

SHOULD THE VALMIN CODE BE MANDATORY? -- COMPARISONS TO THE CANADIAN EXPERIENCE: OBSERVATIONS AND COMMENTS FROM A CANADIAN LAWYER

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ABSTRACT

Canada recently completed a major review of its mining reporting standards which culminated with the release, just over one year ago, on February 2, 1999, of the final report of the Mining Standards Task Force ("MSTF"). The final report made 66 specific recommendations relating to the raising of mining standards in Canada. These recommendations were aimed at maintaining Canada as a lead jurisdiction in mineral exploration, development and production finance. Although the MSTF Report has made a number of key recommendations, it falls to various Canadian self-regulatory and regulatory organisations to implement the MSTF recommendations.

Following the release of the MSTF report a number of initiatives have been commenced or completed and regulatory initiatives are continuing on several other important issues affecting the Canadian mineral exploration and mine development industry. These initiatives are set out in Section 1 below.

The major focus of this paper will be to compare the Australian VALMIN Code to the proposed National Instrument 43-101 in Canada. An analysis of the more important provisions of VALMIN and NI 43-101 are set out in Appendix 1.

INTRODUCTION

A notice of the proposed NI 43-101 was released for comment on July 3, 1998¹ (following release of the MSTF interim report) and is a reformulation of, and will replace, National Policy Statement 2-A ("NP2-A") "*Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators*" and National Policy Statement 22 ("NP22") "*Use of Information and Opinion Re Mining and Oil Properties by Registrants and Others*". At the time of writing this Paper (March 1, 2000), the Canadian Securities Administrators (the "CSA") are planning to release a revised NI 43-101 on or about March 17, 2000. The CSA normally provide for a 60 day comment and review period, after which they will make further revisions, provide for a final release, and then set an effective date for the national instrument to be adopted as a rule or a policy by each of the provincial securities commissions, thereby giving it the force of law. By the time of the VALMIN Seminar in April, I am hopeful of being in a position to provide an up-to-date analysis of the revised NI 43-101 in my presentation.

NI 43-101 is expected to be adopted as a rule in each of British Columbia, Alberta, Manitoba, Nova Scotia and Ontario, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA. Currently, securities legislation in most jurisdictions

¹ Notice 98/07/03b — *Notice of Proposed National Instrument Securities Act — 43-101 and Companion Policy 43-101CP Standards of Disclosure of Mineral Exploration and Development and Mining Properties and Rescission of National Policy Statement No. 2-A* (1998), 21 O.S.C.B. 4160.

represented by the CSA requires issuers with mining operations to file reports prepared in accordance with NP 2-A, in connection with a prospectus offering for properties on which proceeds from the distribution are being expended and for any other major producing properties. NP 22 concerns the use of information and opinions regarding natural resource properties by registrants and issuers. The objective of NP22 is to ensure that references to technical data in reports, letters or other publications used directly or indirectly to sell securities conform to some uniform standards. NP 22 requires that the general disclosure standards and definitions of NP 2-A be complied with and used and that sources of information and opinion be specifically named. In addition, technical facts and opinions, such as reserve estimates, must be quoted verbatim.

Rather than provide a summary of each provision of the proposed NI 43-101, which has been reviewed in other papers, I will analyse the proposed broad provisions in comparison to the recent changes to the VALMIN Code. By making these comparisons, I will look predominantly at the additional duties, responsibilities and legal liabilities imposed on experts in each respective code and highlight major differences between the two systems. When doing so, I will comment on the legal requirements of the Canadian securities regulatory system regarding the liability of experts and to the extent possible, make comparisons to the Australian legal situation.

Prior to this analysis, let's look at some of the other recent Canadian initiatives relating to mining standards. Since the MSTF final report was published on February 2, 1999, the Canadian mineral industry has been very active in "raising the bar" in many areas.

1. THE MSTF INITIATIVES

(a) CIMVAL COMMITTEE

The MSTF Final Report specifically recommended that the Canadian Institute of Mining, Metallurgy and Petroleum ("CIM") form a committee of mineral industry valuation practitioners to review and advise on mineral industry best practice approaches to valuation of mineral properties.²

On May 5, 1999, at the Annual General Meeting held in Calgary, the CIM approved the formation of a Special Committee on Valuation of Mineral Properties ("CIMVal") to be co-chaired by Keith Spence (Chairman of the Mineral Economics Society) and Dr. William Roscoe (Roscoe Postle Associates). The additional members of the CIMVal Committee are: Craig Roberts (National Bank Securities), Christopher Lattanzi (Micon International Limited), Ross Lawrence (Watts, Griffis and McQuat), Ian Thompson (Derry, Michener, Booth & Wahl), Paul Lunney (Noranda Inc.), David Scott (CIBC World Markets), Bill Trythal (formerly Placer Dome) and Michael Bourassa (Aird & Berlis). CIMVal reports directly to the CIM Council and is administered by the Mineral Economics Society of CIM. I currently serve as secretary of the CIMVal Committee.

The mandate of CIMVal, as approved by the CIM, is to investigate the various methodologies and practices presently used world-wide in the valuation of mineral properties and recommend a Canadian code and/or guidelines for the valuation of mineral properties.

One of the first major initiatives of the CIMVal Committee will be the presentation of a series of papers on mineral property valuations at Valuation Day on Wednesday, March 8, 2000 as part of the Mining Millennium 2000 Conference in Toronto.

² MSTF Final Report, pp. 83-84.

(b) SECURITIES INDUSTRY COMMITTEE ON ANALYSTS STANDARDS

The Alberta Stock Exchange, the Investment Dealers Association of Canada, the Toronto Stock Exchange ("TSE") and the Vancouver Stock Exchange³ announced in late September, 1999 the formation of the Securities Industry Committee on Analysts Standards with a mandate to review practices and activities of research analysts employed by securities dealers in Canada, the standards of conduct and supervision of analysts and to make recommendations on standards governing the conduct and supervision of analysts.

The MSTF raised various concerns about the supervision of mineral industry research analysts with respect to standards and conflicts of interest. Currently, there are no uniform mandatory standards applicable to analysts or analysts' reports in Canada.

In particular, the Committee is charged with examining existing standards of supervision, compliance procedures and disclosure requirements, with particular attention to conflicts of interest. After a thorough review of the need for the industry to set standards governing practices and activities of research analysts, the Committee will produce a final report with recommendations designed to increase confidence in and improve Canadian capital markets. It is expected that the Committee's interim report will be issued in early July, 2000, and its final report by December 31, 2000.

The Committee consists of ten members, which includes representation from both the providers and users of analysts' reports and is chaired by Mr. Purdy Crawford, Chairman of Imasco Limited.

(c) ASSOCIATION OF GEOSCIENTISTS OF ONTARIO (AGO)

The AGO was formed in March, 1996 to formalise what was originally an ad hoc committee seeking licensure of geoscientists in Ontario. The MSTF Final Report gave impetus for the Ontario Government to agree to proceed with enabling legislation to establish a self-regulatory organisation to license professional geoscientists in Ontario. Since the release of the MSTF Final Report, AGO has been working closely with officials of the Ministry of Northern Development and Mines ("MNDM") and has carried out a comprehensive consultation process with the geoscience community and other major stakeholder groups. An independent advisory group of experienced senior mining, environmental, financial and legal professionals has provided advice to AGO on preparing legislation, developing a business plan and ensuring that the resulting self-regulatory organisation will enable geoscientists to fully meet the requirements of the Qualified Person concept, as set out in the MSTF Final Report, and soon to become a mandatory requirement once NI 43-101 becomes law.

