Agreements relating to the acquisition of mining properties are no more than ordinary commercial documents which happen to deal with that strange and mysterious asset, a mining property. The agreements are negotiated between two or more parties in the usual way, the only "problem" being that over the years many accepted concepts or customs of the trade have developed and have been refined. They are fluid in the sense that a custom is not a hard and fast rule but rather a method of procedure that must be adapted to the circumstances and the subject matter of the transactions. With the involvement of the oil companies in mineral exploration, some hydrocarbon concepts and terminology have become relatively common in the mining industry although, again, the concepts have been modified. The mining "joint venture agreement", "farm-in" or "operating agreement" may be quite different from its oil and gas relative of the same name. In the mining field, a discovery hole does not indicate a potential "field" but rather the mere indication that there may be "something". The "something" may be nothing, a potentially large base metal mine or a small precious metal mine. In any event, there will probably be a lot more work and expense required before an orebody can be established, let alone any return therefrom.

A. Scope of Paper

The scope of this paper will be limited to certain types of those agreements whereby a party may acquire from another party a mining property, either in whole or in part, for the purpose of exploring that property and, if successful, proceeding to development of a mine. This paper is not intended

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to be a "paint by numbers" guide to the drafting of a mining agreement but rather an attempt to identify certain concepts, which, from experience, have proven to be either misunderstood or to create problems.

For convenience of reference, the term "acquiror" refers to a party which is acquiring an interest in a property and the term "disposing party" refers to the party which owns the interest and is disposing of it under the agreement.

B. General

The oil and gas industry has a distinct advantage over the mining industry in that, through its associations, there have been developed accepted or standard form agreements which are known within the industry and, if referred to by name, are a known quantity. This is not true in the mining industry where, even with the growth in the use of joint ventures over the past years, no standard provisions have been developed or adopted in Canada. Accordingly, if a "farm-in agreement" or "working option agreement" or "joint venture agreement" is referred to in connection with Canadian mining, the description means very little and will mean different things to different people. This is not as true in the United States where some associations, such as The Rocky Mountain Mineral Law Foundation, have established some forms of agreement which have been adopted by some companies in certain geographical areas. The adoption is by no means universal and often, the so-called adopted agreements are changed quite substantially. In this connection, The Rocky Mountain Mineral Law Foundation has sponsored two seminars on mining agreements, the papers from which are available from that Foundation. The papers have been well done and are worth reading but they should be read with care as they are based upon US legal concepts which, in many instances, are vastly different from Canadian ones.

For the most part, it would appear that the US mining agreements tend to be much more complicated than do the Canadian ones. This could well be due to the fact that in many states the mining laws are archaic as are the real property laws. In some instances, properties have been dealt with many times often with some interest, usually of a royalty type, being retained by the disposing party in each instance. To add to the problems, each disposing party has probably had his own ideas as to what would be an appropriate interest to retain, so that there may be little similarity between the various overriding interests or royalties.

C. Preliminary Considerations

Before proceeding to consider matters relating to the agreements themselves, some preliminary matters should be considered, as they will

1. Mining Agreements Institute (1979)
   Mining Agreements II Institute (1981)
   The Rocky Mountain Mineral Law Foundation, Fleming Law Building, University of Colorado, Boulder, Colorado 80309, U.S.A.
have to be considered before an agreement can be entered into. Some of these are obvious but others may trap the unwary. It is not intended to discuss these matters but merely to mention them.

Some matters which should be considered are:

(a) What is the nature of the mining property? In most Canadian jurisdictions, an unpatented mining claim is no more than a licence granted by the Crown to enter upon the described lands for the purpose of exploring the same. The licence is granted on a year-by-year basis and certain requirements must be met for the licence to be renewed. In addition, in some jurisdictions, a mining claim can be renewed for only a maximum number of years and upon that maximum being reached, the claim must be discarded or taken to the next higher form of title (usually a mining lease). Freehold property or leases will probably be subject to normal real estate considerations, as, in many jurisdictions after issue of a mining lease or patent, title questions relating thereto are resolved not under the mining laws but rather under the real property laws.

(b) Does the disposing party own the property? With mining claims, usually the Mining Recorder's record is definitive and cannot be questioned. In most jurisdictions, the Mining Recorder will supply for a nominal charge a certified copy of the record relating to the claim. In some jurisdictions, the governing legislation has gone so far as to provide specifically that the acquiror may deal with the recorded owner and the recorded owner is deemed to be the actual owner. Prudence would, however, require that every known interest holder or alleged interest holder be included as a party to an acquisition agreement. With other forms of property, it is prudent, although not often done, to carry out a full title search so that the acquiror knows what he is acquiring and if there are any "clouds" on the title.

(c) Is the disposing party to have an interest only in his property or is his interest to extend to any other property interests acquired by the acquiror within a defined area? If an area of influence is to be used, it must be clearly and precisely defined. The use of a dull pencil on a small scale map can and has lead to lawsuits. A map may be convenient to include for reference purposes (only), but a latitude and longitude or distance from clearly defined points of reference is best. If the usual procedure of defining the area in terms of a distance from the boundary lines of the acquired property is used, care should be taken to avoid an expanding area of influence as "tie on" properties are staked or acquired. The distance must be clearly indicted to relate to the boundaries of "the property" as constituted at the date of the agreement. It may also be advisable to have the provi-

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2. see Mining Act, R.S.O. 1980, c.268, s.77, which, in essence, prohibits the Mining Recorder from entering a notice of trust on the record and removes any duty of inquiry even if the recorded owner is described as holding the mining claim as trustee.
sion terminate at some defined time, such as the making of a production decision.

(d) Are there any special requirements that the acquiror must meet or be aware of? In most instances, it is prudent for the acquiror to obtain a prospector’s or miner’s licence if unpatented mining claims are to be acquired. In some jurisdictions, this is mandatory. In addition, although there may be no restriction upon a foreign acquiror acquiring unpatented mining claims, it may be that there will be some limitation upon the right of a foreign acquiror to obtain a mining lease. In this connection, in virtually all jurisdictions, an unpatented mining claim cannot be mined and a mining lease or patent must be obtained before mining operations commence. Finally, if the acquiror is primarily interested in obtaining feed for a plant situated outside of Canada, it would obviously be interested in any restrictions which might bear on this.

(e) Is the acquiror looking for a mineral which is subject to special legislation, requirements, policies, or considerations, such as radioactive minerals or coal?

(f) Has the acquiror complied with applicable laws of general application? These would include such things as approval under the Foreign Investment Review Act (remember that even if the acquiror is already involved in the mining industry, it may still require approval if a different classification of minerals is involved or if an acquisition of control is involved) and qualification under applicable extra-provincial or extra-territorial qualification requirements.

The above items are things that come to mind immediately and depending upon the circumstances, there will be numerous others. It will often be found in discussing these types of matters and mining agreements generally that the mining company is very much aware of the chances of success (probably less than one per cent) and would far rather see its moneys being invested in doing work in the ground rather than paying fees to its professional advisers to carry out a lot of "legal nonsense" or to draft a

3. see Mining Act, R.S.O. 1980, c.268, s. 24, which provides that a party may not acquire any right or interest in a mining claim unless it is the holder of a prospector’s licence.

