First Nations FINANCIAL MANAGEMENT BOARD | CONSEIL DE GESTION FINANCIÈRE des Premières Nations

September 12, 2022

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Nunavut Securities Office

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Via email: ccollins@bcsc.bc.ca

Dear Provincial and Territorial Securities Regulatory Authorities,

Re: CSA Consultation Paper 43-101
Consultation on National Instrument 43-101
Standards of Disclosure for Mineral Projects

The First Nations Financial Management Board is pleased to provide this submission on CSA Consultation Paper 43-101 *Consultation on National Instrument 43-101 Standards of Disclosure for Mineral Projects* ("Consultation Paper") issued April 14, 2022 by the Canadian Securities Administrators ("CSA") on behalf of Canadian provincial and territorial securities regulatory authorities.

The First Nations Financial Management Board ("FMB") is a board established under the federal *First Nations Fiscal Management Act* ("FMA").

By way of background, the First Nations Financial Management Board ("FMB") is one of three Indigenous-led institutions established through the FMA. The statutory mandate of the FMB includes assisting "First Nations in the development, implementation and improvement of financial relationships

with financial institutions, business partners and other governments, to enable the economic and social development of First Nations".[1]

It is entirely optional for First Nations to work with the FMA institutions. As of June 2022, 325 First Nations across Canada have chosen to be scheduled to the Act. Data indicates that, with the support of these institutions, First Nations are creating healthier communities, reducing the need for federal support, and promoting the development of regional economies.

In short, our organizations are supporting First Nations in moving from managing poverty to managing strong, sustainable economies.

The FMB has built a highly productive relationship with the federal Departments of Crown-Indigenous Relations and Northern Affairs and Indigenous Services, as our objectives and plans often align. In addition, the FMB is increasingly being asked to take on a role as a thought-leader on Indigenous economic development and Indigenous involvement within the private sector. This includes our work with CPA Canada, International Financial Reporting Standards, and the development of environment, social and governance ("ESG") standards with the Montreal office of the International Sustainability Standards Board. We are undertaking numerous initiatives to support First Nations in advancing self-determination and economic reconciliation.

As you know, the FMB provided submissions to the CSA dated September 2, 2021, on the general need for Indigenous consultation on ESG and diversity regulations and the need for Indigenous representation in securities regulators and dated February 16, 2022 on proposed National Instrument 51-107 *Disclosure of Climate-related Matters*. We are disappointed there has not been action on matters raised in our submissions. As set out in our February submission, the CSA is required to consult and cooperate in good faith with Indigenous peoples and their representative institutions on legislation and administrative measures that affect them in compliance with Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration").[2]

Key Points of Our Feedback

With the adoption and commitment to implementation of the UN Declaration by the government of Canada and in the premier exploration and mining Crown jurisdiction in Canada, that being the province of British Columbia, the UN Declaration is, in our view, in effect in all fourteen Crown jurisdictions. The CSA's thirteen constituent securities regulatory authorities, as agents of the Crown, are therefore under an obligation to act in conformance with the UN Declaration.

The process of preparing the Consultation Paper and obtaining feedback from Indigenous peoples, in particular Indigenous rights holders, appears to have not been carried out by the CSA. Therefore, by extension, the CSA's thirteen constituent securities regulatory authorities have not conformed to article 19 of the UN Declaration which states:

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[1] First Nations Fiscal Management Act, SC 2005, c. 9, s. 49(c); see: https://laws-lois.justice.gc.ca/eng/acts/F-11.67/.

[2] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement; also see generally: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.

If we are incorrect, and the CSA, and thus its provincial and territorial members, have in fact consulted and cooperated with Indigenous peoples, in particular Indigenous rights holders impacted or potentially impacted by mineral exploration and mining, on preparation of the Consultation Paper and in obtaining feedback from Indigenous peoples, we respectfully ask that you provide us details of such consultation and cooperation.

We note there are no Indigenous peoples in senior leadership roles in federally incorporated TSX-V issuers. There is an urgent need for reporting on Indigenous diversity, equity and inclusion, and cultural competency, by exploration and mining issuers.

In reviewing our submission, we ask the CSA to consider the following.

- Lands and minerals are finite and subject to pre-existing aboriginal and inherent rights and title of First Nations. Issuers must disclose the scope and nature of these rights and title in the context of their properties as part of their continuous disclosure obligations and in technical reports.

- Indigenous peoples and the UN Declaration are, by definition, material to the majority of mineral projects. *National Instrument 43-101 Standards of Disclosure for Mineral Projects* ("NI 43-101") must include issuer disclosure of clear and accurate information on the scope and nature of Indigenous rights and title regarding mineral projects. Disclosure must include whether an agreement has been entered into between the issuer and the First Nations including disclosure of key items such as whether free, prior and informed consent has been obtained or a pathway has been developed and agreed to for obtaining consent.

- The process of the CSA and securities regulatory authorities to amend NI 43-101 and Form 43-101F1 must be inclusive, requiring consultation with First Nations as rights and title holders and engagement of First Nations organizations, such as the FMB.

