

Osgoode Hall Law School
York University
4700 Keele Street
Toronto, Ontario
Canada
M3J 1P3



PAN AMERICAN SILVER CORP. (TSX: PAAS NASDAQ:PAAS)

Request to Investigate Failure to Disclose Material Information

January 3, 2019

We ask you to investigate concerns with the lack of disclosure and the misleading disclosure provided by Pan American Silver Corp. (Pan American) in relation to its purchase of Tahoe Resources Inc. (Tahoe), announced on November 14, 2018.¹ The directors of both companies have approved the purchase and shareholders of Pan American will vote on January 8, 2019.

According to Pan American:

A primary focus of the Arrangement is expanding Pan American's portfolio of silver properties with one of the most attractive silver properties in the world: the Escobal Mine in Guatemala.²

Consequently, issues relating to problems with the Escobal asset are material to the shareholders decision on whether to approve the purchase of Tahoe.

Tahoe's main asset, the Escobal Mine in Guatemala, was suspended by court order on July 5, 2017 because of a lack of consultation with Xinca Indigenous people in the area. On September 3, 2018, the highest court in Guatemala, the Constitutional Court,³ ordered

- (i) that the mine remain suspended until the state completed consultation in accordance with the International Labour Organization's ILO 169 (ILO 169);⁴
- (ii) that the process for renewing Tahoe's last remaining exploration license be suspended;⁵ and
- (iii) that the state reform its laws to increase the royalties for communities affected by mining.⁶

Pan American has provided an optimistic report on the progress of the consultations, but its disclosure of how Tahoe and the government of Guatemala are conducting the consultations is lacking or misleading in four respects.

¹ Pan American Silver, "Pan American Silver and Tahoe Resources Create the World's Premier Silver Mining Company" November 14, 2018, SEDAR

² Pan American Silver Corp., "MANAGEMENT INFORMATION CIRCULAR with respect to a proposed ARRANGEMENT involving TAHOE RESOURCES INC.", December 4, 2018, p.12, SEDAR

³ Corte de Constitucionalidad (CC), Expediente 4785-2017. online: <http://143.208.58.124/Sentencias/840212.4785-2017.pdf> This 553 page decision is in Spanish and released on September 3, 2018. On October 8, 2018, the Court released a clarification decision online: <https://bit.ly/2EtRQfo>

⁴ CC Decisión, p. 545

⁵ CC Decisión, p. 544

⁶ CC Decisión, p. 552

First, Pan American has not disclosed that the beginning of the court-ordered consultation has been met with significant opposition and conflict from the Xinka Indigenous people. There are already two court proceedings challenging the approach to the consultations by Tahoe and the government of Guatemala.

Second, Pan American has provided an unjustifiably optimistic view on the re-opening of the mine in December 2019. Pan American describes the consultation in a way that does not take into account the importance of Xinka agreement to the continuation of the project. The role of the Xinka is crucial, but, contrary to international best practices, Tahoe appears to be courting individuals who are not representatives of the Xinka. If the Xinka are not on board at the end of the consultation process, there may be renewed legal wrangling, since the Court has established that an inadequate consultation process will result in personal liabilities imposed on government officials and automatic nullity of any license issued.⁷

Third, Pan American has not disclosed that the decision of the Constitutional Court also included the nullification of Tahoe's last remaining exploratory license, until there are consultations with Indigenous people in the area of the exploratory licenses. This means that there is no obvious path for expansion at this moment, and that future expansion will meet stiff resistance.

Fourth, Pan American has not disclosed that the Constitutional Court upheld a lower court decision ordering the government to engage in law reform aimed at increasing royalties going to communities affected by mining.

Pan American adopts Tahoe's optimistic outlook on the progress and completion of consultations with the Xinka Indigenous people

In August 2016, we filed a letter with the United States Securities and Exchange Commission and in May 2017, we filed a letter with the British Columbia Securities Commission. We pointed out that Tahoe had not adequately disclosed community opposition to the mine, and in particular, opposition from the Xinka Indigenous people, who had not been consulted. Tahoe denied that there was a problem, but a peaceful resistance blocking the main road into the mine forced the mine to cease operation in June, 2017,⁸ and in July 5, 2017, a court order suspended operations until the Xinka population had been consulted. On September 3, 2018, the Constitutional Court, the highest court in Guatemala, confirmed the suspension of the mine

