

**PROSPECTORS & DEVELOPERS ASSOCIATION OF CANADA
RE
SOUTH AFRICA'S MINERAL DEVELOPMENT DRAFT BILL**

COMMENTARY

The Prospectors & Developers Association of Canada (PDAC) welcomes many of the goals of South Africa's Mineral Development Draft Bill. These objectives could potentially increase Canadian exploration and mining activity in South Africa. PDAC assumes that the South African government encourages contribution of capital, exploration and mining expertise and risk-taking to add value to South Africa's mineral base, to generate revenue for the State and to promote local economic development. Accordingly, PDAC offers the following commentary in hopes of assisting the South African government to formulate legislation that simultaneously promotes Canadian participation and achieves South Africa's domestic goals. What promotes Canadian participation is likely to promote participation by others.

Common Objectives

PDAC specifically recognizes and supports the government's primary objectives of making lands available for exploration and development, environmental responsibility, and promoting the entry of persons from historically disadvantaged ancestry. PDAC accepts these as the new business reality of doing mining in responsibly governed countries.

Exploration and mining companies, as far as practicable, seek to limit business risks to their core expertise of geology and mining operations. Isolation of risk is achieved best through a stable and predictable macro-environment. Canadian companies look to the government to establish and maintain a stable and predictable macro-environment. Many of the South African government's goals, such as increased opportunities for persons from historically disadvantaged ancestry and local economic development, could perhaps

be viewed as stabilizing the social macro-environment. Although such legislative initiatives tend to impose costs on exploration and mining companies, such costs may yield countervailing reductions of risks and are to that extent consistent with the interests of the exploration industry.

PDAC, however, wishes to express serious concerns about the means by which such goals would be implemented in the Mineral Development Draft Bill (the “Draft Bill”). Our general concern is that the Draft Bill fails to establish a framework of legal norms that would provide sufficient legal certainty to a Canadian company that it would have secure rights to realize a fair proportion of the value it adds to South Africa’s mineral base. With respect to potential participation by junior exploration companies, the Draft Bill would likely be fatal.

Junior exploration companies play an essential role as catalysts to growth in mineral development. The formation of strong mineral development sectors in the United States, Canada and Australia each closely followed reforms to the legal framework whereby prospectors could acquire, hold, encumber and freely transfer prospecting and mining rights. In each case, the legal reforms substantially broadened opportunity of access to individual prospectors who could stake claims at minimal cost then raise high-risk equity capital based on a secure claim that could generate high rewards. These were conditions conducive to junior exploration companies.

Junior exploration companies have distinct requirements.

- Junior exploration companies do not generate cash flow from mining operations; they cannot depend on government grants; they cannot obtain bank financing—they must attract high-risk equity capital.
- To participate in mineral development, junior exploration companies must be able to satisfy the investment goals of those who would contribute high-risk equity capital.

- The shareholders of a junior exploration company invest in identified prospects. Before seeking capital, a junior exploration company identifies prospects based on the unproven but promising insights of entrepreneurial geologists familiar with specific geological formations. Only after prospecting rights have been fully secured could a junior exploration company expect to solicit high-risk equity capital for initial prospecting work.
- Not all equity is contributed at once. Additional risk capital for successive stages of prospecting work is solicited as the property becomes progressively more promising.

Any legal risk of failing to retain the prospecting and mining rights to a particular prospect at any stage after the initial equity contributions would foreclose the possibility of raising equity capital in the first instance. Such legal risks would effectively deter junior exploration companies from participating in mineral development. Because of the essential role of junior exploration companies in finding ore bodies, such legal risks would effectively deprive South Africa from obtaining the economic benefits of broadened access to mineral rights. Mining history shows that mineral development has only flourished where legal reforms permitted junior exploration companies to attract high-risk capital. PDAC accordingly submits that the negative effect the Draft Bill would have on junior exploration companies warrants singular attention.

PDAC proposes that conditions that are seen to be favourable to junior exploration companies also advance the South African government's goal of increasing the participation of companies owned and run by historically disadvantaged persons. PDAC understands that, currently, a major obstacle for such companies is inability to attract financing. Such companies lack a bankable record of technical ability and experience, and lack fungible collateral sufficient to satisfy prudent lending standards. Like Canadian junior exploration companies, these local companies will have to attract successive infusions of high-risk equity capital based primarily on the increasing mineral potential of a specific prospect as information on the prospect is developed.

An entrepreneurial person will want to form a local junior exploration company to stake mining claims for a nominal fee and use his or her natural competitive advantage of greater familiarity with the local geology. The local company can then raise capital to advance the prospect, but only if potential investors have confidence the company can maintain the status of the prospecting right notwithstanding the company's thin capitalization and inexperience. Investors will be deterred by the possibility of loss of the prospecting or mining rights for conditions that cannot be cured by subcontracting or even selling the rights to a more experienced company. The local junior company could also gain experience through joint ventures, but again, only if it could deal freely with interests in the prospecting and mining rights, such as by granting participating interests or options.