Context

First Nations are one of three aboriginal peoples currently recognized by the Crown in s. 35 of the *Constitution Act, 1982*[2] as holding aboriginal and treaty rights. In Canadian legal and non-legal parlance, the use of "aboriginal" has given way to "Indigenous" much in the same manner as "Indian" (used in s. 35) has given way to "First Nation". In addition to *aboriginal* and *treaty* rights Indigenous peoples also hold *inherent* rights. Inherent rights are the rights of First Nations existing at the time of contact by European nations (principally England and France) and continuing to present day. An example of an inherent right is the right of self-determination.

The relationship of Crown-defined aboriginal rights on the one hand (in decisions of the Supreme Court of Canada) and pre-existing and continuing Indigenous inherent rights on the other hand is

[2] Part 2 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: https://laws-lois.justice.gc.ca/eng/const/page-13.html#docCont.

complex. The Indigenous-Crown relationship is not confined to the metes and bounds of the common law. The relationship also includes a number of binding international legal instruments and customary international law. The UN Declaration has been supported by a large majority of nation states who are members of the United Nations General Assembly. Canada is such a supporting nation state. In 2016 the government of Canada endorsed the UN Declaration "without qualification and committed to its full and effective implementation".[3] With the adoption of the UN Declaration into Canadian domestic legislation in recent years by Canada and British Columbia (with commitments from other jurisdictions such as the Northwest Territories[4]), Indigenous peoples with ancestral lands in Canada view the UN Declaration as customary international law.

For thousands of years prior to contact, First Nations had vibrant legal, social and economic systems. Their culture and customs are intimately linked to their holistic view of the world around them. Land, and what exists on and within the land, was not something to be owned, rather it was something to be shared. The concept of owning "title" to land did not exist in the lexicon of First Nations. Land ownership, that is possession to the exclusion of all others, was not part of the Indigenous nations' mindset. This mindset did not comprehend, much less appreciate the view of land held by Europeans where possession, absolute control and ownership are the foundation of their societies.

The core Indigenous value of sharing was extended to non-Indigenous peoples, including the English and the French, particularly with development of natural resources in the 1700s as evidenced, in part, with the Royal Proclamation of 1763.[5] This sharing was recorded in treaties and through economic alliances, such as with the Hudson Bay Company with the fur trade, and benefited both Indigenous peoples and Europeans.

However, this all unravelled by the end of the 18th century when the military dominance of the English and French dispossessed First Nations of their lands and resources. This was further exacerbated by colonial authorities, along with settlers, through their actions ignoring treaties, engaging in outright theft of land, confining First Nations to reserves, attempting to eradicate First Nations' culture by banning cultural practices such as potlaches and sundances, and through establishment of institutions such as residential schools. As we are sadly aware, the residential school system was a weapon of assimilation, as the Truth and Reconciliation Commission of Canada determined, amounting to cultural genocide.

With s. 35 of the *Constitution Act, 1982*, a series of Supreme Court of Canada decisions in the 1990s and 2000s set the framework for defining the scope and nature of aboriginal rights. The *Delgamuukw*[6] and *Tsilhqot'in*[7] decisions in particular confirmed that aboriginal rights included title. That is, title to land, title to resources (including minerals) and the need for Indigenous consent prior to accessing such land and extracting resources. The Crown's view, albeit, was incorrect when it came to land and resources because it asserted all Indigenous lands and resources were subject to Crown jurisdiction and authority.

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[3] See generally: https://www.canada.ca/en/department-justice/news/2020/12/government-of-canada-introduces-legislation-respecting-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html.
[4] https://www.eia.gov.nt.ca/en/gnwt-mandate-2020-2023/united-nations-declaration-rights-indigenous-peoples-undrip.
[5] George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No. 1: see generally, https://www.rcaanc-cirnac.gc.ca/eng/1370355181092/1607905122267.
[6] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do.
[7] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

Adding to the judicial definition of consent in present day Canada is the UN Declaration which views Indigenous consent through the lens of human rights and the minimum requirement of free, prior and informed consent in the "development, utilization and exploitation" of mineral resources.[8] The UN Declaration, an international human rights instrument, is one that Canada and increasingly its provinces and territories have chosen to embrace and implement.

Without land First Nations cannot practice their culture, and they cannot survive, much less thrive, economically. Without land, they are wards of the state. The Consultation Paper is timely as it coincides with Canadian acceptance of the UN Declaration. The entire securities regulatory framework for exploration and mining, and indeed oil and gas and renewable energy, is dependent on the availability and access of land to the exclusion of all others. Land and minerals are finite and are subject to pre-existing aboriginal and inherent rights and title of First Nations. Reporting and non-reporting issuers need to disclose that reality in their continuous disclosure materials. A handful of reporting issuers with mineral projects do make positive statements in recognizing aboriginal and inherent rights and title and free, prior, and informed consent.[9]

We urge the CSA to review the Report of the Royal Commission on Aboriginal Peoples.[10] In particular Volume 2, Part 4 of the Report, which deals with lands and resources. While the Report was released in 1996 it is as relevant today as it was then. Perhaps more so in 2022 with the evolving jurisprudence and emerging implementation of the rights recognized in the UN Declaration. As set out in the UN Declaration, these rights "constitute the minimum standards for the survival, dignity and well-being of all Indigenous peoples of the world".[11] The UN Declaration has started its journey of implementation into Canadian law with the passage in 2021 of the *United Nations Declaration on the Rights of Indigenous Peoples Act*,[12] and in British Columbia with the 2019 *Declaration on the Rights of Indigenous Peoples Act* ("BC Declaration Act").[13] Jurisdictions such as the Yukon do not have specific UN Declaration implementation legislation, opting for an *ad hoc* approach for alignment of Crown laws. In 2021 the government of the Yukon commenced a legislative repeal and replacement process of its exploration and mining legislation under the Yukon Mineral Development Strategy.[14]

