Resource Sector Taxation

A journal devoted to tax issues of interest to the resource sector

FEDERATED PRESS
Volume XVI, No. 1 2022

Highlights

THE MEANING OF A "DEPOSIT" IN THE MINING TAX REGIME

Randy Morphy and Danielle Lewchuk, *Borden Ladner Gervais LLP*

The mining tax regime may be described as a series of rules intended to accommodate the unique nature of the mining industry and facilitate the development of mines. This is accomplished in part by broadly and purposively defining which expenses qualify as exploration expenses and providing favourable tax treatment for those expenses as "Canadian exploration expenses" or "CEE". Under the CEE regime, an exploration expense includes, among others, any expense incurred for the purpose of determining the existence, location, extent or quality of a mineral resource in Canada. The definition of CEE contains certain carve outs for expenses related to a mine in a mineral resource that has come into commercial production, which is referred to as the "operating mine" carve out. Both the purpose of an expense and the scope of the "operating mine" carve out will be informed by the meaning of a "mineral resource" within the CEE regime.

In a mining context, the definition of "mineral resource" includes a deposit of metal, coal and certain minerals, but there is no statutory definition of a "deposit" for this purpose. Therefore, one must look to the industry meaning of "deposit" in order to understand the meaning of mineral resource when applying the purpose test and the "operating mine" carve out in the CEE regime. Randy Morphy and Danielle Lewchuk explore this meaning and conclude that a deposit of metal, coal or minerals means a continuous, well-defined accumulation that is economically viable to extract and distinct in character from the surrounding rock (or, in some cases, a portion of such an accumulation). That conclusion leads to a lower threshold for the purpose test and a higher threshold for the "operating mine" carve out than is intuitive or apparent on a superficial reading of the relevant provisions.

THE MEANING OF A "DEPOSIT" IN THE MINING TAX REGIME

Randy Morphy and Danielle Lewchuk, *Borden Ladner Gervais LLP*

The mining tax regime may be described as a series of rules in the *Income Tax Act* (Canada) (the "**Tax Act**") intended to accommodate the unique nature of the mining industry and facilitate the development of mines. This is accomplished in part through the "Canadian exploration expense" ("**CEE**") regime, which is intended to encourage exploration in an industry exposed to large financial risks that might not be undertaken but for the tax incentive[1] or, put more simply, encourage exploration that could lead to the discovery and exploitation of new mineral resources.[2] This encouragement includes a broad and purposive definition of which expenses qualify as exploration expenses and favourable tax treatment for qualifying expenses under the CEE regime.

Under the CEE regime, an exploration expense includes any expense incurred by a taxpayer for the purpose of determining the existence, location, extent or quality of a mineral resource in Canada, subject to the "operating mine" carve out (among others). In this regard, the purpose of an expense is a factual determination based on "an assessment both of the taxpayer's subjective intention and of the presence or absence of objective manifestations of that intention."[3] That assessment must contemplate the correct meaning of the term "mineral resource" in the CEE regime, which is a question of law. In this way, the meaning of mineral resource will inform any determination of whether an expense meets the purpose test. The scope of the "operating mine" carve out will similarly be informed by the meaning of mineral resource. A mineral resource is defined to include a deposit of base or precious metal (referred to herein as a "metal deposit"), coal and certain minerals,[4] but there is no statutory definition of a deposit for this purpose.

This article begins with some introductory comments on statutory interpretation and the meaning of undefined terms in the Tax Act and discusses the terminology used herein. The balance of the article discusses the meaning of deposit for purposes of the CEE regime and focuses on two significant aspects of the definition: first, the requirement for economic viability and second, the requirement for continuousness. The article concludes with a discussion of implications of this meaning in relation to the purpose test and "operating mine" carve out in the CEE regime.

The Meaning of Undefined Terms in the Tax Act

The case law sets out three well-established principles used to determine the meaning of an undefined term in the Tax Act.[5]

Under the first principle, a term that has an established legal meaning should be given that meaning in the context of the Tax Act. For example, the terms "sale" and "partnership" have an existing legal meaning that was adopted by the Supreme Court of Canada (the "**SCC**") in the context of the Tax Act.[6] Similarly, in the context of the *Excise Tax Act* (Canada), the Federal Court of Appeal ("**FCA**") was required to interpret the term "export" in *Penner International Inc. v. R*.[7] The majority preferred an interpretation focused on the legal meaning of the term "exported" adopted by the SCC in *Carling Export Brewing*[8] over one that relied more heavily on its commercial meaning.

Under the second principle, a term that does not have a legal meaning but has a commercial meaning (generally, an accounting or industry meaning) should be given that meaning unless the context otherwise requires. The Federal Court described this principle as follows:

> Wherever a term is not defined in the Act, then, unless the context otherwise requires, it must be given its common ordinary meaning and, where the term is a common commercial or financial one its meaning must be determined according to ordinary commercial or financial principles.[9]

This second principle has been used to ascribe the accounting meaning to a number of financial terms in the Tax Act including "reserves" and "paid-up capital".[10] It applies equally to industrial terms, on the same basis that "legislation aimed at a narrow commercial context invites an interpretation of its provisions consistent with their accepted meaning within that context".[11] For example, in interpreting the meaning of "pipeline" the FCA noted:

> I would have thought that in construing it in its "popular sense" would mean that sense "which people conversant with the subject matter with which the statute is dealing [in this case those utilizing the service of the pipeline for the transmission of gas, oil, water, steam or solids] would attribute to it" not the popular sense derived from the perception of the man in the street not conversant with either the user industries or pipelines.[12]

The commercial meaning of a term may be determined using academic papers, government publications, specialized or conventional dictionaries, or industry sources.[13]

The third principle is that terms that do not have a legal or commercial meaning are given their ordinary meaning.[14] The ordinary meaning may be determined using everyday language or conventional dictionaries.[15]

Deposit

The term "deposit" (in the context of a metal deposit, coal deposit or mineral deposit) does not have a specific legal meaning. It is a commercial term used in the mining industry and should therefore be given its accepted industry meaning unless the context otherwise requires.[16] The accepted industry meaning may be determined by examining the meaning of the term "deposit" itself as well as the meaning of other industry terms that may be related to or differentiated from the term "deposit".