PDAC submits that the South African government should strive to create prospecting and mining rights that investors in local companies, pioneered by both historically advantaged and disadvantaged persons, can confidently know will not be forfeited and will be freely transferable. Accordingly, the legal framework should clearly distinguish between forfeiture of rights (which undermines confidence of status) and regulated prerequisites to commencing or continuing operations (which impose reasonable delays or other costs but do not imperil the rights). The entitlement to hold prospecting or mining rights should be lost only for breach of objective criteria that can be monitored by a financier. For example, confidence would be promoted by a "use it or lose it" system of prospecting rights if it were only to require pre-established minimum annual amounts of exploration expenditures per hectare or an equivalent payment to the government in lieu of such expenditures. Confidence of status is achieved when the criteria for forfeiture are strictly objective.

The distinction between criteria for forfeiture and regulation of activity is critical with respect to ministerial discretion. Ministerial discretion over use of the rights that results in reasonable delays or added costs will be much more acceptable to investors than ministerial discretion that can result in forfeiture of the rights. Ministerial discretion regarding forfeiture of rights would undermine confidence of status and, PDAC submits,

would deter the formation of an indigenous junior exploration sector. PDAC stresses that confidence of status and free transferability are prerequisites to raising high-risk capital and recommends that the South African government carefully review the discretionary powers of the Minister from this perspective.

PDAC generally recommends that the South African government review the Draft Bill by considering the perspective of an indigenous start-up company seeking to raise capital through successive stages of activity. Historically disadvantaged persons can best obtain capital if the rights are the same no matter whether they are held by historically advantaged or disadvantaged persons. PDAC submits that the government best promotes entry by assisting local startup companies to meet regulatory requirements, rather than using discretion to limit transferability or selectively impose requirements on some holders of rights and not others. The latter approach impairs the fungibility of rights and, therefore, impairs the ability of historically disadvantaged persons and all others to attract much-needed capital.

Our commentary will be divided into two parts. The first part considers the Draft Bill from the perspective of an exploration company. The second part considers the Draft Bill from the perspective of a mining company that has completed the prospecting stage. Our commentary does not address potential concerns about the diamond-control provisions in chapter nine, as PDAC has no perspective that is distinct from local mining interests. We also do not address the transitional provisions in chapter seven. Further, we have not considered the petroleum-related provisions in chapter ten, which are outside the scope of PDAC's mandate.

The Prospecting Perspective

The proposed procedure to apply for a prospecting licence would discourage exploration companies from exploring in South Africa.

An exploration company must be able to do the following: (a) assemble rights to a prospect in a cost-effective manner; (b) add value by producing geological information that enhances the sale value of those rights, and (c) if necessary, transfer those rights to a mining company large enough to underwrite the onerous, capital-intensive requirements of mining, including making an application for mining rights, operating the mine, and closing the mine.

In Canada, an exploration company can acquire the equivalent of prospecting rights by staking or making an application for several parcels without any competitor becoming aware of the action. The rights to a large tract can be assembled all at once at modest cost on a first-come-first-served basis. The “use it or lose it” requirements are simple and objective—a minimum threshold of expenditure per claim per annum, quantified by the nature and cost of the exploration activity, that is prescribed in advance by law for all claims. Further, expenditures can be averaged and applied in most cases among a group of related claims. This recognizes that exploration work on one claim can add value to a neighbouring claim. Finally, Canadian prospecting rights are freely transferable. Exploration companies can thus realize the prospecting value they add without possessing the mining expertise or the capital base required to finance mining operations. Exploration activity is stimulated by creating a low-cost, high-reward system for risk-takers who fund the work.

We are concerned that the Draft Bill would discourage exploration companies for several reasons: the transfer of prospecting rights and mining rights is subject to discretion, application costs are onerous and there is no priority of application, prospecting rights are of uncertain duration, and confidential geological information might be used against the exploration company that generates it.

Discretionary Transfer Restrictions. An exploration company that successfully locates valuable deposits for South Africa would have no legal assurance that it could realize any of the value it added.

