Avoiding Conflict

Mining lenders avoid social risk BY JULIUS MELNITZER

ENVIRONMENTAL and social risks are proving to be an additional hurdle for Canadian extractive companies squeezed for credit in an economic cycle marked by falling oil and commodity prices.

"Canadian lenders are evidencing a growing sensitivity to the risks associated with corporate-community conflicts in the extractive sector," says Kate Lyons of Goodmans LLP. "The question they're asking is, 'How long are you going to be before the courts if I lend you this money?'"

As the *New York Times* reported in March, an impressive list of financial institutions in the US, including Bank of America, Citigroup, Morgan Stanley, JP Morgan Chase, Wells Fargo, Credit Suisse and PNC Financial have "distanced themselves from coal companies involved in mountain top removal."

So far, Canadian institutions have not been so pushy. "What we're seeing is that banks are trying to get ahead by moving into areas of business seen as progressive, such as lending in the Aboriginal sector," says Adam Chamberlain of Borden Ladner Gervais LLP.

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Going progressive could see lenders taking a harder line with the extractive sector. "President Obama's comment on 'extraordinarily dirty' oil extraction in Canada and the ongoing discussion on 'conflict metals' serve as reminders that coal is not the only target in the sights of the green movement, and there is increasing pressure not only on producers, but on their source of funds," Lyons says.

Indeed, the cost of delay arising from company-community conflict has been the subject of heightened attention since the June 2014 decision of the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, which featured a 300-day trial and two appeals over the course of 10 years that finally culminated in the revocation of a logging licence.

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"The bottom line cost of *Tsilhqot'in* was certainly a subject of discussion at the PDAC [Prospectors and Developers Association of Canada] Conference early in March," Lyons says.

Even companies that have reached agreements with local communities through consultation and negotiation are finding that there are other ways in which social risk can contribute to their cash-flow conundrum in the current economy. "What happens to a company's social-licence obligations during a temporary cessation of production or free-falling profits?" Chamberlain asks. "What do they do about the promises they've made to local communities, indigenous people, government and NGOs during the development stage?"

The legal requirements, of course, vary from project to project. "Some project developers are very careful to keep their options open and might go so far as to make commitments that don't have timelines," Chamberlain says. "But typically most of these agreements have a fair bit of flexibility built into them."

Contractual rights, however, aren't the only concern. "The PR side is very important because a developer doesn't want to destroy the relationships it has built with a community," Chamberlain says. "So even if the company is no longer planning to mine the property itself, it wants to maintain its value ... for a potential sale."