Accumulations of Metal, Coal or Minerals

It is necessary in this article (and also in the mining industry) to refer to the physical concept of metal in the ground without economic potential or without regard to economic potential. There does not appear to be a universal term to describe this concept; rather, various terms are used. For example:

- In a book titled *Mineral Deposit Models* from the US Geological Survey,[17] a "mineral occurrence" is defined as a "concentration of a mineral (usually, but not necessarily, considered in terms of some commodity, such as copper, barite or gold) that is considered valuable by someone somewhere, or that is of scientific or technical interest."[18] The reference to value in the definition of mineral occurrence is a reference to the value of the mineral in general and not the specific concentration.[19]

- The Canadian Securities Administrators National Policy 2.A[20] provides that "[w]here the word 'ore' (i.e. possible ore, probable ore or proven ore) may not properly be used, such terms as 'mineralization', 'mineralized bodies' or 'concentrations', etc. should be used." In this context, ore refers to metal in the ground with at least potential economic viability, as opposed to metal in the ground without (or with unknown) economic viability. The distinctions in National Policy 2.A were accepted and applied by the Tax Court of Canada in *Westward Explorations Ltd. v. R.*[21]

- In *Campbell v. R.*,[22] the term "mineral showing" is used in reference to the physical concept of metal in the ground.

For simplicity and consistency, this article will use the term "mineral occurrence" in reference to the physical concept of metal in the ground without economic potential or without regard to economic potential.

The Requirement for Economic Viability

An important component of the meaning of deposit in the CEE regime is whether there is an economic aspect to the term. In other words, is the term metal deposit a strictly physical concept akin to a mineral occurrence? Or does the term include a threshold for potential, likely or proven economic viability? And if so, what is the applicable threshold?[23]

The meaning of metal deposit in this regard will inform the scope of expenses that qualify as CEE. Specifically, if a metal deposit simply means a mineral occurrence, then expenses "incurred for the purpose of determining the existence of a metal deposit" would be limited to those incurred to locate metal in the ground. If a metal deposit requires potential economic viability, then the cost of early-stage studies and analysis undertaken to determine whether located metal in the ground is potentially economically viable should qualify as CEE because they were incurred for the purpose of determining the existence of a metal deposit. If a metal deposit requires likely or actual economic viability, then later-stage studies conducted for the purpose of establishing this higher threshold should also qualify.

The concept of a metal deposit is defined or discussed in a wide range of sources including academic and government publications, dictionary definitions, industry materials and practice, and French translations. Some of these sources describe the same concept in the same or similar words, while others vary slightly in relation to the degree of economic viability required for a mineral occurrence to be considered a metal deposit. There is, however, broad consensus among all sources that the term metal deposit connotes some degree of economic viability.

Academic Publications, Government Publications and Specialized Dictionaries

Most definitions in academic publications, government publications and specialized dictionaries distinguish between a mineral occurrence with potential economic viability and a mineral occurrence with proven economic viability. The former is often referred to as a mineral deposit, metal deposit or deposit. The latter is often referred to as an ore deposit, orebody or simply ore. The sources are not perfectly consistent in their use of terminology, but they are generally consistent in their conclusion that a metal deposit must have at least potential viability.

In *Mineral Deposit Models*, the US Geological Survey notes that "field observations usually begin with 'mineral occurrences' (or with clues to their existence) and progress with further study to 'mineral deposits' and only rarely to 'ore deposits'".[24] The distinction between the latter two terms is between potential and proven viability, as indicated in the following definitions:[25]

- A "**mineral deposit**" is a mineral occurrence of sufficient size and grade that it might, under the most favourable of circumstances, be considered to have economic potential.

- An "**ore deposit**" is a mineral deposit that has been tested and is known to be of sufficient size, grade, and accessibility to be producible to yield a profit.

The textbook, *Understanding Mineral Deposits*,[26] makes the same distinction between potential and proven viability with the following definitions:

- A **mineral deposit** (or an ore deposit) may be defined as a rock body that contains one or more elements (or minerals) sufficiently above the average crustal abundance to have potential economic value.

- An **orebody** refers to a specific volume of material in a mineral deposit that can be mined and marketed at a reasonable profit under the prevailing conditions of commodity prices, costs, and technology. Thus, many mineral deposits are not mined because they fail to pass the test of profitability.

A similar distinction is made by Environment and Climate Change Canada in the glossary of the *Environmental Code of Practice for Metal Mines*:[27]

- **Deposit**: Mineral deposit or ore deposit used to designate a natural occurrence of a useful mineral, or an ore, in sufficient extent and degree of concentration to invite exploitation.

- **Ore**: A natural mineral deposit in which at least one mineral occurs in sufficient concentrations to make mining the mineral economically feasible.

The US Department of the Interior's *A Dictionary of Mining, Mineral and Related Terms* makes the same distinction as Environment and Climate Change Canada in the following definitions:[28]

- **Deposit**: Mineral deposit or ore deposit is used to designate a natural occurrence of a useful mineral, or an ore, in sufficient extent and degree of concentration to invite exploitation.[29]

- **Ore**:
  a. A natural mineral compound of the elements of which one at least is a metal.
  b. A mineral of sufficient value as to quality and quantity which may be mined with profit.
  c. A mineral, or mineral aggregate, containing precious or useful metals or metalloids, and which occurs in such quantity, grade, and chemical combination as to make extraction commercially profitable.
  d. A metalliferous mineral, or an aggregate of metalliferous minerals, more or less mixed with gangue, which, from the standpoint of the miner, can be won at a profit or, from the standpoint of a metallurgist, can be treated at a profit. The test of yielding a metal or metals at a profit seems, in the last analysis, to be the only feasible one to employ.

- **Ore body**: A mineral deposit that can be worked at a profit under the existing economic conditions.

The textbook, *Physical Geology*, offers the highest viability threshold for a metal deposit in the following definition:[30]

- **Metal Deposits**: A metal deposit is a body of rock in which one or more metals have been concentrated to the point of being economically viable for recovery.

