Global Arbitration Review

# The Guide to Mining Arbitrations

Editors
Jason Fry and Louis-Alexis Bret

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# Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. Recently mining – and the disputes it throws up – emerged as one such topic.

One could assume mining is little different from energy – which is already covered by a GAR guide (*The Guide to Energy Arbitrations*). But as Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face other risks. More than energy companies, their projects depend on the blessing of the local population because they are visible and on people's doorsteps in a way that oil and gas projects are not. And there are other differences. It is easier to value an early-stage oil and gas asset than a mine, which has implications for damages. And different substantive principles apply. The *lex mineralia* is less influenced by decisions out of Texas and more by rulings in Australia and Canada.

The era of hydrocarbons is waning, while that of minerals and metals is heading the other way. Copper, cobalt, lithium, silicon, zinc and other precious resources are required for batteries, circuitry and solar panels – they are powering the growth of technology and clean energy.

For all these reasons, it seemed right to add mining disputes to the topics covered by the GAR Guides series.

*The Guide to Mining Arbitrations* is the result. It is a practical know-how text in three parts. Part I identifies the most salient issues in mining arbitration, which are identified by reference to the key business risks facing the mining and metals sector. Part II introduces select substantive principles applicable to mining arbitrations, while Part III introduces some regional perspectives on mining arbitration. The Guide ends with a brief conclusion.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*).

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.



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## Part III: Regional Issues in Mining Arbitration





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## The Contribution of Canadian Law to International Mining Arbitration

**Eric Bédard and Dina Prokic** [1]

*"In seventeen-twenty they sailed to CB,*
*In search for coal that outcropped by the sea;*
*They settled the land 'round Morien Bay, '*
*Twas here coal mining started, they say."*[2]

### Introduction

Whether or not coal mining truly started at Cape Breton Island in Nova Scotia, as the song goes, Canada has by now undisputedly established itself as one of the leading mining countries.[3] This Commonwealth country produces more than 60 different minerals and metals, ranking first in the global production of potash; second in uranium and niobium; third in nickel, gemstones, cobalt, aluminium and platinum group metals; fourth in cobalt, cadmium, graphite and sulphur; and fifth in diamonds, titanium, gold and mica.[4] Its status promises to remain current, at it is also 'home to 14 of the 19 metals and minerals needed

1 Eric Bédard is a senior associate at Woods LLP and Dina Prokic is a member of the New York State Bar. The authors wish to thank Joshua Crowe, associate at Woods LLP, for his contribution to the research that made this chapter possible.

2 The Men of the Deeps, 'The Coal by the Sea' (1991).

3 The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 6, https://mining.ca/resources/mining-facts/.

4 See the most recent data at The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 6, https://mining.ca/resources/mining-facts/.



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to make a solar PV panel.'[5] This abundance of diverse resources has drawn many companies to put down roots in Canada, even when their operations are scattered across the globe.[6]

The wide availability of capital to fuel exploration and exploitation of minerals also explains Canada being home to such a number and variety of mining companies.[7] More than 50 per cent of the world's publicly listed exploration firms in 2013 had their headquarters in this country.[8] In 2017, half of the world's public mining companies were listed on the Toronto Stock Exchange (TSX) and TSX-Venture Exchange. That same year these two exchanges accounted for 38 per cent of the equity capital raised globally for mining.[9] This abundance of minerals and dynamic capital market has fostered the development of a variety of mining related expertise in Canada, such as in geology, remote sensing, mining finance and engineering services, and environmental management.[10] Finally, Canada's stable and reliable legal system,[11] with its independent and experienced judiciary and elaborate legislative and regulatory framework, provides fertile soil for exploration projects.

Canadian mining law has been shaped by several factors, including the country's form of government (constitutional monarchy), federal structure and Aboriginal rights.[12] The country's colonial past also played a role in the adoption by many provinces of the free mining regime, according to which the first person to stake a claim to a resource is granted exclusive rights to its exploration and exploitation.[13]

Except for few instances of private ownership and Aboriginal title, all mines and minerals belong to the Crown (ie, provincial governments or federal government, when they are situated on federal lands).[14] The Constitution Act of 1867 allows each province to

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5 Clean Energy Canada, 'Mining for Clean Energy: Tracking the Energy Revolution 2017', 5, http://cleanenergycanada.org/wp-content/uploads/2017/06/MiningCleanEnergy2017.pdf; The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 12, https://mining.ca/resources/mining-facts/.

6 Dwight Newman, *Mining Law of Canada*, Lexis Nexis (2018), 51.

7 While Vancouver features 'the world's leading cluster of exploration companies', Edmonton is home to oil sands expertise, Saskatoon attracts companies dealing in uranium and potash, and Montreal hosts a number of aluminum and iron ore firms: The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 36, https://mining.ca/resources/mining-facts/.

8 Global Affairs Canada, 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad', 2, https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf.

9 The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 36, https://mining.ca/resources/mining-facts/.

10 Government of Canada, 'Exploration and Mining in Canada: An Investor's Brief', February 2016, 3; The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry 2018', 25, https://mining.ca/resources/mining-facts/.

11 According to the World Justice Project report, Canada ranks ninth in the 2019 Rule of Law Index. See WJP, 'Rule of Law Index 2019', 6, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single per cent20Page per cent20View-Reduced_0.pdf.

12 Dwight Newman, *Mining Law of Canada*, Lexis Nexis (2018), 60. To a lesser extent, the country's bijuralism contributes to the richness of its mining law: the mineral titling regime of Québec is based on the principles found in common law, but its civilian tradition does bear on the qualification of property rights, for instance.

13 This principle originally served to favour the accelerated prospect of a vast territory perceived as sparsely populated.

