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Re: Comments on the 2023-2024 OSC Statement of Priorities

The First Nations Financial Management Board ("the FMB") is pleased to provide the Ontario Securities Commission with comments on their 2023-2024 Statement of Priorities.

Summary:

The main point the FMB wishes to convey in this letter is that while we welcome the intention to "incorporate Indigenous peoples' issues and perspectives in CSA policy work", it is clear from recent federal and B.C. legislation that the CSA has a higher duty than merely to "consider the perspectives of Indigenous peoples."

We further include some comments that we have previously relayed to the OSC on the need to focus on Indigenous DEI and sustainability reporting, and build OSC's internal Indigenous capacity.

General Comments: Requirement to engage with Indigenous Peoples

We welcome the commitment by the Ontario Securities Commission to further cooperate with Indigenous peoples and advance reconciliation, specifically the steps to "incorporate Indigenous peoples' issues and perspectives in CSA policy work" that are described in the 2023-24 Statement of Priorities.

These are positive actions, and we hope to see other Canadian financial regulators move in a similar direction.

However, enhancing “consideration” and “better consider the perspectives of Indigenous peoples and communities” fails to meet the requirements of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly on September 13, 2007 and now the law of Canada.

UNDRIP applies in Ontario

UNDRIP is now the law of Canada after the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (2021) (UNDA) which received Royal Assent on July 21, 2022.

Canada and the other signatories to UNDRIP, almost all nations in the world, acknowledge that the Indigenous rights under UNDRIP “constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world” (Article 43).

As per the [preamble to UNDA](#), UNDRIP also recognizes:

...the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories and resources.

These inherent rights represent existing Aboriginal rights of the Aboriginal peoples of Canada that are recognized and affirmed in section 35 of the *Constitution Act, 1982*.

The Government of Ontario would need to discharge their duty to consult and accommodate any proposed infringements of those inherent Aboriginal rights as codified by UNDRIP (and domestically implemented through federal legislation).

In any event, there is a moral and ethical expectation for Ontario to comply with international human rights standards that are the law of Canada.

What does UNDRIP require?

Article 19 of UNDRIP sets out a high standard for engagement with Indigenous peoples:

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.

British Columbia passed its own UNDRIP legislation in 2019, and, in October 2022 published the [Interim Approach to Implementing the Requirements of Section 3](#) of that legislation. We anticipate that Canada will implement something similar soon.

Under the approach, “the province must approach policy and legislation development that may affect Indigenous Peoples in a manner that ensures Indigenous Peoples are fully involved partners in the process and have opportunities to influence the outcome of matters that may affect them”, IE “Once it is determined that the proposed policy or legislation may affect Indigenous Peoples, effective processes for Indigenous Peoples to participate in developing policy and legislation must be implemented.”

B.C.’s reconciliation approach notes that when the law or policy affects Indigenous peoples, it is about working in partnership with Indigenous peoples.

UNDRIP is the law in Canada and there is implementing legislation in five jurisdictions across the CSA. Harmonization is necessary.

British Columbia has DRIPA legislation and the governments of Yukon, the Northwest Territories and Nunavut are delegated authorities of the Government of Canada and, as such, UNDA also applies in these jurisdictions. In these jurisdictions, the obligation to implement those principles crystallized in UNDRIP is arguably more focused.

UNDRIP is also the law with respect to any federal securities jurisdiction such as systemic risk and criminal law. We have submitted [our comments to CSA on Greenhouse Gas emissions reporting](#), which we think is a federal jurisdiction – as may be other kinds of sustainability reporting, such as biodiversity reporting.

These five jurisdictions are clearly required to abide by Article 19 of UNDRIP. CSA strives for harmonization of legislation.

Practically, this means that the CSA will need to collectively engage in a way that is consistent with B.C.’s reconciliation approach and/or Canada’s future guidance on consultation and cooperation. Effective October 2021, this means that CSA should be following B.C.’s approach in the development of legislative instruments, policy, and administrative decisions.