Less commonly, definitions suggests that a metal deposit "usually" connotes some economic value. The implication is that a metal deposit could, in some circumstances, be used to refer to a mineral occurrence with no requirement for economic viability. However, this use would be the exception rather than the rule. This definition is found in the *Dictionary of Geology & Mineralogy*:[31]

- **Mineral Deposit:** A mass of naturally occurring mineral material, usually of economic value.

The *Dictionary of Geological Terms*[32] makes a similar allowance:

- **Mineral Deposit**: A mass of naturally occurring mineral material, e.g., metal ores or non-metallic minerals, usually of economic value, without regard to mode of origin.

Industry Materials and Commercial Practice

The Canadian Institute of Mining, Metallurgy and Petroleum publishes definition standards for purposes of securities disclosure in National Instrument 43-101.[33] The definition standards provide that a "mineral deposit" will be categorized as a "Mineral Resource" if there are reasonable prospects for eventual economic extraction and a "Mineral Reserve" if it is determined to be "economically minable". Both types of deposits include some degree of economic viability.

This concept is reflected in all manner of commercial agreements in the mining industry. For example, in an Australian case called *Hill End Gold Ltd v. First Tiffany Resource Corporation*,[34] the relevant mining joint venture agreement defined a "Mineral Deposit" as follows:

> [A] deposit of minerals estimated to contain proven, probable or possible reserves of one or more Mineral Products in sufficient volume and of a sufficient grade to be capable of being the subject of a commercially viable extraction operation having regard to the estimated costs of establishing such operation and of bringing the deposit into production and to the then current market price of the Mineral Product or Products which can be won from such deposit.[35]

The courts have long understood that the resource tax regime was "written with an eye to commercial realities"[36] of the industry and should be interpreted accordingly. It should follow that an interpretation of the term metal deposit, when used in relation to the exploration activities of a mining company, should be informed by the commercial reality of what it means to undertake exploration. This reality was described by the Exchequer Court of Canada as follows:[37]

> "Exploration", in general terms, is the operation of testing for the existence and the extent of an ore body and includes prospecting. In relation to asbestos, I take it that, for the purpose of this definition, "ore body" means an area of rock containing veins of asbestos in such quantity and of such quality as to make the removal of the rock containing the asbestos a commercially feasible proposition.

Put another way, exploration is the search for orebodies, not mineral occurrences. The mining tax regime should be interpreted to reflect what it means to undertake exploration, and as such, it would be untenable to interpret the term "metal deposit" as a purely physical concept, separate from and without regard to economic viability. As stated by the Court of Quebec:[38]

> La notion de rentabilité économique est indissociable à toute démarche sérieuse et réfléchie d'exploration et d'exploitation minières, c'est la façon de faire dans l'industrie minière et il faut en tenir compte.

> Authors' translation: The notion of economic profitability is inseparable from any serious and thoughtful approach to exploration and mining, it is the way of doing business in the mining industry and must be taken into account.[39]

French Translations

The words used in the French and English versions of the Tax Act are equally authoritative and must be read together to determine the meaning of terms.[40] In the definition of "matières minérales" (English "mineral resource") in subsection 248(1) of the French version of the Tax Act, the equivalent of "metal deposit" is "gisement de métaux".

In applying and adjudicating disputes under the mining tax regime, the courts use the term "gisement" as the French equivalent of the term "orebody", and vice versa.[41] This equivalence is appropriate in light of the high degree of economic viability ascribed to the term "gisement" in dictionaries and in industry.

For example, the *Dictionnaire de Français Larousse* contains the following definition:[42]

- **Gisement**: Lieu où un matériel géologique donné s'est accumulé et que l'on peut exploiter en totalité ou en partie : Un gisement d'or. Gisement pétrolier.

  Authors' translation: Place where a given geological material has accumulated *and which can be exploited in whole or in part*: a gold deposit, a petroleum deposit.

Similarly, the Government of Quebec's *Grand dictionnaire terminologique* defines the term "gisement" as follows:[43]

- **Gisement**: Concentration locale exceptionnelle de minerai, de forme et volume variables (couche ou filon) qui rend son exploitation rentable et techniquement possible.

  Author's translation: Exceptional local concentration of ore, of variable shape and volume (layer or vein) which makes its exploitation profitable and technically possible.

- **Gisement de minerai**: Official English definition: Generally, a solid and fairly continuous mass of ore,[44] which may include low-grade ore and waste as well as pay ore, but is individualized by [form] or character from adjoining country rock.

The important distinction between the term "gisement" and the related term "gîte" is noted in the Companion Policy to National Instrument 43-101:[45]

> **Improper Use of Terms in the French Language** – For an issuer preparing its disclosure using the French language, the words "gisement" and "gîte" have different meanings and using them interchangeably or in the wrong context may be misleading. The word "gisement" means a mineral deposit that is a continuous, well-defined mass of material containing a sufficient volume of mineralized material that can be or has been mined legally and economically. The word "gîte" means a mineral deposit that is a continuous, defined mass of material, containing a volume of mineralized material that has had no demonstration of economic viability.[46]

A review of the French translations leads to an inescapable conclusion: if a deposit is equivalent to gisement, and gisement is equivalent to an orebody, then a deposit must be equivalent to an orebody for the purposes of the Tax Act. A metal deposit cannot mean a mineral occurrence.

Summary and Implications

The overwhelming majority of academic publications, government publications and specialized dictionaries indicate that a deposit of metal, coal or minerals connotes some degree of economic viability, either potential or proven. The more common threshold is potential economic viability, though some sources suggest a higher threshold and others qualify the viability requirement as "usually" being the case.

However, the French version of the Tax Act and French cases adjudicated under the mining tax regime are clear that the terms deposit and orebody are both equivalent to the term gisement in French, which leads to an inescapable conclusion: *metal deposit must also be equivalent to orebody for the purposes of the Tax Act*. The French version of the Act and case law should be authoritative on this point and should resolve any inconsistency in the English sources.

The implication for mining companies is that expenditures undertaken to determine the economic viability of a mineral occurrence should be considered undertaken for the purpose of determining the existence of a metal deposit (which by definition, is a mineral resource). The economic viability of a mineral occurrence depends in part on the cost and nature of production from a potential mine located thereon. Therefore, expenditures incurred to determine the timing, nature and cost of mineral production from a mineral occurrence should qualify as CEE. These expenses would include feasibility studies undertaken to determine the costs of extraction and sampling to determine the grade or concentration of the mineral occurrence.

