

Submission to the Canadian Securities Regulators Consultation

NI 43 – 401

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Justice and Corporate Accountability Project

Environmental Justice and Sustainability Clinic at Osgoode Hall Law School

Guatemala-Maritimes Breaking the Silence Network

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Thank you for the opportunity to comment on the disclosure requirements for mining companies relating to Indigenous peoples and to social and environmental conflicts in general.

In our view, the existing requirements in Form NI 43-101F are antiquated and fail to reflect current realities. There needs to be a requirement for more specific disclosure that goes beyond the current boiler plate clauses and there needs to be more rigorous enforcement by securities regulators.

I. Who we are

We are three organizations that have studied specific conflicts between Indigenous communities and mining companies and have experience in submitting complaints to securities regulators relating to the failure to disclose material information.

The Maritimes-Guatemala Breaking the Silence Network¹ (BTS) is a voluntary network of people in the Maritimes who began to organize in 1988 to support the efforts of Guatemalans struggling for political, social, and economic justice. The Justice and Corporate Accountability Project has submitted a number of disclosure complaints to securities regulators on our behalf relating to Tahoe Resources in Guatemala.

The [Environmental Justice and Sustainability Clinic](#)² (EJSC) at Osgoode Hall Law School works to advance environmental justice and sustainability in Canada by carrying out a variety of legal work on a *pro bono* basis for a variety of clients (individuals, communities, NGOs, municipalities, First Nations, social enterprises, etc.), often in cooperation with external public interest-oriented lawyers and legal service organizations. We filed a complaint to the Ontario Securities Commission in 2021 in relation to the failure of Noront Resources Ltd. to disclose Indigenous opposition to its proposed mining activities in northern Ontario.

The Justice and Corporate Accountability Project³ (JCAP) is an organization of volunteer law professors and lawyers who work with law students at Osgoode Hall Law School and UVic Faculty of Law to provide legal advice to communities in Latin America, Canada and Africa.

II. Why disclosure on social, environmental and Indigenous issues is needed

We have had the benefit of reviewing a number of the other submissions and note that of the people who commented on Indigenous, Social and Environmental issues, the vast majority felt that there needed to be more specific direction. On Social and Environmental Disclosure, of the 18 submissions that we identified, only five felt that the current wording in items 4 and 20 is adequate. Comments ranged from requiring more detailed disclosure to assuming that the item mandated more fulsome

* We wish to thank Grace Shin and Lo Stevenson for their research assistance.

¹ See breakingthesilenceblog.com/

² See ejsclinic.info.yorku.ca/

³ See <https://justice-project.org/>

disclosure than is enforced at the present. On Indigenous issues, all 17 submissions suggested that there needs to be specific disclosure, whether in Form 43 101F or in another document.

The academic research on these issues supports the need for change to the current disclosure requirements.

1. Disclosure is needed to protect investors

Business law professor Aaron Dhir states that corporate social disclosure “is integral to shielding investors from fraud and to capital markets efficiency. Information asymmetries may result in the incorrect pricing of securities and the practice of incomplete disclosure may serve to cloak malfeasance.”⁴

Investors also need information in order to be able to ask questions about issues that concern them. For example, law professor Barnali Choudhury finds from her research that “in addition to helping identify risks, social disclosure obligations better enable shareholders to engage with corporations to improve corporations’ performance of social issues.”⁵

2. Disclosure provides capital market benefits

According to Hans Bonde Christensen et al in a study for the European Corporate Governance Institute, “more and better disclosure can lead to tangible capital-market benefits in the form of improved liquidity, lower cost of capital, higher asset prices (or firm value) and potentially better corporate decisions.”⁶

In a study for the Harvard Business School Ioannis Ioannou et al find that the “net effect of mandating sustainability reporting is, on average, value-enhancing rather than value-destroying.”⁷ Likewise, Aneta Havlinova and Jiri Kukacka in an article for the Journal of Business Ethics on CSR conclude:

The results show a statistically and economically significant positive impact of CSR on companies’ stock market performance... the results thus support the broad hypothesis of CSR proponents that socially responsible activities of companies result in outcomes such as

⁴ Aaron A Dhir, “Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law” (2008) 47 Can Bus LJ 435 at 461 online: *SSRN* <ssrn.com/abstract=1263925>.