14 Constitution Act, 1867, Section 109.



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legislate on exploration, development, conservation and management of non-renewable natural resources, as well as on export of the primary production from non-renewable natural resources from the province to another part of Canada.[15] Additionally, the provinces 'may make laws in relation to the raising of money by any mode or system of taxation in respect of non-renewable natural resources […] in the province and the primary production therefrom'.[16] While the federal government's regulation of mining operations is seemingly limited, the latter must incidentally comply with dozens of federal acts,[17] and some matters, such as taxation and environment, are regulated at both the federal and provincial levels.[18] Lastly, the Constitution Act of 1982 recognises and affirms rights of Aboriginal peoples,[19] who are entitled to be consulted and accommodated by the Crown if they may be affected by a governmental decision, including with respect to mining projects.[20]

Some of these domestic characteristics are reflected in Canadian treaties with other countries. For instance, in the uranium mining sector the government requires at least

15 Constitution Act, 1867, Section 92A. See, for example, in Quebec: Civil Code of Quebec (CCQ-1991); Mining Act (CQLR c. M-13.1); Business Corporations Act (CQLR c. S-31.1); Mining Companies Act (CQLR c. C-47); Environment Quality Act (CQLR c. Q-2), schedule A; Natural Heritage Conservation Act (CQLR c. C-61.01); Petroleum Resources Act (CQLR c. H-4.2). In Ontario: Conveyancing and Law of Property Act (R.S.O. 1990, c. C.34); Mining Act (R.S.O. 1990, c. M.14); Mining Amendment Act (S.O. 2009, c. 21 – Bill 173); Aggregate Resources and Mining Modernization Act (S.O. 2017, c. 6 – Bill 39); Land Titles Act (R.S.O. 1990, c. L.5); Public Lands Act (R.S.O. 1990, c. P.43); Environmental Assessment Act (R.S.O. 1990, c. E.18); Occupational Health and Safety Act (R.S.O. 1990, c. O.1); Oil, Gas and Salt Resources Act (R.S.O. 1990, c. P.12). In British Columbia: Land Title Act (R.S.B.C. 1996, c. 250); Mineral Tenure Act (R.S.B.C. 1996, c. 292); Mines Act (R.S.B.C. 1996, c. 293); Environmental Assessment Act (S.B.C. 2002, c. 43) and Reviewable Projects Regulation (B.C. Reg. 370/2002); Petroleum and Natural Gas Act (R.S.B.C. 1996, c. 361); Oil and Gas Activities Act (S.B.C. 2008, c. 36).

16 The Constitution Act, 1867, Section 92A. See, for example, Mining Tax Act (CQLR c. I-0.4); Mining Tax Act (R.S.O. 1990, c. M. 15); Mineral Tax Act (R.S.B.C. 1996, c. 291).

17 See, for example, Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)), sections 127, 213; Competition Act (R.S.C., 1985, c. C-34); Criminal Code (R.S.C., 1985, c. C-46), sections 394, 396; Canada Labour Code (R.S.C., 1985, c. L-2), Sections 125.3, 137.2; Canada Business Corporations Act (R.S.C., 1985, c. C-44); Energy Monitoring Act (R.S.C., 1985, c. E-8), Section 5; Extractive Sector Transparency Measures Act (S.C. 2014, c.39, Section 376); Canada National Parks Act (S.C. 2000, c. 32), Section 41.4; National Energy Board Act (R.S.C., 1985, c. N-7); Nuclear Safety and Control Act (S.C. 1997, c. 9) and Uranium Mines and Mills Regulations (SOR/2000-206); Canadian Environmental Protection Act (S.C. 1999, c. 33); Fisheries Act (R.S.C., 1985, c. F-14); Canadian Environmental Assessment Act (S.C. 2012, c. 19, Section 52); Oceans Act (S.C. 1996, c.31), Section 20; Migratory Birds Convention Act (S.C. 1994, c. 22); Federal Real Property and Federal Immovables Act (S.C. 1991, c. 50) and Public Lands Mineral Regulations (SOR/96-13); Territorial Lands Act (R.S.C., 1985, c. T-7), Section 12; Canada Petroleum Resources Act (R.S.C., 1985, c. 36 (2nd Supp.)).

18 For a practical summary, see UNCTAD, 'Case Studies in FDI: How to Attract and Benefit from FDI in Mining – Lessons from Canada and Chile,' 2011, 31, https://unctad.org/en/Docs/diaepcb2010d11_en.pdf. It is also noteworthy that the mining of uranium exceptionally falls within the purview of the federal government, for reasons of national security: the jurisdiction to regulate mining of uranium forms part of a broader power to legislate for the 'peace, order and good government' under Section 91 of the Constitution Act, 1867. See also Erik Richer La Flèche, David Massé and Jennifer Honeyman, 'Canada', in Erik Richer La Flèche (ed.), *The Mining Law Review* (6th ed., 2017), 45.

19 The Constitution Act, 1982, Section 35.

20 See e.g. *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 SCR 550, 2004 SCC 74; *Quebec (Attorney General) v. Moses,* [2010] 1 SCR 557, 2010 SCC 17.



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51 per cent Canadian ownership.[21] To avoid claims of violations of various treaty standards (such as national (NT) or most favoured nation (MFN) treatments), Canadian agreements contain reservations. Thus, under the Canada – EU Comprehensive Economic and Trade Agreement (CETA), an investor in the uranium mining sector is precluded from arguing that a requirement of Canadian ownership violates NT or MFN.[22]

For all these reasons, Canadian courts have had the opportunity, over more than a century, to create and refine a vast body of mining law from that international arbitration decision-makers, practitioners and users may look to for guidance. This chapter will, therefore, first, look at past Canadian influences on international mining arbitrations. Then, through a review of Canadian court judgments in mining disputes, it will suggest areas in which international commercial and investment arbitration could benefit from this body of law.

