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Precious metal prices collapse as QE3 ends

It's been another grim day for precious metal enthusiasts as we go to press, with gold prices sinking to US$1,144 an oz., silver at US$15.45 an oz., platinum at US$1,208 an oz. and palladium plumbing US$756 an oz.

These are four-year lows and the charts look terrible — signalling more pain ahead for precious-metal investors in the face of a surging U.S. dollar, a roaring U.S. equities market and slumping commodity prices.

It's also a time for a collapse in the gold-bug narrative that the massive Quantitative Easing (QE) programs initiated by the U.S. government in response to the Great Recession of 2008 would unleash a wave of inflation that would propel gold to the skies. (A classic example of this line of thinking would be Nick Barisheff's April 2013 hardcover book entitled "$10,000 Gold: Why gold's inevitable rise is the investor's safe haven.")

The latest leg down, led by gold, started on Oct. 29 with the U.S. Federal Reserve's Federal Open Market Committee (FOMC) statement that "economic activity is expanding at a moderate pace," and so it has ended the third round of its asset-purchase program commonly know as QE3 that has added US$1.66 trillion to its balance sheet.

Remarkably, when the QE3 program was announced in September 2012, the jobless rate in the U.S. was 8.1%, and it had been forecast at the time to fall to 6% to 6.8% by late 2015. Instead, it's now at a respectable 5.9% — a six-year low.

The FOMC said it would also keep interest rates low for a "considerable time," and that "inflation has continued to run below the Committee's longer-run objective."

The committee commented that "although inflation in the near-term will likely be held down by lower energy prices and other factors, it judges that the likelihood of inflation running persistently below 2% has diminished somewhat since early this year."

The U.S. federal funds rate hasn't been raised since 2006. In the intervening years, the three rounds of QE added a record US$4.48 billion to the Fed's balance sheet at its peak.

Overseas, the European Central Bank says it is pondering a QE program to combat the weakest inflation rates in five years, while the Japanese central bank is continuing its own QE program.

Again demolishing the gold bug argument that QE translates to higher gold prices, gold prices were sinking at the same time the European and Japanese central banks were making pro-QE moves and statements.

The stock prices of many precious metal miners and explorers are hitting multi-year lows, particularly in the silver space, as trading volumes dwindle on the TSX Venture Exchange.

And we haven't even hit tax-loss selling season yet, which may prove to be a final washout and bottom for precious metal stocks sometime between now to mid-December.

Another sign of the demise of the gold bug narrative this year is the severe contraction of the retail market. On our own website, the story comments submitted in years past by upbeat retail shareholders have given way to expletive-laden, bitter tirades about money lost and broken promises by mining company management.

At a larger level in 2014, while mining conventions geared to industry participants have been going strong, the conventions geared to attracting retail investors are being cancelled or downsized. The Hard Assets group was bought up for its stellar Indaba conference in Cape Town, while its retail-oriented, sparsely attended conventions in New York and San Francisco were terminated. Canada's Cambridge House has had to trim some events in smaller markets and broaden the topics of its remaining conventions to include technology and marijuana companies.

Send your Letters-to-the-Editor and op-ed submissions to the Editor-in-Chief at: tnm@northernminer.com, fax: (416) 510-5138, or 80 Valleybrook Dr., Toronto, ON M3B 2S9.

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COMMENTARY

After Tsilhqot'in: Aboriginal issues for projects north of 60



BY KEITH BERGNER, KAREN MACMILLAN AND TOBY KRUGER
SPECIAL TO THE NORTHERN MINER

Ever since the *Tsilhqot'in* decision was handed down by the Supreme Court of Canada in June, lawyers, journalists, economists and project proponents alike have been assessing the ruling's impact on the development of natural resource projects in Canada.

In carrying out this assessment, it is critically important to distinguish between the context in which the case arose and the various legal contexts in different regions of the country, in particular the focus of this article: the aboriginal issues that arise in the context of project development in the Yukon, the Northwest Territories (N.W.T.) and Nunavut.

In northern Canada, there are numerous First Nations, Inuit and Métis groups and organizations. These groups comprise numerous, rich and varied linguistic and cultural traditions. However, for purposes of legal analysis, there are three distinct legal contexts that need to be understood:

Historic treaties — Two of the historic treaties (Treaty 8 and Treaty 11) covered areas in the western N.W.T. and southeast Yukon. However, these historic treaties were never fully implemented and the Crown and the relevant aboriginal groups have also entered into modern treaty negotiations, and in some cases concluded modern agreements.

Aboriginal title is not absolute and must be held collectively for the present and future generations.

Modern treaties or comprehensive land claims — In the last 30 years, numerous modern agreements and comprehensive land claims have been negotiated. In the N.W.T., land claims have been concluded and implemented with the Inuvialuit (1984), Gwich'in (1992), Sahtu Dene and Métis (1994), and Tli'cho (2005); in the Yukon, land claim agreements have been concluded with 11 of 14 First Nations; and in Nunavut, the Nunavut Final Agreement concluded in 1993, with the Inuit of the Nunavut Settlement Area leading to the division of the N.W.T. and the creation of the new territory of Nunavut in 1999.

Non-treaty areas — In the southern part of the N.W.T. and the southeast and southwest corners of Yukon, land claim negotiations continue.

Duty to consult

The Crown's duty to consult can arise in all three contexts, but the purpose, scope and extent of the duty to consult may be different in each one. Some project developers may encounter more than one such context (sometimes within a single project) and must be alert to the potential differences in the ways the duty to consult may apply.