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[8] Article 32(2) of the UN Declaration: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[9] "First Tellurium proudly adheres to and supports the principles and rights set out in the United Nations Declaration on the Rights of Indigenous Peoples and in particular the fundamental proposition of free, prior and informed consent."; see: https://firsttellurium.com/news-media/news/2022/scientific-report-published-by-the-university-of-british-columbia-okanagan-shows-significant-performance-by-adding-tellurium-to-multiple-battery-types.

[10] The webpage for the Report of the Royal Commission on Aboriginal Peoples is: https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx and for the Report's Volume 2, in particular Part 4 commencing at page 415: http://data2.archives.ca/e/e448/e011188230-02.pdf.

[11] UN Declaration Article 43.

[12] https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html.

[13] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044; generally see: https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples.

[14] https://yukon.ca/en/yukon-mineral-development-strategy-and-recommendations.

Reconciliation between the exploration and mining industry's need to access land on the one hand versus the rights and interests of First Nations on the other hand is a tall order by any measure. There are examples where First Nations interests, including their inherent rights and title gifted by the Creator and land resources provided by Mother Earth, and aboriginal rights and title unilaterally determined by the Crown, are reconciled with the interests of exploration and mining industry and the Crown. That is, a reconciliation of Indigenous sovereignty over land and minerals and the asserted sovereignty of the Crown. But such examples are rare. The consent-based decision-making agreement pursuant to the BC Declaration Act between the Tahltan Nation and the government of British Columbia in June 2022 involving the Eskay Creek mine is one.[15] Another example is the now expired consent agreement between the Kaska Nation and the government of the Yukon in 2003.[16] These examples, we believe, must inform the CSA when revising provisions of NI 43-101 that deal directly or indirectly with the rights of Indigenous peoples.

Amendments to NI 43-101 must consider the Indigenous perspective. The Indigenous perspective is that for First Nations the land has always been theirs. It is their land to share. While some Indigenous lands in what is now Canada have been ceded by treaty or other forms of agreements, those instruments have more often been honoured in the breach than observance by the Crown.[17]

Relevant to our submission on NI 43-101 is the FMB mandate to enable the economic and social development of First Nations. Such development is necessarily reliant on land and resources, including minerals. Social and economic development of First Nations requires clarity of rights and interests as between Indigenous peoples, the Crown and the exploration and mining sector. We encourage you to review documents supporting the RoadMap Project.[18] The RoadMap Project is a practical and optional framework to advance Indigenous economic reconciliation consistent with the UN Declaration. The FMB, the First Nations Tax Commission[19] and the First Nations Finance Authority[20] are drivers behind the project.

Feedback

Introduction

The Consultation Paper states information gathered will assist the CSA, in part, "in considering ways to update and enhance current mineral disclosure requirements to provide investors with more relevant and improved disclosure". Since 2011, the CSA Mining Reviews have identified five broad areas of deficiencies in mineral project disclosures. Relevant to the FMB are deficiencies related to "inadequate disclosure of all business risks related to mineral projects". Specifically, the lack of disclosure, or

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[15] https://news.gov.bc.ca/releases/2022PREM0034-000899.
[16] See the report, *Indigenous Sovereignty: Consent for Mining on Indigenous Lands*, the BC First Nations Energy and Mining Council, January 2022 at page 19 and footnote 37 citing s. 3.3 of the bi-lateral agreement between the Kaska Nation and the government of the Yukon; online at: https://fnemc.ca/2022/01/25/mining-and-consent/.
[17] E.g.; see the 2021 Supreme Court of British Columbia decision of *Yahey* v *British Columbia* https://canlii.ca/t/jgpbr.
[18] https://fnfmb.com/en/leadership/roadmap.
[19] https://fntc.ca.
[20] https://www.fnfa.ca/en/.

inadequate disclosure, on matters involving Indigenous peoples' interests including rights and title related to mineral projects located in Canada.

Our submission focuses on Consultation Paper item J. Rights of Indigenous Peoples. However, we also provide feedback on three other Consultation Paper items:

A. Improvement and Modernization of NI 43-101,
F. Current Personal Inspections, and
I. Environmental and Social Disclosure.

General Feedback

NI 43-101 does not mention Indigenous peoples or the UN Declaration. In jurisdictions such as British Columbia the government must align provincial laws (statutes and regulations and their supporting policies)[21] through a multi-year action plan[22] pursuant to the BC Declaration Act.[23] The government of British Columbia's action plan includes modernization of the *Mineral Tenure Act* ("MTA"),[24] which establishes an online title registry where Crown mineral titles are registered, without notification, consultation or consent of impacted First Nations. This title registration process uses the antiquated free entry system.[25]

With the 2021 passage of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, the government of Canada embarked on a similar effort to align its laws with the UN Declaration. There are various legislative initiatives underway in other provincial and territorial Crown jurisdictions to implement the UN Declaration. For example, the government of the Yukon is in the process of reviewing and replacing its exploration and mining legislation to achieve alignment with the UN Declaration. Presumably the government of the Yukon will review its securities legislation through the lens of the UN Declaration and Indigenous peoples with ancestral lands in what is now the Yukon.