## Canada in mining arbitration

Despite being as often confidential and infrequently publicised as other types of arbitration, the number of mining-related arbitrations is estimated to be significant.[23] For instance, the oil, gas and mining sector generates the largest number of disputes before ICSID – 24 per cent of the Centre's caseload.[24] While Canada rarely finds itself on the receiving end of the claim,[25] Canadian investors are active in seeking protection of their rights.[26]

*In Crystallex v. Venezuela*, the claimant – a Canadian company frustrated in its attempt to develop a gold mining project – argued that the respondent's refusal to issue an environmental permit, allowing the extraction of gold deposits, and the government's subsequent

21 Natural Resources Canada, 'Non-Resident Ownership Policy in the Uranium Mining Sector' (1987), https://www.nrcan.gc.ca/energy/energy-sources-distribution/uranium-nuclear-energy/uranium-canada/non-resident-ownership-policy-uranium-mining-sector/7697. Yet the government may also depart from this requirement in certain cases, as it did in 2015 when it allowed Australia's Paladin Energy Ltd. a majority ownership of a uranium mine in Newfoundland and Labrador. See The Globe and Mail, 'More takeovers seen in uranium sector after Ottawa makes rare policy move', 15 May 2018, https://www.theglobeandmail.com/globe-investor/investment-ideas/ottawa-allows-australian-firm-to-own-canadian-uranium-mine/article25068012/.

22 CETA, Annex I, Reservation I-C-4. See also Canada – Peru BIT (2006), Annex I, I-C-20; Canada–Jordan BIT (2009), Annex I, Section 15; Canada–Tanzania BIT (2013), Annex I, Section 14; Canada–Côte d'Ivoire BIT (2014), Annex I, Section 14; Canada–Mali BIT (2014), Annex I, Section 14; Canada–Serbia BIT (2014), Annex I, Section 14.

23 Raphael J. Heffron, 'Mining Disputes', in Maxi Scherer (ed.), *International Arbitration in the Energy Sector* (OUP, 2018), 6.17.

24 As illustrated, again, by ICSID Caseload Statistics, 2019-1, 12, https://icsid.worldbank.org/en/Documents/resources/ICSID per cent20Web per cent20Stats per cent202019-1(English).pdf.

25 See, e.g., *Mobil Investments and Murphy Oil v. Canada* (I), ICSID Case No. ARB(AF)/07/4; *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04.

26 See, e.g., *Encana v. Ecuador,* LCIA Case No. UN3481, UNCITRAL; *Glamis Gold v. USA*, UNCITRAL; *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6; *Nova Scotia Power v. Venezuela* (I), UNCITRAL; *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1; *Copper Mesa v. Ecuador*, PCA Case No. 2012-2; *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2; *Khan Resources v. Mongolia*, PCA Case No. 2011-09; *Nova Scotia Power v. Venezuela* (II), ICSID Case No. ARB(AF)/11/1; *Rusoro Mining v. Venezuela,* ICSID Case No. ARB(AF)/12/5; *Stans Energy v. Kyrgyzstan* (I), MCCI; *Bear Creek Mining v. Peru,* ICSID Case No. ARB/14/21; *EuroGas and Belmont v. Slovakia*, ICSID Case No. ARB/14/14.



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termination of its mine operation contract amounted to expropriation and violated various treaty standards.[27] Upon findings of expropriation and breach of the fair and equitable treatment (FET) standard,[28] the Tribunal turned to the assessment of damages. Among the various valuation methods proposed by the parties,[29] the Tribunal applied two suggested by the Claimant: the stock market and the market multiples approaches.[30] In choosing to value a development property using these 'forward-looking methodologies',[31] which aim 'at determining lost profits' instead of just looking at a computation of sunk costs, the Tribunal relied on the Standards and Guidelines for Valuation of Mineral Properties of the Canadian Institute of Mining, Metallurgy and Petroleum (CIMVal Standards and Guidelines).[32] The Tribunal thereby reaffirmed the relevance of these Guidelines as 'important standards in the industry'.[33]

Indeed, the Canadian expertise in the field of valuation was recognised in CIMVal Standards and Guidelines serving as one of the three main sets of guidelines on which were based the 2016 International Mineral Property Valuation Standards template.[34] The Canadian guidelines will 'play an increasingly dominant role in shaping' parties' approaches to valuations,[35] as they are more frequently relied upon in arbitration proceedings.[36] The current version dates back to 2003 and contains two parts: mandatory rules called 'Standards' and voluntary 'Guidelines', which elaborate on the Standards and indicate best practices.[37] The Standards are limited to valuations of mineral properties, which include real property, various permits and licences (prospecting, reconnaissance, exploration, development), mining licences and leases, as well as royalty interests.[38] Although the Standards call for valuations by qualified valuators,[39] they do not require that a certain valuation approach and method be used; rather, the responsibility to choose the appropriate ones in each case is left with the qualified valuator.[40] The Guidelines assist in this choice, as they classify mineral properties into categories, and then pair each category with the suitable valuation approach.[41] The market approach may be suitable to all four types of property: exploration

27 *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 6-8.

28 ibid., paras. 623, 673, 675.

29 ibid., paras. 764, 765, 769.

30 ibid., 4 April 2016, para. 916.

31 ibid., para. 882.

32 ibid., paras. 883, 884, 901.

33 ibid., para. 883.

34 International Mineral Valuation Committee, 'International Mineral Property Valuation Standards Template' (2nd ed., 2016), 1, https://www.ivsc.org/files/file/view/id/939.

35 Henry G. Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (OUP, 2017), 20.05.

36 See, e.g., *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 780, 831; *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras. 393, 394.

37 Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties (CIMVAL), 'Standards and Guidelines for Valuation of Mineral Properties' (2003), P2.2, https://mrmr.cim.org/media/1020/cimval-standards-guidelines.pdf (CIMVal Standards and Guidelines).

38 CIMVal Standards and Guidelines, S2.1, S1.0.

39 ibid., S5.1.

40 ibid., S7.1.

41 ibid., G3.3.