The AGO has moved quickly in preparing draft legislation for consideration by its board and the policy branch of MNDM. On February 1, 2000 the first draft of the *Professional Geoscientists Act of Ontario, 2000* was submitted to the government of Ontario. The AGO and representatives of the TSE have requested that the legislation be in place prior to the end of 2000 and the policy and legal branches at MNDM have been very co-operative and extremely helpful in responding to the AGO's request in a timely manner.

(d) TSE NEW LISTING STANDARDS

The TSE announced, at the beginning of October, 1999, an upgrade of its continued listing standards for natural resource companies in line with its original listing requirements. These

³ On November 29, 1999, the Alberta Stock Exchange and the Vancouver Stock Exchange merged to become the Canadian Venture Exchange ("CDNX") which is expected to absorb the Canadian Dealing Network ("CDN"), the one remaining over-the-counter market in the next few months.

changes to the continued listing standards are effective on an interim basis, subject to regulatory approval by the Ontario Securities Commission (the “OSC”). Listed companies have a six month grandfathering period to meet the new continued listings standards before being required to move to a junior market or face delisting.

TSE listed resource companies will now have to maintain a minimum market capitalisation of \$3 million and increase the minimum market value of their public float from \$1 million to \$2 million, both over 30 day trading periods. The TSE has eliminated its previous net tangible asset requirement. Resource companies will now be required to increase minimum annual exploration and/or development expenditures from \$250,000 to \$350,000, revenue from sale of commodities (for mining companies) from \$1 million to \$3 million and replace the current quantified working capital requirement with a requirement for adequate working capital.

The new standards also highlight and reinforce the requirement for companies to comply with TSE disclosure policies, including the recently introduced disclosure standards specific to mining companies, and retain, on a ongoing basis, qualified and experienced management. Under the new regulatory requirements, a revised systematic suspension review process will be introduced pursuant to which companies will be promptly notified if they fall below the maintenance standards. The new standards also allow for a 120 day period to regain compliance and provide the market with a 30-day advanced notice period of a company’s suspension, giving investors adequate time to close out their positions.

(e) MINING EXPLORATION BEST PRACTICES AND REPORTING GUIDELINES

On August 19, 1999, the TSE, along with the CIM, the Prospectors and Developers Association of Canada and the Canadian Council of Professional Geoscientists announced the formation of a committee to initiate the development of exploration best practices and reporting guidelines for the mining industry. The development of these guidelines was recommended in the MSTF Final Report⁴. The committee prepared and released draft guidelines on October 28, 1999 for comment by the industry at large. Final guidelines are expected to be incorporated by reference in the revised NI 43-101.

The objectives of the committee were to develop:

- (i) a set of best practices guidelines to assist qualified persons in the design and implementation of exploration programs; and
- (ii) a set of exploration reporting guidelines to assist qualified persons in their reporting of exploration information in technical reports.

The committee consisted of mining and exploration industry professionals representing diverse backgrounds, experience, geographic locations in Canada and key industry associations.

(f) DIAMOND REPORTING GUIDELINES - “DRAFT” SECOND EDITION

The proposed companion policy 43-101CP to proposed NI 43-101 recommends that reports for diamond deposits should conform to the “*Guidelines for Reporting of Diamond Exploration Results, Identified Mineral Resources and Reserves*” published by the Association of Professional Engineers, Geologists and Geophysicists of the Northwest Territories (“NAPEGG”). NAPEGG completed draft revisions to the Diamond Reporting Guidelines in August, 1999 which have been circulated for comment. The proposed “Second Edition” guidelines are intended to improve the quality and accuracy of public reporting of diamond exploration results. The Second Edition

⁴ MSTF Final Report, p.33 and p.62.

guidelines consider recent requirements of the MSTF Final Report and take into account the July, 1999 draft of the JORC Code. NAPEGG is welcoming comments from the mineral industry on the proposed Second Edition guidelines.

It is clear from the summaries set out above that the Canadian mining industry and the regulators have recognised that problems exist and they are moving rapidly to deal with them. The VALMIN experience has been extremely valuable, and Australians have indeed contributed to this process by making submissions to the MSTF.

2. PROPOSED NATIONAL INSTRUMENT 43-101 VERSUS THE VALMIN CODE

In preparing this paper, it became very clear to me early in my research and review of the various existing policies, guidelines, codes, and instruments (as well as those proposed) that a comparison of the Australian system and Canadian system (from an Ontario context) would not be a simple matter.

Australia has: (i) one over-riding statute to govern securities matters (the *Corporations Law*); (ii) one securities commission, the Australian Securities and Investment Commission (the "ASIC"); (iii) one stock exchange, the Australian Stock Exchange (the "ASX"); and (iv) one professional organisation (AusIMM) which has had major input into Australia's two codes affecting mining standards (the JORC Code and the VALMIN Code) and has self-regulatory authority over its members.

Canada, on the other hand, has: (i) 10 provinces and two territories each with their own securities acts (the Ontario *Securities Act* will be referred to for the purpose of this paper); (ii) 12 Securities Commissions (however, efforts have been made to develop country-wide standards pursuant to national policies and instruments under the authority of the CSA); (iii) three stock exchanges, the TSE, CDNX and the Montreal Exchange and one over-the-counter market; (iv) one over-riding professional organisation -- the CIM, which has no self-regulatory powers but which oversaw the preparation of reserve reporting standards and has struck the CIMVal committee for the purpose of recommending mineral valuation standards; and (v) 12 provincial and territorial self-regulatory professional organisations ("SRO's") for mining professionals (with 3 additional associations being proposed) -- some of which accept only professional engineers as members, others which accept both professional engineers and geoscientists as members, and three provinces (Ontario, Quebec and Nova Scotia) which currently do not provide for self-regulation of professional geoscientists.

The other major difference is each country's understanding of the other country's mining standards codes. The Australians took the lead when they introduced the JORC Code which provided for a logical method of defining mineral resources and ore reserves and introduced the concept of the Competent Person. The CIM Ore Reserve Classification Committee followed the Australian model. (It is not within the scope of this paper to undertake a full analysis of either the JORC Code or the CIM Classification System).

Canada's National Policy Statement 2-A "*Guide for Mining Engineers, Geologists and Prospectors*" is the disclosure standard used from 1971 to the present (although since July, 1998, issuers have the option of relying on the provisions of proposed NI 43-101). NP 2-A did not require technical reports to be prepared and filed. It merely set out the guidelines for preparation of reports that were otherwise required to be filed pursuant to securities legislation. Although NP 2-A had definitions for ore reserves, anything short of reserve status could only be referred to as "mineralisation". It contained no provisions for mineral resource classifications. The proposed NI 43-101 not only sets out guidelines for the preparation of reports but also sets out requirements as to when technical reports are to be prepared and filed, incorporates the CIM's Ore Reserve Classification System and introduces the concept of the Qualified Person.