- Section 61 of the Draft Bill prohibits any mortgage or transfer unless the Minister approves. An exploration company could find itself having to abandon valuable rights that it was not permitted to sell and could not mine itself.
- The Draft Bill imposes no objective criteria on the Minister's discretion to refuse transfers, other than the wide-ranging objectives of the Draft Bill. Indeed, subsection 3(4) *requires* the Minister to favour historically disadvantaged persons.
- There is nothing in the Draft Bill that prevents the Minister from prohibiting all transfers except to historically disadvantaged persons, who might offer just a fraction of the value of the rights. Indeed, nothing prevents the Minister from prohibiting all transfers in order to force the prospecting right to lapse so the Minister could subsequently grant the right to historically disadvantaged persons.
- Section 25 of the Constitution, which in some circumstances protects property from expropriation without compensation, would apparently provide no protection because a prospecting right would not be "property" as it lacks the essential feature of transferability. A prospecting right is more an "access" licence held at the pleasure of the Minister than a property right.

Whether an exploration company (that is not a mining company) could realize *any* of the value it adds to a geological tract would depend on ministerial favour. This is a serious disincentive to the investment of risk exploration capital by an exploration company.

PDAC understands that the South African government seeks to promote access by dealing with speculative hoarding and fragmentation of rights. PDAC submits that objective "use it or lose it" expenditure requirements would correct both hoarding and fragmentation without the need for discretionary control over transfers and renewals. Speculators who acquired rights would have to either make expenditures or payments in lieu thereof or re-transfer the rights quickly. No company that is responsible to its shareholders could hold excessive amounts of inactive property for long, and the government would raise revenue in the meantime. If rights ever became so fragmented

that it deadlocked activity, the “use it or lose it” requirement would result in forfeiture. Thus, the simple, objective requirement to spend minimum amounts annually on prospecting, or to make cash payments in lieu thereof, would remove the need for discretionary control over applications, renewals and transfers. The government should establish a minimum annual expenditure rate that is substantial enough to deter abuses. Conversely, the rate should not be so high or inflexible in its application as to deter access by juniors or to prevent the accumulation or consolidation of rights with respect to particular mineral exploration targets.

Recommendation: A holder must be able to transfer or mortgage prospecting rights freely. Transfer should only be restricted where the holder has failed to satisfy objective criteria in the legislation with serious effect and the transferee will not undertake to cure the default. Any ministerial refusal must be based on failure to comply with objective criteria and be independently reviewable for correctness. Any power to restrict transfers must not be used to favour the selection of particular transferees to the detriment of the holder of the prospecting rights.

No Priority of Application. The application procedure for prospecting rights would be perceived as onerous and uncertain. The cost of making an application would be hard to justify without any legal certainty of priority.

- An exploration company would have to incur significant costs to prepare the broad range of information required by section 26. The following requirements listed in section 26 would each be potentially onerous, depending on the discretion of the Minister: “full particulars of the applicant,” “a detailed prospecting work programme,” “details with documentary evidence to provide the applicant’s technical ability and financial resources,” “a scoping report reflecting the expected environmental impacts,” “identification of interested and affected parties,” “details of consultation with affected and interested parties and the results thereof,” and “any other information, data or documentation the Minister may require.”

- There are no legal restraints on the discretion of Minister to require more information or documentation. This last requirement, in particular, means the cost and delay of an application could be open-ended without any guarantee of obtaining any rights.
- The required public consultation means that no application would be in confidence. All competitors would become aware of the applicant's interest in an exploration target area and each could commence a rival application. Rivals would likely await the objection hearings, in order to take full advantage of the value added by the original applicant through its consultations with affected parties and environmental work and the public airing of local concerns. Section 21 only protects the confidentiality of *exploration* information. At the end of the public hearing process having made public disclosures, the applicant would have no legal certainty whether prospecting rights to any portion of the area it sought would be granted to it notwithstanding the timing priority of its application.
- The applicant must satisfy the Minister as to the prospecting method to be used, but there is no identified standard to measure ministerial discretion. Survey technology is rapidly evolving and complex. Exploration companies with proprietary methods would not risk disclosure and many companies use specialized survey companies that only report results and not the method used.
- Similarly, the Minister can refuse the application if in the Minister's subjective opinion it would not be in the "national interest." A meritorious application is entirely vulnerable to ministerial discretion that is beyond independent review to a defined standard.
- The danger of a rival applicant undermining a costly, meritorious application is compounded by the ability of the Minister through section 62 to exempt the rival from most of the application requirements. Again, subsection 3(4) requires the Minister to promote and favour rival applications by historically disadvantaged persons.

- Even supposing a prospecting right is granted for some portion of the area originally sought, the Minister has discretion as to how long to grant the prospecting right, up to five years.