⁵ Barnali Choudhury, “Social Disclosure” (2016) 13:1 Berkeley Bus LJ 185 at 198 online: *SSRN* <ssrn.com/abstract=2778132>.

⁶ Hans Blonde Christensen, Luzi Hail & Christian Leuz, “Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review” (2021) European Corporate Governance Institute Finance Working Paper No 623/2019 at 18 online: *SSRN* <ssrn.com/abstract=3427748>.

⁷ Ioannis Ioannou & George Serafeim, “The Consequences of Mandatory Corporate Sustainability Reporting” (2017) Harvard Business School Research Working Paper No 11-100 at 6 online: *SSRN* <ssrn.com/abstract=1799589>.

customer loyalty, employee satisfaction, and lower litigation charges, which is in turn reflected in the financial results of the company.⁸

III. What changes need to be made?

For the changes to be effective, the requirements must be clear, reporting must be mandatory, and securities regulators must take action.

1. Disclosure must be detailed and clear

Hans Bonde Christenson et al point out the dangers of “Boilerplate language as an avoidance strategy”⁹ and argue that there needs to be improved standards which prescribe “what and how firms have to provide information”¹⁰ that are needed.

UNSW law professor Justine Nolan argues that “[T]he law should include clear guidance for companies on what and how they report, to enable the production of consistent and comparable reports that can be measured and improvements tracked over time.”¹¹

2. Disclosure must be mandatory

Relying on voluntary disclosures that are not scrutinized by a regulatory body are not sufficient. Business law professor Aaron Dhir states “regulatory requirements are the paramount determinant for corporations in considering whether to move towards the adoption of social reporting.”¹²

Hans Bonde Christenson et al find that there are benefits to CSR disclosure for capital markets but that the “[r]eal effects are more likely to follow from a reporting mandate than from voluntary disclosures.”¹³

3. Disclosure obligations must be enforced

It goes without saying that enforcement is needed to ensure compliance, but it also serves to enhance fair market practices. As Justine Nolan writes, enforcement will “help ensure that those businesses that do disclose in some detail are not punished in the market-place for doing so, as it will ‘level the playing field’ of disclosure.”¹⁴

⁸ Aneta Havlinova & Jiri Kukacka, “Corporate Social Responsibility and Stock Prices After the Financial Crisis: The Role of Strategic CSR Activities” (2021) *J Bus Ethics* at 31 online: *SSRN* <ssrn.com/abstract=3380881>.

⁹ Hans Blonde Christensen, Luzi Hail & Christian Leuz, “Economic Analysis of Widespread Adoption of CSR and Sustainability Reporting Standards” (2018) at 10 online: *SSRN* <ssrn.com/abstract=3315673>.

¹⁰ *Ibid.*

¹¹ Justine Nolan, “Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights” (2018) *U New South Wales Law Research Paper No 18-62* at 1 online: *SSRN* <ssrn.com/abstract=3251087>.

¹² Dhir, *supra* note 4 at 441.

¹³ Christensen, Hail & Leuz 2021, *supra* note 6 at 89.

¹⁴ Nolan, *supra* note 11 at 16.

IV. Responses to consultation questions

In the following sections, we provide responses to your specific questions. In our answers, we rely on the more detailed case studies submitted to you by JCAP in “Social Disclosure and Share Value: Empirical Data on (Non-) Disclosure of Information Related to Violence and Lack of Indigenous Consent.”¹⁵ .

IV A. Environmental and Social Disclosures

Consultation Questions 28 and 29

28. Do you think the current environmental disclosure requirements under Items 4 and 20 of the Form are adequate to allow investors to make informed investment decisions? Why or why not?

29. Do you think the current social disclosure requirements under Items 4 and 20 of the Form are adequate to allow investors to make informed investment decisions? Why or why not?

