



## Haudenosaunee Development Institute

### RESPONSE OF THE HAUDENOSAUNEE DEVELOPMENT INSTITUTE TO CSA CONSULTATION PAPER 43-401

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

**Re: CSA Consultation Paper 43-401**

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#### **A. INTRODUCTION**

The Haudenosaunee Development Institute (“HDI”) provides this response to Section J of CSA Consultation Paper 43-401 with a view to enhancing Indigenous-related disclosures in Form 43-101F1.

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The recommendations provided in this response focus on strengthened Haudenosaunee-related disclosures under NI 43-101 and in Form N3-101F1, in consideration of the obligations identified below, to achieve the following:

- increased ESG-related disclosure to meet the demands of ESG-concerned investors;
- fulfilment of legal obligations to engage and/or obtain consent;
- acknowledgment that the legal rights of Indigenous peoples always carry an economic component that requires that benefits to Indigenous peoples be considered;
- increased issuer disclosure of material risk through enhanced disclosure requirements of Indigenous considerations; and
- Canada’s recognition of the fundamental rights of the Haudenosaunee, its goal of supporting the capacity-building and financial sustainability efforts of the Haudenosaunee, and the call of Canada’s mining industry for increased Indigenous participation.

### *The Haudenosaunee*

The Haudenosaunee Confederacy is a government of nations – including the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora – who made peace in time immemorial and formed a representative government. Haudenosaunee territory is situated in present-day New York, Wisconsin, Pennsylvania, Ontario, and Quebec and is recognized under various treaties and other instruments including the Two-Row Wampum, Silver Chain Covenant, Nanfan Treaty of 1701, and the Haldimand Proclamation of 1784. The Haudenosaunee Confederacy created HDI as a means of assisting government and third parties with respect to meeting the obligation to obtain consent with respect to development on Haudenosaunee lands.

HDI has the right to participate in the CSA’s considerations under CP 43-401 and other modernization efforts recognizing the fundamental rights of Indigenous peoples and the increased influence of ESG factors within Canada’s capital markets.

## **B. PRESSING NEED FOR INDIGENOUS-RELATED DISCLOSURES**

CSA Consultation Paper 43-401 is well-timed for the consideration of Indigenous-related disclosures because of, among other reasons, the confluence of three major trends:

1. The world’s growing demand for mineral resources;
2. Increasing investor demand for ESG data; and
3. Expanding international and Canadian recognition of Indigenous treaty and sovereignty rights.

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### *Growing Demand for Mineral Resources*

First is the world's growing demand for mineral resources, fuelled by the green energy transition. The federal government has recognized both the importance of the mining sector to Canada's economy and the 500% increase in mineral production required by 2050 to facilitate the clean energy transition to batteries. As the CSA has noted, NI 43-101 is recognized globally as the pre-eminent standard for mineral project disclosure. As the world becomes more reliant on the outputs of the mining industry, Canada has an opportunity to be a model for achieving the energy transition in a manner that balances the interests of industry, the environment, and Indigenous nations.

### *Increasing Demand for ESG*

Second is the increasing demand and attention by the investing community in making decisions based on environmental, social, and governance issues. We appreciate the ongoing efforts of the CSA and the securities regulators of Canada's provinces and territories to create clarity and standardization around ESG disclosures, including through consultations on proposed National Instrument 51-107, which would align Canadian disclosure requirements with TCFD standards. We also recognize staff notices that provide additional market clarity around ESG-related issues, including SN 51-333, SN 51-358, and SN 81-334. *However*, the primacy of environmental risks and sustainability disclosures across international ESG frameworks has left other key ESG considerations under-represented, in particular, Indigenous considerations. This is despite many calling for the recognition of Indigenous considerations as an independent, fourth head in ESG.

### *Expanding Recognition of Indigenous Treaty and Sovereignty Rights*

Third is the expanding international and Canadian recognition of Indigenous treaty and sovereignty rights. Among the many recent developments in the recognition of Indigenous rights, Canada's ratification and adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), through the *UNDRIP Act*, S.C. 2021, c. 14, stands out. UNDRIP explicitly recognizes the various fundamental rights of Indigenous peoples across the world, including their right to the lands, territories, and resources that they have traditionally owned, occupied, used, or acquired, and the right to determine and develop priorities and strategies for the development of such lands, territories, and resources. Under UNDRIP, free and informed consent is explicitly required for any mineral project that affects Indigenous land, territories, or resources.

At the level of Canada's mining industry, the Canadian Minerals and Metals Action Plan 2021 describes Mines Canada's continued efforts in support of its goal of advancing the participation of Indigenous peoples, with a focus on procurement. Enhanced disclosure of Indigenous considerations would increase visibility and market efficiency in achieving this goal, as well as Canada's broader goal of Indigenous reconciliation.