The VALMIN Code's title on the other hand, is somewhat of a misnomer. Its full name, "Code and Guidelines for Technical Assessment and Valuation and/or Valuation of Mineral and Petroleum Assets and Mineral and Petroleum Securities for Independent Expert Reports", and its content clearly indicate that the VALMIN Code has as much to do with disclosure standards for technical assessment reports as it does with valuation standards. It says virtually nothing about mineral valuation methodologies (which apparently is intentional -- refer to Appendix 1, "Valuation Reports and Valuation Methodologies"). It more closely resembles our proposed NI 43-101 in that respect, except for one major aspect: it is a best practices guideline for AusIMM members, and is not incorporated into law. As stated in the introduction to the VALMIN Code:

"[The] Australian Stock Exchange supports the issue of the Code, and brings any serious breaches of it to the attention of the AusIMM"; and

"The Australian Securities [and Investment] Commission refers to the VALMIN Code when reviewing mining and exploration prospectuses and takeover documents. Although the[ASIC] regards the Code as indicative of best practice, this does not relieve issuers and others involved in the preparation of prospectuses and takeover documents from their obligations under the Law. The Code is not a statement by the [ASIC] of what constitutes the Law"

(a) DIFFERING FUNDAMENTAL PHILOSOPHIES BETWEEN VALMIN AND NI 43-101

Notwithstanding what was said in the introductory paragraphs to this section regarding regulatory and jurisdictional differences between Canada and Australia, the two countries have much in common. Both countries' legal systems were established on the basis of English common law, both countries have strong mining traditions, and both countries have large contingents of engineering and geoscientific professionals and consultants who are very active nationally and internationally. Each country has had unfortunate encounters with stock promotions or frauds which created a loss of confidence in resource capital markets -- Australia in the mid-1980's with the Poseidon and Karpas Spring situations and Canada in 1997 with Bre-X and a number of other mining securities scandals. It is interesting that it has taken a fiasco for each country to recognise that mining standards needed to be revised.

In both Canada and Australia, technical experts such as geoscientists and engineers are liable both on a criminal and civil basis, in some cases pursuant to statutory provisions, and in other cases on the basis of common law negligence principles, for misleading statements or misrepresentations made in reports and public documents.

Australia originally responded to its resource capital markets problem by instituting the National Companies and Securities Commission ("NCSC") Policy Release 149. As stated by Hein in 1994:

Release 149 came about as a result of the need to control some of the excesses of the mid 1980's. It is unlikely that anybody needs to be reminded of the consequences of some of those excesses, which included a substantial loss of confidence in the Australian capital markets.

The NCSC prescribed what it expected to see in experts' reports. However, the NCSC (now the ASIC), took the approach that it was far better for professional and self-regulatory organisations to decide what is best practice.

One of the main factors which allowed the VALMIN Code to proceed in the manner in which it did in 1995 was the philosophy of the regulator, namely the ASIC, as reflected in the following statement (see Hein, 1994, p. 288):

From the [ASIC] perspective, the regulator's preferred approach is to allow industry experts to develop their own standards then to endorse the major themes of those standards. However, if industry fails to take up the challenge, then it runs the risk that the regulator will be forced to step in to protect the integrity of the capital markets by setting its own standards.

From my understanding of events, Australia had regulator-imposed policies which were put aside in order to allow the AusIMM, a self-regulatory organisation of mining professionals, the opportunity to set its own standards. The VALMIN Code is in a sense a "test-run" for the Australian regulators and the AusIMM.

Canada, on the other hand, has had reporting requirements in place for many years (NP 2-A) which have been driven by the regulators. In that sense, the two countries have two completely different underlying philosophies when it comes to setting policy and guidelines for experts. In Australia, the AusIMM's approach has been to take responsibility for its own members, on the assumption that they know best how to run their business and don't need "black letter law". Based on this approach, they developed the concept of "Competent Person", "Expert", "Specialist", "chartered status" and a code of best practices.

Canada has had policies (then rules) dictating what was to be said in reports, with regulators taking a more active role in reviewing the reports, but with no code of best practice. The MSTF and proposed NI 43-101 have used the various concepts developed by the Australians, such as the Competent/Qualified Person concept and the types of quality assurance and independent verification procedures that have been advocated by the VALMIN Code in the conduct of due diligence. However, instead of having an SRO in Canada ultimately taking carriage of the best practices code and taking responsibility such as the AusIMM has been able to do, we have created quite a different situation. In the implementation of NI 43-101, regulators will tell experts when and how to complete their reports, and where experts fail to do so they will be reported to, and may have to face disciplinary proceedings before, their respective self-regulatory organisations. This fundamental difference in philosophies underlying the VALMIN Code and proposed NI 43-101 has led to concern by some members of the geoscience community in Canada.

I believe the intent of the ASIC and AusIMM in Australia and the regulators in Canada, by imposing responsibilities and obligations on experts, was to "empower" such experts so they would not be influenced by biases of commissioning entities / issuers and their directors and officers. If anyone truly believes that the object of the MSTF was to transfer blame for the recent stock market fiascos in the resource industry to the experts, this is just too simplistic a view. Disclosure in most instances for a resource company must be substantiated by persons with professional knowledge, independent from those who stand to gain or lose from disclosing such information. The Australian model chosen by the MSTF is a sound one and appears to be working quite well. In Australia, the AusIMM basically empowered its own members by offering them the protection of the VALMIN Code and, in essence, saying -- "here's what you have to do so as not to be a dupe of the commissioning entity and in order to conduct proper due diligence". Australia had its professionals drive policy from the bottom up. Canada, due to circumstances relating to our balkanized SRO situation, was really left with no alternative other than to have regulators impose policy from the top down.

Regulators in Canada are cognisant of the fact that by imposing additional responsibilities and obligations on experts, these experts will be faced with greater liability. This is especially true for the expert given the additional role imposed by continuous disclosure requirements (see Appendix 1, "Concept of Disclosure"). This is a major difference from the Australian situation. From my reading of various sources, there does not appear to be a requirement in Australia for an expert to provide independent verification of continuous disclosure. It is certainly not in the VALMIN Code, and if the requirement were to be set out anywhere in the future, it would have to

be in either an ASIC or ASX policy or in a provision of the *Corporations Law*. However, if additional disclosure requirements were imposed by law, the VALMIN Code is already in a position to deal with the situation.

(b) LIABILITY OF EXPERTS UNDER NI 43-101

The following section focuses on liability of experts in Canada and the possible implications of proposed NI 43-101 becoming law. If the AusIMM and the ASIC are looking to make the VALMIN Code mandatory, then it may be helpful to consider this analysis. Unfortunately, I do not have enough background to prepare a similar analysis for Australia.

There has been some concern among members of the geoscience community in Ontario (see Wakefield, 1998, Halton Association of Geoscientists, 1998, and Bottrill, 1999) that the MSTF recommendations and the proposed NI 43-101 would impose additional civil liability on professional experts rather than on the issuer.

Even without a guideline such as NP 2-A or proposed NI 43-101, since 1978 when amendments were made to the Ontario *Securities Act*, experts in Ontario have been exposed to both quasi-criminal liability and civil liability in certain instances, if their reports contained a misleading statement⁵ or a misrepresentation⁶. In the case of a misleading statement, an expert will not be liable if he did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue⁷. In the case of misrepresentation, an expert will not be liable if he conducted such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation⁸. In determining what constitutes reasonable investigation or reasonable grounds as a defence for misrepresentation, the standard of reasonableness is that required of a prudent person in the circumstances of the particular case⁹. Similar provisions apparently exist in Australia (see Sharwood & Low, 1996 and Hein, 1994).

The Ontario *Securities Act* currently contains no statutory provisions for civil liability of experts where a misrepresentation is made as part of continuous disclosure by an issuer. In other words, if a press release made by an issuer contains a misrepresentation attributable to an expert, the *Securities Act* does not provide for a statutory cause of action, by a purchaser of securities who relied on such misrepresentation, against the expert.

