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

FIRST NATIONS MAJOR PROJECTS COALITION

NATOA

September 3, 2021

Laura Belloni
Secretary General
Canadian Securities Administrators

Ms. Belloni,

The signatories to this letter are all involved in enabling the economic and social development of Indigenous peoples including by improving relationships with financial institutions, business partners and other governments. Each organization that has signed this letter advocates for their members on financial matters that matter to them.

We all agree that **Indigenous peoples will be profoundly affected by the decisions the CSA will make on Environmental/Social/Governance (ESG) and on diversity and inclusion regulations.**

The CSA appears to be moving quickly on these issues. The British Columbia Securities Commission (BCSC) recently consulted the First Nations Financial Management Board (FMB) on diversity and Indigenous perspectives on securities legislation and the CSA is currently consulting on ESG standards and disclosure practices for investment products. The Ontario Securities Commission (OSC) will be holding roundtables on both issues. The Government of British Columbia has also sought feedback on their draft Indigenous Reconciliation action plan, which will necessarily include the BCSC in its operation. Therefore, we believe this letter is both timely and is addressing issues that should be of interest for securities regulators across the country: Indigenous Reconciliation in securities regulation.

Background

For millennia, Indigenous Nations managed their lands, people, and economies, creating trading networks that spanned the continent.

However, through the federal government's unfair treaty process, or through the failure of the treaty process in most of British Columbia to result in settlements for most areas of the province, and the enactment of the *Indian Act* of 1876, Indigenous peoples of Canada no longer had the ability to govern their people and lands and to manage their economies. With dismissive interpretation of Indigenous and treaty rights by Canadian courts throughout the 20th century, the Indigenous intent to share the land and its bounty instead became an appropriation of the land and a subjugation of Indigenous peoples.

Accordingly, corporate Canada and its capital markets have benefitted from the reduction and infringement of Indigenous rights and title, and the intentional prevention of Indigenous participation in the economy. Some settlers became rich; most Indigenous people lived in poverty.

Capital flowed to industries and corporations with no regard to Indigenous rights because financial legislation and regulation did not measure or consider its impact. The system was set up to ignore Indigenous peoples.

Now, with the work of the Truth and Reconciliation Commission, the Inquiry into Missing and Murdered Indigenous Women and Girls, the discovery of Indigenous children's unmarked graves in reserves around Canada, and the adoption of *Declaration of the Rights of Indigenous Peoples Act* (DRIPA) in B.C. and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in federal and British Columbia legislation, Canadians are realizing that the old way was wrong, and that Reconciliation is needed.

The corporate mainstream is also coming on-board with Indigenous Reconciliation—the recent *Rotman 360 Degree Report: Where are the Directors in a World in Crisis* at pages 24 to 25 reflects modern expectations for good corporate governance which include Indigenous Reconciliation:

> https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report

On May 12, 2021, shareholders of TMX Group Ltd., with the support of its board, voted overwhelmingly to support a resolution on Indigenous inclusion and reconciliation[1] at the company's annual and special meeting of shareholders held earlier. There is widespread desire for improved disclosure of public companies' efforts on reconciliation and Indigenous inclusion.

The Government of British Columbia and the Government of Canada have also embraced Reconciliation in legislation and in regulation.

Since 2017, mandate letters of the Government of British Columbia and of its Ministers, including the Minister of Finance's to the BCSC, have mandated the incorporation of UNDRIP and the Truth and Reconciliation Commission (TRC) into mandates.