From the perspective of an investor, the notional requirement in sections 26 and 30 that the Minister “must” grant approval upon the applicant fulfilling legislated criteria appears illusory. Both subsection 26(1) and 30 make the “must” subject to other provisions of the Act that effectively strip the “must” of mandatory effect. In subsection 26(1) itself, the Minister must approve on such terms and conditions as he or she “may determine.” In section 30, the Minister must grant the right only if she or he is “satisfied” that the open-ended criteria in section 30 are met—“satisfied” connotes a discretionary, subjective standard. Further, subsection 31(1) provides that the Minister “must refuse” an application if she or he is “of the opinion” that any of the listed conditions have not been met. Paragraph 31(1)(a), for example, defeats the “must” in section 26 and 30 if the Minister is of the “opinion” that “the applicant does not comply with the Act.” Accordingly, the Minister “must” reject an application if in her “opinion” the applicant failed to provide what the Minister considers to be the detail required in an application under subsection 26(2), or indeed, if the Minister is “of the opinion” that the applicant has breached some requirement with respect to some unrelated project. Further, subsection 3(4) provides that the Minister “must” give preference to historically disadvantaged persons in the granting of a prospecting right (or a mining right). The “must” in subsection 3(4) presumably overrides the conflicting “must” in sections 26 and 30, but sections 26 through 31 provide no certainty as to how.

In sum, an applicant for prospecting rights must incur substantial advance costs, would have no certainty as to whether any prospecting rights would be granted for any guaranteed proportion of the area sought for any guaranteed duration, would inform potential rivals of the application and provide them with most of the costly information required for an application, and would be vulnerable to unfettered Ministerial discretion to award the prospecting right to rivals who may be exempted from most of the onerous application requirements. An applicant would receive no compensation for its advance

work in the event the prospecting rights were awarded to another applicant on the basis of that work. In contrast, the Canadian system has a first-come-first-serve, nominal-cost application made in confidence with a non-discretionary grant for a minimum term over the entire area sought. The Canadian system enables an exploration venture to acquire rights and then have a stated period in which to seek financial resources to satisfy all operational regulations.

The requirement in paragraph 26(2)(c) to identify a particular mineral or mineral group implies that prospecting rights and mining rights would be limited to those minerals. This is not practical because exploration is sufficiently risky that limiting prospecting rights to particular minerals is unnecessary and counterproductive. In addition, at the mining stage minerals are often mined differently than originally expected, which may mean certain minerals must be mined together. Forcing early commitment would unnecessarily reduce potential yields and thus deter high-risk investment. PDAC understands that the South African government may perceive this as necessary to encourage access to large tracts with more than one distinct mineral deposit. PDAC submits that “use it or lose it” annual expenditure requirements would be sufficient to resolve access issues by encouraging holders of large tracts to retain only that land which is essential to mine the minerals they are currently interested in.

Recommendations:

- (1) An applicant wants to know with certainty the area it would obtain and for what minimum duration in preference to all rivals before engaging in a costly application process. At a minimum, a *pre-application* notice must, once accepted, give the applicant the right to obtain a prospecting right that cannot be forfeited (except for failure to meet objective requirements). The holder’s *use* of the prospecting right can depend on environmental hearings and reasonable ministerial direction, but rights must be secure in their status upon first application. Any ministerial discretion to favour applicants during the pre-application process must be limited, based on objective criteria and exercised before application costs are incurred. If a holder fails to obtain

approval under section 30 to use the prospecting right, the holder must be able to sell the prospecting right to someone who could present a better application.

- (2) The grant of the prospecting and mining rights should not require commitment to particular minerals at any time.
- (3) The “national interest” discretion should be removed. If “national interest” must be retained, the expression has to be defined and it must require at least full cabinet approval before being invoked.

Uncertain Duration of Prospecting Rights. An exploration company whose application for prospecting rights was approved would have no legal assurance as to the duration of the rights it obtained. As noted above, a successful applicant obtains no minimum term of prospecting right; the Minister has complete discretion to grant any length of initial term up to five years.

Renewals are not available as of right upon satisfying objective criteria. Rather, renewals are entirely discretionary, except in circumstances where they must be refused.

- Section 33 makes renewals subject to ministerial discretion.
- Paragraph 35(1)(b) prohibits renewal if the holder is in default under any provision of the proposed Act. This creates a “cross-default” vulnerability where a minor contravention at an unrelated project could result in the loss of renewal rights. In general a holder of rights is vulnerable to default under the proposed Act for unpredictable reasons. For example, the Minister under section 13 has power to make *any* order pertaining to the use of land to rectify circumstances that in the opinion of the Minister detrimentally affect the objects of the proposed Act. The Minister, in response to shifting local opinion, might order rectification to achieve a higher standard of affirmative action and social beneficiation from a particular project. If the holder were unable to achieve the new standard at those operations, all renewals of other rights must be refused.