4. Canada Mining Regulations, C.R.C. c.1516, s.58(10), wherein it is specified that a lease will not be granted to a corporation incorporated outside of Canada or to any corporation unless "the Minister is satisfied" that the specified requirements relating to Canadian ownership or the opportunity for Canadian participation have been satisfied. Also, see s.64, which prohibits transfer of a lease to a person who does not meet the requirements of s.68(10).

5. Mining Act, R.S.O. 1980, c.268, s.113, which provides that in the absence of an exemption granted by the Lieutenant Governor in Council, all ores or minerals removed "shall be treated and refined in Canada so as to yield refined metal or other product suitable for direct use in the arts without further treatment". If a party is in default under this section, the Lieutenant Governor in Council may declare the title to the affected property void.

6. 1973 R.S.C., c.46
definitive agreement which anticipates success (and is, therefore, especially in the joint venture situation, a fairly sizable document). These matters are, obviously, decided for the advisers by their client, but it is essential that they at least be discussed with the client, no matter how briefly. It is a very expensive and time-consuming, and possibly impossible, task to "fix up" a title problem or a bad agreement after an orebody has been discovered. Recent history indicates that the glitter of a mining success is often tarnished by litigation.

Turning now to some considerations upon some of the common types of agreements or provisions relating to the acquisition of mining properties.

D. Purchase Option

As the name indicates, the purpose of this type of agreement is to create an arrangement whereby the acquiror obtains from the disposing party an option to purchase or to acquire the disposing party's mining property or an interest therein. The simplest form that this agreement can take is an arrangement whereby the acquiror for a period of time may enter upon the disposing party's property to examine it and, if satisfied, may within the time specified purchase the property for a cash purchase price. This type of agreement is not common as disposing parties are becoming more sophisticated and want to share in the benefits of the orebody which is "obviously" on their property. The result has been that the purchase option consideration may contain little or no cash but rather leave the disposing party with a royalty interest or other participation in the property. Some comments relating to royalties are dealt with below.

In considering the purchase option, the form of consideration for the granting of the option and for the granting of extensions to the term will have to be settled. Usually, mining corporations are reluctant to pay cash and would far rather have consideration based upon a required expenditure in doing work related to the property (with the disposing party retaining an interest). On the other hand, the disposing party will want to see some cash for his efforts if only to reimburse him for his expenses - after all, the disposing party is as aware of the chances of success as the acquiror. The usual compromise that is reached is that the consideration for the granting of the option will be at least in part in cash, usually $5,000 or less, to reimburse the disposing party for his efforts. This may or may not be coupled with an obligation to make a specified amount of expenditure in doing work related to the property. This initial consideration will maintain the option in force for between twelve and eighteen months, whereupon it may be renewed for a further period or periods of specified lengths of time (usually twelve months). It is unusual for the aggregate possible term of an option to exceed five years. Some cash consideration may be required for each extension and, in most instances, the extension may not be had unless some specified minimum level of expenditure has been made, or is committed to be made, in doing work on the property. The cash and/or minimum levels are rarely equal but rather are stepped upwards as the extensions proceed so that the acquiror is "encouraged" to carry out this
evaluation of the property as quickly as possible. If minimum levels of expenditure are contemplated, care should be taken to provide that any averages will be applicable to meet subsequent levels. Finally, with regard to consideration, if the expenditure of money in doing work on a property is involved, the option agreement must clearly indicate whether or not the expenditure is obligatory or optional on the part of the acquiror. The mining corporation would, obviously, prefer to have the performance of work optional on its part and this can quite often be accomplished. As failure to make a minimum level of expenditure will result in the termination of the agreement, it is prudent to provide that if for some reason the minimum level is not reached, the acquiror has a right to pay to the disposing party the deficiency in lieu of making the expenditure.

When an option agreement is negotiated, the parties rarely discuss other than the "bare bones" of the deal. Accordingly, when drafting the purchase option agreement, many ancillary matters must be considered, so that the agreement will work. These include:

(a) a clear right to enter upon the property and use the surface for the purpose of carrying on exploration work and evaluation of the property and to take reasonable quantities of samples for the purposes of assaying and testing. If royalty is involved, it should be made clear as to whether or not the royalty affixes to these samples - it is suggested that it should not. If the surface rights are owned by a third party, a further agreement permitting entry may be required.

(b) the right of the acquiror to remove its assets from the property for a reasonable period of time following termination of the option agreement. It is commonly provided that if equipment is not removed within the period, then it becomes the property of the disposing party. It may well be that the disposing party will wish to obligate the acquiror to remove all of its equipment if the option agreement is terminated.

(c) the manner in which the acquiror is to protect its interests during the option period. With unpatented mining claims, the usual practice is that the claims be transferred to the acquiror to hold in trust during the option period with an accompanying obligation to retransfer the claims if the option is terminated. In the case of real property, there is often reluctance on the part of the disposing party to transfer his property in this manner, so some alternative, such as filing notices against title, must be used. The escrowing of transfer documents must be used with great caution unless the escrow holder becomes the registered owner of the property.

(d) if farming or recreational properties are being optioned, special covenants may be required by the disposing party. These could include such things as closing fence gates, paying stumpage, not cutting lines in certain areas, not interfering with livestock, refilling trenches and/or plugging drill holes, removing all waste and returning drill sites to original condition (loose wording can make this an ex-
ceptionally onerous requirement), not doing any work within a specified distance from buildings, and so on. This list is limited only by the imagination and, in some instances, to comply with the requirements of the disposing party may involve considerable expense to the acquirer.

(e) the state in which the property is, to be left upon termination of the option. In most instances, the disposing party is satisfied with a covenant to leave the property in a safe state in compliance with the relevant legislation, but the disposing party may have some special requirements that must be met.

(f) a clear statement as to the nature of the rights of the acquiror insofar as the expenditure of moneys is concerned. Is the acquiror obligated to make certain expenditures or are all expenditures and/or payments under the option agreement, in the sole discretion of the acquiror? In most instances, the acquiror will assume the obligation of maintaining the property in good standing during the term of the option but care should be taken in drafting the obligation if the acquiror is not to become the registered owner of the property as in these circumstances the acquiror will not receive notices and other documents relating to the good standing of the property. If the acquiror does not become the registered owner, the covenant should be set forth in terms that require the acquiror to reimburse the disposing party for any costs related to maintaining the property in good standing, but with the primary obligation of doing so resting with the disposing party. The disposing party should be required to provide proof of compliance with this obligation prior to a specified number of days before any taxes become due or other requirements are required to be met, so that the acquiror can protect his interests by making payments, if necessary (the agreement should contemplate this possible occurrence).

(g) a clear method of delivering notices and deeming their receipt. This should be realistic and care should be taken that street addresses and suite numbers are used, rather than merely post office box numbers. If personal delivery or courier delivery is to be used, a post office box number is not of much help. There has been a growing tendency to omit deemed receipt if notice or deliveries are made by way of the mails.