The economic viability of a mineral occurrence also (and equally) depends on the assumed price at which the production from a potential mine can be sold. Mining companies may incur expenses to establish or confirm this critical assumption, for example by obtaining a long-term pricing study for the type of metal located in a particular mineral occurrence. Intuitively, these do not "feel" like exploration expenses, perhaps because they are focused on metal in a general sense rather than the particular mineral occurrence, or perhaps because they are an economic undertaking and we think of exploration as a physical undertaking – visiting sites, drilling holes, analyzing samples, etc. That intuition is wrong, or at least not consistent with commercial reality in the mining industry, where exploration is a physical and economic undertaking. The purpose of a pricing study is to help ascertain the economic viability of a mineral occurrence in order to determine whether a metal deposit exists. As such, a pricing study linked to the output from a potential mine at a mineral occurrence under exploration should qualify as an expenditure made for the purpose of determining the existence of a metal deposit.

The Canada Revenue Agency ("**CRA**") does not accept this view on the basis that a metal deposit refers to a physical accumulation of metal akin to a mineral occurrence.[47] This is in keeping with an extremely restrictive approach taken when applying the definition of CEE. For example, the CRA asserts that the "quality" of a mineral resource in the definition of CEE refers to the *physical quality and not the economic quality of a mineral accumulation*.[48] This approach continues to frustrate the intention of the resource tax regime (which is to facilitate the development of mines rather than the discovery of worthless mineral accumulations) and ignore the commercial reality of the industry it was intended to accommodate.

The Requirement for Continuousness

In the same way that the economic aspect of a metal deposit will inform the purpose test, the physical aspect of a metal deposit will inform the scope of the "operating mine" carve out, which refers to expenses that are excluded from paragraph (f) of the CEE definition by virtue of subparagraph (vi) thereof.[49]

For reference, paragraph (f) currently includes in CEE any expense incurred by the taxpayer for the purpose of determining the existence, location, extent or quality of *a* mineral resource in Canada, and the "operating mine" carve out excludes any expense that may reasonably be considered to be related to a mine in *the* mineral resource that has come into production in reasonable commercial quantities or to be related to a potential or actual extension of *the* mine. Reading the provisions together, it seems clear that "the mineral resource" in the carve out refers to the mineral resource in paragraph (f) that the taxpayer is attempting to determine the existence, location, extent or quality of. As such, the carve out applies only where there is a producing mine *in the mineral resource under exploration*.

In cases where exploration occurs near a producing mine, the scope of the carve out depends on local geology and on the meaning of a metal deposit in a physical sense. Specifically, if a metal deposit refers to a single continuous mineral occurrence that is distinct in character from the surrounding rock, then the carve out will only apply if there is a producing mine in the mineral occurrence under exploration; alternatively, if a metal deposit refers to a group of such mineral occurrences located near each other, then the carve out may apply if there is a producing mine in a nearby mineral occurrence.

This physical aspect of the meaning of a metal deposit is addressed directly in various dictionary definitions and industry materials and indirectly in a number of cases involving the repealed "new mine" exemption in former subsection 83(5) and the inclusion for "new mine construction" expenses previously contained in subparagraph (iii.1) and paragraph (g) of the definition of CEE. It is clear from these sources that the industry meaning of a metal deposit includes a requirement for continuousness. The courts have accepted this meaning and, in addition, held that in the context of the CEE regime a mineral resource may include not only a metal or coal deposit but also in certain circumstances, a portion of a metal or coal deposit. The courts have not, however, suggested that two or more nearby metal or coal deposits could constitute a single mineral resource.

Dictionaries and Industry Materials

The industry meaning of the term orebody contemplates a single continuous mineral occurrence that is distinct in character from the surrounding rock; it does not contemplate a series of nearby mineral occurrences. For example, *A Dictionary of Mining, Mineral and Related Terms*,[50] *Dictionary of Scientific and Technical Term*s cited by the CRA,[51] and the Government of Quebec[52] all adopt an identical definition:

- **Ore Body**: Generally, *a solid and fairly continuous mass of ore*, which may include low-grade ore and waste as well as pay ore, but *is individualized by form or character from adjoining country rock*.[53]

Similar definitions are also cited by the *Dictionary of Geological Terms* and the CRA:

- **Orebody**: A *continuous, well-defined* mass of material containing enough ore to make extraction economically feasible. See also: mineral deposit.[54]

- **Ore Body**: A more or less solid mass of ore that may consist of low-grade as well as high-grade ore *and that is of different character from the adjoining rock*.[55]

- **Ore Body**: A *well-defined mass* of ore-bearing rock.[56]

Similarly, in the Companion Policy to National Instrument 43-101,[57] the terms "gisement" and "gîte" both refer to a continuous and defined mass of material. More importantly, the Companion Policy refers to a mineral property as one or more mineral claims where the "underlying mineral deposits would likely be developed using common infrastructure".[58] In other words, the fact that several mineral deposits may be extracted by a single mine or with common infrastructure does not turn them into a single deposit.

The analysis of the physical meaning of the term orebody should apply equally to a metal deposit because those terms have been given the same meaning for the purposes of the Tax Act and to the extent they are distinguished elsewhere, the distinction is an economic one; i.e., a metal deposit is a mineral occurrence with potential economic viability and an orebody is a metal deposit with proven economic viability. Indeed, none of the definitions of deposit or metal deposit indicate that a deposit may refer to a collection of nearby mineral occurrences.

New Mine Exemption Case Law

Former subsection 83(5) of the Tax Act provided a tax exemption for income derived from the operation of a mine for a period of 36 months commencing on the day on which the mine came into production.[59] The exemption was applicable to income from a "new mine" and not applicable to income from an extension to an existing mine. Taxpayers would often claim this exemption for extraction activities near an existing mine. The neutral term "workings" became used in reference to what the taxpayer claimed was a new mine and the CRA claimed was an extension of an existing mine.