There are three problems with the current disclosure requirements:

- (i) the current requirements are too general and easily addressed with meaningless boiler plate clauses;
- (ii) there is very little disclosure of violence and social conflict related to the mines; and
- (iii) the lack of disclosure harms shareholders because once the problems become public, the share price drops.

(i) The current requirements are too general and easily addressed with meaningless boiler plate clauses

The current requirements provide only general guidance that could easily be fulfilled by including key words in a boiler plate clause on “risks”. For example, attached as Appendix A is a two-page boiler plate from Tahoe Resources on risks associated with their Escobal mine in Guatemala. The boiler plate mentions the usual risks but fails to identify specific Issues within the corporation’s knowledge, such as their decision to sue the government of Guatemala in light of severe protests that were impeding mining operations.

¹⁵ Shin Imai & Sarah-Grace Ross, [“Social Disclosure and Share Value: Empirical Data on \(Non-\) Disclosure of Information Related to Violence and Lack of Indigenous Consent”](#)

(ii) *There is very little disclosure of violence and social conflict related to the mines*

In 2017, JCAP released *The Canada Brand: Violence and Canadian Mining Companies in Latin America*.¹⁶ This study tracked incidents of violence at Canadian mining projects in Latin America that were reported in the media and in blog posts over a 15-year period. The report only includes incidents that could be corroborated by at least two independent sources and does not attribute fault for the violence. We found:

- 28 Canadian companies were involved in violent incidents;
- 44 deaths, 30 of which we classify as “targeted”;
- 403 injuries, 363 of which occurred during protests and confrontations;
- 709 cases of “criminalization”, including legal complaints, arrests, detentions and charges; and,
- a widespread geographical distribution of documented violence: deaths occurred in 11 countries, injuries were suffered in 13 countries, and criminalization occurred in 12 countries.

The second part of the *Canada Brand* report documented the responses by mining companies to these incidents in their Annual Information Forms, quarterly Management Discussion and Analysis reports continuous disclosure documents, and press releases. Our research showed that Canadian companies listed on the Toronto Stock Exchange largely ignored these incidents. Between 2000-2015:

- publicly listed companies reported only 24.2% of the deaths and 12.3% of the injuries listed in this report; and,
- larger companies tended to report incidents in general terms, using blanket statements, whereas smaller companies tended to report the incidents in more detail.

These findings are consistent with an analysis conducted by the Shift Project, that analyzed the human rights disclosures of 18 of the top TSX-listed Canadian mining companies, and found that the majority were “failing to communicate a comprehensive narrative around human rights, cherry-picking instead a limited set of issues.”¹⁷

¹⁶ Justice and Corporate Accountability Project, “The ‘Canada Brand’: Violence and Canadian Mining Companies in Latin America” (2017) Osgoode Leg Studies Research Paper No 17/2017, online: *SSRN* <ssrn.com/abstract=2886584>.

¹⁷ Erika Piquero, “Most Canadian Mining Companies are Lagging When It Comes to Human Rights Reporting. Here’s Why.” (2019), online: *The Shift* <shiftproject.org/most-canadian-mining-companies-are-lagging-when-it-comes-to-human-rights-reporting-heres-why/>.

(iii) the lack of disclosure harms shareholders because once the problems become public, the share price drops.

The disclosure of violence and environmental harm is enough of a concern to enough investors to impact the share price. In the JCAP report, “Social Disclosure and Share Value: Empirical Data on (Non-) Disclosure of Information Related to Violence and Lack of Indigenous Consent”,¹⁸ we found four indicia that demonstrate that the information disclosed in our complaint (but not disclosed by the companies) was important material information relating to the health of the company.

1. Media coverage of JCAP’s complaints were followed by a drop in the share price.
2. Institutional investors divested specifically because of concerns with the human rights record of the mine.
3. A subsequent owner of a mine immediately addressed concerns raised in our complaint.
4. Shareholders began class action law suits based on a company’s failure to disclose material information.