(h) a clear method as to who is to receive payment and how it may be made. If there is more than one disposing party, is the payment to be split amongst them and, if it is, in what percentages? A convenient method for deeming payment for the purposes of the agreement is to permit the delivery of a cheque in accordance with the notice clause, although in these circumstances, for the peace of mind of the disposing party, there should be a provision inserted whereby if, in fact, the cheque is not received or is destroyed or mutilated even though payment will be deemed to have been made for the purposes of maintaining the agreement in good standing, the acquiror
has a clear obligation to replace the cheque.

(i) some “pet” clauses which the acquiror wishes to insert. These should not be inserted merely to satisfy the acquiror unless the draftsman is satisfied that they are applicable and enforceable.

The purchase option need not be for the acquisition of a 100 per cent interest in a mining property. It may well be that the acquiror will only be permitted to acquire up to a specified interest. This circumstance creates the added complication that if the acquiror acquires its interest in the property, the property will be owned by two or more parties. The governing agreement should deal with the precise nature of the respective interests of the owners, their respective rights to deal with them and the manner in which the property may be explored, developed and operated following the acquisition. These additional factors are usually met by combining the option agreement with an appropriate form of joint venture agreement or requiring that the property be transferred to a newly incorporated company.

E. Option to Lease

The purchase option is the most common form of mining option agreement but, in some circumstances, the disposing party may not wish to give up title to the mining rights even though it is prepared to permit the acquiror to exploit them. The answer to this is an option which, upon exercise, results in the acquiror being granted a lease to the mining rights by the disposing party. The form of lease must be attached to the option agreement and not left to be negotiated in the future. It is a substantial agreement which will cover not just the traditional lease provisions, such as term (usually renewable), rental (usually includes a royalty type rate), right to occupy, etc., but will also include extensive provisions relating to: right to use surface; right to mine, store and treat ores; right to cross-mine; right to build and utilize tailings ponds and waste dumps; reclamation; and so on.

This form of option agreement is often used where a timber company is the disposing party.

F. Joint Ventures

The joint venture is the creation of our tax laws. At common law a joint venture is a partnership but through custom of the trade in the mining and certain other industries it has taken on special characteristics. In essence, a joint venture is the joint development and exploitation of individually owned properties. Within the mining industry, suppliers should be aware that if they are dealing with the operator of a joint venture, it will have restraints upon its powers to contract and, accordingly, if sizable contracts are to be entered into by the operator, the prudent supplier will ask for some confirmation of the authority of the operator from the joint venturers. In addition, although it may not have been tested before the courts, it is clearly understood within the mining industry that, unlike the true partnership, the liability of the venturers is several and not joint and several. If this understanding is to be relied upon at law, obviously, appropriate evidence would have to be led as to the custom in the trade and the in-
volvement of the litigant in the trade and its knowledge of this custom—the leading of evidence could be a problem. The main reason for the increase in the use of joint ventures over the past few years is the perceived income tax advantages and the large amounts of money required in order to bring a large project into commercial production (usually much more than one company, no matter how large, is prepared to commit to one project). Joint ventures are also stylish!

For federal tax purposes, the primary tax advantages to joint venturers lie in the fact that the participation of each venturer is looked upon as a separate business operation of that venturer as opposed to the partnership which, for tax purposes, is considered to be a single business operation. Each venturer can take its pro rata share of available tax deductions for capital cost allowance, exploration and development expenditures, earned depletion and so on and apply these against its general income as opposed to income from the joint venture only. With the very low success rate in exploration ventures, this may be an important consideration to an income-producing mining corporation. The appropriate provincial taxing statutes must also be considered, as must the individual tax position of each venturer. It is not within the scope of this paper to consider taxation questions.

For many years it was felt that in order to qualify, for tax purposes, as a joint venturer, each venturer had to agree to pay its pro rata portion of operating costs and to take its pro rata portion of product produced from the joint venture operations in kind. The venturer would then be left to dispose of the product on its own and for its own benefit. This concept was inherited from the United States taxation laws and may not be an absolute necessity in order for an arrangement to qualify as a joint venture in Canada. Taking product in kind is certainly a strong indicia of joint venture as opposed to partnership but during recent discussions had with Revenue Canada, Revenue Canada has indicated that even if the joint venture arrangements call for the sale of all product and the dividing up of resulting "profits", this alone may not destroy the joint venture and cause it to be a partnership for tax purposes. Notwithstanding, it is still preferable for the joint venturers to agree to take their product in kind rather than have the operator sell it as part of the joint venture operations. The operations of a joint venture need not, however, stop at the ore stage and can include further processing, even on a custom basis, so that the product is a concentrate or refined material. From a practical point of view, any problem created by a venturer being obligated to take its product in kind can be overcome by venturers pooling their product and entering into a separate agreement for the joint sale of their product by a single selling agent. Such an arrangement may or may not call for the selling agent to be paid a commission for his efforts. The selling agency agreement should not form part of the joint venture agreement. In such a selling agreement, it is important to set forth clearly how revenues and costs will be shared if all of the product available is not sold or different prices are obtained.

In essence, the joint venture agreement should be capable of taking a project from its earliest stages of exploration to commercial production
and subsequent operations. This is not to say that it must attempt to anticbine every possible eventuality. This would be impossible. In fact, in all likelihood, the venturers will not even be able to tell the draftsman what type of mining or milling methods they expect will be appropriate - they probably do not even know if they have a potential orebody. The venturers must have some procedure set forth in the agreement that they may follow in order to reach a decision if there are differences of opinion. As is discussed below, in a two-party joint venture this is a problem but in a multiple-party joint venture, the problem is less acute.

For convenience of discussion, the remaining comments upon joint ventures are set forth below in several separate sections. The individual section should not be considered to be exhaustive or self-contained as many parts raised in one section will have application in one or more of the other sections.

1. General,

A joint venture may be established:

(a) to carry out "grass roots" exploration projects in which event none of the parties have any properties at the time the joint venture arrangements are entered into and properties acquired under the arrangements will be owned proportionately by the venturers as their respective interests appear under the joint venture agreement (usually based upon their respective contributions); or

(b) where several parties each own properties and it is to their advantage to "lump them together" so that they may be jointly explored and developed and, hopefully, brought to production and operated as a single joint venture operation. In these circumstances, the respective initial interests of the joint venturers will be a highly negotiated matter and depend upon the relative "values" of the properties to be brought into the joint venture; or

(c) where one party has some property in which some other party or parties wish to acquire an interest and thereafter develop and operate the property by way of joint venture; or

(d) where one party, usually a geologist, has developed a theory which is interesting to several other parties who will finance the implementation (and hopefully proving) of the theory and do this by forming a joint venture for the purpose. Usually the geologist does not contribute money and is the party that carries out the work, thereby benefiting by having an interest if the project succeeds and by creating a job for himself and his staff. This type of project is becoming more common; or

(e) a combination of one or more of the foregoing.