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property, mineral resource property, development property and production property. The income approach is suitable for development and production properties, whereas a cost approach is recommended for exploration properties.[42]

The investor-state dispute in *Clayton/Bilcon v. Canada* is also worth mentioning in the context of mining arbitration. The dispute was triggered by the respondent's rejection of the investor's project to operate a quarry and marine terminal after a negative environmental assessment. The claimant contested the appropriateness of the procedure used during this assessment, arguing that it contravened Canada's duties to accord its investment FET, full protection and security, and national and MFN treatment. In particular, it claimed that the procedure before a joint review panel (JRP) was 'unwarranted',[43] since it was only appropriate for 'projects of far greater risk or magnitude',[44] than that of the claimant. Moreover, the claimant alleged that the 'overriding consideration in assessing the project' were 'community core values',[45] a term not mentioned in any legislation.[46] Although the Tribunal acknowledged that 'social impacts can be within the scope of a valid assessment',[47] in its Award on Jurisdiction and Liability it sided with the claimant.[48] The Tribunal found JRP's approach to be 'distinct, unprecedented and unexpected',[49] and, above all, 'highly problematic in light of the applicable law and facts of the case'.[50]

Before the Tribunal had a chance to decide on the issue of damages, an application for the set aside of its Award was filed with the Federal Court of Canada.[51] Although it ultimately dismissed the application, the Court noted that:

> *'the majority's Award raises significant policy concerns. These include its effect on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment processes, and the potential "chill" in the environmental assessment process that could result from the majority's decision.'*[52]

One cannot help but wonder whether the Tribunal was somewhat influenced by this statement in its award on damages: out of more than US$400 million claimed,[53] it awarded only US$7 million.[54]

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42 CIMVal are more extensively discussed in chapter 5 of the present guide.

43 *Clayton/Bilcon v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, para. 17.

44 ibid., para. 16.

45 Ibid., para. 20.

46 ibid., paras. 23, 503.

47 ibid., para. 601.

48 ibid., para. 604.

49 ibid., para. 601.

50 ibid., paras. 451, 534.

51 2018 FC 436.

52 ibid., para. 198.

53 *Clayton/Bilcon v. Government of Canada*, UNCITRAL, Award on Damages, 10 January 2019, para. 87.

54 ibid., para. 400. The claimant may ask Canadian courts to set aside this award.



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The claim made against Canada by an American company under Chapter XI of the NAFTA in *Lone Pine Resources v. Canada*,[55] based on the revoking of exploration licences for petroleum, natural gas and underground reservoirs located in the St. Lawrence River is also worthy of attention. The expected award may shed light, inter alia, on whether a NAFTA tribunal ought to exercise its jurisdiction regarding working interests arising out of a farmout agreement. The claimant's allegations that Canada breached its FET obligation and proceeded to an illegal expropriation could also raise the issue of the appropriate valuation method for natural gas project at the exploration stage.

## Potential areas of Canadian influence in international mining arbitrations

While this chapter does not purport to argue that Canadian law is an authoritative source of law in mining arbitration proceedings,[56] it remains that Canadian courts have exceptional expertise in the field. The depth and breadth of Canadian experiences with a variety of legal and factual issues in the area make Canadian mining law a logical source of inspiration that may inform arbitral decision-making, in the context of both commercial and investor-state arbitrations.

### International commercial arbitration

Irrespective of the specific law applicable to a given arbitration, tribunals are commonly tasked with the contractual interpretation of agreements involving various actors of the mining industry and asked to rule on the consequences of handling confidential information. The sophistication of the solutions articulated by Canadian courts in such contexts make this body of law an attractive basis for arguments.

#### *Contractual allocation of risk*

It is no secret that mining exploration entails substantial risks, be it geological, financial or other.[57] Governments accordingly grant companies and their investors tax credits to make project financing possible,[58] among other incentives. Parties, likewise, are inclined to mitigate risks, either by assigning or sub-contracting their exploration contracts, or entering into joint ventures, farming in and farming out.[59] If the issue of allocation of risks is not dealt with in advance (i.e., by way of contract), the project is unlikely to advance.[60]

Yet, inserting a clause into a contract does not guarantee its application. Before relieving any party of liability, Canadian courts will analyse an exclusion of liability clause pursuant

55 ICSID Case No. UNCT/15/2. The author Eric Bédard formed part of the team at Canada's Trade Law Bureau that defended Canada's interests in this matter.

56 The Canadian government has clearly dissociated itself with such an approach, see, e.g., *Clayton/Bilcon v. Government of Canada*, UNCITRAL, Award on Damages, 10 January 2019, para. 186.

57 John Southalan, *Mining Law and Policy: International Perspectives* (The Federation Press, 2012), 14; Henry G. Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (OUP, 2017), 6.01; Dwight Newman, *Mining Law of Canada*, Lexis Nexis (2018), 56.

58 *Ressources Strateco Inc. v. Attorney General of Quebec*, 2017 QCCS 2679, para. 548.

59 *Silver Butte Resources Ltd. v. Esso Resources Canada Ltd.*, *Tenajon Resources Corp. and Westmin Resources Ltd.*, 1994 CanLII 625 (BCSC), 10.

60 John Southalan, *Mining Law and Policy: International Perspectives* (The Federation Press, 2012), 14.



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to the three-pronged *Tercon* test: (1) they will consider whether the clause applies to the circumstances established in evidence; (2) in the affirmative, they will review whether it was unconscionable at the time of contract conclusion (i.e., invalid); (3) if valid, the courts will determine whether overriding public policy mandates against enforcement of the given clause.[61]

Applying the *Tercon* test to the standard form contract used in the Canadian oil well drilling industry, the Alberta Court of Appeal refused to shield the defendant from liability for fraudulent misrepresentation in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd*.[62] As a result of Precision employee's mistake, which was not timely communicated to Yangarra, the latter's drilling equipment was damaged.[63] At the very least, Precision's actions were reckless; at most, they constituted active deception.[64] Disregarding the fact that the parties' contract was a 'no-fault' agreement, under which each bore the risk of damage to its own assets,[65] the Court held that 'public policy requirements […] intervened to give no effect to [contractual] language' that explicitly released the parties from a claim based in fraud.[66]