The courts generally decided these cases on their particular facts based on the degree of connectedness between the existing mine and the workings. The important aspect of these cases is not their specific factual outcome but rather the common understanding among the taxpayer, the CRA, the court and the expert witnesses that (i) an orebody or metal deposit refers to a continuous mineral occurrence that is distinct in character from the surrounding rock and (ii) a single mine can and often does extract minerals from several nearby orebodies on a mineral property.

In *Bethlehem Copper*,[60] the taxpayer commenced production in 1962 from a deposit referred to as "East Jersey" and claimed the tax exemption. The taxpayer later commenced production in 1965 from workings in a nearby deposit referred to as "Jersey". The two deposits were 1,000 to 1,100 feet apart with different rock characteristics and with "no structural connection" and "insufficient mineralized rock" between them. They were understood to be distinct and separate deposits, which the trial judge summarized as follows:

> Dr. Holland testified the structural control in both ore bodies was in a north-south direction and because Jersey lay to the west of East Jersey, there was, in his words, no structural connection between the two ore bodies.[61]

In *MacLean Mining*,[62] the taxpayer commenced production in 1928 from a deposit at Buchans, Newfoundland. The taxpayer sunk multiple shafts to mine a number of orebodies continuously after 1928.
In 1963, the taxpayer commenced production from a deposit known as "MacLean" and claimed the tax exemption. The MacLean deposit was described as "an extensive and distinct body of ore" located "horizontally more than 1,000 feet from the nearest known ore body and vertically more than 350 feet deeper than it".[63] The SCC noted that it is "well known that mines often, if not generally, include several orebodies" and held that the word "mine" meant "a mining concern taken as a whole, comprising mineral deposits, workings, equipment and machinery, capable of producing ore".[64]

In *Falconbridge*,[65] the taxpayer commenced production from a deposit referred to as the "Springer" deposit. The taxpayer later commenced production from the nearby "Perry" deposit and claimed the exemption again. The Perry deposit was referred to as a "separate ore body" located approximately half a mile away from the Springer deposit.

In *Marbridge*,[66] the taxpayer commenced production at an orebody with the "No. 1 mine". A nearby orebody was then discovered, and the taxpayer commenced production at the "No. 2 mine". Both parties acknowledged that the orebodies were separate – the dispute was whether the No. 2 mine was a new mine or an extension of the No. 1 mine.

New Mine Construction Expense Case Law

Between 1978 and 2013, expenses incurred to bring a new mine into production were generally treated as CEE under subparagraph (iii.1) and later paragraph (g) of that definition. Such expenses are no longer treated as CEE and are now treated as Canadian development expense under paragraph (c.2) of that definition.[67] The clause initially referred to:

> any expense incurred by him after November 16, 1978 for the purpose of bringing a mineral resource in Canada into production and incurred prior to the commencement of production from the resource in reasonable commercial quantities[.][68]

In 1985, the clause was amended to make specific reference to a "new mine":

> any expense incurred by him after November 16, 1978 for the purpose of bringing a new mine in a mineral resource in Canada into production in reasonable commercial quantities and incurred before the coming into production *of the new mine*[.][69]

The explanatory notes describe the amendment as follows:

> Mining development expenses incurred prior to production from a mineral resource qualify as Canadian exploration expenses under subparagraph 66.1(6)(a)(iii.1) of the Act.[70] The reference to a "mineral resource" in that subparagraph is being changed to a reference to a "new mine". As a result of this amendment, mining development expenses incurred in bringing a new mine in a mineral resource into production may qualify as Canadian exploration expenses even though there may previously have been production from the mineral resource by another mine.

Between 1985 and 2013, subsequent amendments relating to the commercial production threshold were made, which are not relevant to this discussion.

Taxpayers would claim mine construction expenses as CEE under subparagraph (iii.1) (rather than as depreciable capital expenditures) so that amounts could be added to their "earned depletion base", which was relevant in computing a "resource allowance" deduction under former subsection 65(1). The CRA would often deny the claimed CEE treatment on the basis that the expenses were incurred to expand an operating mine.

In *Oro Del Norte*,[71] the taxpayer was a member of a joint venture that operated an open pit coal mine referred to as the "CRC Surface Mine" that commenced commercial production in 1970. The mine was located in a coal deposit referred to as the "Jewel Seam", which extended continuously for 60 miles along the foothills of the Rocky Mountains and hosted a number of other producing and abandoned mines at various locations dating back to 1921. Between 1979 and 1983, the joint venture incurred expenses for drilling and tunnelling to develop

an underground mine (referred to as the "CRC Underground Mine") located below the CRC Surface Mine in a deeper portion of the Jewel Seam. The taxpayer claimed its share of these construction expenses as CEE. [72]

The Minister's position was that the expenses did not qualify as CEE under subparagraph (iii.1) because they were not incurred prior to commercial production from the resource. Specifically, "the resource" was the Jewel Seam, and production therefrom had already commenced. This position is a straightforward application of the words of the original version of subparagraph (iii.1) and is undoubtedly correct as a purely textual interpretation: "the resource" in subparagraph (iii.1) refers back to "a mineral resource", which includes a "coal deposit". The coal deposit here was the Jewel Seam, and production from the Jewel Seam (which was acknowledged to be a single orebody) had already commenced at the CRC Surface Mine and elsewhere. For its part, the taxpayer argued that "the resource" relevant to the application of subparagraph (iii.1) to the construction expenses of the CRC Underground Mine was the *portion* of the Jewel Seam exploitable by the CRC Underground Mine. Therefore, the exclusion in subparagraph (iii.1) should not apply because there was no production from that portion.