A joint venture of the type referred to in subparagraph (c) above has a couple of special considerations. It is a combination of an option to acquire an interest followed by a joint venture if the option is exercised. The oil terminology of "farm-in" is becoming quite common to this type of arrangement, which usually contemplates the acquiror acquiring its interest
by doing a specified dollar value of work. This work will often be done by the disposing party using the acquiror's money. Obviously, the acquiror will have its own ideas as to how its money should be spent and, accordingly, will want to have provisions in the agreement whereby it has, at least, a veto right with respect to work proposed to be carried out by the disposing party. The acquiror wishes to obtain as much information about the whole property as it can for the smallest amount of expenditure, whereas the disposing party wants to enhance the value of its property and may well want to concentrate expenditures to work in a small part of its property. Some interesting negotiations can result. Usually the acquiror will have the right, as it would under the option arrangement, to abandon the project at any time but without any right to be refunded for any moneys that it has paid and this may end up to be its only protection against what it considers to be wasteful expenditures. In addition, it must be remembered that although in theory a precise dollar expenditure will occur at a precise moment in time, in practice, this will not happen. Accordingly, some care should be taken so that work does not have to stop completely and new programmes be prepared at the moment the acquiror earns its interest. Most companies are prepared to accept the concept that the programme current when a required expenditure is reached may be completed, usually with the party that is doing the work paying for excess costs (those over and above the amount required for the acquiror to earn its interest) which are then included automatically as part of the first programme to be carried out under the joint venture.

Some matters which should be considered when preparing (and negotiating) a joint venture arrangement include:

(a) the preparation, proposal and approval of work programmes must they be annual programmes or may they cover an arbitrary period of time? is there any maximum dollar value which may not be exceeded without consent? If there is such a maximum, it is suggested that there be some provision whereby it will "fall away" during advanced exploration and development stages of work, is there any minimum dollar level required?

(b) procedures relating to the election by the participants as to whether or not they will contribute to an approved programme during early stages usually thirty days' consideration to make the election is considered to be sufficient but in later development stages where major expenditures may be called for, it is more common to have a longer period of time. In the case of junior public companies especially, the time limits will be of great concern as the junior company may have to arrange to finance its participation (often by way of a public issue of securities); if a party fails to elect to participate within the specified time limit, should it be deemed to have elected to participate or to have elected not to participate?
(c) effect of election to participate
if a venturer elects to participate in a programme, it should be obligated to contribute to that programme an amount equal to its interest under the joint venture arrangements, plus a contingency amount (usually 10 per cent to 15 per cent).

(d) effect of election not to participate
in most instances the non-participant's interest will be diluted in favour of the participating venturers as the participating venturers contribute further moneys.
in lieu of dilution, an interest can immediately drop to a "carried" level.
if one or more venturers elects not to participate, are the other venturers entitled to reduce the expenditures under the programme (pro rata or to a specified minimum level) without a new programme being thereby created or must the participating venturers carry out the entire programme as approved?
if a venturer elects not to participate in one programme, may it participate at its reduced interest in future programmes? This is usually a highly negotiated matter. Usually a major corporation does not wish to accept the re-entry concept on the basis that the early work is of a highly speculative nature and a party that is not prepared to take the risks should not later be entitled to maintain an interest when such work proves to be successful.
if the participating venturers do not complete the approved programme or complete the approved programme to the specified level (usually between 70 per cent and 85 per cent of estimated expenditures), what rights do the non-participants have? It is becoming common to permit the non-participant to pay its pro rata portion of the actual costs incurred and thereby revert to the participating status and interest that it had immediately before the approved programme was undertaken.

(e) if large geographical areas are subject to the joint venture, the possibility of more than one orebody or area of interest. This may sound overly optimistic but it should be anticipated, particularly in situations where "grass roots" exploration is to be carried out over an area of, say, several hundred square miles. This can be accommodated by inserting provisions for the designation of areas within the joint venture area which will be considered as separate and distinct "mini-joint ventures" within the framework of and subject to the same terms as the main joint venture. Following designation, all programmes, books, records and so on will be segregated and kept separate; participations may vary from those in the joint venture area not designated or from other designated areas; a different operator may be appointed; and other variations can be accommodated. The object is to provide the parties with the mechanics to permit flexibility without renegotiation of the arrangements.

(f) provisions providing fora method to commission a feasibility study,
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to consider the completed feasibility study and amend it if necessary, and to approve the feasibility study
although a feasibility study may be produced "in-house" by a major company, the venturers should have the right to require an opinion from an acceptable consultant to the effect that he has reviewed the feasibility study, agrees with it and is of the opinion that its recommendations are in keeping with good mining practice and reasonable and that the suggested project is commercially viable. The consultant should not be asked to do a further feasibility study but merely to confirm the "in-house" study. The cost of the consultant should be a joint venture expense as an independent opinion will no doubt be required if a party has to raise financing for further participation.
the agreement should contain a definition, in general terms, as to what is expected to be included in a feasibility study. Problems arise if this is not done as the views of the respective venturers may well vary widely, e.g. in the circumstances of the agreement, would a preliminary feasibility study constitute a "feasibility study"? If the agreement provides that the preparation of the "feasibility study" is a condition precedent to the obtaining of a substantial interest in the property by one of the parties, the answer to such a question will certainly be of interest.

(g) procedures for the implementation, approval and participation in a development programme
usually the development programme will be based upon the recommendations of a positive approved feasibility study, will be carried out over a period longer than one year and will require the contribution of substantial amounts of money by participants. It is this programme which will contemplate the project being taken from the feasibility study stage to commercial production.
if there have been dollar or time constraints upon prior programmes, they should not be applicable to a development programme.

(h) procedures to be followed if a venturer, having agreed to participate, defaults in its obligations
- usually default is divided into two categories, one, the more serious, relating to default with respect to a development programme and the other, of lesser significance, with respect to any other programme.
if default occurs in other than a development programme, it is commonly provided that the party will suffer dilution and be considered to be a non-participant as at the commencement of the programme. The defaulting party may be forgiven its obligation to pay its proportionate part of the programme.
default with regard to a development programme can have very serious consequences due to the mega dollars which may be involved in the project. Accordingly, the consequences of default
should be appropriately dire as well. The attached form of joint
venture agreement contains a very extensive and complex pro-
vision relating to default under a development programme which
has been accepted in a number of joint venture agreements by
both major and junior corporations. It is only one of many
possibilities. In considering this matter, it should be kept in mind
that if the terms are too strict, the courts may attempt to con-
strue them as a penalty.

(i) providing in specific terms for the powers, duties and obligations
of the operator, including its right to invoice participants for con-
tributions and their respective obligations to pay the invoices within
a specified period of time

conceptually the operator should be in charge of day-to-day
operations of the joint venture but should not have the power
to make basic substantive or policy decisions which one would
expect to be made by the property owners.

if a development programme is commenced, is the operator ent-
titled to receive, in addition to reasonable administrative and
overhead expenses (usually limited to or specified as a percen-
tage of costs of the programme), a management fee for acting
as operator? If the operator is to be entitled to receive a manage-
ment fee, some procedure to settle this must be provided for.
In addition, provisions should be made for changing the quan-
tum of the fee once the project has been brought into commer-
cial production. Hopefully, the parties will be able to give some
guidance as to the range of fees but a fee will not be able to be
specified in the agreement. One method that has been accepted
is to set forth a maximum level and then provide that if a fee
cannot mutually be agreed upon within thirty days after being
requested by the operator, then it will be fixed at not more than
the specified level by arbitration.