Although the decision in *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd*. preceded Tercon, the Alberta Court of Appeal adopted a similar approach in the context of the natural gas industry, refusing on public policy grounds to enforce an exclusion clause in favour of a supplier that knowingly omitted to disclose to the buyer the defects in its plastic resin pipeline.[67]

### *Force majeure clauses*

Although a century old, the scenario of *Samuel v. Black Lake Asbestos and Chrome* could very well happen today. The parties' two, nearly identical, contracts called for delivery of a large quantity of Canadian lump chrome ore by a certain date. [68] Soon after the contracts' conclusion, prices of chrome, as well as production costs, began to rise due to increased demand for chrome in times of war.[69] Obtaining the required quantity would, therefore, entail greater expense than the defendants had anticipated at the time of contracting. Unsurprisingly, they were delaying deliveries to the plaintiff, trying to profit from dealings

61 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* [2010] 1 S.C.R. 69, 2010 SCC 4 (CanLII), paras. 121-123.

62 2018 Dixon et al., 'Recent Judicial Decisions of Interest to Energy Lawyers', 56:2 *Alberta Law Review* (2018), 2018 CanLIIDocs 262, 503.

63 *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378, paras. 3, 4.

64 ibid., para. 24.

65 ibid., para. 2.

66 ibid., paras. 41, 44.

67 *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, referred to in Michael A. Marion et al., 'Canada's aging oil and gas infrastructure: Who will pay? The public and private cost recovery frameworks', 52:2 *Alberta Law Review* (2014), 2015 CanLIIDocs 111, 363.

68 *Samuel v. Black Lake Asbestos and Chrome Co. Ltd.*, Judgment of the Appellate Division of the Ontario Superior Court in 1920 CanLII 456 (ONCA), 271. The trial judge's ruling was upheld by the Supreme Court of Canada. See *Samuel v. Black Lake Asbestos and Chrome Co. Ltd.*, 62 S.C.R. 472, 1921 CanLII 8 (SCC).

69 *Samuel v. Black lake Asbestos and Chrome Co. Ltd.,* Judgment of the Ontario Superior Court in 1920 CanLII 456 (ONCA), 274.



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with other purchasers.[70] After an unsuccessful attempt to increase the contract price,[71] the defendants stopped further deliveries to the plaintiff.[72] Refusing to apply the elaborate force majeure clauses contained in both contracts which, inter alia, covered 'other unforeseen circumstances beyond the reasonable control of the sellers',[73] the trial judge held:

> *That increased cost of production, unless specifically provided against, is not a ground for refusal to perform, is well established, even though it be to the extent of rendering the contracts unprofitable to the vendors. Mere economic unprofitableness is not to be regarded as equivalent to impossibility of performance.*[74]

In *Re Dominion Coal Co. Ltd.,* the Nova Scotia Court of Appeal enforced a force majeure clause to relieve Dominion Coal Company (Domco) of liability resulting from the government's expropriation of its assets and the latter's subsequent breach of the charter party. Domco had agreed to produce, sell and deliver coal to Hydro-Electric Power Commission of Ontario (Hydro) during a period of five years (1963-1967 inclusive).[75] Domco had also entered into a charter party with Upper Lakes Shipping Ltd. (Upper Lakes), which was to remain in force throughout the coal contract's existence.[76] When the coal contract was extended for a further period of five years, the charter party was renewed accordingly.[77] In 1967, however, the newly passed Cape Breton Development Corporation Act established a Crown corporation (Devco), whose main purpose was 'to promote and assist the financing and development of industry on the Island'.[78] Under the Act, Devco was empowered to acquire lands on the Island of Cape Breton or personal property either by purchase or expropriation.[79] Not long thereafter, in 1968, Devco acquired all of Domco's assets[80] (ie, 'all of the physical plant and equipment, leases, company records and all other tangible personal property essential to the works and all undertakings formerly operated by Domco in the Island of Cape Breton.')[81] Upper Lakes continued to carry coal from Cape Breton to Hydro on behalf of Devco.[82] However, the amount of coal shipped during 1969 was reduced from the agreed 750,000 tons per year to 250,000, and the coal contract was terminated […] as of the end of 1969.[83] As its contract was supposed to carry on for another five years, Upper Lakes sought legal remedies against Domco.

The Court held that Domco was not liable for any breach of the charter party's terms occurred after Devco's requisition of its assets. The charter party contained an exception

70 ibid., 275.
71 ibid.
72 ibid., 274.
73 ibid., 272.
74 ibid., 276.
75 *Re Dominion Coal Co. Ltd.*, 1974 CanLII 1305 (NSCA), 399.
76 ibid.
77 ibid., 400.
78 ibid.
79 ibid., 400-401.
80 ibid., 403.
81 ibid., 402.
82 ibid., 403.
83 ibid.



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clause, which, apart from 'Acts of God, […] acts of enemies, pirates and thieves, […] riots and strikes […],' exempted Domco from liability:

> *'for failure to perform their part of the agreement (i.e. the supplying of coal cargo), if such failure of performance is caused by circumstances beyond their control created by: (1) the termination of the coal contract between Domco and Hydro; (2) the requisition or threat of requisition of the coal by authority; (3) priorities or other action or direction of any Government or Government authority or agency […].'*[84]

Devco's acquisition of Domco's property 'effectively denuded' the latter of its assets, rendering it incapable of performance of its part of the charter-party'.[85] In the Court's view, the exception clause clearly showed that 'the parties contemplated the possible takeover by the Government of the coal operation of Domco, and expressly provided that in such event the liability of Domco would cease.'[86]