Unless the UN Declaration is scoped into an amended NI 43-101, including those elements of aboriginal and inherent rights and title that directly or indirectly involve exploration and mining projects, then NI 43-101 will fail in its purpose of material disclosure by issuers. If the investing public does not have relevant information regarding Indigenous peoples and their rights and interests that is on par with mineral reserve and resource disclosure, then the investing public is at a disadvantage to insiders of issuers and to those sophisticated investors who do who have such information.

This is not meant as a criticism of the current provincial and territorial securities regulatory systems of disclosure. Rather the Consultation Paper has provided a starting point for the conversation

[21] Section 3 of the BC UN Declaration: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044.
[22] https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation.
[23] The government of Canada is currently inviting submissions on development of an action plan to achieve the objectives of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* which received royal assent on June 21, 2021: https://www.justice.gc.ca/eng/declaration/index.html.
[24] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96292_01.
[25] For general discussion of the free entry system and its failings see: https://reformbcmining.ca/wp-content/uploads/2019/05/BCMLR-Mineral-Tenure.pdf.

to amend the scope and nature of disclosure of material information regarding Indigenous peoples and their rights and mineral projects.[26]

The influx of foreign and domestic capital into the treasuries of issuers for critical mineral exploration and mining projects in Canada is significant, with conservative estimates in the trillions of dollars.[27] The government of Canada has been working closely with provincial and territorial Crown holders of mineral titles, including the governments of British Columbia and Ontario, on the exploration, development and production of 31 critical minerals, the vast majority of which are on Indigenous lands.[28] An open and transparent disclosure regime under a revitalized securities disclosure regime regarding Indigenous rights bolsters the interests of all parties, ultimately to the benefit of public market investors.

Specific Feedback

Our feedback is set out in two parts. The first part provides comments on Consultation Paper item J, Rights of Indigenous Peoples and responses to questions 31, 32 and 33. The second part contains comments and responses on other topics in the Consultation Paper including modernization of NI 43-101, current personal inspections, and environmental and social disclosure.

Part 1

J. Rights of Indigenous Peoples

For the purpose of providing feedback, we reproduce the Consultation Paper's introductory text and three questions in item J. Rights of Indigenous Peoples.

> **We recognize Indigenous Peoples to include First Nations, Inuit and Métis Peoples in Canada. We also recognize that mineral and mining issuers have projects in jurisdictions outside of Canada, and those jurisdictions will have Indigenous Peoples.**

Terminology, of course, is vital to ensure accurate disclosure by issuers. The definition in item J of Indigenous Peoples is based on s. 35 of the *Constitution Act, 1982*. It does not apply to jurisdictions outside of Canada. If securities regulatory authorities are reviewing disclosures about mineral projects located in jurisdictions outside of Canada, then a precise definition of Indigenous peoples for the jurisdiction concerned is required. As stated in the UN Declaration, "the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and

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[26] In British Columbia work is underway by the British Columbia Law Institute involving the province's 3,000 statutes and supporting regulations with a view to alignment with the UN Declaration: https://www.bcli.org/project/reconciling-crown-legal-frameworks/. Both the *Securities Act* of British Columbia and NI 43-101 have the force of law that will require their alignment with the UN Declaration. We view this as a positive opportunity for securities regulatory authorities and their governments. In our view, the alignment should occur sooner than later.

[27] See generally the Event Primer for the Indigenous Net Zero Conference, hosted by the BC First Nations Major Projects Coalition held April 2022 by the Dr. Suzanne von der Poten, Mark Podlasly and Peter Csicsai. https://static1.squarespace.com/static/5fb6c54cff80bc6dfe29ad2c/t/625718230c35d172cde4ffc3/1649874991482/FNMPC_Primer_04132022_final.pdf.

[28] See Canada's June 2022 Discussion Paper: https://www.canada.ca/en/campaign/critical-minerals-in-canada/canada-critical-minerals-strategy-discussion-paper.html#a64.

regional particularities and various historical and cultural backgrounds should be taken into consideration". Other international organizations have definitions of Indigenous peoples that may be useful for consideration by Canadian securities regulatory authorities. Two examples are the International Labour Organization with its use of "tribal peoples",[29] and the World Bank's use of the term "Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities".[30]

> **The unique legal status of Indigenous Peoples has received national and international recognition. For many projects, the rights of Indigenous Peoples overlap with legal tenure, property rights and governance issues. We believe that disclosure of these rights, and the Indigenous Peoples that hold them, forms an essential part of an issuer's continuous disclosure obligations.**

While we appreciate the goodwill intended by the above statement, we must make the following comments. From a national, or Canadian Crown perspective and from a territorial and provincial Crown perspective, "recognition" comes from a series of Supreme Court of Canada judgements commencing in 1973 in the *Calder*[31] decision which determined that aboriginal title exists in Canada. "Recognition" by the Crown of aboriginal rights and title only arose from bitter legal disputes with Indigenous peoples that took decades for the Supreme Court of Canada to resolve. The continuing recognition in Canadian common law of the doctrine of *terra nullius* and doctrine of discovery has also significantly impeded reconciliation between Indigenous peoples and the Crown.[32]

We are unsure of the meaning of the Consultation Paper's statement that "the rights of Indigenous peoples overlap with legal tenure, property rights and governance issues". In our view, there is no overlap. Either Indigenous lands were ceded or surrendered equitably, that is without coercion, undue influence or other unconscionable tactics, or they were not. For the most part, treaties entered into between the Crown (federal and/or provincial) and Indigenous peoples and settlement agreements allocated rights as between the parties, in particular matters regarding land and resources. The "overlap" is where the Crown asserted and assumed ownership, jurisdiction and control of Indigenous lands without a treaty or binding agreement.