Requirements of Ontario Civil Servants

UNDA is the law of Canada and recognizes and affirms inherent Aboriginal rights of Indigenous peoples of Canada. Ontario civil servants have sworn an oath or affirmed allegiance to the Crown:

I swear (or solemnly affirm) that I will faithfully discharge my duties as a public servant;
I will respect the laws of Canada and Ontario, including the recognition and affirmation
of the Aboriginal and treaty rights of Indigenous peoples in the Constitution...

As described above, UNDRIP is a codification of inherent Aboriginal rights under Section 35 of the Constitution.

We would therefore expect staff of the OSC to engage Indigenous peoples in legislative and administrative development in a way consistent with Article 19 of UNDRIP. We suggest following B.C.'s reconciliation approach.

The value of Indigenous inclusion in Canadian business

Through the Quiet Revolution, Quebec began to build its own economic and financial organizations to the degree where, today, Quebecois rightly expect to be included in the boards and senior management positions of national firms. As a recent example, CN Rail faced significant backlash to the lack of a francophone on the board, with deep financial ramifications.

In a similar way, we believe that the best future for Canada will have Indigenous people throughout all aspects of the national fabric. This is the natural completion of Confederation.

Further, opening doors for Indigenous people to take on roles in Canada's corporate sector is a critical part of the work to advance economic reconciliation. [Call to Action 92 from the Truth and Reconciliation Commission](#) (2015) urges the corporate sector to both adopt UNDRIP and "ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities."

As we have outlined in previous submissions and conversations, Indigenous inclusion can lead to more robust management and board decisions because of the different, long-term view that Indigenous people take. This is often referred to as "seven-generational thinking."

This point was made in a piece by the [Globe and Mail editorial board](#) just before Christmas. As they wrote, there are countless examples where "a lack of Indigenous voices on a board hurts a company." They conclude by saying:

Corporate board meetings happen behind closed doors, but what's said once those doors close has wider resonance. A greater range of voices will lead to smarter decision-making – and higher profits.

Osler recently published its annual report on [Diversity Disclosure Practices](#). They found that seventeen board positions at 337 CBCA corporations are held by Indigenous people – 0.9% of nearly 2,500 board seats. These figures are provided only by those that provided disclosure. Additionally, only nine Canadian companies reported that they had an Indigenous person at the Executive level.

When the [Chartered Financial Analyst Institute built their DEI code](#), they wrote that "diversity of perspectives will lead to better investor outcomes". Additionally, within the organization itself, they added that an inclusive culture, awareness, and education simply makes for a better place to work.

Investors are increasingly looking for organizations to respond to issues like reconciliation in how they hire, promote, and retain employees. Indigenous inclusion can therefore become a competitive advantage for Canadian corporations.

Education for management and staff

[Call to Action 92 of the Truth and Reconciliation Commission](#) also speaks to education for management and staff of corporations. The same is set out for public servants at all levels of government in Call to Action 57:

We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Closing Remarks

As stated, the level of engagement required by Canadian and British Columbian legislation that enacts the *United Nations Declaration on the Rights of Indigenous Peoples* goes beyond the degree outlined in the OSC's Statement of Priorities for the upcoming year. Beyond the legal requirement, the longer-term – or seven-generational thinking – provided by Indigenous people can contribute to more robust operations.

With investors increasingly looking for greater disclosure, Indigenous inclusion can be a core competitive advantage for Canada, resulting in greater and more reliable investment in this country.

Addendum:

As previously submitted, below are the FMB's suggestions to address the lack of Indigenous representation in securities regulation:

1. Under TRC Call to Action 57, public Servants, the Board and staff receive intensive training on Indigenous Reconciliation.
2. Set aside at least one seat on the Board of each securities regulator for an Indigenous person (see CPA Canada)
3. Establish an Indigenous consultative and cooperative body (e.g. FMB's proposal for an "Indigenous Council on Financial Reporting and Standards Setting))
4. Embed Indigenous consultation in CSA projects (e.g. 51-107; 43-101)
5. Ensure that at least one seat on any SROs is set aside for an Indigenous person
6. Securities regulators and SROs should implement a hiring, retention, and promotion plan for Indigenous peoples.
7. Any diversity initiative must not combine Indigenous people into a 'catch-all' ethnic diversity category.

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