*Transcanada Pipelines Ltd. v. Northern and Central Gas Corp. Ltd.* concerned a force majeure clause in a contract for the supply of natural gas.[87] The contract obliged the buyer, Northern, to pay 'demand charges' irrespective of whether or not it took delivery of the gas that the seller, Transcanada, undertook to supply. When the buyer's clients were hit with strikes and explosions, their demand for gas decreased, thus prompting Northern to seek relief from the demand charges. The Ontario Court of Appeal stated that, as a general rule, force majeure clauses were limited to events besetting the parties to the contract, unless the parties had widened the clause's scope by, for example, exempting the seller from liability arising from its supplier's non-delivery of gas (as was the case here). The Court refused to exempt Northern on account of strikes and explosions suffered by its customers on the following grounds: (1) the parties' specific intent to only protect the seller, which is evident from the fact that only Transcanada could be exempt for failures of its suppliers; (2) the duty to remedy any force majeure 'with all reasonable dispatch', which indicated that the 'remedying' could only be performed by the parties to the contract; (3) the fact that upholding Northern's interpretation would essentially grant it 'business interruption insurance protection.'[88]

### *Liability for misuse of confidential information*

Confidential information has always been a key asset in the mining industry, especially concerning ore location, quality, and accessibility, and it promises to be an increasingly difficult asset to protect. Growing availability of data and processing capabilities mean that, more than ever before, the disclosure of the slightest piece of exploration results may deprive

84 ibid., 405.

85 ibid.

86 ibid., 406.

87 *Transcanada Pipelines Ltd. v. Northern and Central Gas Corp. Ltd.*, 1983 CanLII 1617 (ONCA).

88 Although the decision of the Nova Scotia Court of Appeal in *AMCI Export Corporation v. Nova Scotia Power Incorporated*, 2010 NSCA 41, does not, in the end, decisively address the legal and factual issues raised about the coal supply and purchase agreement in question, it helpfully illustrates the myriad ways in which a supplier may seek to avoid paying damages for failure to deliver.



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a mining company of its edge in putting together a development project fast enough. Canadian courts have articulated legal solutions that consider the value of this information in the mining industry.

For instance, omitting to resolve some questions in a contract does not necessarily deprive an injured party of recourse against a partner that proves untrustworthy. In *Lac Minerals v. International Corona Resources*, where the parties had no confidentiality agreement in place, the Supreme Court of Canada held that a senior mining company, Lac, by misusing information received from a junior mining company, Corona, had breached a duty of confidence to Corona. Corona had carried out an extensive exploration programme and arranged to acquire certain property (Williams property). During Lac's representatives' visit to the Corona property, Corona disclosed its confidential geological findings and theory of the site, highlighting the importance of the Williams property. At the meeting, Lac had advised Corona to aggressively pursue the Williams property. Yet, following the meeting and unbeknown to Corona, Lac itself acquired it and staked 640 favourable claims east of the property.[89] Undoubtedly, Corona's information was 'the springboard that led to the acquisition of the Williams property.'[90]

In finding a breach of confidence, the Court looked at whether: (1) information conveyed was confidential; (2) information was communicated in confidence; and (3) the recipient of information misused it.[91] The first element was satisfied, since the information conveyed 'went beyond what had been imparted publicly'.[92] The fact that 'information of commercial value was given on a businesslike basis and with some avowed common object in mind' satisfied the second element of the test. Finally, testimony of Lac's witnesses showed that 'Lac was aware that it owed some obligation to Corona to act in good faith, and that that obligation included the industry-recognized practice not to acquire the property which was being pursued by a party with which it was negotiating.'[93] Justice La Forest stated:

> *'Lac had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to Lac so that Lac and Corona could negotiate a joint venture for the exploration and development of the area, or Lac could, on the basis of publicly available information, have pursued property in the area on its own behalf. Lac, however, is not entitled to the best of both words.'*[94]

He further added that, 'in the modern world the exchange of confidential information is both necessary and expected. […] The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.'[95]

89 *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, 612.
90 ibid., 636.
91 ibid., 608.
92 ibid., 612.
93 ibid., 641.
94 ibid., 642.
95 ibid., 672.



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When addressing the issue of remedies, Justice La Forest underscored that 'in breach of confidence cases there [w]as considerable flexibility'.[96] As Corona's claim was restitutionary, Lac had to give back what it took.[97] Yet, the Williams property could not be 'given back', since it never belonged to Corona.[98] Monetary damages were deemed 'unfair and unjust',[99] since 'the actual damage […] was virtually impossible to determine with any degree of accuracy'.[100] Thus, the Court's majority awarded Corona a constructive trust over the Williams property.[101]

*Lac Minerals* is arguably the 'most relevant authority on the misuse of confidential information and on the appropriate remedy in mining cases.'[102] Countless subsequent judgments have relied on the Supreme Court's pronouncement. For example, in *Ontex v. Metalore*, Metalore had acquired confidential information thanks to Ontex having granted it access to its property. Although the parties' agreements required Metalore to share this information with Ontex so that both companies could participate in staking additional claims, Metalore used it exclusively to advance its own interests. The Ontario Court of Appeal found Metalore in breach of its duty of confidence. However, the Court refused to impose a constructive trust in the plaintiff's favour, because it proved no detriment or loss flowing from the breach of confidence.

The British Columbia case of *Minera Aquiline Argentina SA v. IMA Exploration Inc.* may be of interest not just because of the Court's findings on confidentiality, but also because of its discussion on applicable law.[103] The dispute involved a Toronto-based exploration company, Minera Aquiline, as plaintiff, and IMA, a British Columbia junior mining company, together with its Argentinian wholly owned subsidiary, Inversiones Mineras Argentinas, on the defendant's side. IMA was interested in acquiring plaintiff's mining property Calcatreu (Argentina).[104] As any prospective purchaser, 'before receiving access to data and the Calcatreu site for the purpose of evaluating it',[105] IMA signed a confidentiality agreement that covered 'certain financial, operating, technical, geological and other information concerning the [Calcatreu] Project', as well as 'all communications […] between the Participants relating to the Project […]'.[106] During the first visit, IMA's representative accidentally observed a satellite map that was prepared in the course of a different project, showing all of the points sampled.[107] While some points were within Calcatreu, most were outside of its boundaries, in north-central Chubut.[108] This map triggered IMA's interest,

96 ibid., 671.