Increasingly these overlapping lands, lands where the Crown has taken control without Indigenous consent, are subject to litigation.[33] Much of this litigation stems from natural resource

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[29] Indigenous and Tribal Peoples Convention,1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document.

[30] World Bank's Environmental and Social Framework, Chapter 7, https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf#page=89&zoom=80

[31] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do.

[32] The most judicial discussion on the twin doctrines of *terra nullius* and discovery being the 2022 decision of the British Columbia Supreme Court in *Saikuz* v. *Rio Tinto Alcan* where the court stated, "the whole construct of Crown aboriginal title is a legal fiction to justify the *de facto* seizure and control of the lands formerly owned by the original inhabitants"; https://www.bccourts.ca/jdb-txt/sc/22/00/2022BCSC0015.htm, at paragraph 198.

[33] This paragraph of our submission focusses on Indigenous land not subject to treaty; for treaty lands see the *Mikisew Cree* decision of the Supreme Court of Canada on the "taking up" of treaty land and the triggering of the duty of consultation where a Crown decision impacting use of such land may adversely impact a treaty right: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2251/index.do .

projects including mineral projects. A current example is the 2021 petition of the Gitxaala Nation in the Supreme Court of British Columbia.[34] The Gitxaala Nation has never surrendered or ceded any portion of its ancestral lands (traditional territory in Crown parlance) to any person or organization. Yet, the government of British Columbia continues to register mineral claims and issue mining leases with detrimental impact to the Gitxaala Nation and its peoples. The 2012 *Ross River Dena Council*[35] decision of the Yukon Court of Appeal determined that the government of Yukon registration of mineral claims in Yukon Territory without Indigenous consultation is contrary to the constitutional rights of the Ross River Dena people. This is one of the legal arguments being advanced by the Gitxaala Nation. The nation also relies on the UN Declaration as it is now being actively implemented in the province under the BC Declaration Act. Indeed, as set out above, the government of British Columbia's Action Plan for implementation of the UN Declaration includes modernization of the *Mineral Tenure Act*.[36]

When reviewing the nature and scope of disclosure of matters relating to the rights and title of Indigenous peoples with continuous disclosure obligations and in Form 43-101F1 ("Form) for technical report disclosure, Crown securities regulatory authorities will need to carefully consider, and be clear, in their requirements for disclosure.

The Consultation Paper states the CSA's belief is that the "disclosure of these rights, and the Indigenous Peoples that hold them, forms an essential part of an issuer's continuous disclosure obligations". Thus, meaningful engagement with Indigenous rights and title holders is required as part of the process to amend NI 43-101. We recommend you reach out to First Nations and First Nations organizations before finalizing amendments to NI 43-101 and the Form. For example, we suggest you engage the BC First Nations Energy and Mining Council (www.fnemc.ca) who, with the BC First Nations Leadership Council, are advocates for Chiefs in Assembly who represent right and title holders with ancestral lands in British Columbia. As you may be aware, the majority of British Columbia is unsurrendered and unceded Indigenous land, as are almost 25% of Indigenous land in the Yukon. Much of these Indigenous lands located in British Columbia and the Yukon hold significant mineral potential. The "volt" rush for battery mineral and metals with the countenance of the federal government and the governments of British Columbia and Yukon has commenced. The government of the Yukon has recognized the pivotal role of First Nations in exploration and mining and has embarked on a process to repeal and replace its mineral and mining legislation by 2024. The drafting of this new legislation will reflect the UN Declaration with the direct, substantive involvement of First Nations with ancestral lands within the Yukon Territory. There are similar examples to be drawn upon from other jurisdictions.

For further reference, see the UN Declaration's article 32 which states:[37]

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,

[34] https://www.gitxaalanation.com/single-post/gitxaała-launches-legal-challenge-to-bc-s-mineral-claim-regime.
[35] https://www.yukoncourts.ca/sites/default/files/documents/en/2012_ykca_14_rrdc_v_yukon.pdf.
[36] See action item 2.14 in the Action Plan located at this weblink: https://declaration.gov.bc.ca.
[37] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement.

particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Item 4 of the Form requires disclosure of the nature and extent of surface rights, legal access, the obligations that must be met to retain the property, and a discussion of any other significant factors or risks that may affect access, title, or the right or ability to perform the work on the property. We are interested in hearing whether other disclosures should be included in the Form, or the issuer's other continuous disclosure documents, that relate to the relationship of the issuer with Indigenous Peoples whose traditional territories underlie the property.