The implication of the Minister's interpretation – that construction expenses for the CRC Surface Mine would have been similarly disqualified because other mines at other locations in the Jewel Seam currently or previously existed – clearly gave the Court some pause and led to a contextual and purposive analysis. In that analysis, the Court held that the concept of a resource in the mining industry is a physical and economic concept. As such, the portion of the Jewel Seam became a resource upon the determination that it would be economically feasible to extract from that portion with an underground mine. In other words, that portion was a separate resource because the CRC Underground Mine required a separate economic analysis and different mining method than the CRC Surface Mine. The Court therefore concluded as follows:

> Resources which lie within the ambit of the reserve to be recoverable by a particular development project, in my view, are the "mineral resource" or coal deposit intended by s/p (iii.1). Resources which lie beyond that ambit, beyond the limits of the resource to be recovered by a specific project, may lie in the same geological ore body or in the same geological coal deposit or seam, but if they were included in the meaning of "mineral resource" in s/p (iii.1), then only the first commercial mining development in the geological resource, or at most only the first such development on a property owned or leased by a particular developer, regardless of the size of the property if it includes only a single ore body or coal seam, would qualify as Canadian exploration expense. That would significantly restrict the application of s/p (iii.1), and would be of little interest to those concerned to develop mineral resources.[73]

The definition of "mineral resource" includes a metal deposit and a coal deposit in paragraphs (a) and (b). In *Oro Del Norte*,[74] the Court read into those paragraphs a relieving phrase such that a mineral resource includes a deposit *or a portion of a deposit recoverable by a particular mine and mining method*. The Court, importantly, does not suggest that a collection of nearby deposits could comprise a single mineral resource for the purposes of the definition of CEE.

In *Placer Dome*,[75] the Court was required to apply the version of subparagraph (iii.1) amended in 1985 to a set of facts similar to those in *Oro Del Norte*. In *Placer Dome*, the taxpayer decided in 1980 or 1981 to commence mining operations at a gold deposit located at Detour Lake in Ontario. The plan was to begin with an open pit mine and eventually construct an underground mine to extract at depths greater than 120 metres. The open pit mine commenced production in 1983 and produced through 1987. In 1985, 1986 and 1987, the taxpayer incurred expenses to construct the underground mine, which commenced production in 1987. Both parties agreed that the open pit mine and the underground mine were located in the same orebody.

The taxpayer treated the open pit mine and the underground mine as separate mines and claimed the construction expenses for the latter as CEE on the basis that they were "incurred for the purpose of bringing a new mine in a mineral resource in Canada into production in reasonable commercial quantities and incurred before the coming into production of the new mine".[76] The Minister's position was that the underground mine was not a new mine but rather an extension of the open pit mine. The Court applied the tests set out in the new mine exemption case law (discussed above in the previous section) and determined that the underground mine was a new mine, which confirms that a single deposit may host more than one mine.

Summary and Implications

The requirement for continuousness reduces the scope of the "operating mine" carve out in paragraph (f) of the definition of CEE as it relates to expenses incurred to explore a metal deposit that may be located near another metal deposit that hosts an operating mine. In short, these expenses should not be excluded as CEE under the carve out if they are incurred in a metal deposit that is separate from (meaning not continuous with) the one that hosts the operating mine. That result should hold regardless of whether the operating mine is eventually extended to the deposit under exploration.

Conclusions

In the context of the CEE regime, a deposit means a continuous, well-defined accumulation that is distinct in character from the surrounding rock (or, in some cases, a portion of such an accumulation) with potential or proven economic viability. That conclusion leads to a lower threshold for the purpose test and a higher threshold for the "operating mine" carve out than is intuitive or apparent on a superficial reading of the relevant provisions.

---

[1] *Petro-Canada v. R.*, 2004 FCA 158 (F.C.A.) at para. 28, citing *Global Communications Ltd. v. R.* (1999), 99 D.T.C. 5377 (Fed. C.A.) at para. 19. The comments were made in the context of oil and gas exploration but should apply equally to mining exploration.

[2] *Wesdome Gold Mines Ltd. c. Québec (Agence du revenu)*, 2016 QCCQ 1504 (C.Q.), affirmed *Agence du revenu du Québec c. Wesdome Gold Mines Ltd.*, 2018 QCCA 518 (C.A. Que.), leave to appeal refused *Agence du revenu du Québec v. Wesdome Gold Mines Ltd.*, 2019 CarswellQue 946 (S.C.C.) [*Wesdome*]. These comments were made in the context of an incentive regime for new mines in Quebec based in part on the CEE regime.

[3] *MacDonald v. Canada*, 2020 SCC 6 (S.C.C.) at para. 56, citing. Canada, *Ludco Enterprises Ltd. v Canada*, 2001 SCC 62 (S.C.C.) at para. 54.

[4] Subsection 248(1), "mineral resource". The certain minerals are a mineral deposit in respect of which (i) the Minister of Natural Resources has certified that the principal mineral extracted is an industrial mineral contained in a non-bedded deposit, (ii) the principal mineral extracted is ammonite gemstone, calcium chloride, diamond, gypsum, halite, kaolin or sylvite, or (iii) the principal mineral extracted is silica that is extracted from sandstone or quartzite.

[5] See David Ward, "Finding the Meaning of Undefined Terms in the Income Tax Act", *Report of Proceedings of Fifty-Fourth Tax Conference*, 2002 Conference Report (Toronto: Canadian Tax Foundation) 39:1-18.

[6] *Will-Kare Paving & Contracting Ltd. v. R.*, 2000 SCC 36 (S.C.C.) at paras. 30-33, *Backman v. R.*, 2001 SCC 10 (S.C.C.) at para. 17.

[7] 2002 FCA 453 (Fed. C.A.) [*Penner*].

[8] *Carling Export Brewing & Malting Co. v. R.*, [1930] S.C.R. 361, [1930] 2 D.L.R. 725 (S.C.C.), reversed [1931] 2 D.L.R. 545, [1931] 2 W.W.R. 258, [1931] A.C. 435 (Jud. Com. of Privy Coun.), cited in *Penner*, *supra* note 7. The decision of the SCC in *Carling Export Brewing* was reversed by the Privy Council, but not on the meaning of "export". See *Penner*, *supra* note 7.

[9] *R. v. Bank of Nova Scotia* (1979), 80 D.T.C. 6009, [1980] C.T.C. 57 (Fed. T.D.), affirmed (1981), 81 D.T.C. 5115, [1981] C.T.C. 162 (Fed. C.A.).

[10] See *Canfor Ltd. v. British Columbia (Minister of Finance)* (1977), [1976] C.T.C. 429, [1976] 3 W.W.R. 519 (B.C. S.C.), varied in part [1977] C.T.C. 269, [1977] 2 W.W.R. 673 (B.C. C.A.), reversed (1977), [1978] 1 S.C.R. 1047 (S.C.C.).