In 2019, with B.C. passing the DRIPA, there is a legislative requirement. In consultation and cooperation with the Indigenous peoples in British Columbia, **the government of British Columbia must take all measures necessary to ensure the laws of British Columbia are consistent with UNDRIP. This**

[1] The vote resolves that the TMX Group's Board of Directors report to shareholders on its work:

- to develop internal programs and policies on equity, diversity, and inclusion (ED&I), including those that encompass current and prospective Indigenous employees, and relationships with Indigenous communities,
- to review procurement from Indigenous-owned businesses, and those owned by other underrepresented groups, and establish appropriate disclosure practices and objectives; and
- to engage with qualified Indigenous and other organizations to support this work so that these programs can be shown to meet standards that are appropriate for the company and, wherever possible, aligned with commonly-used frameworks and to report in an ongoing way that supports investors' ability to determine the breadth, depth, and content of these programs.

requirement applies to the BCSC. Currently, this requirement includes consultation with the First Nations Leadership Council and B.C. has proposed the creation of a secretariat to coordinate government reconciliation efforts. Accordingly, **the CSA should be cognizant that national instruments, policies and notices may require extra legislative steps in British Columbia in order to comply with DRIPA.**

In 2021, similar legislation passed federally, that would presumably apply to any prospective federal securities-related legislation (potentially, for example, criminal, systemic risk and derivatives laws).

The Government of the Northwest Territories in the statement of priorities for the 2019 government has indicated its intent to implement UNDRIP. Certainly, the governments of the three territories, with majority or strong minority Indigenous populations, should also be considering the effects of securities legislation on their Indigenous population and considering how to further Indigenous perspectives in their capital markets through ESG and diversity.

In the rest of the provinces, many jurisdictions expanded diversity and inclusion to gender (aka Women on Boards) through a comply or explain requirement; since OSC was the lead on this initiative and virtually all issuers wish to distribute in Ontario, prospectuses filed across the CSA *de facto* include this requirement. The OSC showed racial diversity leadership in its Statement of Priorities to take actions outlined in the BlackNorth Initiative CEO pledge to end anti-Black systemic racism.

However, Indigenous people, Canada's constitutionally recognized First Peoples, are left to be puzzled as to why we are left out on diversity initiatives by the securities regulatory leadership in Vancouver, Calgary, Winnipeg, Toronto and Montreal. After all, the Truth and Reconciliation Calls to Action, which called for diversity and inclusion of Indigenous peoples in government and business, were published in 2015.

We are concerned that the CSA, with broad powers to create regulations on the capital markets, must have greater engagement with Indigenous peoples and Indigenous Reconciliation in development of ESG and diversity and inclusion regulations.

Making ESG into ESGI

Interest in ESG investing has grown considerably in Canada for both retail and institutional investors, including in the investment fund industry. It is reasonable to assume that part of the reason for this growth in interest is that several large natural resource projects in Canada have failed to get off the ground due to a lack of 'social licence'. This lack of social licence is based not only because of environmental concerns, but also because of concerns that these projects would not sufficiently address concerns that Indigenous communities were properly consulted and engaged on these projects.

As you are aware, currently, there are no unified standards for ESG, although many international organizations have proposed standards, some of which are used by the investment industry. With the urgency to address climate change, suddenly, international standard setting bodies are now rushing to adopt ESG standards that have been developed without Indigenous consultation. IOSCO (The

International Organization of Securities Commissions), International Financial Reporting Standards (IFRS) Foundation / International Accounting Standards Board, and CFA Institute current drafts of international ESG standards do not adequately include Indigenous Reconciliation principles.

We anticipate that these international standards will be set within the next few months to a year, and that Canadian Securities Administrators will be tempted to adopt them without considering Canada's constitutional, legislative and moral obligations to Indigenous peoples. We firmly believe that **policy on recognizing and disclosing ESG standards in Canada must be "made in Canada" with input and consultation with Indigenous peoples.**

Some Canadian ESG advocates and political leaders from across the spectrum recognize that Indigenous Peoples are so important to Canada's economy that they refer not to ESG, but to ESGI— "I" for Indigenous. Canadian investors are looking to incorporate in investment decisions the UNDRIP – which Canada recently voted to make Canadian laws consistent with and are demanding ESGI transparency from issuers. Investors increasingly recognize the risks of issuers not receiving free, prior and informed consent (FPIC) from affected communities—stalling of a project for years in litigation and protest, increasing the cost of capital, and raising systemic risk in the capital markets.