- Paragraph 35(2)(a) also prohibits renewal if the Minister is of the opinion that it would result in “the hoarding or lock-up of mineral resources.” This subjective discretion conflicts with an exploration company’s economic objective of realizing value added to an exploration target that spans more than one prospecting right. It may well be prudent for an exploration company to double spending on one prospecting right and simply hold rights to neighbouring land pending results. The “use-it-or-lose-it” requirement of continuous and active prospecting operations for each prospecting right likewise fails to establish objective criteria and fails to make allowance for distribution of activity among related prospecting rights.
- Paragraph 35(2)(b) ultimately makes renewal conditional on the subjective satisfaction of the Minister.

The certainty of duration of rights is further eroded by section 9 of the Draft Bill, which would grant the Minister discretion to suspend or cancel a right. The Minister need only be of the “opinion” that operations detrimentally affect the “objects” of the proposed Act. Again, the Minister, in response to changing local opinion and in furtherance of the objects in paragraphs 2(d), (e) and (h) of the Draft Bill, could decide that the prospecting plan, although previously approved, now fails to integrate “sufficiently” social and economic factors to improve local development. By canceling existing rights then granting new ones to historically disadvantaged persons, the Minister would have acted consistently with the objects of the Draft Bill.

Recommendation: The legislation should provide for a minimum term for the area sought. Refusals of renewals and cancellations should only occur where the holder has failed to achieve objective criteria established at the time the right was granted or failed to meet objective standards contained in laws of general application, with serious effect. The objective of favouring the entry of historically disadvantaged persons should not be permitted to motivate non-renewals or cancellations.

Use of Confidential Information. The Draft Bill's scheme to create a repository of geological information could be used by the State against the economic interests of an applicant or holder of prospecting rights.

Section 26 requires an applicant for prospecting rights to submit exploration information and data. Although section 21 requires exploration data and information to be kept confidential while an application is pending, nothing prohibits the Minister from using the information to decide to prefer a rival applicant by invoking section 62 to exempt it from regulatory requirements or providing financial support under section 16 of the Draft Bill. Indeed, the Minister would arguably have a duty to do so under subsection 3(4) of the Draft Bill. Ninety days after the application was refused, the Minister could make the data available to the rival.

The Draft Bill in many ways puts the prospecting applicant and right holder into the position of a joint venture partner with the State. As will be discussed below with respect to mining rights, the State has authority to exercise total control over operational decisions on an ongoing basis. Regarding information, the State controls all exploration information and can compel any information it requests about applicants, holders of rights, operations or geology.

- Specifically, section 18 provides that at any time the Minister may, with a view to the objects of the Draft Bill, require *any* information.
- Section 19 requires a mining company to keep “proper” records in South Africa and to submit reports, including reports of financial expenditures.
- Section 209 gives the Minister power to conduct warrant-less searches at any time without prior notice.
- Section 20 requires all information from boreholes to be forwarded to the Minister and makes it an offence to dispose of such information.

- Section 22(3) requires all records from a terminated mining right to be sent to the Director-General.
- Section 11 empowers the Minister to have the State conduct its own prospecting notwithstanding the existence of a prospecting right over that territory.

Thus, the State has more control over information than would a joint venture partner, but the State assumes none of the duties of confidence and good faith.

In Canada, the landmark case *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, protected a junior company that shared information with a joint venture participant. The case illustrates how joint venture principles protect the value that exploration companies add to an assemblage of prospecting rights by protecting information shared in confidence from exploitation by a joint venture participant. It is critical to observe that the remedy in *Lac Minerals* did not merely refund the exploration company's sunk costs. The Supreme Court of Canada implicitly recognized that the legal framework must compensate an exploration company by securing the full value of the opportunity. Shareholders of junior exploration companies generally invest in particular prospects and are uninterested in taking risks for the chance of a refund. The Canadian legal framework safeguards the ability of junior exploration companies to attract high-risk capital by securing the full value added by successful exploration work from exploitation by confidants. The Draft Bill would provide no such protection to exploration companies *vis-à-vis* the State.

The Draft Bill does not guarantee that prospecting rights will be exclusive. Section 11 empowers the Minister to have the State conduct rival prospecting. Section 25 nominally requires prospecting rights to be exclusive of prospecting by non-State rivals. However, section 25 permits rival prospecting rights if the Minister is satisfied that the holder of the original prospecting right would not be detrimentally affected. There is no objective restraint on the Minister's opinion as to what constitutes detrimental effect. Further, although paragraph 26(3)(c) limits some applicants from acquiring rights in areas of

existing prospecting rights, the Minister can invoke section 62 to exempt a rival applicant from the exclusivity requirement. Moreover, if paragraph 26(2)(c) means prospecting rights will be limited to identified minerals, it is unclear whether rival prospecting can occur on the same tract where a subsequent applicant seeks rights to a different mineral group. Non-exclusive prospecting becomes a significant concern because the Minister can use information against the interests of an applicant or holder of prospecting rights or mining rights.

