 79 includes various provisions concerning measures for site protection and reclamation. The mining industry is aware of its responsibility for environmentally responsible development and fully agrees with the government's intent to ensure that the amounts required for reclamation purposes, which are paid in the form of financial guarantee, are available and sufficient.

The industry believes that it is just as important to ensure that the amounts payable and the payment methods do not put significant pressure on the operator's ability to invest, which stresses the importance for a payment schedule adapting to the operator's situation and a possible diversification of the types of financial guarantees, which would offer security for both the Québec State and the operator.

Principal Amendments

- **To section 232.4:** obligation to provide a financial guarantee.
- **To section 232.4.1 :** details respecting the amount and scope of the financial guarantee.
- **To section 232.4.2:** details respecting the payment schedule of the financial guarantee for exploration work.
- **To section 232.4.3:** details regarding the required guarantee, that is 100% (previously 70%) of the anticipated costs, and tightening the payment schedule to a five-year period (payments beginning in the first year).
- **To section 232.10:** conditions for obtaining a certificate for the release from reclamation obligations.

Our Analysis

The industry is primarily concerned about the tightening of the payment schedule for providing the financial guarantees and notes that a possible diversification of the types of financial guarantee is not addressed.

The proposed provisions of section 232.4.3 which reduces to five years the time for paying the total amounts of the required financial guarantee seems to be incompatible with two realities: on the one hand, the first years of operation constitute a critical period during which the operator's need for capital is intensive while the operating income is far from being optimal; on the other hand, certain operations are likely to last for many decades.

The industry does not oppose adequate financial guarantee requirements to ensure mine site reclamation. However, it believes that since a five-year period to provide these guarantees immobilizes a significant amount of capital, which could otherwise be invested in development-related work, such period should rather be based upon the anticipated time during which the mine will be in operation.

In addition, although section 232.10.2 enables the Minister to release a person from his or her obligations and issue a certificate to that effect to such person if the Minister agrees to let a third person assume the obligations, it seems that Bill 79 should regulate the transfer of responsibility for reclamation in the context of a transfer of mining rights. Lastly, the industry would like more clarifications respecting the criteria or guidelines used by the ministry for determining that territories on which mining operations have been carried out no longer pose risks for the environment.

PROBABLE INDUSTRY RECOMMENDATIONS

In short, we understand that many industry stakeholders expressed the wish to make representations before the parliamentary committee to discuss their position respecting Bill 79. It should be reasonably expected that several recommendations will be made, among which the following will likely figure (without limitation).

- To fully maintain (i) the option to make payment in lieu of minimum work required for renewing claims, (ii) the eligible area on which excess work credits may be used and (iii) the possibility of using excess work credits from a mining lease or concession.
- With respect to any operating mine, provide for the possibility of payment at each renewal period of each peripheral claim for the entire lifespan of the mine.
- It would be preferable that the public consultation be held at the already planned consultation phase in the process for obtaining the various required authorizations, where the progress of the studies is such that the relevant mining project can be correctly defined.
- To specify the terms of any public consultation and to define the concept of public interest.
- To promote an analysis of the possible cohabitations of various uses of a given territory **prior** to refusing or terminating a mining lease.
- To adopt a payment schedule for providing the financial guarantee, which should be more aligned with the estimated lifespan of the relevant mine.
- For any long-term operation, the financial guarantee should work like a retirement fund, particularly with respect to an adequate capitalization mechanism and a credit rating determined by an independent third party.

- To provide that the reclamation obligation should follow the asset in the context of transfer of ownership. In addition, to specify the criteria or guidelines the Minister uses when granting a release.

CONCLUSION

The government must maintain a sometimes precarious balance between a policy that addresses the concerns of the public (a significant portion of which still having a negative perception of the industry) and a policy that allows for supporting the mining industry, which generally is already proactive in its management of environmental and social matters. By doing so, the government must also take into account the realities of the Québec mining industry, which faces serious global competition.

It is to be hoped that the work of the parliamentary committee will initiate a dialogue between the government and the industry which will result in the mining industry's contribution to Québec's development being maintained and a regulatory context that is mindful of the environment and communities while remaining favourable to mining investment in Québec.

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