Exploration and mining impacts the land, water and dependant ecosystems, often in perpetuity. Exploration and mining are not insubstantial activities and their impact is not limited to a claim or a lease. Roads, ATV and exploration trails and the use of helicopter and fixed wing aircraft have impact and go well beyond claim and lease boundaries. Time and again exploration and mining activities impact Indigenous traplines, food hunting and gathering activities, and the use of sacred and ceremonial sites.

We commend the CSA for specifically setting out item 4 in the Form and requesting feedback. Item 4 sets out numerous Crown legal requirements, yet there is no mention of Indigenous rights which, in our view, should be included in the disclosures for each of the eight paragraphs (a) through (h). The same can be said for item 1, item 5 and item 20 of the Form.

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?

As the Consultation Paper notes regarding mineral resource and mineral reserve estimation, many technical reports only contain boilerplate disclosure about potential risks and uncertainties that are general to the mining industry. Most technical reports contain even less disclosure, much less boilerplate disclosure, about risk and uncertainties arising from the rights of Indigenous peoples.

Specific mandatory disclosures of issuers on the rights of Indigenous Peoples with respect to a mineral project should include:

1. the traditional and colonial (settler) names of the Indigenous people on whose lands a mineral project is located; this includes mineral projects with multiple First Nations with shared and overlapping lands,

2. a map depicting the Indigenous peoples' land on which claims and/or leases are located, recognizing that many First Nations may not provide such a map due to ongoing treaty and other land and resources negotiations, thus secondary sources of information may be acceptable to be relied on, and

3. a description of Indigenous peoples' rights and how the mineral project activities impact those rights, including the rights of other First Nations impacted by mine activities (e.g.; access roads and trails).

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?

Specific mandatory disclosures of issuers should include points 1 to 3 above in question 31 along with the following:

1. whether an access agreement, exploration agreement, project agreement, impact benefits agreement or other business or commercial agreement has been concluded or are in negotiation as between the issuer and the First Nation,

2. whether First Nations' free, prior, and informed consent has been provided to a mineral project, and where consent has not been provided the reasons why not and the issuer's plan for obtaining consent,

3. has the issuer provided notice to impacted First Nations of its intention to register mineral claims, or if the issuer has purchased or optioned mineral claims did it notify, consult, or obtain the consent of the First Nation(s) impacted,

4. is the issuer carrying out consultation activities to support the Crown in discharging its constitutional duty to consult and, where necessary, accommodate First Nations, and

5. if the issuer received notification from Indigenous rights holders opposing the issuer's mineral project or that consent is not provided by rights holders, information on why the project is opposed or consent not provided and the issuer's plan for addressing the opposition and achieving consent.

33. Should we require the qualified person or other expert to validate the issuer's disclosure of significant risks and uncertainties related to its existing relationship with Indigenous Peoples with respect to a project? If so, how can a qualified person or other expert independently verify this information? Please explain.

Yes, the regulator should require the qualified person or other expert to validate the issuer's disclosure of significant risks and uncertainties related to its existing relationship with Indigenous peoples and a mineral project. In our view, it will be a rare circumstance that a qualified person (being a professional registered engineer, geoscientist or both) will have the knowledge and skill set to validate such disclosure. An expert who is not a qualified person may be required. In light of the legal nature of this validation, a lawyer experienced in Indigenous law, and licenced to practice in the Crown jurisdiction where the mineral project is located, should be retained and supervised by the qualified person. Such supervision is likely required in s. 3.4(d) of NI 43-101 where an issuer discloses in writing mineral resources or mineral reserves on a property material to the issuer, the issuer must identify "any known legal,

political, environmental, or other risks that could materially affect the potential development" of such resources or reserves.

Independent verification of disclosure means retaining a qualified person who meets the test of independence in s. 1.5 of NI 43-101 and is able to assess the information supplied. Alternatively, retaining an expert other than a qualified person is a more likely option. As above, a lawyer experienced in Indigenous law, and licenced to practice in the Crown jurisdiction where the mineral project is located, would likely have the knowledge and skill set to provide the verification required.

Part 2

A. Improvement and Modernization of NI 43-101

We commend the CSA for considering improvements to NI 43-101, particularly in terms of the rights of Indigenous peoples. For the most part, NI 43-101 has been unchanged since its adoption in 2001. In the last two decades, we have seen significant recognition of aboriginal rights and title and increased recognition by public governments of Indigenous peoples' inherent rights that existed prior to settlor contact (mainly by Europeans) which exist to this day. As we noted above, this recognition has generally been through the courts with numerous Supreme Court of Canada and appellate court decisions, many of which involved exploration and mining.

Recognition has also come from progressive Crown governments who are looking to increase First Nations participation in exploration and mining. For example, the governments of British Columbia, Yukon and Canada have embraced First Nations as potential partners by adopting the UN Declaration implementation legislation, or recognize the importance of the UN Declaration when amending or repealing and replacing their exploration and mining legislation.

We provide feedback on question 1 of the Consultation Paper.

1. **Do the disclosure requirements in the Form for a pre-mineral resource stage project provide information or context necessary to protect investors and fully inform investments decisions? Please explain.**

Our response is no. Currently, NI 43-101 is silent on Indigenous peoples. The Form's disclosure requirements for a pre-mineral resource stage project do not contemplate information or the context necessary to protect investors and fully inform investment decisions.