Much of PDAC's concern about use of confidential information would be alleviated by making the status of rights forfeitable only for nonpayment of "use it or lose it" expenditures, royalties, rents or other pre-established amounts. The Draft Bill should also distinguish exploration data from mining data. In Canada, for example, generally the only exploration data that is disclosed to the government is that required to prove that the minimum expenditure requirement has been met. In particular, the holder need only disclose that portion of the work sufficient to meet the expenditure requirement.

Finally, exploration and development companies develop confidential techniques and know how that are assets of significant value to their businesses. It would be a serious disincentive to operate in South Africa if there were a danger that the competitive value of such techniques and know how would be lost because of mandatory disclosure to the State. The power of the Minister (under section 18 and elsewhere) must not extend to compel disclosure of this information.

Recommendation: Companies must be able to maintain sensitive exploration information in total confidence, or the State must not be permitted to use such information against the interests of the company, except in stated objective circumstances and subject to providing full compensation of value added where it is equitable to do so. At a minimum, exploration information disclosed to the government should be kept in confidence for at least three years. Holders of prospecting rights or mining rights must be able to preserve their confidential techniques and know how in total confidence.

The Mining Perspective

Although PDAC's members are mainly individuals and junior exploration companies, the effect of the Draft Bill on mining companies would fundamentally affect their investment decisions. As noted above, exploration companies must be able to mortgage and transfer prospecting rights to finance the development of a prospect they discover and to realize value by selling the prospecting rights to a third party. Without the certainty of an automatic upgrade from prospecting rights to mining rights, an exploration company could only sell at a substantial discount. This would discourage exploration companies from making prospecting investments. *The current legal framework of the Draft Bill would preclude junior exploration companies from raising high-risk equity capital.*

Mining Rights Application is Uncertain. Canadian mining companies are willing to operate responsibly under stringent requirements so long as they are ascertainable, objective standards consistently applied. Section 38 of the Draft Bill would impose an onerous application procedure. The detail required in the application is uncertain. For example, there must be a "detailed" business plan, a "social plan containing details of the socio-economic impact of the proposed mining project, as well as the measures to remedy any negative socio-economic impact during the life of the mine and after closure" and the applicant must provide "any other information or documentation the Director-General may require." Nonetheless, the cost of the application procedure, of itself, would not be a major disincentive when deciding to mine. Of greater concern is the uncertainty implicit in the standards for granting a mining right, which makes the decision to incur advance costs much more difficult.

An application is vulnerable to ministerial discretion in numerous ways.

- As noted, paragraph 38(2)(j) requires "any other information or documentation the Director-General may require." This could result in impracticable requirements.

- Under section 42 or 43, the Minister might not be “satisfied” with the “manner” in which the applicant intends to mine.
- Under paragraph 43(1)(a) the Minister must refuse an application if she or he is of the “opinion” that the application does not comply with the proposed Act. Thus, the uncertainty of detail required under section 38 makes the entire application vulnerable to ministerial discretion.
- Section 43 introduces other ways in which the Minister has legally unlimited discretion to refuse an application based on subjective opinion: if the mining would cause “unacceptable” environmental impact (s. 43(1)(b)), or if the intended mining operations would not be in the “national interest” (s. 43(1)(f)).
- The expression “national interest” is not defined in the Draft Bill and presumably means something broader than the more frequently used expression “objects of the Act.”
- Finally, if the minister approves the granting of a mining right, it may be on such terms as the Minister determines (s. 38(1)).

As noted above, a serious concern about the legally unrestrained ministerial discretion is that the proposed Draft Bill would permit the use of such discretion to undermine a mining application to promote historically disadvantaged persons. The valuable exploration information gathered by the holder could be used to motivate a refusal to renew and then be given to a favoured historically disadvantaged person without any compensation to the mining rights applicant. Redressing past wrongs should not be done in a manner detrimental to the shareholders of companies that contribute to the growth of South African mineral development. The power of the minister to expropriate chattels such as large vehicles under section 15 with potential exception from the principle of full compensation is a further indication that mining operations are vulnerable.

The cost of prospecting operations can be significant. The expense of an evaluation or pre-feasibility study can exceed Cdn.\$5-10 million. A feasibility study to determine the viability of constructing a mine and related infrastructure can cost more than Cdn.\$40 million. Companies cannot invest or finance such sums without the assurance of an automatic upgrade from prospecting right to mining right if the feasibility study proves favourable. Junior exploration companies must be able to raise high-risk equity from shareholders based on a secure entitlement to upgrade to full mining rights.

Recommendation: Mining right approval should be automatic to the holder of the prospecting right. The only exception would be if the holder had failed to satisfy objective criteria in the legislation with serious effect and no proposed transferee has undertaken to cure the default. Standard terms and conditions of mining rights should be set out in regulations and ministerial discretion should be restricted, based on objective criteria and subject to independent review for unreasonableness.