As the Shareholder Association for Research and Education (SHARE) and the National Aboriginal Trust Officers Association (NATOA)'s Reconciliation and Responsible Investment Initiative (RRII) noted in a recent report:

> "*As recent experiences demonstrate, both in Canada and internationally, the way companies engage with Indigenous peoples as business partners, employees, and rightsholders have significant implications for companies' operational success in the short and long term. The risks to companies that fail to develop positive relationships with Indigenous peoples are well documented, including reputational damage, regulatory intervention, litigation, project delays and disruptions, shut downs and financial loss. For example, a world-class mining operation with $3 to 5 billion in capital expenditures could suffer a cost of roughly $20 million per week from delayed production due to company-community conflict.*"

We also note that recent protests have also led to bank and insurance companies joining a boycott to not work with project proponents, and other companies in the supply chain shying away from working with proponents.

This only highlights the need for Indigenous perspectives to be included in ESG. Good Canadian ESGI standards will create greater transparency, and increased efficiency in capital flows. Corporate compliance with UNDRIP and meaningful efforts by Corporate Canada to advance Economic Reconciliations, will also lead to lower cost of capital, including tighter credit spreads, lower costs of insurance, and lower banking costs.

Ultimately good ESGI Standards will assist corporations to do business with Indigenous peoples and will allow Indigenous peoples to make quicker decisions whether they participate in potential natural

resource development projects because there will be better disclosure and higher ESG standards. All of which must be recognized as important to the investment community.

Canadian Securities Administrators should work to actively support ESGI standards that are developed in consultation with Indigenous governments, peoples, experts, and organizations—Canada cannot simply settle for disclosure of standards that are adopted verbatim from EU, US, or international standards.

Specifically, we recommend that:

- **ESG in Canada should instead be referred to as "ESGI"—including Indigenous Reconciliation disclosure and metrics.**

- **For investment products that market themselves as ESG compliant, there must be prescriptive standards that ensure that the ESG claim is full, true, and plain and based on objective standards. UNDRIP and Reconciliation principles must be included in the definition of ESG and any reporting requirements.**

- **To promote confidence in capital markets and encourage the provision of information that investors need to measure risk of issuers not having Indigenous social license, reporting issuers must report in their prospectuses and continuous disclosure on ESGI matters related to Reconciliation, Truth and Reconciliation Commission Call to Action 92 *Business and Reconciliation*[2], and UNDRIP, including, but not limited to**
  - **Diversity statistics for Indigenous board members, senior management, and staffing**
  - **Recognition of Indigenous rights, including whether the issuer commits to apply UNDRIP and/or seek free, prior, and informed consent**
  - **Effects of development on Indigenous communities and efforts to mitigate**
  - **Cumulative environmental effects**
  - **Indigenous contracting and procurement**

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[2] Business and Reconciliation

92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:
i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
iii. Provide education for management and staff 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, andAboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

- Indigenous training and education
- Indigenous ownership and economic participation

- Proxy advisory firms advise pension plans and investment funds, collectively the largest investors in the capital markets, about how to vote their shares. Proxy advisory firms have immense power and influence in deciding whether or not companies and boards are held to account on ESGI, including diversity. Proxy advisory firms must comply or explain why they have not included Indigenous Reconciliation as a factor in their proxy voting recommendations, including for Indigenous board diversity and ESGI-related voting, or be regulated to do so. Proxy advisory firms should also implement an Indigenous Reconciliation plan including diversity targets.

- ESG rating agencies likewise have immense influence on how investors, both institutional and retail, decide on which fund or company to invest in. In the absence of international ESG standards, they are essentially making the rules of what defines an ESG fund. ESG rating agencies must be required to comply or explain why they have not included Indigenous Reconciliation as a factor in their ESG ratings, or be regulated to do so. ESG rating agencies should also implement an Indigenous Reconciliation plan including diversity targets.