The MSTF Final Report endorsed the recommendations of the Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Report) released in 1997 which documented the lack of effective remedies for damages caused to investors who relied on misleading continuous disclosure¹⁰. The Allen Report recommended the introduction of a scheme of statutory civil liability for misleading continuous disclosure which could lead to liability for issuers, their

⁵ Ontario Securities Act, section 122(b) provides that "every person . . . [who] makes a statement in any application, release, report, preliminary prospectus, prospectus . . . or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading is guilty of an offence and on conviction is liable to a fine of not more than \$1 million or to imprisonment for a term of not more than two years, or to both".

⁶ Ontario Securities Act, sections 130 and 131 provide, in effect, that where a prospectus or take-over bid circular contains a misrepresentation, a purchaser of securities (in the case of a prospectus) and each security holder of an offeree issuer (in the case of a take-over bid circular) has a right of action for damages against every person whose consent in respect of such prospectus or take-over bid circular has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them.

⁷ OSA, section 122(2).

⁸ OSA, section 130(4), 131(6).

⁹ OSA, section 132.

¹⁰ MSTF Final Report, pp. 70-71.

directors, officers and controlling shareholders and any expert who consented to the use in such disclosure of a report, opinion or statement (or an extract therefrom) of such expert. Following the release of the Allen Report, in May 1998 the OSC and other members of the CSA issued a Request for Comment regarding proposed legislative amendments to Canadian securities legislation to create a statutory civil remedy for misleading continuous disclosure (see Rooney, 1998). To date, there have been no further developments regarding this proposal.

When analysing reporting and disclosure guidelines in the proposed NI 43-101, there are several issues which have been raised and may need to be addressed by the CSA in the final version:

- (i)** Is NI 43-101 merely setting the standard of reasonableness that experts must utilise in the conduct of their due diligence? On that basis, by acting in accordance with the instrument and conducting due diligence and employing best mineral industry practices, the expert has immediately been provided with a valid defence in any legal action.
- (ii)** In setting new standards, is the bar being raised unreasonably high, so as to impose liability unfairly on professionals dealing in an area where opinions frequently turn out to be incorrect, but which were nevertheless based on correct information and reasonable assumptions? If such is the case, regulators may want to consider additional defence mechanisms to protect experts from being held to a higher standard of care.
- (iii)** Does proposed NI 43-101, in addition to setting new standards, impose additional reporting requirements and additional liability beyond what is already set out in legislation and regulations? The answer is probably “yes”. Although the OSC has drafted new provisions dealing with statutory liability of experts for misleading continuous disclosure, it is unclear whether such provisions will ever be implemented. However, if experts fail to comply with NI 43-101's new continuous disclosure reporting standards they could be held to be in breach of their standard of care and face civil liability (not to mention potential disciplinary proceedings before their own SRO). That being the case, experts in the mining industry may be exposed to greater liability than experts in other disciplines.
- (iv)** If NI 43-101 does impose additional reporting requirements (such as use of reports in continuous disclosure situations), should the instrument also provide for defence mechanisms and limitations on liability in order to protect or limit the additional legal exposure of experts? There have been discussions on the advantages and disadvantages of liability of professional advisers, including technical experts (see the TSE background papers on corporate disclosure at pp. 242-243). The final report of the Allen Committee (at p. 60) recommended limits on exposure for experts in the case of a misrepresentation in a continuous disclosure situation.

In conducting research for this paper, my research assistant searched Canadian case law, OSC bulletins, and articles going as far back as 1970, and was not able to find a single case involving a civil action against a geoscience expert for a misleading statement or a misrepresentation in a technical report. This strongly suggests that misrepresentation by geoscience experts has not been a problem in Canada.

In that light, some members of the geoscience community have had difficulty endorsing the MSTF recommendations and proposed NI 43-101 as they do not see the Bre-X fiasco as a failure of technical experts. They see it as the sole responsibility of the promoting company and its executives, the mining analysts, and the regulators. Bre-X and the other mining scandals occurred despite existing securities regulations and TSE policies. Some are of the view that surveillance, investigation and prosecution have not been the strong point of the Canadian securities regulatory regime since the early 1970's because of lack of government funding and the split of regulatory jurisdiction between the federal and provincial governments (see Vaughan, 1999). Having said that, there is a growing realisation in the Canadian geoscience community that standards need to be improved and that geoscience professionals must co-operate and be a

fundamental part of that process.

3. CONCLUSIONS

The differences conceptually between the proposed NI 43-101 and the VALMIN Code are as follows:

	Canada	Australia
Who dictates when to file report?	Regulator	Regulator
Who dictates what report must contain?	Regulator (prescriptive)	AusIMM (flexible)
Who controls the Code of “best practice”?	Regulator	AusIMM
Who enforces?	Regulator & 12 (15?) individual SRO's (plus civil liability)	Regulator & AusIMM (1 SRO) (plus civil liability)

For a full analysis of the differences between the two codes, refer to Appendix 1.

The major difference between the Canadian and Australian systems is in the manner in which policy will be set in the future and in the implementation of NI 43-101 and the VALMIN Code. In Canada, we have a group of regulators (members of the CSA, where the majority do not have geoscientific expertise) who will set the ground rules and policies. This is somewhat unpalatable to some members of the Canadian geoscientific community who feel that they must bear the brunt of additional obligations without having significant input in the rule making process. The MSTF apparently had given consideration to having a “code” drafted by a self-regulatory organisation. The problem however, is that Canada lacks a single powerful SRO that is able to take on that responsibility.

Australian geoscientists currently enjoy the luxury of having such a powerful SRO. The AusIMM, because of its profile and national status, has been able to assert that it knows what is best for its members, and recognises that if it fails to adequately carry out its responsibility, to the detriment of the investing community, it will lose that control, and the entire geoscience and mining community will suffer as a consequence.

In responding to the Bre-X fiasco, the MSTF should be commended for picking up on the VALMIN model, the QP concept, independent verification, and a code of mineral industry best practices. However, due to the lack of a single powerful SRO in Canada, and consistent with our strong regulatory tradition, the model was imposed by regulators from the top down.

The MSTF has responded in the best way that it could under the circumstances. Perhaps over time a national organisation such as the CIM, in conjunction with provincial SRO's, may succeed in convincing regulators to relinquish some control in favour of a code developed and enforced by experts, in the same way that the NCSC Release 149 in Australia was dropped and responsibility was handed over to the AusIMM and the VALMIN Code. In my opinion, and after my review of the Australian situation, this would be a very desirable outcome for Canada.

The following statement was made by Michael J. Lawrence, President of the AusIMM, in a recent article (see Lawrence, 1999a):

The ASX should quickly move to incorporate the VALMIN Code into the Listing Rules . . . This makes Australia's system more directly comparable to the intended TSE/OSC scheme. The expressed strong support by ASX, ASIC, major accounting firms,

shareholders' and directors' associations, etc. is gratifying, but VALMIN should be formalised in legislation (especially to require compliance with it by merchant bankers and brokers/analysts).

I agree with the above statement and further agree that the use of the VALMIN Code should be mandatory pursuant to provisions of the ASIC and the ASX. The Australian situation could be further improved if there were to be a stronger legal requirement for all resource-related market participants to prepare relevant reports in accordance with the Code. However, it is important that VALMIN itself remain within the control of the AusIMM. The Australian model is fair, appears to work and is enforceable. Other than fine-tuning certain aspects of the VALMIN Code (e.g. making it applicable to continuous disclosure situations and providing for valuation guidelines), the AusIMM should continue to assert its strength and emphasise to the ASIC and ASX that the Canadian "full-regulatory" model does not fit the Australian mould, and would be an unnecessary imposition of regulation. As the popular saying goes, "if it ain't broke -- don't fix it".