97 ibid., 669.

98 ibid.

99 ibid., 675.

100 ibid.

101 ibid., 675, 679.

102 *Ontex Resources Ltd. v. Metalore Resources Ltd.*, 1993 CanLII 8673 (ONCA).

103 *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.*, 2006 BCSC 1102, confirmed on appeal. See *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319. Leave to appeal to the Supreme Court of Canada dismissed. See 2007 CanLII 66723 (SCC).

104 ibid., para. 3.

105 ibid., para. 3.

106 ibid., para. 63.

107 ibid., para. 51.

108 ibid., para. 51.



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and during the second visit, it asked plaintiff for a digital copy of this data.[109] Eventually, however, IMA decided against bidding on Calcatreu.[110] Instead, it staked mineral claims in Chubut.[111] Minera Aquiline claimed that, by using confidential geological information obtained during the site visit, IMA breached the confidentiality agreement or, alternatively, its common law duty of confidence.[112]

IMA disputed the agreement's scope, since it did not expressly reference regional exploration data.[113] The Court held that 'this information was covered by the words "relating to" and "concerning" the Project',[114] and held IMA in breach of its contractual duties.[115] Central to this conclusion was the fact that plaintiff 'undertook the geochemical survey, which in its first phase, resulted in developing the [contested] data, for the express purpose of potentially adding to the Calcatreu gold property'.[116]Although, after this finding, a ruling on the plaintiff's alternative claim of breach of confidence at common law was unnecessary,[117] the Court nonetheless analysed the issue and found that all conditions of the *Lac Minerals* test were met.[118]

On the issue of the law applicable[119] to a breach of confidence claim, the defendants argued in favour of Argentine law, since the claim involved title to a foreign immovable, (i.e., one that was outside of the Court's jurisdiction).[120] Conversely, the plaintiff argued for the application of BC law, since its claim was an 'in personam claim in equity for the wrongful appropriation of the mining claims through a breach of confidence'.[121] The Court sided with the plaintiff, characterising the claim as an 'equitable' one and any effect on the title in land in Argentina as 'purely incidental'.[122] However, the Court's analysis did not end there. Since the obligation arose 'in connection with both a pre-existing contractual relationship and a transaction involving foreign land, the Court proceeded to examine a number of factors,[123] all of which pointed to BC law.[124] The Court also noted that, even if Argentine law were to apply, the defendants would still be liable, since 'Argentine law on breach of confidence [w]as only subtly different from [BC] law on that issue, and the differences [were] not substantial enough to relieve the defendants of liability.'[125] The great-

109 ibid., paras. 55, 56.
110 ibid., para. 58.
111 ibid., paras. 20, 58.
112 ibid., para. 5.
113 ibid., para. 61.
114 ibid., para. 109.
115 ibid., paras. 109, 111.
116 ibid., para. 81.
117 ibid., para. 112.
118 ibid., paras. 148, 157.
119 For a similar analysis on applicable law from an Alberta court, see *Victoria Oil & Gas Plc. v. Alhambra Resources Ltd.*, 2009 ABCA 64, discussed in Jeff W. Bright and Patrick W. Burgess, 'Recent Judicial Developments of Interest to Energy Lawyers', 48:2 *Alberta Law Review* (2010), 2010 CanLIIDocs 162,525-527.
120 ibid., para. 160.
121 ibid., para. 164.
122 ibid., para. 181.
123 ibid., para. 200.
124 ibid., para. 158.
125 ibid., para. 208.



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est distinction between the two legal systems concerned available remedies.[126] Yet, even though Argentine courts cannot order the remedy of constructive trust,[127] by virtue of 'compensation in kind', envisaged in Section 1083 of the Argentine Civil Code, they could order the transfer of property to the company, which would essentially put the plaintiff in the position it would have been in absent the wrong.[128] In any event, as this was an *in personam* claim, the Court underscored that the enforceability of remedies, appropriate under Canadian law, in Argentina was not an issue in that case, as the parties would need not attempt to recognise or enforce the judgment there.[129]

In *Barrick Gold Corporation v. Goldcorp. Inc.*, applying the principled approach described in *Minera Aquiline*, the Ontario Superior Court held that Chilean law governed Barrick's common law claim of misuse of confidential information.[130] However, since 'none of the parties have pleaded the laws of Chile,' the Court assumed that they were the same as the laws of Ontario.[131] While the authors refrain from a detailed account of the facts of this complex case for the sake of brevity, several general remarks may be distilled from the Court's decision to dismiss Barrick's common law claim.[132] First, 'there is no authority for imposing a duty of confidence in favour of a third party to a contract who is neither the owner of the confidential information nor a confider of the confidential information.' [133]Second, it is not 'reasonable to provide a right in equity to prevent an otherwise permitted transaction by restricting the disclosure of confidential information'.[134] Third, a claim cannot be asserted without the claimant having a reasonable expectation of privacy.[135] Finally, even when claimant has an ownership interest in the agreement and, as such, is entitled to a duty of confidence in its favour respecting that agreement, its claim may fail due to its acquiescence to disclosure.[136]

## Investor-state arbitration

Arbitral tribunals seized of investor-state disputes are frequently asked to determine whether a certain governmental action constitutes expropriation and, if so how to value the expropriated property. Canadian legal sources also shed light on these matters.

126 ibid., para. 234.

127 ibid., para. 257.

128 ibid., paras. 258, 266, 269.

129 ibid., para. 253.

130 *Barrick Gold Corporation v. Goldcorp. Inc.*, 2011 ONSC 3725, para. 773.

131 ibid., paras. 778-779.