State Interference with Mining Discretion. It is plain from several sections of the Draft Bill that the State intends to remain an active partner in ongoing mining operations.

In Canada, the holder of mining rights has a property right, the use of which is under the holder's control, subject to lease conditions and laws of general application. The contractual lease conditions are standard and come into force at the commencement of the lease. The lease remains subject to objective requirements contained in laws of general application. This legal framework is valuable to Canadian mining companies because it provides scope of control over the manner of mining (so long as it is safe and not a nuisance), which enables a mining company to apply its core expertise. The Draft Bill would create a fundamentally different relationship between State and holder of mining rights.

The Draft Bill in numerous sections indicates an intention to have the State use discretionary powers to impose ongoing control over all aspects of mining operation.

- Section 9, as noted, gives the Minister broad power to compel “rectifying” measures where the objects of the Draft Bill are in the opinion of the Minister “detrimentally affected.” This must be read in view of the broad objects of the Draft Bill, such as in paragraph 2(d) to “promote employment and advance the social and economic welfare of all South Africans.” The Minister might at any time request more from holders of mining rights. Failure to achieve compliance could result in cancellation of the mining right.
- Section 13 gives the Minister power to order anything if in the Minister’s opinion land is being used in a way such that the objects of the Draft Bill are being detrimentally affected.
- Section 12 enables the Minister to dictate her or his opinion as to the “optimal rate” of mineral production.
- Section 23 requires the holder to notify the Minister if profitability falls below a specified level or if ten percent of the mine labour force will be laid off. In the latter event, the Minister may order such rectifying measures as she or he deems necessary.
- Subsection 24.A(4) empowers the Minister to order local beneficiation of any particular mineral if she or he is of the opinion it can be done “economically.”

Further, through conditions in the mining right imposed under section 38, the Minister can dictate virtually any aspect of the manner of mining, which is consistent with the statements of objects. Section 221 empowers any Ministry-authorized officer who is of the “opinion” that any condition of a mining right is not being complied with to order immediate rectifying steps, to order that operations be suspended, or to impose a fine. Section 216 makes it an offence to contravene conditions in a mining right or an officer’s order, which can result in imprisonment for six months under section 217. Section 10(1)(e) empowers the Minister to cancel mining rights if the holder fails to comply with the terms and conditions of the mining right in every respect, as required by section 48.

The Draft Bill thus inflexibly restricts the holder of mining rights to the plans in the application, but effectively empowers the Minister to impose different requirements as the project progresses. The complexity of dealing with and apprehension about the severity of consequences flowing from the exercise of these discretionary powers may extinguish the appetite for mineral investment in South Africa.

Although PDAC fully supports environmental responsibility, the scope of the concept of “sustainable development” in sections 1(1)(xlii) and 64 (3)(a) imports into the panoply of environmental powers virtually any aspect of the condition of society at large. Extraordinary powers are appropriate to curb serious, irreversible physical damage to the natural environment; however, they are misplaced to regulate to the impact of mining on society at large. The latter objects are valid concerns, but the environmental powers are not an appropriate means of achieving this. The Draft Bill already provides for consideration of social factors in the application process for prospecting rights and mining rights.

In sum, the Draft Bill reflects a shift in thinking such that the Minister controls every aspect of mining and simply retains the mining company to “add value” to the State’s mineral resource ownership. The holder of mining rights is left with minimal flexibility or discretion to apply its own expertise to adjust operations as the mining progresses or to research and develop new methods. The uncertainty of beneficiation requirements under subsection 24A(4) adds uncertainty to the value that can be realized, thus making investment decisions more difficult.

Recommendation: The government should identify specific abuses it wishes to correct and address them with objective criteria in laws of general application.

Uncertain Duration of Mining Rights. The expected duration of legally guaranteed mining rights is fundamental to mining investment decisions. The Draft Bill, however, leaves this important decision criterion highly uncertain.

Most of the above comments pertaining to the uncertain duration of prospecting rights apply analogously to mining rights.

- Under section 45, the term of the original grant is entirely within the discretion of the Minister. There is no legally guaranteed minimum term.
- Section 47 gives the Minister discretion to not renew a mining right if the Minister “is not satisfied” with the reasons given for the application to renew.
- Retention permits are similarly onerous to obtain and subject to broad ministerial discretion.
- Retention permits are completely non-transferable.
- As noted above, provisions in the Draft Bill such as section 9 would grant the Minister broad discretion to bring about the cancellation of mining rights.

