

Selected Developments and Trends in Canadian Finance and M&A for the Mining Sector

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About Torys LLP



- **Leading Canadian business law firm with a significant U.S. law capability through our New York office**
- **300 Toronto-and New York-based legal professionals**
- **Top-ranked cross-border and international experience, having worked on many groundbreaking and innovative international matters:**
 - > mergers and acquisitions
 - > public and private financings
 - > stock exchange listings
 - > cross-border and international investment structures
 - > corporate reorganizations

Our experience

- Advised on some of the most significant Canada-related mining and metals deals in recent years, including the following:

Hindalco Industries
US\$6 billion



Acquisition of Novelis by Hindalco and related financing transactions

Global deal counsel to Hindalco

Gerdau Ameristeel
US\$4.22 billion



Acquisition of Chaparral Steel by Gerdau and related financing transactions

Canadian and U.S. counsel to Gerdau on various aspects of the transactions

Mitsubishi Corporation
US\$2.5 billion



Investment in, and project financing of, the Antamina copper project in Peru

Counsel to Mitsubishi Corporation


Algoma Steel
C\$1.85 billion



Sale of Algoma to India's Essar Global

Canadian and U.S. counsel to Algoma Steel


Sherritt International
C\$1.6 billion



Acquisition of Dynatec

Counsel to Sherritt International

OAO Severstal
C\$900 million



Acquisition of PBS Coals

Counsel to OAO Severstal

- **Our specialties include:**

- > mergers and acquisitions
- > corporate and capital markets
- > project finance
- > project development
- > shareholder arrangements
- > environmental, health and safety
- > tax
- > competition and foreign investment review
- > climate change
- > aboriginal matters
- > litigation and dispute resolution

- **Representative Clients**

- > Aleris International
- > Barrick Gold
- > Brookfield Asset Management (formerly Brascan)
- > Cameco
- > Centerra Gold
- > Diamet Minerals
- > Dundee Precious Metals
- > Dynatec
- > ENRC plc
- > Essar Steel Algoma
- > Gerdau Ameristeel
- > Glencore
- > Goldcorp
- > Hindalco Industries
- > Inmet
- > Mitsubishi
- > Namibian Minerals
- > Novelis
- > Pallinghurst
- > Placer Dome
- > Royal Utilities Income Fund
- > Severstal
- > Sherritt International
- > Trelleborg AB
- > Western Mining

- **Driven by producers needing access to capital and customers seeking to secure a strategic source of supply**
 - > for Canadian-listed companies, these transactions have been done through private placements permitted under the TSX rules
 - > an acquisition from treasury resulting in a less than 20% voting equity interest can be completed quickly and efficiently without shareholder approval
 - > non-voting equity can be issued in excess of 20% limit on voting equity
 - > equity investments have often been accompanied by ongoing preferential access to production and/or direct interests in underlying assets
 - > equity investments may also serve as a toehold for future acquisitions of control

Selected Transactions Include:

- **Japanese consortium (including Tokyo Electric Power and Toshiba) acquisition of a 19.9% interest in Uranium One for approx. C\$270M**
 - > includes a long term off-take agreement providing the consortium the right to acquire up to 20% of Uranium One's available production for which Uranium One has marketing rights
 - > strategic relationship agreement provides a first right of co-investment to the consortium in respect of new uranium assets and projects
- **Wuhan Iron and Steel Corporation (WISCO) acquisition of a 19.9% interest in Consolidated Thompson Iron Mines for approximately C\$240M**
 - > includes a 25% interest in Bloom Lake mine and long term off-take rights
- **Korea Electric Power's acquisition of a 19.9% interest in Denison Mines for approximately C\$75M**
 - > includes an off-take agreement to purchase 20% of Denison's uranium output

Acquisition of Control Through PIPE Financings

- **Driven by producers' acute need for access to capital and investors' desire for controlling interest**
 - > these transactions involve the acquisition of a majority controlling interest in an issuer through a private placement of securities from treasury
 - TSX financial hardship exemption - deals can be done without the normal requirement for shareholder approval for transactions materially affecting control
 - > issuer's board must conclude and pass resolution to the effect that the issuer is in serious financial difficulty and the private placement is designed to improve the situation

Acquisition of Control Through PIPE Financingscont'd

- > the TSX has recently indicated a heightened standard of review of these situations, including
 - the requirement to provide detailed information regarding the necessity for the private placement, the alternatives considered, the manner in which the private placement is expected to address the financial hardship and why shareholder approval is not being sought
- > such private placements are also exempt from the Canadian takeover bid rules because issuance from treasury
- > need to review issuer's shareholders' rights plan to ensure it does not impede large issuance from treasury

Acquisition of Control Through PIPE Financingscont'd

Selected transactions include:

- **Pallinghurst Resources' acquisition of a controlling interest in Platmin pursuant to a US\$175M private placement**
- **Severstal's acquisition of a controlling interest in High River Gold pursuant to a C\$56M private placement**
- **Glencore's acquisition of a controlling interest in Katanga pursuant to a US\$265M private placement**