⁷ CC Decisión, p. 551

⁸ Sandra Cuffe, CIM Magazine, September 6, 2018, online: <http://magazine.cim.org/en/news/2018/guatemalan-court-upholds-tahoe-resources-mine-suspension/>

until the consultations with the Xinka were completed. Tahoe has estimated that the consultation could be over in six months,⁹ but based its financial position on a consultation that would not end until December 2019.¹⁰

On November 13, 2018, a joint press statement released by Pan American Silver and Tahoe Resources, supporting the sale of Tahoe to Pan American, said this about the Escobal project:

Robust growth profile with the restart of the Escobal silver mine following completion of the consultation process and community engagement. Escobal is a well built, turn-key operation with minimal capital outlay and development risk.¹¹

In its Management Circular on December 4, Pan American described the steps for reopening the mine and expressed its confidence that it will eventually obtain the social license to operate the mine.

[Escobal] is a well built, proven turn-key operation, with over \$500 million invested into development and infrastructure. The Escobal Mine is capable of a rapid restart once the current ILO 169 consultation process with local Indigenous peoples is completed, court approval is obtained, the protest and blockade near the town of Casillas is ended, the Escobal Mine's export credentials are renewed by the Guatemalan government and the social licence is re-established ...Pan American has a proven 25-year track record of responsibly constructing and operating mines in Latin America and building trust with local communities and Indigenous groups. Based on this experience, Pan American firmly believes that a lasting social licence for the restart of the Escobal Mine can be achieved.¹²

The Management Circular also states that “[a]s of November 6, 2018, Stage 1 of the four-stage ILO 169 consultation process was well advanced.”¹³

⁹ Material Change Report, September 11, 2018, SEDAR

¹⁰ Tahoe News Release, November 6, 2018, SEDAR

¹¹ Pan American Silver and Tahoe, News Release, November 13, 2018, SEDAR

¹² Pan American Silver Corp., “MANAGEMENT INFORMATION CIRCULAR with respect to a proposed ARRANGEMENT involving TAHOE RESOURCES INC.”, December 4, 2018, p.12, SEDAR

¹³ Pan American Silver Corp., “MANAGEMENT INFORMATION CIRCULAR with respect to a proposed ARRANGEMENT involving TAHOE RESOURCES INC.”, December 4, 2018, p.114, SEDAR

1. *Pan American has not disclosed the conflicts and court cases surrounding the beginning of the court-ordered consultations*

Pan American's Management Circular on December 4 refers to a Tahoe News Release from October 10 which said that "[w]e have already progressed our engagement with the Xinka and other community members who are interested in productive dialogue with the Company."¹⁴

What neither Pan American nor Tahoe have disclosed is that the Xinka Parliament have said that they have not been involved in any consultation and that they have instituted two proceedings before the Supreme Court of Justice, objecting to Tahoe's actions in relation to the consultation. The Xinka Parliament is the legitimate, elected representative of Xinka people in the region.

First, the Xinka Parliament complained that Tahoe and the government of Guatemala had begun phase 1 of the consultation process without consulting them. The Xinka brought their concerns Supreme Court of Justice and, on November 15, 2018, the Court confirmed that the technical steps for commencing phase 1 of the consultations had not yet been fulfilled.¹⁵ We do not know Pan American and Tahoe's interpretation of this court decision because neither Pan American nor Tahoe have disclosed the existence of the decision, nor their position on how the decision impacts the consultation processes or the estimated timelines for the reopening of the mine.

Second, on November 10 the Xinka Parliament revealed that they had been invited to a "mediation" in Rome by a Catholic organization called Carità Política, which is a supporter of the mine.¹⁶ The Xinka Parliament refused to participate because they felt that Carità Política was not neutral. The Xinka Parliament alleges that Tahoe then sought out individuals who were not legitimate representatives of the Xinka to meet in Rome to represent the Xinka.¹⁷

As a consequence, on November 19, the Xinka Parliament brought a second proceeding to the Supreme Court of Justice, to prohibit Tahoe from "going to communities to try to confuse them, going to communities to offer or give away donations, to advertise in the media"¹⁸

¹⁴ Pan American Silver Corp., "MANAGEMENT INFORMATION CIRCULAR with respect to a proposed ARRANGEMENT involving TAHOE RESOURCES INC.", December 4, 2018, p.114, SEDAR; see Tahoe News Release, October 10, 2018, SEDAR

¹⁵ Corte Suprema de Justicia, Amparo 1076-2017, November 15, 2018, from the website of the Xinka Parliament online: <https://bit.ly/2SVFVuF>