## **C. EXPANDED DISCLOSURE REQUIREMENTS ARE NEEDED**

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*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?**

AND

**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?**

Our responses to questions 31 and 32 are below. These responses also speak, however, to questions 29 and 30, which inquire into appropriate disclosures for social matters and community consultations. As detailed below, in the context of Indigenous issues, such disclosures are fundamental and should be required.

Indigenous-related disclosures create accountability for issuers and visibility for investors who are seeking to allocate capital in consideration of ESG factors. Requiring such disclosures presents an opportunity to advance industry goals for Indigenous participation and Canada's reconciliation efforts. Core to the efforts of securities regulators, increased Indigenous disclosure requirements also ensure issuers fully disclose material risks – mineral and other resource projects have faced significant repercussions, including litigation, when failing to adequately engage with implicated Indigenous nations, bands, communities, and organizations.

Indigenous-related disclosures, including social and community consultation disclosures, must address, at a minimum:

- the identity of implicated Indigenous nations, communities, and organizations;
- the relationship between the issuer and implicated Indigenous nations, communities, and organizations, including involvement in mineral projects;
- established and asserted treaty rights, Aboriginal rights, and/or Aboriginal title in respect of material properties of the issuer;
- environmental and archeological impacts through an Indigenous lens;
- record of engagement/consultation between the issuer, the Crown, relevant government bodies, and affected Indigenous nations, bands, communities, and organizations in respect of mineral projects;
- whether or not the issuer has been delegated any procedural aspects of engagement/consultation from the Crown (and, if so, when and from what Crown entity);
- whether the issuer has committed to providing capacity funding in respect of mineral project(s) and, if so, to which Indigenous nations, communities, and organizations, and,

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more generally, how Indigenous people are to financially benefit from the mineral project(s); and

- existing engagement/consultation frameworks in place, if any (and, if none, a description of why no such frameworks are needed).

In Form 43-101F1, such disclosures should be made in, at least, the following sections:

Item	Examples of Disclosure
1 – Summary 25 – Interpretation and Conclusions	<ul style="list-style-type: none"> <li>• Summary and conclusions of key items below</li> </ul>
2(c) – Introduction; sources of information/data 3(a) – Reliance on Other Experts; opinion of expert if non-qualified person Item 12 – Data Verification	<ul style="list-style-type: none"> <li>• Indigenous engagement/consultation (or non-engagement/non-consultation)</li> <li>• Record of engagement/consultation, including government/Crown involvement or delegation</li> <li>• Experts engaged</li> <li>• Archeological and environmental studies conducted</li> <li>• Engagement funding information</li> <li>• Disclosure of findings, opinions and recommendations received from qualified Indigenous engagement/consultation, including implementation</li> </ul>
Item 4(c) – (e), (g) – (h) – Property Description and Location; rights to minerals, encumbrances, permits, significant factors/risks Item 5(e) – Accessibility, Climate, Local Resources, Infrastructure and Physiography; sufficiency of surface rights Item 14(d) – Mineral Resource Estimates; the materiality of socio-economic/political factors, etc.	<ul style="list-style-type: none"> <li>• Applicable treaty rights and other Indigenous land rights</li> <li>• Record of engagement and attempts to obtain consent including government/Crown involvement or delegation</li> <li>• Status of relationships with applicable Indigenous stakeholders</li> <li>• Status of negotiations with Indigenous</li> </ul>

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	stakeholders
Item 6(a) – History; prior ownership	<ul style="list-style-type: none"> <li>• History of Indigenous land utilization, claims, and treaty rights</li> </ul>
Item 19(b) – Market Studies and Contracts Item 20(d) – Environmental Studies, Permitting and Social or Community Impact; social/community requirements/plans and status of negotiations	<ul style="list-style-type: none"> <li>• Contracts (or proposed contracts) between issuer and Indigenous stakeholders, including Indigenous stakeholders</li> <li>• Archeological and environmental studies conducted</li> </ul>

*Question 33*

**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 disclosure requirements listed above would require validation by an expert or experts deeply familiar with the rights, traditions, and history of each applicable Indigenous nation, community, or organization. Expert verification of the disclosure requirements should avoid a one-size-fits-all or pan-Indigenous approach, having particular regard to overlapping treaties, traditional territories, and colonial and traditional forms of Indigenous governance.

Several organizations have been formed to fulfill this purpose. For example, HDI currently fulfills this purpose on behalf of the Haudenosaunee Confederacy Chiefs Council, representing the Haudenosaunee Confederacy's interests in the development of lands within areas of Haudenosaunee jurisdiction.

Organizations like HDI are uniquely qualified to verify compliance with, and disclosure of, issues relating to treaty rights, environmental impacts, archeological impacts, and duties of engagement.

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