In non-treaty areas (where aboriginal rights and title have been asserted but not proven), the Crown has a legal duty to consult with aboriginal groups when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title, and is contemplating conduct that might adversely affect it. The scope and content of the duty to consult varies with the circumstances.

In historic treaty areas, consultation is also required if the Crown contemplates conduct that might adversely affect a treaty right or exercises the Crown's ability to "take up" land for various purposes, including mining.

In modern treaty areas, consultation may also be required if the Crown contemplates conduct that might adversely affect a treaty right — but the nature of the consultation can be shaped by agreement of the parties to the modern treaty.

Third parties, such as mining companies, do not have a legal duty to consult. However, the Crown may delegate "procedural aspects" of consultation to industry proponents seeking approval for a particular development. In practice, this has often meant that project proponents shoulder the lion's share of the engagement effort with aboriginal groups.

Unextinguished title

In areas where there are no treaties, the Supreme Court of Canada determined that unextinguished aboriginal title continues to exist. But with the exception of the Tsilhqot'in Nation in B.C., the courts have not identified precisely where aboriginal rights or title exist for the vast majority of First Nations. In the absence of such definition, aboriginal groups have asserted aboriginal rights and title over large tracts of Crown land. Many of these asserted "traditional territories" overlap with claims of neighbouring aboriginal groups.

In June 2014, the Supreme Court of Canada — for the first time — issued a declaration of aboriginal title in favour of the Tsilhqot'in Nation over 1,700 sq. km of land. The court confirmed that aboriginal title is a unique and beneficial interest in the land that cannot be equated to other forms of property ownership. Aboriginal title confers ownership rights similar to fee simple, including the right of enjoyment and occupancy of the land and the right to: decide how the land will be used; possess the land; reap the economic benefits of the land; and proactively use and manage the land.

However, aboriginal title is not absolute and must be held collectively for the present and future generations. It cannot be alienated except to the Crown, nor encumbered in a way that would prevent future generations of the group from using and enjoying it.

Tsilhqot'in stipulates that governments and others seeking to use aboriginal title lands must obtain the "consent" of the aboriginal titleholders.

If consent cannot be obtained, then the government can still "justify" an incursion onto the land by showing that: it discharged its procedural duty to consult and accom-

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OP-ED

After Tsilhqot'in: Aboriginal issues for projects north of 60

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modate; its actions were in pursuit of a compelling and substantial objective; and the action is consistent with the Crown's fiduciary obligation to the aboriginal group.

Further, the court has stated that it may be necessary for the Crown to "reassess prior conduct" in light of a declaration of aboriginal title. Perhaps most troubling for project proponents is the following statement from the court: "... if the Crown begins a project without consent prior to aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."

For proponents looking to develop resource projects in areas where aboriginal title has been asserted (and treaties have not been concluded), this decision means there are compelling reasons to continue the now well-established practice of early engagement with aboriginal groups and negotiatng impact benefit agreements (IBAs).

IBAs

For most projects, there is no legal obligation to enter into IBAs, yet they are becoming common practice. In Nunavut, the Nunavut Final Agreement requires agreements in certain circumstances. However, even in areas where agreements are not a strict legal requirement, as a practical matter, few companies are content to leave the fate of their projects entirely in the hands of the government, who must satisfy the duty to consult. Proponents seek to de-risk their projects and build long-term positive relationships with the host aboriginal community.

The terms of such agreements can vary broadly from project to project and there are no standard form agreements containing "usual terms."

However, there are common elements found in most agreements and challenges that repeatedly present themselves in their negotiation.

The common elements include:

Employment opportunities — Generally, employment opportunities that are of a lasting or on-going nature are the best fit between the desires of aboriginal groups and the needs of industrial proponents, as distinct from the short-term opportunities that arise during construction.

Business opportunities — Many aboriginal groups have established contractors that may be either owned directly by the aboriginal group or owned or controlled by its members. These may provide opportunities for aboriginal groups to participate in the benefits of a project and offer a needed service to industrial proponents.

Financial opportunities — A common feature of such agreements is monetary payments. Although most agreements are confidential, the federal government has recently introduced draft legislation to require certain resource companies to disclose annual payments to foreign and domestic governments over $100,000 as of June 2015 (although applying these provisions to aboriginal groups has been delayed for two years to allow time for further consultation).

Communications committees or structures — Many agreements, especially those for long-term projects, include a mechanism (such as a committee or liaison person) for ongoing communication between the aboriginal group and the project operator.

Legal certainty and a competitive advantage — In exchange for the above benefits, proponents seek support for their project and the consent of the aboriginal group. For these agreements to be successful, they must provide both value to the proponent and benefits to aboriginal groups. The typical goals of industrial proponents in entering these agreements are to obtain legal certainty and to create an approval and operating environment that is timely, cost-effective and provides a competitive advantage.

Conclusion

Canadian law concerning the rights of Aboriginal Peoples and the lands over which they claim aboriginal rights and title requires that mining project proponents engage in consultation with aboriginal groups.

In many cases, proponents also seek to enter into meaningful contractual arrangements with, and acquire the consent of, affected aboriginal communities.

While this represents a major threshold issue in connection with building a mine in Canada, aboriginal consultation and negotiation provide mining companies with the opportunity and the encouragement to build long-term relationships and to engage positively with the aboriginal communities in and around which they operate, thereby strengthening their social licence and reducing project risk.

These factors ultimately combine to transform this issue into yet another unique strength of northern Canada's vibrant mining sector.

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