2012 – The Mining Year in Review

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by Doug Bryce and Jeremy Fraiberg

The Canadian mining industry had a sobering year in 2012. Canadian companies were not immune to global trends affecting the sector, including increased capital cost pressures, resource nationalism, concerns regarding global economic growth in the wake of the European debt crisis and the U.S. fiscal cliff, and questions about a potential slowdown in China, which has been the dominant driver of the commodities super cycle. The net effect of these trends has been a more challenging business environment and a reduction in the prices of many commodities, particularly base metals.

Capital Market and M&A Activity

Both the number of financings and the amount of capital raised in the Canadian mining sector were significantly reduced in 2012 relative to 2011 on both the Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSX-V), reflecting decreased valuations and decreased investor appetite for offerings in the sector given its current challenges. Junior miners proved to be especially vulnerable to the change in sentiment that occurred in mid-2011 and continued in 2012, with the S&P/TSX Venture Composite Index (which has a heavy weighting of junior mining companies) down a stunning 52% since its recent highs in the spring of 2011. By contrast, the S&P/TSX Capped Material Index, composed of relatively larger TSX issuers, was down a more modest (albeit still painful) 29% over that same period. Similarly, trading volumes of securities in mining issuers in 2012 were down very substantially on the TSX and TSX Venture Exchanges both in terms of value and numbers of shares traded. That said, the successful completion of the sizeable and previously postponed initial public offering of Robert Friedland's Ivanplats Limited provided some degree of hope that market sentiment had not turned entirely against the sector for quality offerings.

Not surprisingly, M&A activity has also decreased considerably. According to data compiled by Crosbie & Co., there were 76 announced deals through December 15, 2012, with a total value of approximately $4.9 billion (though this total does not include notably First Quantum's announced intention to make a $5.1 billion unsolicited bid for Inmet Mining in early 2013). In 2011, there were a total of 101 announced deals with a total value of approximately $26.8 billion.

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

Winsway Coking Coal Holdings Limited and **Marubeni Corporation** in their $1 billion acquisition of Grande Cache Coal Corporation.

Goldcorp Inc. in its successful defence of a claim brought by Barrick Gold Corporation against Goldcorp, Xstrata Chile and New Gold in respect of Goldcorp's acquisition of a 70% interest in the El Morro mining project in Chile.

Continental Nickel Limited in its $45 million sale to IMX Resources Limited.

Regulatory Developments

There were a number of notable developments in 2012 on the regulatory front. Canadian securities regulators made waves through a number of tough sanctions against issuers with non-compliant technical disclosure. These included the widely noted cease-trade orders issued by the British Columbia Securities Commission against Barkerville Gold Mines Ltd. and Clifton Star Resources Inc., as well as the cease-trade order issued by the Autorité des Marchés Financiers in Quebec against the rare-earths mineral issuer Orbite Aluminae. In addition, the bought deal financings of Karnalyte Resources Inc., Extorre Gold Mines Limited and Rio Novo Gold Inc. were terminated due to regulatory concerns over technical disclosure. The severity of these sanctions has signalled a tougher approach to the regulation of technical disclosure by mining issuers.

On a related note, the Canadian Securities Administrators (CSA) published CSA Staff Notice 43-307 *Mining Technical Reports – Preliminary Economic Assessments* in August. The Staff Notice sets out CSA staff's position on a number of issues regarding the use and disclosure of preliminary economic assessments (PEAs), which was the subject of regulatory concern in a number of transactions. The Staff Notice serves as a more general reminder that one of the most frequent sources of trouble for mining issuers relates to disclosure of economic analysis of their properties that is either not appropriately supported by a current technical report or that is otherwise made without regard for the restrictions imposed by National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.

In the United States, the Securities and Exchange Commission (SEC) adopted final rules in August under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* requiring disclosure by all issuers that file reports with the SEC regarding the use of conflict minerals, and requiring disclosure of payments to governments by resource extraction issuers. The conflict minerals rule creates an annual reporting regime for issuers that use defined minerals (columbite-tantalite, wolframite, tin, and gold) that have or may have originated from "Covered Countries" (consisting of the Democratic Republic of the Congo and adjoining countries) as part of a manufacturing process, but does not generally apply to mining companies. The rule governing disclosure of payments to governments requires resource extraction issuers to make an annual filing disclosing in detail all such payments (including without limitation to Canadian federal, provincial or local governments) in the prior year, subject to a de minimis payment exemption for any payment or series of related payments of less than US$100,000.

Finally, as described in more detail elsewhere in this Capital Markets Review[1], the Ontario Securities Commission issued two staff notices in 2012 relating to Canadian reporting issuers with significant operations and management outside of Canada in the wake of the difficult Sino-Forest Corp. investigation and proceedings (OSC Staff Notice 51-719 *Emerging Markets Issuer Review* and OSC Staff Notice 51-720 *Issuer Guide for Companies Operating in Emerging Markets*). These staff notices, which have not to date resulted in any changes to applicable securities regulations, signal an increased regulatory focus on issuers with significant operations and management functions in emerging markets, which includes many mining issuers. Similarly, the TSX and TSX-V issued a joint consultation paper on emerging issuers in December 2012 relating to a similar set of issues.

The Year Ahead

After a challenging year in 2012, mining industry participants are hoping that 2013 will bring an increase in capital market and M&A activity. Much will depend on the global economic environment. Mining issuers in Canada should expect that regulators will continue to focus on technical disclosure, and those issuers with operations in emerging markets will likely be subject to stricter scrutiny in the coming year.

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1 See "2012 Developments in Canadian Corporate Governance"