The six complaints analyzed in the report make up a small sample, but impact of social conflicts on share prices is confirmed by a much larger study by professors from Oxford and Monash Universities.¹⁹ This study looked at 354 killings over 20 years, mostly around extractive projects, and estimated a cumulative median loss of over USD \$100 million in the 10 days following an assassination.

Consultation Question 30

30. Should disclosure of community consultations be required in all stages of technical reports, including reports for early stage exploration properties?

There should be disclosure of community consultations and community concerns from the earliest stages – even before exploration has begun. Such early consultation is now acknowledged as an international best practice. See, for example, *The IFC Strategic Approach to Early Stakeholder*

¹⁸ Imai & Ross, *supra* note 15.

¹⁹ David Kreitmeir, Nathan Lane & Paul Raschky, “The Value of Names - Civil Society, Information, and Governing Multinationals on the Global Periphery” (2020), online: *SSRN* <ssrn.com/abstract=3751162>.

*Engagement*²⁰ and the *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*²¹ which set out the expectations of the World Bank and the Organization for Economic Co-operation and Development for extractive companies to engage with communities.

In a study released by the Harvard Kennedy School in 2014, the authors interviewed top executives in mining companies and found that early engagement was crucial to avoid costs later on.

Interviewees observed that effective management of community expectations requires **“frontloading” the company’s investment in community relations** ... experienced interviewees emphasized that it only gets more expensive to try to “buy support” later in the project lifecycle and that this almost never leads to sustainable relationships.²²

In evaluating a company, then, it would be important for investors to know whether the company was following international best practices for community engagement.

IV B. Rights of Indigenous People

Consultation Questions 31 and 32

31. What specific disclosures should be mandatory in a technical report in order for investors to fully understand and appreciate the risks and uncertainties that arise as a result of the rights of Indigenous Peoples with respect to a mineral project?

32. What specific disclosures should be mandatory in a technical report in order for investors to fully understand and appreciate all significant risks and uncertainties related to the relationship of the issuer with any Indigenous Peoples on whose traditional territory the mineral project lies?

Whatever one’s views on the rights of Indigenous peoples, it would be folly to argue that those rights are irrelevant to the success of a mining project. In Canada, one only needs to look at the downfall of the Northern Gateway Pipeline or the Transmountain pipeline, and internationally, the spectacular closing of Barrick Gold’s \$8.5 billion Pascua Lama mine in Chile²³ to see the immense costs associated with the failure to respect the rights of Indigenous peoples.

²⁰ International Finance Corporation, “A Strategic Approach to Early Stakeholder Engagement” (2014), online (pdf): *World Bank* <<https://documents1.worldbank.org/curated/en/784051524469298172/pdf/125556-WP-PUBLIC-FINAL-IFC-131208-ESSE-Handbook-web-1013.pdf>>.

²¹ Organization for Economic Cooperation and Development, “OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector” (2017), online (pdf): *OECD* <doi.org/10.1787/9789264252462-en>.

²² Rachel Davis & Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector” (2014), CSR Initiative at the Harvard Kennedy School, at 10 online: *The Shift* <<https://shiftproject.org/resource/costs-of-company-community-conflict-in-the-extractive-sector/>>.

²³ Reuters, “Chile top court ratifies closure of Canadian-owned Pascua Lama project” July 14, 2022. <https://www.mining.com/web/chile-top-court-ratifies-closure-of-canadian-owned-pascua-lama-project/>

JCAP's report to this consultation documents a decline in share prices when media reported on the failure to disclose opposition from Indigenous peoples in the Pebble Mine project in Alaska and Tahoe's Escobal mine in Guatemala.

Among the specific issues that should be disclosed are

- any significant and sustained opposition to mining projects voiced by Indigenous peoples in the region;
- any threats of disruption, action or blockade by Indigenous peoples that could reasonably be expected to delay a project;
- disputed rights to land;
- which groups of Indigenous people are favourable or not favourable to mine;
- any political changes in the region that are likely to impact the degree of support for a mining project;
- degree of engagement with Indigenous peoples;
- description of specific conflicts related to the mine – including violence and killing – and how the mine addressed those issues;
- whether there has been free, prior, informed, consent; and
- whether there are any agreements with Indigenous peoples.