[11] *Citibank Canada v. R.*, 2002 FCA 128 (Fed. C.A.) at para 29.
[12] *Nova, an Alberta Corp. v. R.* (1988), 88 D.T.C. 6386 (Fed. C.A.) at 6390. Brackets in original.
[13] Ward, *supra* note 5 at 6; *Controlled Foods Corp. v. R.* (1980), 80 D.T.C. 6373, 1980 CarswellNat 276 (Fed. C.A.) at paras. 13-14; *Upper Lakes Shipping Ltd. v. Minister of National Revenue*, 1995 CarswellOnt 2562 (Ont. Gen. Div.) at para. 22 [*Upper Lakes TC*], reversed on other grounds (1998), (*sub nom.* Upper Lakes Shipping Ltd. v. Minister of Finance) 98 D.T.C. 6264, 1998 CarswellOnt 41 (Ont. C.A.) at para. 5 [*Upper Lakes CA*]; *Nova CA*, *supra* note 12 at 6390, affirming (1987), 87 D.T.C. 5146, 1987 CarswellNat 352 (Fed. T.D.) at paras. 11-15 [*Nova TC*]; *QEW 427 Dodge Chrysler (1991) Inc. v. Ontario (Minister of Revenue)* (2000), 49 O.R. (3d) 776, 2000 CarswellOnt 2392 (Ont. S.C.J.) at paras. 39, 45 and 49, affirmed (2002), 59 O.R. (3d) 460, 2002 CarswellOnt 1466 (Ont. Div. Ct.) at paras. 12-13; *Canadian Wirevision Ltd. v. R.*, [1978] 2 F.C. 577, 1978 CarswellNat 168 (Fed. T.D.) at paras. 24-26; *Royal Bank v. Deputy Minister of National Revenue (Customs & Excise)* (1979), 79 D.T.C. 5263, 1979 CarswellNat 253 (Fed. C.A.) at para. 19 reversed on other grounds 1981 CarswellNat 468 (S.C.C.) [*Royal Bank*]; *Oerlikon Aérospatiale Inc. c. R.* (1999), (*sub nom.* Oerlikon Aérospatiale Inc. v. R.) 99 D.T.C. 5318 (Eng.) (Fed. C.A.), affirming 1997 CarswellNat 1017 (T.C.C.) at paras. 29, 31 and 34; *Penner*, *supra* note 7 at paras 36-37.
[14] More specifically, these terms should be given the meaning that persons conversant with the subject matter have given or do give to them. See , Canadian National Railway v. Minister of National RevenueCanadian Pacific v Canada, [1994] F.C.J. No. 933 at para 18, 2 G.T.C. 7233 (Fed. C.A.) at para. 18. .
[15] *Nova CA*, *supra* note 12 at para. 23, *Nova TC*, *supra* note 13 at para. 36; *Upper Lakes TC*, *supra* note 13 at para. 22; *Royal Bank*, *supra* note 13 at paras. 11-13.
[16] To state the obvious, the context in which the term "deposit" is used (i.e., as part of an overall regime for the taxation of mining and mining companies) does not require that term to be given a meaning (such as its everyday meaning or its meaning in a banking context) other than its understood meaning in the mining industry.
[17] Dennis P. Cox and Donald A. Singer, eds, *Mineral Deposit Models*, U.S. Geological Survey Bulletin 1693 (Washington: 1992), Introduction, available online at: https://www.geokniga.org/bookfiles/geokniga-depositmodel080422grmkvsky2yur080423nkmdf.pdf.
[18] *Ibid* at 1.
[19] The distinction becomes clear when the term "mineral occurrence" is differentiated from a "mineral deposit" in the same paragraph with reference to economic potential, which only has meaning in reference to the specific concentration. *Ibid*.
[20] Canadian Securities Administrators, *Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators*, National Policy 2.A (Effective: January 6, 1984; Rescinded February 1, 2001), available online at: https://www.bcsc.bc.ca/securities-law/law-and-policy/instruments-and-policies/national-policy-statements/historical/nps2a-guide-for-engineers-geologists-and-prospectors-submitting-reports-on-mining-properties-to-canadian-provincial-securities-administrators-rescinded ("**National Policy 2.A**").
[21] 2006 TCC 105 (T.C.C. [General Procedure]) [*Westward*]. On February 1, 2002, National Policy 2.A was rescinded and replaced by National Instrument 43-101, *Standards of Disclosure for Mineral Projects* and Companion Policy 43-101 CP to National Instrument 43-101 to consolidate and expand significantly on the current disclosure and reporting requirements applicable to issuers in the mining sector. In *Westward*, the Tax Court of Canada referred to National Policy 2.A in 2006 after it was rescinded because it offered "industry accepted standard dictionary definitions for the classification of ore reserves" that were "helpful"; see para 110. As a result, it remains relevant for purposes of this article.
[22] (1999), 99 D.T.C. 297, [1999] 2 C.T.C. 2288 (T.C.C.).
[23] The analysis below should apply equally to a coal deposit.
[24] *Supra* note 17 at 1.
[25] *Ibid*.
[26] Kula Misra, *Understanding Mineral Deposits* (Philadelphia, United States: Kluwer Academic Publishers, 1999).
[27] Environment and Climate Change Canada, *Environmental Code of Practice for Metal Mines*, Glossary of Terms, available online at: https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=CBE3CD59-&offset=7&toc=show.
[28] Paul W. Thrush and the Staff of the Bureau of Mines, eds, *A Dictionary of Mining, Mineral and Related Terms* (Washington: US Department of Interior, 1968), references in original omitted, available online at: https://www.google.ca/books/edition/A_Dictionary_of_Mining_Mineral_and_Relat/b4IAavjDLjEC?hl=en&gbpv=0.
[29] This same definition of "deposit" is also cited in Michael D. Holloway and Emma Holloway, eds, *Dictionary of Industrial Terminology*, 2d ed (John Wiley & Sons, 2020).
[30] Steven Earle et al., *Physical Geology*, 2d ed (BCcampus Open Publishing, 2019) at chapter 20.1, available online at: https://opentextbc.ca/physicalgeology2ed/chapter/20-1-metal-deposits/.
[31] McGraw-Hill Education, *Dictionary of Geology & Mineralogy*, 2d ed (McGraw Hill, 2002), available online at: https://www.academia.edu/10260338/Dictionary_of_Geology_and_Mineralogy.