(j) providing for the disposition of product (as mentioned above, joint
venturers will, in all likelihood, agree to take product in kind)
provisions must be inserted to protect the operator so that it is
not placed in the position of having paid operating costs and not
having the right to retain a venturer's product and sell it if the
venturer does not pay its accounts. Remember also that operating
costs can exceed revenues from the sale of product.

in drafting provisions relating to the taking of product in kind,
it must be remembered that, in fact, these provisions may become
operative (i.e. there may be no selling agency agreement) and,
accordingly, they must be practical. If the product of the joint
venture is ore, it may be difficult to divide such product equitably
amongst the joint venturers. Unfortunately, ores do not have a
consistent grade or consistency. It may be advisable to provide
specifically that the joint venture operations will not produce ore
as a product but rather will produce a product which has been concentrated or otherwise beneficiated (either by the joint venture or on a custom basis) so that is may be divided equitably amongst the venturers.

(k)provisions relating to disposition of interests
it is usual to provide for a right of first refusal. Some care should be taken in crafting this type of provision in order that it is practical. It is suggested that a right which requires the offering party to have in hand a bona fide offer is not worth the paper it is printed on and may, in essence, be a prohibition against transfer.

numerous other areas relating to this subject should also be considered, such as: right to assign to associated or affiliated companies; right to charge the property interest to raise participation moneys; requirement of any assignee or mortgagee to agree to be bound by the joint venture agreement; and so on.

In addition to the foregoing list, there are, obviously, required numerous of the more normal contractual type provisions, such as representations and warranties; force majeure; notice clauses; termination clauses; etc.

One final word with regard to general provisions has to do with termination. Care should be taken if it is intended to permit a party to terminate its participation under the joint venture agreement by transferring its interests to the other venturers. This is quite a common provision but consideration should be given to providing that this cannot be done once a property has been brought into commercial production. The reason why this limitation is suggested is in order to avoid a "race" to terminate the agreement as the life of the mine approaches its end. The venturers that have reaped the profits from the mining operations should equally continue to be liable to participate in the liabilities relating to reclamation and environmental requirements once the operations have been completed - unlike a partnership, the joint venture structure does not accommodate the establishment of reserves for contingencies.

2. **Multiple-Party Joint Venture**

In using the term multiple-party joint venture, reference is being made to a joint venture which has more than two participants, all of which have an interest in the property and are participating. In these types of joint ventures, the concept of a management committee is usually used to make decisions and, hopefully, settle disputes. The management committee may be composed of named representatives of the venturers who are specifically given the power to bind the venturer whom they represent. It is prudent to provide in the agreement for alternate representatives who may act in the absence of the primary representative. The agreement may identify alternates by name or may permit a representative to name an alternate by notice to the other venturers. It is strongly recommended that the situation be avoided whereby a representative does not have full power to bind his venturer as this can make management committee decisions meaningless in that
they are still subject to "executive approval" with the result that decisions (and therefore the project) are delayed and confusion may well result.

Some consideration should be given to the provisions relating to the calling and holding of meetings and the general procedural aspects relating to the management committee. In many ways, these provisions will be similar to the general by-laws of a corporation. Attention must be given to notice, quorum and the percentage of votes required to carry a resolution of the committee. The quorum should be sufficiently high to ensure that one party does not dominate unless it has a very substantial interest. The same considerations must be addressed when the required percentage majority to carry a resolution is fixed. Often in a joint venture having multiple parties, there is one party which as a substantially smaller interest than the others. Especially in a three-party situation, this small minority party could hold the deciding vote and, in essence, make all the decisions for the venture. In addition, it must be remembered that in all likelihood the joint venture arrangements will include dilution provisions so that in the future voting percentages will change. This is certainly fair but sooner or later it may well result in one party clearly controlling the joint venture. Within the mining industry, conceptually, control by a majority interest holder is an accepted feature but there have to be some restraints on the majority holder so that it does not "go off on a frolic of its own".

It should be specifically provided in the agreement that a decision of the management committee reached in accordance with the requirements of the agreement is binding upon all venturers whether or not they are participating and whether or not their representative was present at the meeting. This is an essential ingredient and, hopefully, will "solve" potential disputes before they arise. The agreement should contemplate that resolutions may be passed at a meeting or by written resolution and, in addition, it is well to provide that representatives may attend the meeting by conference telephone. These provisions will no-doubt seem elementary to you but it is surprising how often they are left out of joint venture agreements by a solicitor who is meticulous as to what must be included in the general by-laws of a corporation. It must always be borne in mind that a joint venture must stand alone and there is not a body of underlying legislation which may be looked to to help cure defects.

With the administrative and procedural matters of the management committee looked to, the next matter that must be addressed is the scope of the powers that the management committee will have. Some of these will be negotiated and some of them will be "standard". Depending upon the circumstances of the transaction, it may be that the venturers require that certain decisions of major import, such as a material expansion of facilities or the acceptance of a feasibility study, be by a large percentage of the interest holders or even by unanimous agreement. The latter is, obviously, dangerous and it is suggested that it be avoided. It must be remembered that if unanimous agreement is specified, it means just that and would include any party that had an interest in the property even though it may be a diluting and non-participating interest which is on the verge of being
It was mentioned above that in a multiple-party joint venture agreement, the management committee may serve the purpose of settling disputes on the basis that by following specified procedures decisions can be made which bind all of the parties, even a dissident party. This presumes that the venturers are not acting arbitrarily or trying to improperly "squeeze out" another venturer. If this type of situation arises, there are serious problems which are probably best referred to the courts for decision. Arbitration may be used for this purpose, but it has been found that in several jurisdictions the laws relating to arbitration are best avoided, although, if the venturers are European they may prefer to have disputes settled by means of arbitration rather than by the courts. If arbitration is to be used, the draftsman of the agreement should not merely put in the two line provision that arbitration will be held in accordance with the relevant statute but rather should carefully consider the best procedures which should be followed and in some circumstances it may be better to provide that special arbitration rules, such as those of the International Chamber of Commerce, will be applicable. This matter should be discussed with the client.

In essence, as with any agreement, a joint venture agreement will run smoothly only so long as the parties are co-operating and happy.

3. Two-Party Joint Venture

For many years, the mining industry has avoided the two-party joint venture and especially a 50/50 joint venture. The small percentage which gave one party a de facto majority interest was sacrosanct. The reason for this attitude was quite simply that in the "good old days" everyone accepted the concept that the majority interest holder would govern and, "of course", it would act reasonably, especially if the majority interest holder was one of the major companies. Unfortunately, the "good old days" have passed and we seem to be inheriting a litigious attitude to matters. In addition in some areas, it would also appear that corporate ethics are being sacrificed to the corporate profit and loss statement. It would be interesting to carry out a survey of the litigious histories of orebodies which have been brought into production in, say, the last fifteen years as opposed to those brought into production earlier. We have certainly seen from orebodies such as the Kidd Creek deposit in Ontario and the Afton mine in British Columbia that the discovery of a major orebody may benefit not only the mining and minerals industry but also that portion of the legal profession which practises in the litigation field.