Appendix 1

Example of Boiler Plate Clauses on Risks

Forward-looking Statements and Risks from Tahoe's 2014 Annual Information Report

FORWARD-LOOKING STATEMENTS

This AIF contains “forward-looking information” within the meaning of applicable Canadian securities legislation and “forward-looking statements” within the meaning of United States Private Securities Litigation Reform Act of 1995 (collectively referred to as “forward-looking information”). Wherever possible, words such as “plans”, “expects”, or “does not expect”, “budget”, “scheduled”, “estimates”, “forecasts”, “anticipate” or “does not anticipate”, “believe”, “intend” and similar expressions or statements that certain actions, events or results “may”, “could”, “would”, “might” or “will” be taken, occur or be achieved, have been used to identify forward-looking information.

Forward-looking information in this AIF may include, but is not limited to, the following: statements related to our liquidity position, the intention to repay outstanding debt and the sufficiency of cash from operations to fund such repayment; expected working capital requirements and the sufficiency of capital resources; the completion of the business combination with Rio Alto and the expected timing thereof; the availability and sufficiency of power for operations; the assessment of future reclamation obligations; exploration and review of prospective mineral acquisitions; our expected community outreach and related activities for 2015; statements relating to changes in Guatemalan mining laws and regulations and the timing and results of court proceedings; the estimation of Mineral Resources and Mineral Reserves; our plan to continue the exploration, permitting, engineering, development and operation of the Escobal property and Escobal mine; our mine development plan; further development of alternative power sources at the Escobal mine; in regards to the 4500 tpd scenario, statements relating to upgrades and modifications, project costs, economics, production and timing; the acquisition of additional mineral resource interests in the Americas; future exploration and development activities; and the timing and receipt of approvals, consents and permits under applicable legislation.

Forward-looking information is based on the reasonable assumptions, estimates, analysis and opinions made in light of our experience and our perception of trends, current conditions and expected developments, as well as other factors that we believe to be relevant and reasonable in the circumstances at the date that such statements are made, but which may prove to be incorrect. We believe that the assumptions and expectations reflected in such forward-looking information are reasonable. Assumptions have been made regarding, among other things: our ability to carry on exploration and development activities; the timely receipt of required approvals, including the approvals required for the business combination with Rio Alto; the price of silver and other metals; our ability to operate in a safe, efficient and effective manner; the successful closing of the business combination with Rio Alto; and our ability to obtain financing as and when required and on reasonable terms. Readers are cautioned that the foregoing list is not exhaustive of all factors and assumptions which may have been used.

Forward-looking information is subject to known and unknown risks, uncertainties and other factors that may cause actual results to be materially different from those expressed or implied by such forward-looking information, including risks associated with our dependence on the Escobal mine and our limited operating and production history, risks associated with the fluctuation of the price of silver and other metals, the risk of civil unrest and political instability in Guatemala, the risk that permits to maintain and/or expand the Escobal mine cannot be retained or obtained, risks associated with the availability of additional funding as and when required, overestimation of Mineral Resources and Mineral Reserves, geologic, hydrological, and geotechnical risks, infrastructure risks, inflation risks, governmental regulation risks, security risks including those along the concentrate transport route, environmental risks and hazards, insured and uninsured risks, land title risks, risks associated with competition, risks associated with currency fluctuations, labour and employment risks, risks associated with dependence on key management personnel and executives, legislative, judicial and

litigation risks, the risk that the dividend program may not be continued, risks associated with the repatriation of earnings, risks of negative operating cash flow, risks associated with the interests of certain directors in other mining projects, risks associated with dilution, risks associated with stock exchange prices and risks associated with effecting service of process and enforcing judgments.

This forward-looking information is based on our reasonable beliefs, expectations and opinions on the date of this AIF. Although we have attempted to identify important factors that could cause actual results to differ materially from those contained in forward-looking information, there may be other factors that cause results not to be as anticipated, estimated or intended. There is no assurance that such information will prove to be accurate, as actual results and future events could differ materially from those anticipated in such information. Accordingly, readers should not place undue reliance on forward-looking information. We do not undertake to update any forward-looking information, except as, and to the extent required by, applicable securities laws.