132 ibid., paras. 4, 787. Readers nevertheless should know that the primary claim in this matter concerns '[…] Barrick Gold Corporation alleg[ing] that Xstrata Copper Chile S.A. breached an agreement to sell Barrick a 70% interest in a Chilean mining project referred to as the El Morro Project. The 70% interest of Xstrata Copper Chile SA was instead sold to Datawave Sciences Inc, a subsidiary of New Gold Inc, pursuant to the exercise of a right of first refusal set out in a shareholders agreement between Datawave Sciences Inc and Xstrata Copper Chile SA.'

133 ibid., para. 788.

134 ibid., para. 790.

135 ibid., para. 791.

136 ibid. paras. 798, 803.



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*Denial of necessary permits as expropriation*

A classic example of de facto expropriation in the mining context is *R v. Tener.*[137] In 1937 the province had granted respondents' predecessors in title an interest in fee simple in the lands now in dispute.[138] A few years after the grantees had received a grant of all minerals in the land, along with the right to remove them,[139] British Columbia created Wells Gray Park, which encompassed the land subject to the respondents' mineral claims.[140] Thirty years into the grant, the province enacted a new Park Act, requiring anybody wishing to exploit a natural resource in the park to obtain a use permit.[141] A permit for this class of park was 'restricted to situations where it was "necessary to the preservation or maintenance of the recreational value of the park involved".'[142] Later amendments to the Mineral Act required anyone exploring for or producing minerals in a park to also have the authorisation of the Lieutenant Governor in Council.[143] When respondents requested park use permits, not only were none issued,[144] but in 1978 they were also informed that 'no new exploration or development work [could] be authorized within a Provincial Park.'[145] Hence, respondents claimed compensation pursuant to applicable legislation.

The Chambers judge refused to award compensation, because, in his view, a 'taking' was required, and the refusal of a permit could not be viewed as an expropriation of the mineral claims themselves.[146] Conversely, the Court of Appeal held that a 'taking' was unnecessary for compensation to be ordered; rather, 'injurious affection' sufficed.[147]

The Supreme Court of Canada interpreted the term 'land', which was not defined in statutes, as including an interest in land.[148] It also subsumed the extinction of an interest in land under the expression 'expropriation of land.'[149] After thoroughly analysing the 'complexities of the interacting group of statutes',[150] the Court found that the province's actions amounted to a compensable taking (i.e., 'recovery by the Crown of a part of the right granted to the respondents in 1937').[151] The aim of this expropriation was 'to enhance the value of the public park, […] to preserve the qualities perceived as being desirable for public parks'.[152] The 1978 notice 'took value from the respondents and added value to the park', leaving the respondents 'with only the hope of some future reversal of park policy and the

137 Shawn H.T. Denstedt and Ryan V. Rodier, 'What happens when developers can't develop: Can and should resource developers be compensated when they can't develop their assets?', 48:2 *Alberta Law Review* (2010), 2010 CanLIIDocs 158, 337.

138 *R v. Tener,* [1985] 1 S.C.R. 533, 1985 CanLII 76 (SCC), para. 42.

139 ibid., para. 43.

140 ibid., para. 44.

141 ibid., para. 45.

142 ibid., para. 46.

143 ibid., para. 3.

144 ibid., para. 4.

145 ibid., para. 4.

146 ibid., para. 9 .

147 ibid., para. 9.

148 ibid., para. 53.

149 ibid.

150 ibid., para. 54.

151 ibid., para. 59.

152 ibid., para. 60.



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burden of paying taxes on their minerals'.[153] In the words of Justice Wilson, the respondents' claims have become 'worthless'.[154] This case shows that 'a de facto expropriation requires a total barrier to the exercise of a proprietary interest', as well as that 'the benefit acquired by the government can be different in substance than the specific property interest that is effectively confiscated'.[155]

*Valuation*

Selecting the most appropriate valuation method upon findings of expropriation remains a daunting task for any arbitral tribunal seized of an investor-state dispute. The BC Superior Court decision in *Shell Can v. East Kootenay* provides for help reflexions on the matter, recognising the particularities of such an exercise in the mining industry:

'Although in most cases the value of a business conducted at a premises will be different from the value of the land and improvements, there are undoubtedly cases where they are the same. Such cases may include mines, where the land and improvements are put to their highest and best use in producing an income stream from the production of coal, and where there is no residual value when the deposit is worked out.'[156]

The case underlines the factual considerations in determining, for instance, whether the discounted cash flow (DCF) method is to be favoured to the replacement cost or the market value, as an indicator of value,[157] and recalls that Canadian law allows for the use of different methods side by side. [158]

Finally, in *Bayens v. Kinross Gold Corp.*,[159] the Ontario Superior Court proceeded to a substantial discussion of the approaches to valuation in the mining industry, underscoring its relation to financial disclosure requirements.[160]

## Conclusion

This chapter has barely scratched the surface of the expertise developed by Canadian courts in dealing with disputes arising in the mining industry. The volume of decisions, the creativity of the solutions arrived at by courts, and the intimate knowledge of the particularities of the industry that they exhibit make Canada a natural source of legal insights in the area: parties to international mining disputes and the tribunals they trust to decide the matter would all benefit from the body of knowledge accumulated over the years in Canadian mining law.

153 ibid., para. 60.

154 ibid., para. 34.

155 Shawn H.T. Denstedt and Ryan V. Rodier, 'What happens when developers can't develop: Can and should resource developers be compensated when they can't develop their assets?', 48:2 *Alberta Law Review* (2010), 2010 CanLIIDocs 158, 338.

156 *Shell Can. Resources Ltd. v. Easte Kootenay Assessor, Area* 22, 1987 CanLII 2537 (BCSC), para. 9.

157 ibid., para. 17.

158 ibid., para. 14.

159 2013 ONSC 6864.

160 After having been denied certification (a decision confirmed on appeal in 2014 ONCA 901), a settlement was approved in 2015 ONSC 3944.



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# Appendix 1

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