- Similarly, the Canadian Investment Funds Standards Committee (CIFSC) will determine the definition of a "Responsible Investment" (RI) fund (i.e., ESG fund) for categorization codes for the investment industry. They will define what ESG means and the Canadian Securities Agencies would permit these codes to be included in prospectus, continuous disclosure and marketing material in the ordinary course. The CIFSC has communicated it will align with the finalization of CFA Institute's *ESG Disclosure Standards for Investment Products*, an international standards process that has not incorporated Indigenous consultation or Indigenous definitions for ESG, for defining RI Fund Identification Framework. (FMB and RRII have submitted comments to the CFA Institute on the lack of Indigenous consideration in its framework. https://www.cfainstitute.org/-/media/documents/code/esg-standards/esg-consultation-paper-comment-first-nations-financial-mgmt-board-and-reconciliation-responsible.ashx) CIFSC must create a "made in Canada" approach to the definition of Responsible Investment fund working with Indigenous peoples. In the alternative, as a *de facto* ESG standard-setter, CIFSC should be regulated as a Self-Regulatory Organization (SRO) and have Indigenous Reconciliation requirements listed above.

We believe that these amendments would not only respect UNDRIP and Indigenous Peoples, but would also help investors who recognize the materiality of Indigenous rights and respectful relations with Indigenous peoples in identifying ESGI products that match their own values and investment beliefs.

Indigenous involvement in ESGI standards would reduce systemic risk created by project risk and project delay, better protect investors from lack of disclosure on Indigenous-related risks, better inform Indigenous nations and individuals on which issuers to invest in, and better inform investors who can more efficiently allocate resources to issuers that better manage Indigenous-related risk.

Indigenous inclusion in ESG is essential for investors and for capital markets.

Indigenous Representation and Inclusion in Securities and Finance

The Canadian public markets consist of thousands of reporting issuers with a collective market capitalization in the trillions of dollars. Registrants—dealers, portfolio managers and fund managers—transact and manage trillions of dollars. Securities commissions play uniquely important roles across Canada in the creation of economic regulations and policies that regulate business and investment, creating free and fair capital markets and creating investor confidence. However, Indigenous people do not yet see themselves reflected in the boardrooms of Canada, or in the finance industry, or, in fact, in financial regulators.

To wit, according to the Government of Canada (https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08998.html), for *Canada Business Corporations Act* corporations that were reporting issuers in 2020 (i.e., public companies):

- Indigenous persons hold 0.3% of board seats among the 403 distributing corporations that disclosed diversity information (the same percentage for both venture and non-venture issuers)
- Indigenous persons hold 0.2% of senior management positions among the 403 distributing corporations that disclosed diversity information
- Indigenous persons hold **none** of the senior management positions among the 160 venture issuers and 0.3% of senior management positions among the 243 non-venture issuers

Yet, Indigenous people make up almost 5% of the total population of Canada.

This is a 17 to 25 times under-representation across Canada.

We estimate Indigenous governments have at least $20 billion of assets under management with registrants. Yet, there are only a dozen Indigenous CFA charter holders in North America. We can name only a handful of senior Indigenous finance executives or asset managers. We are aware of only one staff member across all the Canadian Securities Administrators who is Indigenous.

This lack of representation undermines Indigenous confidence in capital markets.

Due to lower levels of education and lack of familiarity with the capital markets, Indigenous peoples and governments are also much more vulnerable to mis-selling and fraud. Yet, we are not aware of any campaigns targeted at Indigenous investor education.

Clearly, there is work for securities regulators to do on Indigenous Reconciliation.