A key item, and perhaps the most important, when carrying-out due diligence for an investment in, or acquisition of a property is a status report of relationships with potentially impacted Indigenous peoples. Whether the property is a recently registered claim, in development or in production, information about Indigenous peoples' rights and their relationships with the property owner and public government is mandatory.

While the scope and nature of disclosure regarding Indigenous rights and relationships may be subject to confidentiality agreements, certain basic information should be part of continuous disclosure obligations and included in technical reports. For example, disclosure should include the name of a potentially impacted First Nation, their governance structure and their status as a self-government

agreement or treaty signatory (or adherent), or as a nation that has not ceded or surrendered their aboriginal rights or title to their ancestral lands, including their natural resources. Some First Nations are on the record as not supporting exploration and mining on their ancestral lands. That information should be disclosed by the property owner. Likewise, First Nations who are supportive of exploration and mining should be disclosed.

We appreciate we are only starting the conversation on the nature and scope of disclosure regarding Indigenous peoples and our examples are for illustrative purposes only. To commence on a pathway to demonstrably improve and modernize NI 43-101, significant dialogue is required by CSA with First Nations rights and title holders and with First Nations organizations who advocate on behalf of such rights and title holders.

F. Current Personal Inspections

We agree that s. 6.2 of NI 43-101 is a foundational element of the qualified person's role as a gatekeeper for the investing public. However, the inspection performed on a property by a qualified person, in our experience, is limited to examining the property geology and mineralization and to verify work done on the property. We rarely see in an inspection substantive information of "social licence and environmental concerns" (as referenced in the Consultation Paper). Our impression, rightly or wrongly, is that current personal inspection is a "check-the-box" exercise often constrained, as the Consultation Paper points out, by seasonal weather (such as snow). The CSA staff mention of significant non-compliance with s. 6.2(2) is noteworthy.

Our view is that s. 6.2 can be amended by setting out certain minimum requirements regarding the description of details of social licence concerns and less tangible elements in item 2(d) of the Form. We recognize the use of "social licence" is the phrase in the Consultation Paper and not the Form. But the colloquial use by the mining sector of the phrase encompasses rights of Indigenous peoples. Further, specific inclusion in the qualified person's inspection of Form items 4(f) and (h), and 5(c) would assist in providing investors with a more complete picture of the property.

20. Should we consider adopting a definition for a "current personal inspection"? If so, what elements are necessary or important to incorporate?

Yes, a definition of "current personal inspection" should be included in NI 43-101. In addition to inspecting matters involving geology, mineralization, potential mining methods and mineral processing, the qualified person or other expert should meet with First Nations potentially impacted by exploration or mining of the property. This will assist the qualified person to assess "less tangible elements" including property access and "social licence and environmental concerns" (using the vernacular of the Consultation Paper's item F. Current Personal Inspections).

Our view is that it is important to require a current personal inspection for early stage exploration properties. If a property is the subject of an NI 43-101 technical report, then it has sufficient potential for engagement of a potentially impacted First Nation by a qualified person. Section 6.2(2) excludes early stage exploration properties from a current personal inspection. The majority of First Nations receive no notice, much less are consulted or provide consent regarding exploration and mining activities on their ancestral lands. Our experience is that early engagement with a First Nation can increase the acceptance of exploration and ultimately mining. Industry associations such as the Association of Mineral Exploration

in British Columbia or the Prospectors and Developers Association of Canada support early engagement with First Nations, as do many public governments.

Further, the inspection may well identify matters the property proponent is unaware of, particularly in terms of access. For example, traplines are integral to First Nations families and communities. Exploration involving mechanical disturbance of the ground from exploration trail and road construction to trenching and ground and airborne geophysical activities would be better informed with knowledge of Indigenous trapline locations and hunting practices generally.

I. Environmental and Social Disclosure

The Consultation Paper's statements in item I. Environmental and Social Disclosure are, in our view, understated. Our view is that it is not awareness that has increased in recent years, it is investor demands for responsible mining that have significantly increased. An example of such demand is the activity of a coalition of investors representing $20 trillion of assets under management. The coalition is demanding disclosure of tailing storage facilities risks and solutions to ensure such facilities do not fail[38] and support of the Global Industry Standard on Tailings Management.[39]

Initiative on Responsible Mining Assurance

Improvement to NI 43-101 and item 20 of the Form should be informed by the voluntary mining standard of the Initiative on Responsible Mining Assurance ("IRMA").[40] The IRMA Standard for Responsible Mining is the global high-bar standard for development, operation, closure and reclamation of mines and has been recognized as such by its members and others.[41]

IRMA is the only voluntary mine standard to fully require the adoption of the UN Declaration and the need for free, prior, and informed consent of Indigenous peoples.[42] IRMA is planning to release a draft mineral exploration standard in late 2022 or early 2023. We suggest that the CSA examine the IRMA Standard chapters on environmental responsibility. The disclosures required under these IRMA chapters will, in our view, be a valuable touchstone for CSA improvement and modernization of NI 43-101.

Environmental, Social and Governance Standards

Conformance with reputable ESG standards is increasingly expected by investors. Unfortunately, current ESG standards were created by the private sector, for the private sector.