¹⁶ "Tahoe Resources' Minera San Rafael Featured in Vatican's Carità Política Magazine", September 12, 2018 <https://www.tahoeresources.com/English/blog/blog-details/2018/Tahoe-Resources-Minera-San-Rafael-Featured-in-Vaticans-Carita-Politica-Magazine/default.aspx>

¹⁷ Statement from the Xinka Parliament, November 7, 2018 online English translation: <https://bit.ly/2QZtzEI>

¹⁸ BTS – Earthworks – NISGUA, Xinka Parliament denounces illegalities as court-ordered consultation process begins" November 19, 2018 online English translation: <https://bit.ly/2Eqly4M>

These facts are material because any court ruling could further delay the consultation process and because, as we indicate below, a rocky start to the consultation process does not augur well for future agreement with Xinka communities impacted by the Escobal mine.

2. Pan American provides a misleadingly optimistic view on the reopening of the mine in December 2019

In its Management Circular of December 4, 2018, Pan American describes the process for consultation:

In the case of the Escobal Mine, a successful consultation process will identify any concerns from the Xinka Indigenous communities in the area of influence and seek to determine, in good faith, acceptable mitigations to those concerns in order for the mine to restart operations.¹⁹

This description of the process gives the impression that consultation is a procedural formality and once the process is done, the mine will be reopened to operate in the same manner it had been operating prior to being closed.

This is also indicated in the November 14, 2018 proposed arrangement between Pan American and Tahoe, in which it is suggested that there will be no substantial change resulting from the consultation process to the operations of the Escobal mine:

Restrictions on Business Activities: There is no arbitral award, judgment, injunction, order or decree binding upon Tahoe or any of the Tahoe Material Subsidiaries that has or could reasonably be expected to have the effect of prohibiting, restricting, or impairing in any material respect (i) any business practice, (ii) any acquisition or disposition of property, or (iii) the conduct of the business, as currently conducted.²⁰

What Pan American does not mention is that ILO 169 provides that consultations will be conducted “with the objective of achieving *agreement or consent* to the proposed measures.”²¹ While it may be arguable that this provision does not technically permit a veto, it certainly provides for a substantive commitment to try to get an agreement or consent. This is confirmed the Constitutional Court which says that the consultation process should result in agreements and that good faith in negotiations includes *modifications* to the project to meet the objections of Indigenous peoples.²²

At the end of the four phases of the consultation process, the Supreme Court of Justice must approve the attempts to achieve consent. If the Xinka do not agree with the proposals made by

¹⁹ Pan American Silver Corp., “MANAGEMENT INFORMATION CIRCULAR with respect to a proposed ARRANGEMENT involving TAHOE RESOURCES INC.”, December 4, 2018, p.114, SEDAR

²⁰ Arrangement Agreement, Pan American Silver Corp. and Tahoe Resources Inc. and 0799714 B.C. Ltd., Execution Version, dated November 14, 2018, pp54, SEDAR

²¹ ILO 169, Article 6.2

“The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

²² CC Decisión, p. 493 -494

the government and the operator of the Escobal mine, they will have an opportunity to challenge the process at Court, with the possibility of an appeal to the Constitutional Court.²³ This process of obtaining a decision from the Supreme Court of Justice, through various appeals, to a final decision from the Constitutional Court, lasted 14 months in this case, that is, following the original suspension of the Escobal mine in July 2017. As such, it would be reasonable to anticipate a similar time frame for a court challenge following the conclusions of consultations, even if the court finally decides that the consultation process was adequate. Of course, if the court finds the process was inadequate, there will be further delay. In either case, the estimate of reopening of the mine in December 2019 is unrealistic and misleading, unless there is an agreement or consent from the Xinka.

In other words, much depends on the quality of the engagement with the Xinka. Here, Tahoe has started on the wrong foot and possibly irrevocably poisoned relationships.

As noted above, Tahoe has already created conflict with the Xinka Parliament, and there is already litigation, barely two months after the order of the Constitutional Court. We do not know whether Pan American feels that Tahoe is acting legally, as it has not even disclosed the litigation, let alone explained their view. But regardless of the legality, international best practices on engagement with Indigenous peoples says that consultation should start early and engage the governing structure of the Indigenous people. For example, the *Due Diligence Guidance For Meaningful Stakeholder Engagement In The Extractive Sector* released by the Organization of Economic Cooperation and Development (OECD) in 2017 states:

Early engagement is important as time is needed to build strong relationships with stakeholder groups and it allows enterprises to anticipate issues before they arise. It is important to consult with stakeholders prior to taking any decisions that may impact them and it will often be useful to consult with stakeholder groups from the point of entry to understand risk and opportunities and, as relevant, to help to develop engagement plans and activities.²⁴