APPENDIX 1

ANALYSIS OF PROPOSED NI 43-101 AND THE VALMIN CODE

In this Appendix, capitalised terms used are defined below. Other terms which are capitalised in the VALMIN Code (e.g. Report, Valuation, Mineral Asset, etc.) have not been capitalised below. It is acknowledged that the revised Code deals with petroleum assets in addition to mineral assets. However, for the purpose of this Appendix, I will only be referring only to mineral assets.

"**Code**" means the VALMIN Code;

"**Commissioning Entity**" means, for the purpose of the Code, the organisation, company or person commissioning a report;

"**Expert**" means the individual who is responsible for the preparation of a report for the purpose of the Code. In some instances I may only make reference to the Expert when the Code also makes reference to an Expert and a "**Specialist**" (both terms are described in detail in section (d) below);

"**Guidelines**" means the Guidelines to the VALMIN Code;

"**Instrument**" means proposed National Instrument NI 43-101;

"**Issuer**" means the reporting issuer when referring to requirements under the Instrument or under securities laws in Canada;

"**Policy**" means proposed Companion Policy 43-101CP to the Instrument; and

"**QP**" means the qualified person who is responsible for preparing a report for the purposes of the Instrument;

(a) CONCEPT OF DISCLOSURE & OBLIGATION TO FILE A REPORT

The Code does not mandate when a report is to be filed. According to clause C11 of the Code, a report must be prepared pursuant to provisions of the *Corporations Law* and the ASX Listing Rules. Examples cited in clause C11 include prospectuses, information memoranda, compensation for compulsory acquisitions, protection of the rights of certain classes of shareholders in transactions between associated companies, assistance to receivers or managers in the disposal of assets, valuations involving acquisition agreed to by shareholders under the *Corporations Law*, capital reductions or selective capital reductions (if a report is prepared), and the valuation of a vendor's consideration in a public float. There are no continuous disclosure requirements in the Code.

The Instrument on the other hand dictates when technical reports must be prepared and filed and mandates that all disclosure (defined "as any document or **oral statement** made by or on behalf of an Issuer and intended to or reasonably likely to be made available to the public in the local jurisdiction, whether or not filed under securities legislation") concerning mining projects material

to an Issuer must be based upon information prepared by or under the supervision of a QP. Part 3 of the instrument requires that a technical report shall be prepared and filed for each property material to an Issuer when such Issuer becomes a reporting issuer, or files a prospectus, information circular, take-over bid circular, offering memorandum, rights offering circular, annual information form, or valuation.

The Instrument has continuous disclosure requirements which go beyond anything in the Code. An Issuer must file a technical report for any document that discloses for the first time resources or reserves on a property material to the Issuer or discloses any material change, from the most recently filed report, in resources or reserves on a property material to the Issuer. In recognition of the fact that the disclosure of resources or reserves must be made in a timely fashion, allowance is made for the technical report supporting such disclosure to be filed by an independent QP no later than 30 days after the disclosure¹¹. (See TSE Background Papers, 1995, p.207 for a discussion on the appropriate standard of care to be applied in the context of continuous disclosure, where the suggestion was made that the conduct expected should be judged “in the circumstances”, and that tight deadlines could be taken into account where material news had to be prepared quickly for release).

This continuous disclosure aspect of the Instrument would appear to be an attempt to catch a Bre-X type fraud at a much earlier stage of a project. I acknowledge that a number of papers have been written by our Australian friends (see Lawrence) about the Bre-X saga and their comments are much appreciated. However, it is my opinion that the Code, in its current structure, would not necessarily prevent a similar fraud from occurring if a particular issuer has not filed a prospectus (thereby requiring it to prepare and file a technical assessment report) but is merely issuing shares via private placement exemptions and promoting its stock through press releases.

(b) NATURE AND CONTENT OF THE REPORT

The Code emphasises substance rather than form. Those involved in the preparation of a report must aim for maximum rather than minimum disclosure, and for substantive rather than mere technical compliance with the code (clause C6). Reports should be prepared in a way such that one’s peers can judge it and check the analysis. The Code emphasises the concepts of transparency, independence, competence and materiality. ‘Transparent’ (definition clause D37) as applied to a valuation basically means that the factual information used, the assumptions made and the methodologies applied all must be made plain in the report and must be easily seen through with respect to motive and quality. As for “Materiality”, data or information is material when it is of such importance that its inclusion or omission might result in the reader of the report reaching a different conclusion. The Guidelines (clauses G113 to G152) provide best practices of what is recommended to be included in a report.

The Instrument on the other hand is very prescriptive and sets out a detailed list of what must be contained in a report at each stage of the exploration, development and production process. Former NP 2-A contained a similar list, but in less detail. The Instrument does not provide for flexibility and basically is not a best practices code developed by QP practitioners. Rather it is a code developed and drafted by regulators, which does not recognise that geoscience is an imprecise science and does not always lend itself to rigid mathematical formulas.

¹¹ Section 2.3 in the Policy further provides that regarding an Issuer’s obligation to disclose material facts and to make timely disclosure of material changes, there may be circumstances in which the Issuer expects that certain information concerning a project may be material notwithstanding the fact that a QP has not prepared or supervised the preparation of the information. In this situation, it is suggested that Issuers file a confidential material change report concerning this information while a QP reviews the situation. Once a QP has confirmed the information, a press release may be issued and the material change report will no longer be confidential.

One example of this concept in the Instrument that may be troubling to QPs is the proposed wording of section 5.2¹². It is not appropriate to require a QP to give an opinion that the carrying out of a certain program will be “a worthwhile undertaking”. Perhaps the choice of words should have read “a useful undertaking in order to gather information to prove or dis-prove a theory or proposition about the property”, or words to that effect.

(c) TYPES OF REPORTS

VALMIN sets out criteria for 3 types of reports (clause C12) - “Technical Reports” (which set out aspects of the technical assessment of the actual or potential economic production from a property), “Valuation Reports” (which express an opinion as to the value of a mineral security or its underlying mineral property), and “Fairness and Reasonableness Reports” (which are directed to an evaluation of the fairness and reasonableness of a transaction).

The Instrument is limited to technical assessment reports and has different disclosure requirements depending on whether a property is at the exploration, development or production phase.

(d) QP VS EXPERT/SPECIALIST

During the MSTF process in Canada, comparisons were often made between the Competent Person concept of the JORC Code and the proposed QP concept in the MSTF Report and the Instrument. The QP concept is really not that much different from that of the Competent Person, and is really a “made in Canada” response to an Australian approach. The concept of the Expert in the Code is even more stringent than that of the Competent Person. An Expert must be independent, be a professional having expertise, competence and 10 years of relevant experience so as to give authority to a statement made in relation to a particular matter, and be a member of a recognised professional association having an enforceable code of ethics. Specialists, on the other hand, are those individuals retained by Experts to provide subsidiary reports on matters where the Expert is not personally expert. The professional requirements of the Specialist are identical to that of an Expert, with the exception that only 5 years relevant experience is required.

The Expert or Specialist does not necessarily need to be a geoscience or engineering specialist. In the case of providing disclosure on property title (tenements), the Expert or Specialist could be a solicitor or tenement specialist who must qualify as a Specialist as set out in the definition. In the case of a valuation of mineral securities or where a vendor consideration opinion is provided the Expert or Specialist who participated must hold an investment adviser’s licence or a security dealers’ licence.