Our view is adherence, or a plan to adhere to an ESG standard is material and should be the subject of disclosure. We suggest that NI 43-101 or the Form be amended to provide a measure of ESG

[38] The Investor Mining and Tailings Safety Initiative, https://www.churchofengland.org/about/leadership-and-governance/church-england-pensions-board/pensions-board-investments/investor-1.
[39] https://globaltailingsreview.org/global-industry-standard/.
[40] https://responsiblemining.net/what-we-do/standard/.
[41] IRMA members include purchasers who demand the highest standards of sustainable, responsible mining practices for minerals and metals for use in their products. IRMA members include Tesla, GM, Microsoft, Tiffany and Co., Corning and Mercedes-Benz as well as Anglo American and ArcelorMittal.
[42] See Chapter 2.2 of the IRMA standard: https://responsiblemining.net/wp-content/uploads/2018/08/Chapter_2.2_FPIC.pdf.

disclosure. Unfortunately, ESG standards for the most part do not include Indigenous perspectives.[43] ESG standards have little to do with Indigenous lands, Inherent and constitutional rights or treaty rights, and have not in any demonstrable manner tapped the vast reservoir of Indigenous knowledge, or of Indigenous cultural heritage, principles or traditions.

The drafters of ESG standards simply never considered Indigenous perspectives. However, some ESG organizations are now considering revisions to their standards to include specific reference to Indigenous peoples. Amending NI 43-101 is an opportune time to consider disclosure by issuers regarding adherence to ESG standards and by disclosing Indigenous perspectives and values. This in effect amounts to putting the "I" into ESG, i.e.; IESG.

An example of putting the "I" into ESG is the work of the Reconciliation and Responsible Investment Initiative ("RRII").[44] The RRII is actively targeting Canadian issuers with shareholder engagements on the development and implementation of a "Reconciliation Action Plan." These plans include Truth and Reconciliation Commission Call to Action 92,[45] free prior and informed consent, and inclusion, diversity, education, and procurement.

The FMB views this as an opportunity for the CSA and its member securities regulatory authorities to require issuers to articulate how Indigenous perspectives amplify and expand upon ESG standards regarding mineral projects.

IFRS 6 Exploration for and Evaluation of Mineral Resources

International Financial Reporting Standard ("IFRS") 6 Exploration for and Evaluation of Mineral Resources requires entities to assess exploration and evaluation assets for impairment where the carrying amount of the assets may exceed their recoverable amount. Clearly a mineral project's potential impact to Indigenous lands is part of the consideration of identifying conditions that impair the value of exploration and evaluation assets. Equally the lack of an issuer obtaining free, prior and informed consent of Indigenous peoples is an impairment. While this is a disclosure under IFRS, it is material and applies to disclosures under NI 43-101. Our view is that the nature and scope of such impairments must be disclosed in detail, and not in a mere summary manner as is the practice with materials items under NI 43-101.

International Sustainability Standards Board

We recommend that the CSA consider issuer disclosure of adherence to financial sustainability standards, in particular the International Sustainability Standards Board ("ISSB").[46] The FMB supports the

[43] See the 2021 paper *Indigenous Sustainable Investment, Discussing Opportunities in ESG* by Mark Podlasly, Max Lindley-Peart and Suzanne von der Porten prepared for the First Nations Major Project Coalition 2021 annual conference: https://static1.squarespace.com/static/5fb6c54cff80bc6dfe29ad2c/t/6009dc280d5f7c464a330584/1611258929977/FNMPC_ESG_Primer_2021_Final.pdf.
[44] https://reconciliationandinvestment.ca.
[45] https://www.rcaanc-cirnac.gc.ca/eng/1524506030545/1557513309443.
[46] https://www.ifrs.org/groups/international-sustainability-standards-board/.

governments of Quebec and Canada to fund and lend assistance for the establishment of Montreal centre as part of an ISSB multilocation approach. [47]

Concluding Remarks

We acknowledge that amending NI 43-101 to include the rights and interests of Indigenous peoples will be challenging. The CSA is breaking new ground and for that we commend you. We know it is a challenge for the CSA, but rest assured it is also a challenge for Indigenous peoples and their supporting organizations such as the FMB.

The statutory mandate of the FMB, in part, is to assist First Nations in the development, implementation and improvement of financial relationships to enable the economic and social development of First Nations. Improved disclosure by issuers in the context of Indigenous rights not only assists investors, it assists Indigenous peoples being informed about exploration and mining activities on their ancestral lands. It provides information for First Nations governments, businesses, and their funding organizations[48] to identify opportunities and potentially be active participants in the mineral industry, including as equity holders.

While on occasion we encounter progressive exploration and mining companies providing significant disclosure of their activities to and about Indigenous governments and peoples, they are the exception rather than the rule.

We would be pleased to discuss our feedback with you in greater detail. Further we would be pleased to assist Canadian securities regulatory authorities as they consider and prepare an amended NI 43-101, Form 43-101F1 and Companion Policy 43-101CP.

Sincerely,

On behalf of the First Nations Financial Management Board

Per "Geordie Hungerford"

Geordie Hungerford, CFA, CAIA, MBA, LLB
Chief Executive Officer

[47] https://www.ifrs.org/news-and-events/news/2022/06/ifrs-foundation-launches-montreal-issb-centre-supported-by-key-actions/.

[48] For example, the Saskatchewan Indigenous Investment Finance Corporation which provides loans for equity investment in mining projects, see: https://siifc.ca.