RISKS RELATING TO OUR BUSINESS

Dependence on the Escobal Mine

The Escobal mine is currently the Company's sole operation. As a result, unless we acquire additional property interests, any adverse development affecting the Escobal mine could have a material adverse effect upon the Company and would materially and adversely affect the potential production of Mineral Reserves, profitability, financial performance and results of operations of the Company. Ongoing development and operation of the Escobal mine depends upon Tahoe's ability to consistently mine to design parameters and to process mined material at approximate design throughput rates. The long-term commercial viability of the Escobal mine is also dependent upon a number of factors, some of which relate to the particular attributes of the deposit (such as size, grade and proximity to infrastructure), metal prices and government regulations, including regulations relating to royalties, allowable production, importing and exporting of minerals and environmental protection. Most of the above factors are beyond our control. As a result, there can be no assurance that any design will succeed in achieving its stated goals under all potential future conditions. Failure to do so will have a material adverse impact on our operations and potential future profitability.

Operations in Guatemala

The Escobal mine is located in Guatemala which has a history of political unrest. Guatemala suffered an armed conflict for 36 years, which was finally resolved through a peace agreement reached with the country's internal revolutionary movement in 1996. The last political crisis in Guatemala occurred in 1983 and constitutional government was not restored until 1985. Renewed political unrest or a political crisis in Guatemala could adversely affect our business and results of operations.

Guatemala suffers from social problems such as a high crime rate and uncertain land tenure for many indigenous people, which could adversely affect the Escobal mine. Such adverse effects could result from the efforts of third parties to manipulate local populations into encroaching on the Escobal mine land, challenging the boundaries of such land, impeding Escobal mine activities through roadblocks or other public protests or attacks against Escobal mine assets or personnel.

Our business may be exposed to a number of risks and uncertainties, including terrorism and hostage taking, military repression, extortion, expropriation or nationalization without adequate compensation, labour unrest, high rates of inflation, changes to royalty and tax regimes, extreme fluctuations in currency exchange rates, volatile local, political and economic developments, difficulty with understanding and complying with the regulatory and legal framework respecting the ownership and maintenance of mineral properties, surface rights, mines and mining operations, and difficulty obtaining key equipment and components for equipment.

Appendix 2

Relevant Excerpts from Form 43-101F1 Technical Report

Item 4: Property Description and Location - To the extent applicable, describe

- (a) the area of the property in hectares or other appropriate units;
- (b) the location, reported by an easily recognizable geographic and grid location system;
- (c) the type of mineral tenure (claim, licence, lease, etc.) and the identifying name or number of each;
- (d) the nature and extent of the issuer's title to, or interest in, the property including surface rights, legal access, the obligations that must be met to retain the property, and the expiration date of claims, licences or other property tenure rights;
- (e) to the extent known, the terms of any royalties, back-in rights, payments, or other agreements and encumbrances to which the property is subject;
- (f) to the extent known, all environmental liabilities to which the property is subject;
- (g) to the extent known, the permits that must be acquired to conduct the work proposed for the property, and if the permits have been obtained; and

to the extent known, any other significant factors and risks that may affect access, title, or the right or ability to perform work on the property.

Item 20 Environmental Studies, Permitting and Social or Community Impact - Discuss reasonably available information on environmental, permitting and social or community factors related to the project. Consider and, where relevant, include

- (a) a summary of the results of any environmental studies and a discussion of any known environmental issues that could materially impact the issuer's ability to extract the mineral resources or mineral reserves;
- (b) requirements and plans for waste and tailings disposal, site monitoring and water management both during operations and post mine closure;
- (c) project permitting requirements, the status of any permit applications and any known requirements to post performance or reclamation bonds;
- (d) a discussion of any potential social or community related requirements and plans for the project and the status of any negotiations or agreements with local communities; and
- (e) to the extent known, any other significant factors and risks that may affect access, title, or the right or ability to perform work on the property