In addition to having the educational and practical experience, the Code recommends that Experts and Specialists be familiar with the Code, the JORC Code, the requirements or statements of the ASIC and ASX, the *Corporations Law* and court decisions concerning independent expert reports as is relevant to their work (clause C19).

In Canada, a QP must be an engineer or geoscientist with 5 years experience appropriate to the particular mining project and who is a member in good standing of a self-regulatory professional association. The current definition of QP in the Instrument is vague and does not really contemplate the complexities of various geoscientific, engineering and legal specialities that may be required in the preparation of one report. The footnote reference in the definition states that the requirement for technical experience had been increased from three years to five years and

¹² “A report that contains recommendations for expenditures on exploration or development work on a property shall include a statement by the QP that, in the QPs opinion, the character of the property is of sufficient merit to make the program recommended a worthwhile undertaking”

otherwise revised to conform to the concept of “Competent Person” in the JORC Code. A comparison to the Expert / Specialist concept of the Code (though not necessarily the 10 year experience requirement) would have been a much better model to follow in the preparation of the Instrument. Perhaps this will be rectified on the next draft (For a useful discussion on the QP concept, see Grace, 1999).

(e) RELATIONSHIP BETWEEN COMMISSIONING ENTITY/EXPERT; ISSUER/QP

The Code (clause C25) provides that the Commissioning Entity and the Expert must enter into a written agreement which specifies the terms governing the preparation of the Report. The Guidelines (clause G108) recommend what matters should be contained in such agreement, including the right of the Expert to refuse to provide an opinion or report where it is impossible or impractical to obtain sufficient accurate or reliable data or information; the right and obligation of the Experts to base their findings on information within their own knowledge or acquired as a result of their own investigations; and those representations referred to in clause C27. The Code provides very clear provisions that an Expert must not undertake the preparation of a report unless the Commissioning Entity ensures and represents in writing to the Expert (clause C27) that all material information relevant to the report has been disclosed to the Expert, that the Expert will have access to the Commissioning Entity’s property and personnel as is necessary, and that the independence of the Expert will be respected at all times.

The Code also provides for circumstances where certain information disclosed to the Expert is to be treated confidentially and not disclosed in public versions of a report. The fact that certain information is not disclosed must be nevertheless indicated in the report.

In addition, clause G156 recommends that Experts obtain an indemnity from the Commissioning Entity in order to be compensated for any liability resulting from reliance on information provided by the Commissioning Entity or failure of the Commissioning Entity to provide material information; or which relates to any consequential extension of work load through queries, questions or public hearings resulting from the report. Where such an indemnity is provided to the Expert, it should be disclosed in the report.

The Instrument does not provide the same level of detail and protection to QPs on this issue. Part 8 of the instrument sets out the requirements of the certificate of the QP, but does not impose a duty on the Issuer to provide all material information relevant to the preparation of the report. Considering the added responsibility (and potential liability) of QPs working within the new requirements of the Instrument, this is one aspect of the Code that should be adopted in Canada. Numerous articles have been written on the topic of liability of experts, in particular, what additional liabilities they will face under civil liability provisions for continuous disclosure. The final MSTF Report made a specific recommendation that a detailed retainer agreement be signed between independent contractor QPs and the retaining entities to clearly outline their respective rights and responsibilities¹³. The requirement for retainer agreements should be set out in the Instrument in order to provide adequate negotiating leverage to QPs when dealing with Issuers who are reluctant to provide such protection.

(f) CONCEPT OF INDEPENDENT

All reports required by the Code must be prepared by Experts or Specialists who are independent of the Commissioning Entity. There are definitions, code provisions and Guidelines relating the concept of “independence”. As per clause C22, the overriding principle of Independence is that the Expert and Specialist must have no material present or contingent interest in the Commissioning Entity in any form whatsoever. Experts and Specialists must disclose any

¹³ MSTF Report, page 23.

previous material association between themselves, their families and their employers with the Commissioning Entity or with the assets being assessed or valued.

Pursuant to the Instrument, an independent QP cannot be an insider, affiliate or employee of the Issuer, the majority of his or her income from the previous year cannot be derived from the Issuer, there can no expectation of becoming employed by the Issuer, and he or she does not own or expect to own securities of the Issuer.

(g) ABILITY TO USE A NON-INDEPENDENT

By their very definition, the Code requires Experts and Specialists to be independent. Under the Instrument, QPs need not be independent where reports are filed in conjunction with an offering memorandum, a rights offering circular, an annual information form, or where a document discloses less than a 100 percent change in resources or reserves on a property material to the Issuer. As set out in the next section, senior resource issuers are permitted to utilise “dependent” QPs in certain instances.

(h) SENIOR VS JUNIOR RESOURCE ISSUER

The Code does not distinguish between, and does not set different standards for, senior issuers and junior issuers. The Instrument makes the distinction. “Senior resource issuer” means an Issuer with gross revenues, derived directly or indirectly from mining operations, of an average of at least \$50 million per year for each of the Issuer’s three most recently completed financial years. While in most instances, technical reports must be prepared by independent QPs, senior resource issuers are allowed to use “internal” QPs whenever resources or reserves are disclosed with respect to one of their material properties or whenever they file an information circular or take-over bid circular. It is not apparent to me that reporting by senior companies is any better than that of junior companies, and it is not clear to me why this distinction needed to be made.

In addition, technical reports are not required to be filed in conjunction with prospectuses which qualify under the Prompt Offering Qualification system (the “POP system”)¹⁴. Most junior resource issuers do not qualify under the POP system.

(i) EXEMPTIONS

The Code does not contain any explicit exemptions from its application, most likely because of the flexible nature of the Code itself. According to clause C4, the Code must be adhered to where the ASIC and *Corporations Law* requires it, except where a relevant regulatory authority such as the ASIC grants relief. The Code itself does not provide for relief. As discussed earlier in this paper, the Code does not prescribe a mandatory checklist of what must be contained in a report. The emphasis for disclosure in a report is on transparency, independence, competence, and materiality.

The Instrument must be complied with strictly. Deviations of the listed requirements are not permitted unless an exemption is obtained from the regulator or the securities regulatory authority (pursuant to Part 9 of the Instrument), subject to such conditions or restrictions as may be imposed.

¹⁴ The POP System allows eligible Issuers quick access to the markets by permitting the Issuer to incorporate by reference in a short offering document, information that has already been made available to the public through continuous disclosure in the secondary market.

(j) MATERIALITY

The concepts of “material” and “materiality” are used in similar contexts in the Code and the Instrument -- both in terms of what information and data should be contained in a report but also to set standards as to what properties should be the subject of the report.

According to clause D22 of the Code, “material” means, with respect to the contents and conclusions of a report, data or information of such importance that the inclusion or omission of the data or information concerned might result in a reader of the report reaching a different conclusion than might otherwise be the case. As a guideline, a useful benchmark is that if the information’s or data’s inclusion or omission could lead to changes in total value of more than ten per cent, it is material. Materiality is an overriding consideration in the application of the Code (clause C7).

Clause G119 of the Guidelines, also recommends that a report list by title and location related properties not considered material, setting out reasons.

The principal use of the word “material” in the Instrument relates to mineral properties. In that context, a property will generally not be considered material if the book value of the property, as reflected in the Issuer’s most recently filed financial statements or the value of the consideration paid including exploration obligations or required to be paid for the property during the next 12 months, is less than 10 percent of the book value of the total of the Issuer’s mineral properties and related plants and equipment.

