Class actions now in session

Vancouver — The numbers are sobering: A $4-billion class action lawsuit against **Kinross Gold** (K-T, KGC-N), a $1-billion claim against **Baffinland Iron Mines**, a $250-million claim against **Agnico-Eagle Mines** (AEM-T, AEM-N), a $66-million claim against **Eastern Platinum** (ELR-T), and a $50-million claim against **Canada Lithium** (CLQ-T), all in the past year.

Any eventual settlement will likely be for far less, but the high-profile claims are a stark reminder of the new legal reality for Canadian miners: that bad news followed by a big drop in the share price has a good chance of attracting a class action lawsuit.

With the exception of the Baffinland lawsuit, which relates to company's takeover process, the listed lawsuits are all known as "bill 198 actions" after the 2005 Ontario legislation that relaxed the rules on securities-based class actions. The key element of the bill was that it removed the need to prove that plaintiff shareholders had relied on misleading information when buying a stock, as is the case with civil claims. Instead, they only had to prove that misleading information existed. The bill, combined with updated class action legislation about the same time, opened the doors to the class action lawsuits mining companies are seeing today.

To avoid becoming a U.S.-style, sue-first, ask questions later system, the bill incorporated some barriers such as the need to have a judge agree that the case has some merit. The precedents set so far, however, point to a fairly low threshold of entry, with 35 "bill 198" actions launched between 2006 and 2011.

"The general view of class action practitioners is that it's now easier to commence a class action lawsuit than it ever was," says Alan Hutchison, a partner at Fraser Milner Casgrain who works in both securities and mining litigation.

In the world of mining, with reams of disclosure and forward looking statements, there is a lot of material in which to potentially find fault. Add to that the geologic complexity and operational risk of mining, and the deep pockets of many miners, and the industry makes for a compelling target for class action lawsuits. Between 1997 and 2011 the mining industry accounted for 18% of the 89 class action lawsuits filed, while in 2011 the industry was subject to 4 of the record 15 cases filed.

This year looks to be another busy one for the industry, with the high-profile Kinross suit, alleging the company made false and misleading statements related to its Tasiast mine in Mauritania, and the Agnico-Eagle lawsuit related to the write-down of its Globex mine in Quebec, already brought forth. As is generally the case, both companies have declined to comment on the matter.

André Durocher, a partner at Fasken Martineau, says that attempts in the U.S. to reign in class action lawsuits, combined with increased legal expertise on class actions in Canada, and of course the country's prominence in the industry, all makes for fertile grounds for class action lawsuits. He says the volatility of mining stocks make them particularly vulnerable.

“Let’s say you have bad news, and the stock reacts violently the next day, it makes for an ideal situation for someone to claim that the bad news has cost the client,” Durocher says.

Hutchison says that with the mining sector generally doing well over the past decade expectations have been heightened and people are taking gains for granted.

“Mining in general is a high risk, high reward investment,” Hutchison says, “but I think that people tend to forget the first part.”

Dimitri Lascaris, a partner at the Siskind law firm that has played a prominent role in brining class action cases forward in Canada, says the high number of mining lawsuits is inevitable given how predominant they are on Canada’s stock markets. That being said, he also thinks some industry practices have also contributed, and that disclosure standards could be improved.

“Sometimes companies make wildly optimistic projections they have no business making and they do it, frankly, to prop up their stock price,” Lascaris says. “I think there is a bit of a Wild West culture that still prevails in the mining industry.”

All three lawyers, however, say they’ve seen companies adapt better practices since the door was opened for class action lawsuits.

Hutchison says over the past five years there he has seen a greater emphasis on process. Companies are initiating more special board committees, using more of both inside and outside legal council, consulting with multiple fairness advisors, contracting external engineering firms, and generally relying more on experts.

“As long as the company has acted appropriately and relied on external advice from an expert in their field, that’s a compelling defence,” Hutchison says.

Durocher says that companies seem to have made a number of changes to corporate governance in anticipation of the 2005 changes, while taking ever more care with public disclosures like press releases.

“They tend to review press releases much more,” Durocher says. “They parse the statements with a heavier pen.”

Lascaris says that “companies are significantly more cautious about making aggressive, unrealistic projections about their performance. I think there was a lot of that going on before the law came into effect.”

As to the threat class actions pose to companies, settlements have so far been modest. **Bear Lake Gold** (BLG-V) settled for $1.3 million, **Orsu Metals**’ (OSU-T) for $2.2 million, Southwestern Resources for $15.5-million, and in perhaps the most high-profile yet **NovaGold Resources** (NG-T, NG-X) reached a global $28-million settlement in 2010 related to its halting work at the Galore Creek project.

Lascaris noted that the new law limits company liability to 5% of its market capitalization, even in cases of blatant fraud, though there is still the possibility of pursuing more in the civil courts. Director and officer insurance provides further buffering for a settlement, as well as funds to fight a lawsuit.

“Few if any cases will constitute an existential threat to a mining company,” Lascaris says.

But lawsuits still provide a significant distraction to management and often lead to negative publicity. Hutchison says that for those reasons, as well as to stave off further legal costs, companies almost always settle once the class action is certified.

“I think you’re finding that a lot of mining companies, even if they have a compelling defence, they’d prefer to settle rather than keep incurring costs and uncertainty,” Hutchison says.

With the legal framework still relatively untested however, there is still a fair bit of uncertainty as to where securities class actions could go in the future. There could be a trend towards even more lawsuits like in the U.S., where American firms were first to sue Kinross and Agnico-Eagle and have already launched lawsuits against **Nevsun Resources** (NSE-T, NSE-X) related to the drop in gold reserves at its Bisha mine. As claims amounts increase there could also be an increase in settlement amounts.

But for now, with significant risk involved in launching a plaintiff suit, legal firms will have to be selective in the cases they pursue. And the mining industry will have to continue to improve disclosures as the potential of a lawsuit could well increase as legal capacity and precedents increase.

But overall, Hutchison notes that most people in the industry are not altogether too concerned.

“Let’s face it, people in the mining industry are generally optimists,” Hutchison says, “most people are trying to build things, they’re not moving ahead on the expectation that something is going to go wrong.”