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A FISCAL STRUGGLE

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The past few years have been a bumpy road for the mining industry in Quebec, to say the least. Fortunately, it appears that this period of uncertainty has come to an end given that amendments to the Mining Act have finally been adopted by the Quebec parliament and those to the Mining Tax Act are on their way. Now that they can once again rely on a stable and predictable policy framework - something which has historically been a key factor in terms of investment attractiveness for the province - mining businesses should focus on obtaining equitable tax treatments, especially in light of the recent administrative developments discussed here.

First, it is worth recalling that mining businesses operating in Quebec are subject to a Canadian federal income tax which is administered by the Canada Revenue Agency, pursuant to the Income Tax Act (Canada), a Quebec provincial income tax administered by the Quebec Revenue Agency, pursuant to the Taxation Act (Quebec), and a Quebec provincial mining royalty regime currently administered by the Quebec Ministry of Energy and Natural Resources, pursuant to the Mining Tax Act (Quebec).

The June 4, 2014 Quebec budget speech announced that, starting on April 1, 2015, responsibilities regarding the administration of the Mining Tax Act will be overseen by the Quebec Revenue Agency. Employees of the Ministry of Energy and Natural Resources assigned to functions under the Mining Tax Act and identified by the Deputy Minister of Energy and Natural Resources will therefore become employees of the Quebec Revenue Agency.

Proposed legislation in this regard was presented to the Quebec National Assembly by the Liberal majority government on November 26, 2014 through Bill 28, 'An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balanced budget in 2015-2016', which is most likely to receive royal assent in 2015.

Given that most of the information transmitted by mining businesses to Quebec's Ministry of Energy and Natural Resources for the mining royalty regime is also the same information required by the Quebec Revenue Agency for the province's income tax legislation, one could think that such a shift in responsibility will increase efficiency and thus simplify relations between the Quebec government and mining companies.

Consequently, it's hoped that grouping the administration of these laws under the same umbrella will not only lead to a fully harmonised interpretation of the terms, provisions and concepts found in each of these laws, but will also allow for or at least encourage a reconsideration of the current Quebec tax authorities' audit policies and practices.

Indeed, we sometimes witness unfortunate situations whereby mining businesses receive proposed assessments and notices of assessment issued by the Quebec Revenue Agency or the Quebec Ministry of Energy and Natural Resources with respect to flow-through share financings and the very popular Quebec refundable tax credit for resources, without adequate legal reasoning to support them.

An example of this is when the Quebec Revenue Agency rejects expenses claimed by taxpayers as "eligible expenses" for claiming Quebec refundable tax credit. This is because it deems the expenses were not solely incurred for exploration purposes or were not absolutely necessary for carrying on exploration work.

The definition of "eligible expenses" under the Taxation Act (Quebec), the relevant case law and the tax and economic policies underlying the refundable tax credit for resources conflict with such a narrow interpretation.

We also found that the interpretation of the tax legislation by the Quebec tax authorities may vary depending on who is performing the audit. Indeed, we noticed that certain auditors do not feel bound by the work done by their own colleagues during previous tax audits of the same taxpayer.

This situation is exacerbated by the fact that neither the Quebec Revenue Agency nor the Quebec Ministry of Energy and Natural Resources has yet to publish sufficient administrative positions with respect to their interpretation of key concepts relevant to the mining industry, contrary to other sectors.

In the absence of such guidelines, it appears that decisions made in the course of an audit are sometimes left to the personal interpretation and judgement of the individual auditor, which can result in unpredictable, arbitrary and unfair results.

Furthermore, certain employees of the Quebec Revenue Agency working on files of mining companies do not always seem familiar with the technical particularities of the industry and the business environment in which they operate.

The bottom line for mining businesses is that it is difficult to determine whether a given expense will be denied or not in the future, even though identical or similar expenses have been accepted in the context of previous thorough audits by the same tax authorities.

Whereas consistency among legal interpretation of terms, provisions and concepts found in both the Quebec income tax regime and the Quebec mining royalty regime should be a given, we also believe that it should also be consistent with the Canada Revenue Agency's interpretation of similar terms, provisions and concepts provided in the Income Tax Act (Canada).

We have noted, for example, that what constitutes a "new mine" for the Quebec Revenue Agency or the Quebec Ministry of Energy and Natural Resources may differ from what it means for the Canada Revenue Agency. Also, there should not be different interpretations of the terms 'Canadian Exploration Expenses' (CEE) and 'Canadian Development Expenses' (CDE) for federal and Quebec provincial purposes and of the provisions relating to Pre-Production CDE and Post-Production CDE concepts found in the federal income tax legislation, the Quebec income tax legislation and the Quebec royalty regime.

In our experience, the Canada Revenue Agency may have a better understanding of the unique challenges that mining companies face on a daily basis. The Canada Revenue Agency also relies on the expertise of the Minerals and Metals Sector of Natural Resources Canada - a recognised authority in the industry - to provide advice on technical issues. It would be judicious for the Quebec Revenue Agency to do the same in the future when interpreting and applying Quebec income tax and mining royalty laws.

There is no doubt that the federal and provincial policies and practices targeting the resource sector have an impact on the investment climate for the industry and, consequently, it is desirable that both levels be consistent with each other.

That being said, it would benefit both the Canadian federal and Quebec provincial tax authorities to revisit their positions and interpretations affecting mining companies in order to align them with the actual provisions of the tax legislation and the case law interpreting such legislation in order to foster a fairer and more predictable business environment.

We believe mining companies should feel confident in challenging positions taken by the tax authorities if they consider them unfounded, as their chances of success before the courts are not illusory.

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