**Pallinghurst
Resources
US\$175 million**

PALLINGHURST
RESOURCES

Private placement
investment to acquire a
controlling interest in
Platmin Limited

Counsel to Pallinghurst
Consortium

**OA0 Severstal
C\$56 million**

Severstal

Private placement
investment to acquire a
controlling interest in
High River Gold

Counsel to Severstal

- **Selected Transaction: HudBay's proposed combination with Lundin**
 - > designed to match Lundin's acute financing needs and diverse mineral portfolio with HudBay's significant cash reserves and comparatively narrow geographic and mineral focus
 - > structured as a share exchange transaction whereby HudBay would acquire Lundin with newly issued shares that would almost double HudBay's existing float
 - > HudBay issuance was intended to be exempt from approval by its shareholders due to a TSX rule exemption for the issuance of shares to acquire another public company

- > exemption was successfully challenged by shareholders; OSC ruled that HudBay shareholders must have a right to vote on the acquisition in order to preserve the integrity of the marketplace
- > transaction was subsequently abandoned due to the level of opposition of HudBay shareholders

Postscript:

- > SRM and other investors succeeded in their proxy contest to replace HudBay's board
- > The TSX has proposed to revise the public company acquisition exemption to limit dilutive issuances to 50% of an issuer's float unless shareholder approval is obtained

- > In a recent situation where the Offeror proposed issuing up to 57% of its share capital to complete a takeover bid the TSX responded as follows:
 - it is not applying the proposed 50% limit at this time
 - in order to address OSC criticisms in the HudBay case the TSX required specific submissions on:
 - whether the transaction will materially affect control
 - whether the transaction provides consideration to insiders of 10% or more of market capitalization
 - the impact the transaction will have on the quality of the market place
 - dilution to the issuer, premium paid for the target, impact on the issuer's trading price following announcement and composition of the issuer's board post transaction
 - copies of securityholder complaints or other views

Canada: *Investment Canada Act* Review

- A direct acquisition of control of a Canadian business is generally subject to review if
 - > the acquiror is non-Canadian; and
 - > the asset value of the Canadian business exceeds C\$312 million (this threshold is adjusted annually and lower thresholds apply for some sectors, e.g., culture)
- Reviews normally last 45-75 days and require cabinet minister approval
- Investors must demonstrate that the investment is of “net benefit” to Canada

Canada: *Investment Canada Act* Review ... *cont'd*

- > Government considers the effect of the investment on Canadian employment and resources; productivity; technological development; ability to compete in world markets; and compatibility with national, industrial, economic and cultural policies
- > investors must usually give binding 3-5 year undertakings relating to matters such as continuation of employment levels, minimum R&D levels and the maintenance of a Canadian head office
- > current economic crisis has resulted in many investors seeking relief from their commitments as they are unable to maintain employment and investment levels

- When investors are State-Owned Enterprises, additional “net benefit” criteria are considered
 - > the Government’s intent is not to block acquisitions by SOEs, but ensure that these investors operate under standards similar to other commercial enterprises
 - > the Government will consider the nature and extent of foreign government control, whether the SOE adheres to Canadian standards of corporate governance and whether the Canadian business will continue to have the ability to operate on a commercial basis following the acquisition

Canada: *Investment Canada Act* Review ... *cont'd*

- corporate governance considerations include commitments to transparency and disclosure; independent directors; and independent audit committees
- commercial orientation considerations include operating on a commercial basis with respect to where to export and process
- Proposed amendments to the Act will introduce new review thresholds and a national security test
 - > the review threshold will increase from C\$312 million in asset value to C\$600 million in enterprise value
 - new threshold will increase to \$1 billion over four years
 - annual inflation-indexed increases thereafter
 - low thresholds for special sectors (except culture) will be abolished

Canada: *Investment Canada Act* Review ... *cont'd*

- > any investment will be subject to potential review on national security grounds
 - no financial thresholds or mandatory review for national security reviews
 - investments will be reviewed on an “injurious to national security” and not the usual “net benefit” standard

- U.S. developments—*Foreign Investment and National Security Act of 2007* (FINSA)
 - > the president has the authority to suspend, prohibit or divest any foreign acquisition of a U.S. business that is determined to be a threat to the national security of the United States
 - > FINSA broadens scope of foreign investment review under the U.S. national security transaction review regime
 - national security mandate broadened to include “homeland security” matters, “critical infrastructure” including “major energy assets”, and “critical technologies”, in addition to the traditional defense sectors

U.S. FINSA National Security Review ... *cont'd*

- as before, initial 30-day review followed by a more thorough 45-day second-stage investigation if there is a potential threat to national security
- rebuttable presumption for second stage investigation when the acquiror is a foreign government–controlled entity
- Review process can be expected to be more politicized than in the past
- Market participants need to factor national security ramifications, broadly framed (both Canadian and U.S., as applicable), into their transaction planning, and develop proactive strategies early in the process to address regulatory risk



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