As we indicated in our communication to the United States Securities and Exchange Commission in August 2016, and the BC Securities Commission in May, 2017 regarding Tahoe's failure to disclose material information about the social conflict surrounding the Escobal project, the Xinka have opposed the mine for many years and feel aggrieved by the mine on several fronts, including the targeted murders of two Xinka who were active in opposing the

²³ Tahoe News Release, November 6, 2018, p. 3, SEDAR

²⁴ OECD, *Due Diligence Guidance For Meaningful Stakeholder Engagement In The Extractive Sector* (2017), p. 60. Online: <https://bit.ly/2Gzm82L>

mine,²⁵ the criminalization and detention of its leaders²⁶ and Tahoe's denial of the existence of Xinka people.



Figure 1²⁷

In conclusion, Tahoe has provided a misleading and simplistic description of the consultation process, has engaged in a process that disregards international best practices and has published a misleadingly optimistic date for reopening of the mine.

²⁵ Justice and Corporate Accountability Project, "Request to Investigate Tahoe Resources for Failure to Disclose Material Information", May 8, 2017, p. 14-17. Online: <https://justice-project.org/2018/03/18/bc-securities-commission/>

²⁶ Exaltación Marcos Ucelo, a member of the Xinka Parliament, was murdered in March 2013 while driving home from a community referendum on mining. In July 2018, Estuardo Quevedo, a member of the Peaceful Resistance Camp in Casillas, blocking traffic to the Escobal mine was gunned down on his motorcycle. He was the father of two daughters and a son. online: <https://nisgua.org/xinka-peoples-parliament-denounces-murder-environmental-activist-angel-estuardo-quevedo/>

²⁷ Funeral for Estuardo Quevedo, a member of the Peaceful Resistance Camp in Casillas, murdered in July, 2018.

3. Pan American has not disclosed that the Constitutional Court also nullified Tahoe's last remaining exploratory licence

As the map below shows, Tahoe had a number of plans for expansion in promising areas outside of the immediate area of the mine (marked as "ESCOBAL" in red in the middle of the map). The map also shows three exploration concessions areas marked in light green as "Granted" – Andres, Lucero and Juan Bosco.

Over the years, Tahoe lost the Andres and Lucero exploration concessions, but never changed the map, which appeared in its filings.²⁸ Tahoe was in the midst of renewing its remaining exploratory license – Juan Bosco - but the Constitutional Court put a halt to the renewal process in its September 2018 decision, and said that there needed to be a new environmental assessment and consultation with the Indigenous people in the four municipalities of Mataquescuintla, Nueva Santa Rosa, Casillas and San Rafael las Flores.²⁹