“Materiality” in a general context is set out in section 2.2 of the Policy. Materiality is a matter of judgment in the particular circumstances and should be determined in relation to the significance of the information to investors, analysts and other users of the disclosure. Information will generally be considered to be material to an Issuer if it is probable that the disclosure or omission to disclose would influence or change an investment decision of a reasonable investor. Although the Instrument does not emphasise materiality to the same extent as the Code, the Certificate of the QP (section 8.1(2)(g)) does require the QP to state that as of the date of the certificate, he or she “is not aware of any material fact or material change not reflected in the report, the omission to disclose which makes the report misleading”.

(k) REQUIREMENT FOR REGULATORY REVIEW

As stated earlier in this paper, the ASIC refers to the Code when reviewing mining and exploration prospectuses and takeover documents but the Code is not a statement by the ASIC of what constitutes the Law. Apparently, the ASIC’s target is to register a prospectus within three days and there is no time to do a detailed examination prior to registration. The ASIC has well developed programs for examining documents after registration. It is at this point that an expert’s report is likely to come under scrutiny and “surveillance staff will call for working papers, draft reports, client instructions and all the other underlying information on which the final published report is based” (see Hein, 1994).

It has always been the practice in Canada, even with NP 2-A, for regulators to take an active role in reviewing experts’ reports prior to issuing a final receipt for a prospectus. In keeping with that practice, Part 8 of the Policy states that disclosure and reports filed under the Instrument may be subject to review by regulatory authorities. If a report does not meet the requirements of the Instrument, the Issuer (**Note:** it does not say the QP) will be in breach of securities legislation and may be required to revise the disclosure or report.

(I) VALUATION REPORTS AND VALUATION METHODOLOGIES

The Code applies to valuation of mineral assets and valuation of mineral securities. However, clause C2 sets out a clear limitation relating to the valuation of mineral securities. The Code applies to mineral securities to the extent that their valuation requires the valuation of the underlying mineral assets. The Code does not address other issues related to the valuation of mineral securities. Guideline G149 recommends that caution be exercised in the use of “sharemarket” data to provide evidence of the value of mineral assets or mineral securities, because of the significant problem of possible lack of comparability between mineral assets and mineral securities.

Clause C5 requires that Experts and Specialists must be suitably qualified and, depending on the nature of a valuation, may be required to have geoscientific, engineering, environmental, financial, legal and commercial expertise. The valuation of exploration areas must not be undertaken without the involvement of a geologist who must give written consent to the form and context in which his or her technical assessment report is used in deriving the valuation (C18). An Expert or Specialist who participates in the valuation of mineral securities (or provides a vendor consideration opinion) must hold an investment adviser’s licence or a security dealer’s licence, where required under the *Corporations Law* (C20). The Code emphasises that the valuation process must be objective and rigorous and the outcome of any valuation will depend on the interaction of a number of assumptions which the Expert must make, all of which must be reasonable and disclosed in the report.

The Code was deliberately drafted so as not to specify valuation methodology. Clause C24 provides that the decision as to the valuation methodology(ies) to be used are solely the responsibility of the Expert or Specialist whose decisions must not be influenced by the Commissioning Entity. However, in ASIC Practice Note 43, the regulator has passed comment on some of the methods it considers appropriate for the Expert to consider (see Hein, 1994). According to the Code, the Expert or Specialist must state the reasons for selecting each methodology used in the report. Neither the Code nor the Guidelines set out types of valuation methodologies to be used by Experts. Rather, Guidelines G150 to G152 set out general considerations for the selection of a valuation method which is dependent on the purpose of the valuation, the development status of the mineral assets, the amount and reliability of relevant information, the risks involved, and relevant conditions for commodities and/or shares. The Expert is also recommended to state why any particular valuation method has not been used. It is apparently the intention of the VALMIN Committee to look at unacceptable and illogical valuation practice and to release some guidelines sometime in 2000.

When the purpose of a report is to determine the “value¹⁵” of a mineral asset or mineral security, it may be different from the “technical value¹⁶” of the mineral asset and be subject to change with time. In most circumstances, it will be necessary to illustrate the effect of variation in basic assumptions by determining a range of such values (C32). In times of high commodity prices or buoyant stock market conditions, the Expert may conclude that the “value” of a mineral asset or mineral security may be higher than the “technical value”. The reverse may be true when market conditions are depressed. A report should take such factors into account, and all reasoning behind any differences between value and technical value must be disclosed (G153).

¹⁵ Value is the fair market value of the mineral asset or mineral security and is the estimated consideration, in the opinion of the Expert reached in accordance with the provisions of the Code, for the transfer of the asset or security as between a willing buyer and a willing seller in an ‘arm’s length’ transaction, wherein each party had acted knowledgeably, prudently and without compulsion.

¹⁶ Technical Value is an assessment of a mineral asset’s future net economic benefit at a particular valuation date, under a set of assumptions deemed most appropriate by an Expert, excluding any premium or discount to account for market, strategic or other considerations. It must be on a pre-tax 100 per cent equity basis, in order to provide a common reference point (G152).

A report must be written in plain English and must contain, among other things, sufficient information to allow experienced investment analysts to understand how the valuation was arrived at, including details, summarised if appropriate, of the relevant financial model as well as sensitivities to variation in the most important assumptions and sufficient information on the valuation method(s) used so that **another Expert** can understand the procedures used and assess the valuation (C33). An Expert is under no obligation to express an opinion as to valuation where it is impossible or impracticable to obtain sufficient accurate or reliable data. In such circumstances, or where the Expert considers a mineral asset to have no or negative value, this must be stated in the report (C59 and C60).

The Instrument does not state explicitly whether it applies to valuation reports, however, it does apply to all disclosure made by or on behalf of an Issuer regarding mining properties of the Issuer. Considering the special requirements of valuation reports, in that they express an **opinion** (see clause C12 of the Code) as to the value of a mineral property or a mineral security, the Instrument does not provide any guidance as to the assumptions which should be taken into consideration or the valuation methodologies to be used in order to provide such an opinion. The only reference made to valuations is in Section 3.2(1).7 which requires a report to be prepared in accordance with the Instrument and to be filed to support statements made or information included in a “valuation required to be prepared and filed under securities legislation”. In that sense, perhaps this requirement in the Instrument is not that dissimilar from clause C18 in the Code which states that a technical assessment report must be used in deriving the valuation for an exploration property. However, the CIMVal Committee recently sent a letter to the CSA requesting that this provision be deleted from the Instrument, stating that valuation reports are distinct from technical assessment reports and should be dealt with in a separate code.

BIBLIOGRAPHY

BOTTRILL, TERENCE J., 1999. *A Contrary View*, in *Mining Standards Task Force - An Update*, Prospectors and Developers Association of Canada in cooperation with the Natural Resources and Energy Law Section of the Canadian Bar Association - Ontario: Toronto.

CARSON, JOHN, 1999. *Mining Standards Task Force: The Final Report and the Role of the TSE*, in *Mining Standards Task Force - An Update*, (Prospectors and Developers Association of Canada in cooperation with the Natural Resources and Energy Law Section of the Canadian Bar Association - Ontario: Toronto).

Code and Guidelines for Technical Assessment and/or Valuation of Mineral and Petroleum Assets and Mineral and Petroleum Securities for Independent Expert Reports (the VALMIN Code), March 24, 1998.