In considering a two-party joint venture, it must be accepted that in any two-party situation decisions are made in only one of two ways - they are either unanimous or unilateral. From a practical point of view, it would be impossible to carry on an exploration and development joint venture if every decision had to be unanimous. Geologists and mining engineers being professionals are just as bad as their legal brethren - if you put the same problem to six of them, you will be lucky if you only get five different answers. Accordingly, in the two-party joint venture, it is necessary
to decide what, if any, decisions are so basic that they must have unanimous approval and failing unanimous approval, the project will be suspended or broken up. It is interesting to note in passing that often when there are two major companies involved in joint venture arrangements, usually the acquiror that is entering the project, is prepared to let the disposing party act as operator with wide discretion so long as some safeguards are built into the agreement to avoid arbitrary or unreasonable actions. This is not overly surprising as the disposing party very likely has a "track record" and the acquiror will have reviewed the records of the disposing party relating to the project and discussed the project with the geologists and executives involved in order to determine how they intend to proceed. If the acquiror enters into the agreement, its investigations have, obviously, disclosed an acceptable method of proceeding in which the acquiror is prepared to participate. This is a commendable attitude but it must be remembered that even though corporations may never die, their executives and executive policies certainly change, sometimes on a daily basis.

The mining industry seems to have a "fixation" with that marvellous decision-making body the management committee. As is indicated under the preceding section, the committee certainly has its uses but not in a two-party agreement. If the traditional management committee concepts are used in a 50/50 venture, all decisions are automatically unanimous, or, in a majority/minority venture, it will likely be that all (or at least most) of the decisions will be the decisions of the majority party. It is interesting to speculate as to what legal rights a minority interest holder may have inadvertently waived if it has agreed to a situation where management committee decisions are binding on all participants and then management committee is controlled by the majority party who is also the operator. What would be the effect and what rights would the minority interest holder, who has agreed that management committee decisions are binding, have if the management committee decided on a method of proceeding which was not in accordance with good mining practice and "instructed" the operator to act accordingly?

It is suggested that in a two-party joint venture there be no management committee, however, there should still be a committee. This committee would be only a "forum for discussion" and would not be a decision-making body. At first glance, this would appear to be a rather needless "lawyer's provision". This is not so. It will provide the right to a minority interest holder, or the non-operator, to require the operator to sit down across the table and discuss the project both generally and specifically, the operator's reports (or lack thereof), work carried out, results and costs of such work and plans for the future. Hopefully, it would not be necessary to force the operator to do these things but it might be. This type of meeting can be informal and does not require the extensive provisions contemplated in the preceding section. Even though the concept of a decision-making management committee may not be present, it is suggested that it is still desirable to have named representatives for each venturer who have the power to bind the venturer whom they represent. The venturer will probably want
Two-party Joint Venture

to provide that the representative does not have the power to amend the agreement but at least there are named persons upon whom the other venturer can rely with regard to the matters relating to the project.

If it is decided to "trust" one of the joint venturers and permit it to act as operator and to have wide discretion, then the other party is going to want to be safeguarded to some extent from arbitrary or unbusinesslike decisions. There are numerous things that can be done to accomplish this, some of which are:

(a) a limitation be put upon the maximum expenditures under any programme of work proposed by the operator. This is not practical during development stage but does work at exploration stage. It must be remembered that unless the agreement permits only annual programmes, the limitation may not be effective.

(b) as indicated above, provide that certain decisions require unanimous agreement. This may not be practical and could result in a good orebody not being brought into commercial production or being brought into commercial production much later than would otherwise happen.

(c) provide a procedure whereby the operator may propose programmes of work in consultation with the other venturer and attempt to reach consensus on an acceptable programme. This is a "pious hope" concept but quite often discourse between the parties does disclose common grounds and thereby avoids potential disputes. In extreme cases, the use of a consultant, as discussed in the next subparagraph, may be incorporated with respect to all programmes, but if this is done considerable delays, and possibly expense, in settling programmes can be expected.

(d) permit either venturer to require a feasibility study to be prepared but with regard to the approval of the feasibility study, require confirmation of the reasonableness of its proposals by an independent consultant. Even with such a confirmation, if there is a dispute relating to a development programme as contemplated in a feasibility study, then major corporations are usually prepared to accept a procedure whereby the dispute is referred to a mutually acceptable independent consultant who answers only the question whether or not the proposed procedure is reasonable and in keeping with good mining practice. If his answer is affirmative, then the questioned procedure is settled and may be proceeded with. If his answer is negative, then the operator may not proceed with the questioned procedure and the consultant may then address the same question with respect to any alternative procedure suggested by the other venturer. If the alternative procedure is found to be in keeping with good mining practice, then that procedure will prevail and the operator will be obligated to follow it. If not, then the parties will have to start afresh. It is important that the consultant not be asked to propose his own procedures as this could be time consuming and expensive and could well result in something that is not acceptable to either of the ven-
turers. The procedure suggested is really not put forward as a "cure-all" but is a method whereby the operator can be "kept honest". It also has the advantage that no major corporation would want to have it known within the mineral industry that its joint venturer was so concerned with its proposed procedures that it required them to be referred to an outside consultant. The threat of this can be expected to "encourage" the operator to sit down at the table and attempt to reach an amicable solution to the problem. The suggested procedure will not provide an answer for the varying corporate philosophies, such as the rate at which an orebody should be mined, and the non-operator will certainly be to some extent at the mercy of the operator's internal corporate philosophy upon matters such as rated capacity.

(d) provide that disputes be settled by arbitration. It is suggested that this is unacceptable and would result in numerous expensive and time consuming delays. In addition, the resulting decision of the arbitrators would, very possibly if not probably, not satisfactorily decide the dispute or offer acceptable alternatives.

It should be remembered that in a two-party joint venture agreement, there is a reasonably good chance that in the future there will only be one participant with the other venturer being non-participating and suffering dilution to some specified end point (see next section). In these circumstances, the operator should be left to proceed with the project in its discretion but should still covenant to act in accordance with good mining practice. In addition, so long as the non-participant has an interest in the property, it probably should receive some form of annual report with particular emphasis upon its rate of dilution, but other rights which it enjoyed as a full participating venturer should fall away.

Finally, there is always concern in the mining industry that an operator may decide to "shelve" a project. It is a mistake to put in any agreement a firm obligation to bring a property into commercial production - this could be an expensive and frustrating covenant. It is, however, suggested that some comfort to the minority party may be provided by the inclusion of a provision whereby if an operator does not carry out work or propose a programme over a specified period of time (often one year), then the other venturer (if participating) may propose a programme which the operator may adopt as its own (and thereby be obligated to participate and carry out the programme), or, permit the other venturer to carry it out as operator but participate therein and thereby retain its interest, or, do neither of the above, in which case it would become a non-participant. If the proposing venturer becomes the operator, it would continue as operator under the agreement thereafter, subject to the same reciprocal rights.