[32] Robert Latimer Bates and Julia A. Jackson, eds, *Dictionary of Geological Terms*, 3d ed (Anchor Press/Doubleday, 1984).
[33] CIM Standing Committee on Reserve Definitions, *CIM Definition Standards for Mineral Resources & Mineral Reserves* (Quebec: Canadian Institute of Mining, Metallurgy and Petroleum, 2014), available online at: https://mrmr.cim.org/media/1128/cim-definition-standards_2014.pdf.
[34] 2010 NSWSC 375 (Australia), available online at: https://www.austlii.edu.au/
[35] *Ibid.* at para. 46. Emphasis added.
[36] *Gulf Canada Resources Ltd. v. R.* (1996), 96 D.T.C. 6065, [1996] 2 C.T.C. 55 (Fed. C.A.).
[37] *Johnson's Asbestos Corp. v. Minister of National Revenue* (1965), 65 D.T.C. 5089, [1965] C.T.C. 165 (Can. Ex. Ct.).
[38] *Wesdome*, *supra* note 2.
[39] *Ibid.* at para. 75.
[40] *R. v. Jarvis*, 2002 SCC 73 (S.C.C.) at para. 79.
[41] *Bethlehem Copper Corp. v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 790 (S.C.C.) [*Bethlehem Copper*]; *Minister of National Revenue v. MacLean Mining Co.*, [1970] S.C.R. 877 (S.C.C.) [*MacLean Mining*]; *Falconbridge Copper Ltd. v. R.* (1975), 75 D.T.C. 5394 (Fed. T.D.), affirmed (1979), 79 D.T.C. 5227, [1979] C.T.C. 307 (Fed. C.A.) [*Falconbridge*]; *Marbridge Mines Ltd. v. Minister of National Revenue* (1971), 71 D.T.C. 5231, [1971] C.T.C. 442 (Can. Ex. Ct.) [*Marbridge*]; *Oro Del Norte S.A. v. R.* (1993), 93 D.T.C. 5217 (Fed. T.D.) [*Oro Del Norte*]; and *Placer Dome Inc. v. R.* (1993), 93 D.T.C. 235, [1993] 1 C.T.C. 2411 (T.C.C.) [*Placer Dome*] .
[42] Available online at: https://www.larousse.fr/dictionnaires/francais/gisement/36999.
[43] Office québécois de la langue française, *Grand dictionnaire terminologique*, available online at : https://gdt.oqlf.gouv.qc.ca/index.aspx.
[44] "Ore" is defined therein as "Minéral à partir duquel peut être extrait, avec profit, un élément métallique " or in the authors' translation: "Mineral from which a metallic element can be extracted profitably".
[45] British Columbia Securities Commission, *Companion Policy 43-101CP to National Instrument 43-101, Standards of Disclosure for Mineral Projects*, at 3, available online at: https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy4/43101CP-CP-February-25-2016.pdf [Companion Policy to 43-101].
[46] Emphasis added.
[47] See, for example, CRA Document 2016-0680761R3 (January 1, 2017) and 2019-0796791I7 (February 21, 2019). The CRA's conclusion appears to be based on the assumption that a metal deposit is a physical accumulation of metal akin to a mineral occurrence. See discussion in Brian R. Carr and Torran Jolly, *Canadian Resource Taxation* (Toronto, ON: Thomson Reuters, 2019) (loose-leaf updated 2019, release 1) vol. 1 at 2.5.3.
[48] CRA Document 2020-0873931E5 (February 9, 2022).
[49] Subsection 66.1(6), "Canadian exploration expense" subparagraph (f)(vi).
[50] Thrush, *supra* note 28.
[51] McGraw-Hill, *Dictionary of Scientific and Technical Terms*, 4th ed, cited in CRA Document -2001-0092397 (August 3, 2001). Emphasis added.
[52] *Supra* note 43.
[53] Emphasis added.
[54] *Dictionary of Geological Terms*, *supra* note 32. Emphasis added.
[55] *Webster's Third New International Dictionary*, cited in CRA Document 2001-0092397 (August 3, 2001). Emphasis added.
[56] *The Random House Dictionary of the English Language*, 2nd ed, cited in CRA Document 2001-0092397 (August 3, 2001). Emphasis added.
[57] *Supra* note 45.
[58] *Ibid.* at 5.
[59] The new mine exemption was repealed effective December 31, 1973. See *Oro del Norte*, *supra* note 41.
[60] *Supra* note 41.
[61] *Bethlehem Copper*, *supra* note 41 at 796, citing (1972), 72 D.T.C. 6410 (Fed. T.D.).
[62] *Supra* note 41.
[63] *MacLean Mining*, *supra* note 41 at 879, 880.
[64] *Ibid.* at 882.
[65] *Supra* note 41.
[66] *Supra* note 41.
[67] Subsection 66.2(5).
[68] Originally enacted by *An Act to amend the statute law relating to income tax*, S.C. 1974-75-76, c. 26, s. 36, amended by *An Act to amend the statute law relating to income tax and to amend the Canada Pension Plan*, S.C. 1979, c. 5, s. 20.

[69] *An Act to amend the statute law relating to income tax and to make a related amendment to the Tax Court of Canada Act*, S.C. 1985, c. 45, s. 29 [emphasis added].
[70] Now subsection 66.1(6), "Canadian exploration expense".
[71] *Supra* note 41.
[72] The expenses in dispute included construction expenses claimed under clause (iii.1) as "incurred prior to the commencement of production from the resource in reasonable commercial quantities" and exploration expenses "not including those related to a mine, whether or not owned by the taxpayer, that has come into production in reasonable commercial quantities or related to a potential or existing extension thereof". The discussion herein relates to the clause (iii.1) analysis.
[73] *Supra* note 41.
[74] *Supra* note 41.
[75] *Supra* note 41. The Minister chose not to appeal the Tax Court decision. See *Income Tax News*, Decision Bulletins, 94-04 (February 2, 1994).
[76] *Placer Dome*, *supra* note 41.

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com