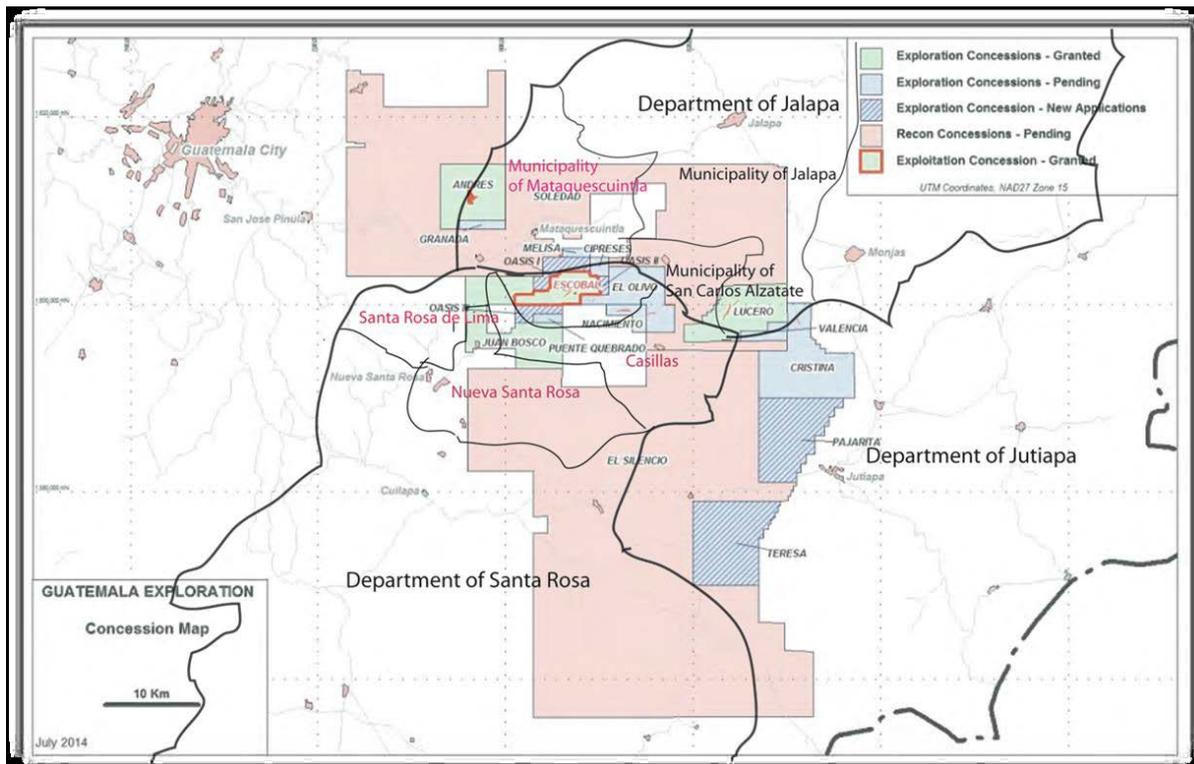


Figure 2

²⁸ Justice and Corporate Accountability Project, "Request to Investigate Tahoe Resources for Failure to Disclose Material Information", May 8, 2017, p. 17-18 where we indicate that the two other green areas marked as "granted" were in fact lost sometime in 2016. Online: <https://justice-project.org/2018/03/18/bc-securities-commission/>

²⁹ CC Decisión – pp.380. 388-390 and p.544

In other words, Tahoe's avenues for expansion have disappeared. Pan American has not disclosed this information.

In addition, Pan American has not disclosed that obtaining social license in the areas of potential expansion will run into municipalities that have held plebiscites against mining. To obtain an exploration license for Juan Bosco, for example, will require consultations in the municipalities of Mataquesuintla, Nueva Santa Rosa and Casillas, all of which have had referenda resulting in votes against the presence of mining operations in their communities.³⁰ Opposition in the surrounding municipalities is so serious that Tahoe has not been able to link into the main power grid, forcing the company to run its mine on diesel. Tahoe has disclosed the existence of a blockade of the main road into Tahoe since June 7, 2017 which has prevented Tahoe vehicles from reaching the mine, forcing Tahoe to use helicopters to bring in the diesel.³¹

The potential for future expansion of the mine is material information for the future viability of the project, and the Commission should investigate whether Pan American should have disclosed the loss of Tahoe's last remaining exploratory licence, as well as the conflicts outlined in our letter of May, 2017, which indicate that Tahoe does not have social license to expand beyond its current project area.

³⁰ Justice and Corporate Accountability Project, "Request to Investigate Tahoe Resources for Failure to Disclose Material Information", May 8, 2017, p.33.

³¹ NISGUA, "Communities maintain peaceful demonstration in protest of negative impacts of Tahoe Resources' mine in Guatemala" June 15, 2017. Online: <https://bit.ly/2Gtb0Er>

4. *Pan American has not disclosed that the Constitutional Court ordered the state to engage in law reform to ensure that the communities receive more royalties*

The Constitutional Court upheld the lower court decision, ordering the state to change the royalty structure so that a greater percentage should go to the communities affected by mining exploration. The court ordered that Indigenous people should participate in the formulation of the proposed law. The Court does not say whether there should also be a corresponding increase in the overall royalty rate, but there have been past attempts to raise the overall rate for mining. For example, in December 1, 2014, Guatemala made a surprise announcement, raising the rate from 5% to 10% for mining companies.³² Eventually, the rate was struck down by the courts on procedural grounds.

The failure to disclose potential changes in the tax regime in Guatemala is material in this case because of the proposed sale of Tahoe Resources to Pan American Silver. Pan American Silver has said that Escobal is the main asset that they are after³³. The purchase is already risky since valuation of the mine is dependent on assumptions of future income from a reopened mine. This income would be affected, not only by estimates of the start date, but also by the tax structure in the future. These are risks that reasonable investors would take into account in valuing Tahoe's worth and determining whether to approve the purchase of the company by Pan American.

³² Financial Times, Peter Koven, "Tahoe Resources threatened by monster royalty hike", Financial Post, December 1, 2014. online: <https://bit.ly/2LpJTJe>

³³ Hayley Woodin, "B.C. firms seeks to reopen troubled Guatemalan mine " Business in Vancouver, December 12, 2018. online: <https://bit.ly/2Bjlpgo>