4. Non-Participation

Although the subject of non-participation was referred to earlier in this paper, it is of sufficient importance to be dealt with separately. A joint
venture agreement will have to provide a procedure to give effect to the venturers' wishes with respect to the effect of a party deciding not to participate in a programme. It is a matter of negotiation as to whether the non-participation in one programme bars the non-participant from any further participation for the life of the venture or whether the non-participant may re-enter at its lower interest rate for subsequent programmes. It is accepted practice to provide that a voluntary non-participation (as opposed to default in payment) results in the non-participant's interests in the project being diluted in favour of the participating venturers as they continue to fund programmes of work. This is usually accomplished by proportionate dilution as further contributions are made, such that each party's interest under the agreement is equal to that percentage of the aggregate contributions of all parties that were made by such participant. If the arrangements are of the farm-in type where there has been a period of disproportionate contributions, then this will have to be provided for in the formula. This can be done by: (i) ignoring them and disregarding any contributions made during the farm-in period; or (ii) taking the aggregate of the contributions made during the farm-in period and pro rating them on a "deemed basis" amongst all participants pro rata to their respective interests in the joint venture; or (iii) allocating to each party a deemed expenditure based upon the actual contribution made by the party or parties that contributed during the farm-in period, such that the aggregate of the deemed and actual contributions during the farm-in period is allocated amongst all ofthe venturers pro rata to their respective interests. It is surprising how slowly a party's interest will be diluted under this type of formula and, accordingly, it should be noted that the first method referred to above will result in a more rapid diminution of interest than will the other two. This difference will not be particularly significant after substantial moneys have been expended but can be very significant in the early stages.

Although the proportional diminution is the most common method, virtually any method acceptable to the parties may be provided for. The main concern is to have the method clearly set forth so that it can be clearly understood by the parties that will have to implement it. The draftsman should not be concerned about setting forth a formula in lieu of trying to express a complicated procedure in sentence form - remember technically oriented people will be trying to implement the agreement.

It is advisable to provide in any dilution provisions a provision that if a party is reduced to a certain specified level of interest, it ceases to have an interest in the property or in the joint venture. Usually this interest lies between one and ten per cent. The reason for this type of provision is obvious; the participating venturers do not want to be bothered with low percentage holders who will be really nothing more than nuisances. It is a matter of negotiation as to whether at the specified level the interest of the non-participant is forfeited to the other participants and the non-participant "disappears", or if the interest is forfeit but in return the non-participant receives a royalty interest. If a royalty is to be received, it should be made quite clear that it is merely a contractual right to be paid moneys
and does not entitle the recipient to any rights under the agreement which it formally had as a participant. More is said about royalties later in this paper.

In drafting dilution provisions, care should be taken to ensure that only active participants share in the diluted interests. Situations have arisen where even though a party is non-participating, it is receiving the benefit of another party's non-participation. This is, obviously, an undesirable and ludicrous situation.

5. Conclusion

A joint venture agreement is a bulky and formidable document. There are no shortcuts available. Some corporations like to enter into what they term exploration joint venture agreements, i.e., they only contemplate exploration work. This is presumably done on the basis that the chances of a mine being found are remote, therefore a short agreement relating to exploration is appropriate. These agreements usually contemplate that a joint venture agreement or operating agreement will be entered into at some later stage. If it is ever intended to follow this route, it must be remembered that at law an agreement to agree is not binding and if a mine is found, the smallest interest holder has just as strong a negotiating position as does the largest interest holder if their relationship is not clearly spelled out in a binding document, such as a definitive joint venture agreement.

Due to its formidable size, it is often difficult to have a client read the entire agreement. It is intimidated by it and, therefore, reluctant to "tackle the project". This places its advisers in a particularly difficult situation. Sometimes the physical layout of the agreement may help. If the sequence of topics are in a logical order to the reader with a minimum number of cross-references, it will be easier for the technical person to undertake the chore of reading the agreement. The draftsman should not be dogmatic in how the agreement is to be structured or laid out. In addition, the supplying of a comprehensive index will often ease the burden of the client. As lawyers, we often sacrifice readability for what we perceive to be clarity. Unfortunately in our bpassion to cover every possible contingency, we accomplish a frightening jumble of words for the layman to try to read and understand. If our agreements are not understandable to the people that have to use them, they are very close to useless.

Finally, no agreement can substitute for trust, good faith and good relationships. The ideal joint venture is one where a clear definitive agreement has been entered into and then that agreement is deposited in a drawer to be used only in a situation where a dispute or disagreement arises.

G. Royalties

Royalties come in numerous sizes and packages. All of them are based in one way or another upon the operations resulting from a successful venture. Although it is advisable to attempt to make the royalty a contractual obligation, there is usually a very strong argument that the royalty, in fact,
"runs with the land". Accordingly, care should be taken to make certain that a royalty holder does not have to give its consent to dealing with the lands and does not have any right to question or veto proposed operations. Ideally, the land owners should be able to deal with their lands as they wish with the only obligation to the royalty holder being that will extract from any assignee or mortgagee a covenant to honour the royalty. In drafting royalty provisions, it is strongly suggested that unless the draftsman is quite familiar with accounting and accounting terms, he have an accountant confirm that his provisions are workable and reasonable from an accountant's point of view.

Royalties may take many forms, the limitation being only the imagination of the parties involved. Some of the more common forms are:

(a) **Net smelter return**: This is a royalty based upon the amount received by the producer from the sale of its product less a very limited number of deductions, such as transportation expenses to purchaser's site, sampling and assaying charges, and penalties charged by the processor. Operating costs and/or capital costs are not taken into account as deductions and, accordingly, this royalty should be considered as a gross royalty. Its quantum is usually quite small but the royalty would be payable upon the first product produced, even if the operations were not profitable.

(b) **Net profit**: This is usually considered to be a royalty paid upon a percentage of the gross revenues from operations after deducting all moneys contributed with respect to the project (including capital costs); cost of moneys; operating costs; working capital and other reasonable reserves; and generally any ancillary costs related to the project as a whole. It is a truly net amount and is quite often a relatively high percentage, possibly as high as twenty-five per cent, although the range of seven to fifteen per cent is more common. If the net profit royalty is ever paid, then the participants have realized the return of their investment. The sophisticated potential royalty holder will want to receive a specified advance royalty which is usually deductible in determining net profits, but which from the operator's point of view brings the net profit royalty uncomfortably closer to a gross type of royalty.

(c) **Production**: This usually takes the form of a specified dollar value per tonne of ore mined and milled. It is a gross type royalty and its quantum depends upon the type of mineral involved. The draftsman should be careful with respect to this type of royalty, so that the operator will not find itself obligated to pay the royalty should it want to crush and use some waste rock (rather than ore) for its own purposes. This type of royalty has the advantage that it is easy to calculate and does not give the holder access to a lot of records.

If a joint venture is involved, it is very difficult to provide for a net profit type of royalty because, as we have seen above, usually the joint venture will not itself produce a profit. Some type of compromise arrangement must be reached. In addition, another problem can arise if common
mining facilities are to be used for various projects and ores are blended. If some of the ores are subject to a royalty, then some method will have to be anticipated in the agreement to permit the blending and appropriate allocation of deductible costs. There is no completely satisfactory way to accomplish this and much of it must be done on an "equitable basis". It is probably one of the few areas where disputes might reasonably be handled by arbitration.