Further, the Draft Bill would leave mining rights vulnerable to cancellation for non-material and inadvertent lapses. Section 10(1)(e) empowers the Minister to cancel mining rights if the holder permits or suffers an inconsequential or minor lapse in the requirements of section 48, which are wide-ranging. A mining company must do each of the following to comply with section 48:

- continuously and actively mine in accordance with the original business plan filed with the application (notwithstanding any change in the nature of the mineralization from that originally hypothesized),
- comply with the terms and conditions of the mining right,
- comply with the environmental management programme,
- comply with all provisions of the proposed Act or any other “law” in respect of the mining operation, and

- contribute toward the local economic development of the area in of operation in accordance with the original social plan filed with the application.

Recommendation: The legislation should provide for a minimum term for the mining rights sought. Refusals of renewals and cancellations should only occur where the holder has failed to achieve criteria established at the time the right was granted or failed to meet objective standards contained in laws of general application, and the delinquency is serious. The South African objective of favouring the entry of historically disadvantaged persons should not be permitted to motivate non-renewals or cancellations.

Transferability. To raise capital, holders of mining rights must be able to mortgage and to sell their mining rights. No potential lender or co-venturer would contribute substantial capital without being assured it could transfer the mining rights or assume the operations in case of default by the holder. The State should not use transfer restrictions as a means to achieve collateral objects, such as preferring historically disadvantaged persons. Rather than seeking to control who becomes a transferee, the State should achieve its objectives by requiring responsible operations by the holder or subsidizing historically disadvantaged persons in bidding to acquire the rights.

Recommendation: A holder must be able to mortgage and transfer mining rights freely. Transfers should only be restricted where the holder has failed to satisfy objective criteria in the legislation with serious effect and the transferee will not undertake to cure the default. Any ministerial refusal must be based on failure to comply with objective criteria and be independently reviewable for unreasonableness. The power to restrict transfers should not be used to favour the selection of particular transferees to the detriment of the holder of the mining rights.

Uncertain Royalty Obligation. The Draft Bill does not provide for a royalty rate. Investment decisions would be extremely difficult without knowing the applicable royalty rate.

Summary

In Canada, the fundamental role of the State in business is to establish a framework of legal norms that facilitate reliance and stability of expectations, while protecting public interests from nuisance. Plainly, the overall objective of the Draft Bill is also to put the State in the position of owner or custodian of the South African mineral base.

However, the Draft Bill as conceived invites Canadian exploration and mining companies to participate in a joint venture where the State, as owner, retains ongoing sovereign discretion, including the powers of the State to rewrite the terms of the pact with no core of guaranteed rights. Accordingly, there are no enduring legal norms to safeguard stability of expectations. The reliability essential to mining investment decisions is no greater than one's trust in the opinions of ministerial discretion from time to time.

PDAC respectfully submits that the Draft Bill should be amended to separate the sovereign regulatory power of the State to establish the macro-environment of mining from ministerial discretion to establish the terms and conditions of prospecting rights and mining rights when such rights are granted. To foster investment expectations, the State should commit to a legal framework of more objective criteria and rely on the legislature to adapt the laws of general application to the wisdom of experience.

As noted above, PDAC acknowledges that it is a fundamental goal of the South African Government to increase the participation of companies owned and run by historically disadvantaged persons and to create jobs in the South African mineral industry. In PDAC's view, this will be best accomplished by creating an investment environment in which junior exploration companies (domestic or foreign-owned) can attract high-risk capital. The ability to attract capital requires fungible, freely transferable rights. Any attempt to achieve corrective justice through continuing administration of the prospecting and mining rights themselves (such as discretionary approval of transfers) would limit the ability of exploration companies to raise capital and, as a secondary effect, restrict the ability of historically disadvantaged persons to do the same. This would impair the

development of industry capacity among historically disadvantaged persons and so work against what we understand is a fundamental goal of the Draft Bill.

PDAC would like to assist by recommending the use of several approaches to develop industry capacity among historically disadvantaged persons. We would emphasize the use of more subsidized training programs, including prospecting schools, mining schools, job-training cooperatives, as well as access to university education. Increasing the knowledge of individuals about local geology and mineral exploration will be an important catalyst for a flourishing, indigenous junior exploration industry. The implementation of non-discretionary tax or royalty incentives can be effective as inducements to promote subcontracting with or forming joint ventures with historically disadvantaged persons, and training historically disadvantaged persons in specified skills.

PDAC is cognizant of the delicate balance which needs to be achieved between, on the one hand, the urgency of creating jobs and involving local people in the mineral industry and on the other hand, the time and patience required to build capacity, which, if managed appropriately, will enable their involvement to be meaningful, long-lasting and unrestricted. Government can effectively promote the development of capacity through the use of macro-policies and adjusting the levels of incentives and disincentives.

PDAC hopes you will find its commentary on the Mineral Development Draft Bill helpful and is available for further consultation with your Ministry at any time.