DEY, PETER, (1975). *Securities Reform in Ontario: The Securities Act, 1975*, 1 *Can.B.L.J.*.20.

ELLIS, TREVOR, 1999. *Recent Australian and Canadian Developments Affecting Mineral Valuation*, *American Institute of Mineral Appraisers Newsletter*, 4(3):1, 6-7

GILFILLAN, JOHN F., 1994. *Code and Guidelines for the Assessment and Valuation of Mineral Assets and Mineral Securities for Independent Expert Reports. (The Valmin Code).*, in *Mineral Valuation Methodologies Conference*, pp 11-16 (AusIMM/MICA: Sidney).

GILFILLAN, J., 1997. *Reporting Mineral Resources and Ore Reserves – The ASX, The JORC Code and The AusIMM: Are you a Competent Person?*, *The AusIMM Bulletin*, 5:pp.23.24.

GRACE, KEN, 1999. *The Qualified Person*, in *Mining Standards Task Force - An Update*,

Prospectors and Developers Association of Canada in cooperation with the Natural Resources and Energy Law Section of the Canadian Bar Association - Ontario: Toronto.

HALTON ASSOCIATION OF GEOSCIENTISTS, 1998. *Letter to the TSE/OSC Mining Standards Task Force: Comments on "Setting New Standards"*, Interim Report of the Mining Standards Task Force (Halton Association of Geoscientists)

HEIN, JOHN, 1994. *The Regulator's View of the Valuation of Mineral Assets in Expert Reports*, in *Mineral Valuation Methodologies Conference*, pp 287-292 (AusIMM/MICA: Sidney).

JENSEN, MAUREEN C., 1999. *Disclosure Requirements for Mining Companies*, in *Mining Standards Task Force - An Update*, (Prospectors and Developers Association of Canada in cooperation with the Natural Resources and Energy Law Section of the Canadian Bar Association - Ontario: Toronto).

JOINT ORE RESERVES COMMITTEE OF THE AUSTRALASIAN INSTITUTE OF MINING AND METALLURGY, AUSTRALIAN INSTITUTE OF GEOSCIENTISTS AND MINERALS COUNCIL OF AUSTRALIA (JORC), 1999. *Australian Code for Reporting of Mineral Resources and Ore Reserves (The JORC Code), 1999 Edition*.

LAWRENCE, MICHAEL J. AND DEWAR G.J.A., 1999. *Mineral Property Valuation, or 'What Number Did You Have in Mind?'*, in *PACRIM 99*, pp 13-27 (AusIMM: Bali, Indonesia).

LAWRENCE, MICHAEL J., 1997. *Project Evaluation Due Diligence – Lessons from the Busang Saga*, in *World Gold 97 Conference*, (Singapore).

LAWRENCE, MICHAEL J., 1999a. *Professionals Beware! An analysis of the TSE/OSC Mining Standards Task Force Report*, *Asian Journal of Mining*, April/May, pp.49-50.

LAWRENCE, MICHAEL J., 1999b. *Comment on Final Report of TSE/OSC Mining Standards Task Force*, *The AusIMM Bulletin*, No. 4, June, pp. 40-42.

LAWRENCE, MICHAEL J., 1999c. *Project Valuation Due Diligence: Advantages of the Australian System using AusIMM's VALMIN Code (1998)*, in *PDAC 1999 Annual Convention*, (PDAC: Toronto).

LAWRENCE, MICHAEL J., 2000a. *Project Valuation Due Diligence: Advantages of the Australian System using AusIMM's VALMIN Code (1998)*, in "Valuation 1 Session" *Mining Millennium 2000*, (PDAC/CIM: Toronto).

LAWRENCE, MICHAEL J., 2000b. *An Australian Perspective on Canadian Regulatory Initiatives in the Post Bre-X Era*, to be presented to "Rebuilding Investor Confidence: A Report Card" Forum (PDAC/CIM: Toronto).

LAWRENCE, MICHAEL J., HANCOCK, R.G. AND DEWAR G.J.A., 1996. *The Due Diligence Defence Against Personal Liability for Consultants*, in *Ethics, Liability and the Technical Expert*, pp 11-23 (AusIMM/MICA: Perth).

NATIONAL POLICY STATEMENT 22 — *Use of Information and Opinion Re Mining and Oil Properties by Registrants and Others*.

NATIONAL POLICY STATEMENT 2-A — *Guide for Mining Engineers, Geologists and Prospectors*. Notice 98/07/03b — *Notice of Proposed National Instrument 43-101 and Companion Policy 43-101CP -- Standards of Disclosure of Mineral Exploration and Development and Mining Properties and Rescission of National Policy Statement No. 2-A (1998)*, 21 O.S.C.B. 4160.

NOTICE 97/11/07A - NOTICE OF REQUEST FOR COMMENT - *Proposed Changes to the Definitions of "Material Fact" and "Material Change" under the Act in response to the Final Report of the Toronto Stock Exchange Committee on Corporate Disclosure* (1997), 20 O.S.C.B. 5681.

ROONEY, KEVIN, 1998. *Civil Liability for Continuous Disclosure - From Interim Report to Request for Comments*, Masters Thesis, LLM, Osgoode Law School, Toronto.

ROSE, P., 1996. *Managing the Risk of Professional Liability*, in *Ethics, Liability and the Technical Expert*, pp 25-29 (AusIMM/MICA: Perth).

SBURLATI, RENATO, 1996. *Experts' Reports in Prospectuses - A Regulator's Views*, *The AusIMM Bulletin*, 4:14-15.

Securities Act, S.O. 1966, c.142, subsection 141(d).

Securities Act, R.S.O. 1960, c.363, paragraph 69(1)(d).

Securities Act, R.S.O. 1950, c.351, paragraph 68(1)(d).

Securities Act, R.S.O. 1980, c.466, paragraphs 126(1)(d), 126(4)(a) and section 128.

Securities Act, R.S.O. 1970, c.426, paragraph 142(1)(d).

Securities Act, S.O. 1978, c.47, paragraphs 126(1)(d), 126(4)(a) and section 128.

Securities Act, R.S.O. 1990, c.S.5, paragraphs 130(1)(d), 130(4)(a) and section 132.

SHARWOOD, M. AND LOW, R., 1996. *Liability of Technical Professionals in the Mining Industry – The Lawyers' Perspective*, in *Ethics, Liability and the Technical Expert*, pp 31-59 (AusIMM/MICA: Perth).

THE ONTARIO SECURITIES COMMISSION, *Request for Comments: Civil Liability for Continuous Disclosure* (1998), 21 O.S.C.B. 3367.

TORONTO STOCK EXCHANGE, 1995. *Towards Improved Disclosure*, Background Papers of the Committee on Corporate Disclosure (Toronto Stock Exchange: Toronto).

TORONTO STOCK EXCHANGE, 1997a. *Final Report: Responsible Corporate Disclosure*, (Toronto Stock Exchange: Toronto).

TORONTO STOCK EXCHANGE, 1997b. *Responsible Corporate Disclosure: Comment Letters Received by the Committee on Corporate Disclosure*, (Toronto Stock Exchange: Toronto).

TORONTO STOCK EXCHANGE AND ONTARIO SECURITIES COMMISSION, 1999. *Mining Standards Task Force Final Report* (TSE Publications: Toronto).

WAKEFIELD, DONALD E., 1998. *Letter to the TSE/OSC Mining Standards Task Force: Comments - Interim Report* (Osler, Hoskin & Harcourt).