Many other matters can be covered in provisions relating to the payment of royalties, such as:

(a) if the royalty holder assigns the right to receive the royalty to a number of other parties, does the payor wish to have to settle the royalty with each of the assignees or will it require them to nominate one or two parties with whom he may deal and to whom it may pay the royalty for appropriate distribution?

(b) if the royalty is based upon revenues, some provision should be made for non-arm's length dealings.

(c) if the tax structures should change, should there be a change in the royalty rate?

(d) is the royalty holder to be entitled to receive an auditor's certificate or merely have the right to inspect or audit books?

H. The Carried Interest

In many agreements, particularly those with prospectors or junior corporations, the disposing party retains what is called a "carried interest" or "non-assessable carried interest" or some other such interest. A logical question would be: "What type of interest is this?" The answer will vary with the number of people asked and range from an undivided interest in the property concerned to a net profit type of interest. This widely used phrase should be avoided in mining agreements unless the agreement clearly defines what it means. Although in the oil and gas business the "carried interest" may have some meaning which is widely understood, it does not in the mining industry.

There is a strong argument that a "carried interest" is a direct interest in the property and ores contained therein. It may be arguable that the holder of the "carried interest" has to participate in the "cost" of extracting the ores. Does such "cost" include capital and operating costs or just direct operating costs? If the holder has some interest in the property, what rights does the holder have with respect to product derived from such ores, or, for that matter, what rights does the operator have to treat such ores? If the interest is a "non-assessable carried interest", the argument against the holder being required to share costs is obviously stronger but the question of the respective rights of the parties to take or treat ores after extraction is still present.

If it is intended to leave a party with a residual interest, then the governing agreement should clearly set forth the exact nature of that interest and the respective rights of the parties with regard to dealing with or disposing
of the property or an interest therein, extracting ores, treating ores and selling product.

It is suggested that if at all possible, the granting of a small residual interest directly in the property be avoided even with a clear definition of the interest and the respective rights of the parties. Regardless of its size, an interest in a property, whether registered or unregistered, is still a direct ownership interest. In the future, when the other owners wish to deal with "their mine" or to finance its development, in all likelihood, the residual interest holder's signature will have to be obtained. He will be at the least a nuisance and at the worst a major (and possibly expensive) stumbling block to the development of "their mine". Also, if the residual interest holder is an individual, he may have been inconsiderate enough to die leaving numerous heirs, all of whom will have to be involved, if they can be found.

It may be far better to purchase a residual interest for a sizable royalty rather than to try to "live with it" but, remember, the more advanced the property is the harder it will be to reach a reasonable value for the residual interest. In some instances, it is possible to set out an option to purchase a residual interest in the agreement.

I. Partnership

As indicated above, the use of partnerships for mining property acquisition is rare. Its use should not, however, be dismissed without consideration. In some instances, either a general or limited partnership may be the answer to a particular set of circumstances or give some tax or other advantage to one party without detriment to the other. In these circumstances, a partnership may be appropriate.

The mining partnership agreement is substantially similar to any other partnership agreement, other than for the inclusion of joint venture type language to deal with work programmes, dilution of interests, and so on. Accordingly, it will not be discussed here.

A couple of words of caution concerning partnerships. If it is decided to use a general partnership, it must be remembered that the custom of the trade protections available with respect to a joint venture, as mentioned above, may well be lost although with care and planning the public may be lead to believe that the partnership is a joint venture. If a limited partnership is used, all the parties must take great care not to contravene the applicable legislation (especially concerning the involvement of limited partners in operations) or they may find themselves in a general partnership with the former limited partners having full joint and several liability.

From an income tax point of view, it must be remembered that certain tax deductions, such as capital cost allowance, are taken at the partnership level. Accordingly, they are not available to partners to use against their general taxable income.

J. Use of a Company

In the 1960's, a common method of acquiring a property was for the acquiror to acquire a majority interest in the property and be obligated
to transfer this interest together with the disposing party's interest to a new company in consideration of a specified number of shares. It used to be felt that the shares were attractive to the disposing party because he, obviously, could sell them for a profit if a mine was found. Unfortunately, in those somewhat unsophisticated days, the disposing party forgot to take into account the fact that, if he was dealing with a major corporation, the new company would probably remain a tightly controlled subsidiary and there would be little or no market for his shares. In addition, the changing tax laws made the use of a new company less attractive.

In the present day, the use of a new company should not be discounted. There are means of "rolling" properties into new companies which result in no adverse tax consequences to the owners. In addition, it is possible for the shareholders of the company to retain the benefit of the deductions for tax purposes relating to exploration and development moneys invested in the company. Depreciation is, however, "locked" into the company and is usable only if that company has income. This may or may not represent a problem as if property owners have a "hot" prospect the danger of losing the depreciation may be minimal.

From a practical point of view, the use of a new company offers a very familiar structure through which an orebody may be developed, financed or operated. Special circumstances can be covered by means of a shareholder agreement. Probably one of the most significant advantages over a joint venture falls to the minority interest holder who as a minority shareholder acquires some statutory protection, especially when it is remembered that, at law, all directors must act in the best interests of the company (and not the shareholder that nominated them).

Any detailed discussion or consideration of the use of a new company is beyond the scope of this paper but it is something that would well be worth considering with respect to the acquisition of a mining property.

K. Grubstake

The grubstake was an arrangement where a party or parties paid a prospector to carry out prospecting and staking claims on behalf of the grubstaker. The prospector usually had a relatively free hand in his prospecting endeavours and might or might not receive an interest in the claims he staked. The grubstake rarely lasted for more than one season at a time and the prospector would realize a small "profit" (i.e. usually he spent less than he received). The grubstake arrangement was often a highly personal one, and, as it extended only to "grass roots" prospecting and the staking of claims, it has virtually disappeared. In its place has arisen the type of joint venture referred to in subparagraph (d) of section 1. - General of the Comments upon Joint Ventures above.

L. Post-Acquisition Agreements

After a mining property has been acquired, if the acquiring parties are fortunate enough to find an orebody, there will be numerous types of "mining agreements" to be considered. Some of these, such as drilling or
geophysical contracts or an agreement to prepare a feasibility study are highly specialized matters peculiar to the mining industry. Others are of a more general type, such as construction agreements and financing agreements. If there is a joint venture involved, there may be an operating agreement and accounting procedures to be settled, although often these may be settled quite informally and without the execution of definitive agreements. This paper would be multiplied many times over if an attempt was made to consider these various types of agreements.

M. Conclusion

Unfortunately, it is possible in a paper such as this merely to touch upon the subject of mining acquisition and related agreements with a very’’broad brush”. There are many matters which have not been mentioned and which may, in particular circumstances, be highly important to consider. The purpose has been merely to attempt to stimulate the reader’s imagination and to offer some broad lines of approach to several specific types of agreements. The field of mining acquisition agreements is far from stagnant and stereotyped, particularly where joint ventures are concerned.

If you are fortunate enough to have an imaginative client who is active in the mineral exploration field, then you will not lack interesting arrangements to be committed to paper in clear, concise language.