To address the lack of Indigenous representation in securities regulation we recommend the following:

- **In accordance with the Truth and Reconciliation Call to Action 57 *Professional Development and Training for Public Servants*[3], the Board and staff of the CSA and its constituent commissions must receive intensive training on Indigenous Reconciliation. The training cannot be a two-hour snapshot. It must be in-depth, multi-day, ongoing, and comprehensive. It is especially important that senior leadership be taught to empathize and to challenge their own cognitive dissonance about Indigenous peoples from years of colonial education. Leadership must consider how to develop their own institution-specific framework for incorporating Reconciliation into action in the CSA and constituent commissions.**

- **Setting aside at least one seat on the Board of each securities regulator for an Indigenous person, and possibly more in jurisdictions with a high percentage of Indigenous population like Saskatchewan and Manitoba.**

- **the CSA should ensure that at least one seat on any SROs (in particular, the proposed merged Mutual Fund Dealers Association and IIROC) is set aside for an Indigenous person and that the consideration of the governance of a combined MFDA and IIROC should have Indigenous input.**

- **Securities regulators and SROs should Implement a hiring, retention, and promotion plan for Indigenous peoples at all levels in the organization with goals and targets similar to the BlackNorth Initiative, reflecting the 5% Indigenous population of Canada (or higher in provinces and territories with high Indigenous populations), which must be represented in the regulation of its financial markets. This is consistent with what the OSC has targeted with respect to Black Canadians.**

- **Any diversity initiative must not combine Indigenous people into a 'catch-all' ethnic diversity category. The Government of Canada in public CBCA company diversity reporting separates out Indigenous peoples. Securities regulation should mirror this, reflecting Indigenous peoples' constitutional relationship with the Canadian and the provincial Crowns.**

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[3] 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.

- Each securities regulator should create an Office of Reconciliation with a mandate to:
  - develop and report on the regulators' efforts to advance Reconciliation.
  - ensure Indigenous representation internally
  - educate staff and board members on Reconciliation and the history of Indigenous peoples in accordance with Call to Action 57 of the Truth and Reconciliation Commission
  - consult with Indigenous peoples on the development of legislation that may affect them (as required under UNDRIP and DRIPA) and seek counsel from thought-leading national Indigenous institutions like the Reconciliation and Responsible Investment Initiative, NATOA, First Nations Major Projects Coalition and First Nations Financial Management Board on how securities legislation can embrace Reconciliation
  - work with Indigenous peoples to advance economic Reconciliation within the remit of securities regulation
  - educate Indigenous peoples and governments on the capital markets and investor protection.

- In consultation with Indigenous peoples, regulators must consider whether special suitability requirements, duties or proficiency should apply to registrants dealing with Indigenous peoples or governments, due to vulnerabilities including the need for First Nation capital to be invested in and last in perpetuity and Indigenous unfamiliarity with capital markets due to residential schools and systemic racism, and due to a need to consider Indigenous values in the investment and suitability process. Regulators should also investigate if any systemic barriers to access to suitable advice exist for Indigenous people or governments, in particular Indigenous people in remote communities' access to any advice at all and Indigenous governments' access to portfolio managers.

- Registrants, including broker dealers, portfolio managers, and investment fund managers, of a certain size doing business in or selling into Canadian markets must publicly report diversity statistics for Indigenous board members, senior management, and staffing.

- The regulators must consult with Indigenous peoples on the creation of a requirement to have an Indigenous board seat on all reporting issuers, broker dealers, portfolio managers, and investment fund managers doing business in or selling into Canada above a certain size and/or listed on a major exchange or who manage public investment funds.

Conclusion

It is the belief of the signatories that if the CSA and its member regulators adopt these recommendations on the Indigenous ESG and diversity, not only will Economic Reconciliation with Indigenous Peoples in Canada be advanced, but a much more equitable, favourable and profitable environment will be created for investors and market participants across the country. These recommendations give regulators the

opportunity to ensure that their work aligns with UNDRIP and that DRIPA legislative requirements of the Government of British Columbia are met.

We thank you for taking our recommendations into consideration and would recommend a further dialogue with the CSA.

Sincerely,

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About First Nations Financial Management Board (FMB)

Canada has almost 1.7 million Indigenous people, or about 5% of the population, the majority of which are 'First Nations' peoples ('North American Indians') who are members of First Nations bands or governments. There are more than 600 unique First Nations bands/governments in Canada. The First

Nations Financial Management Board is a federal Indigenous-led organization that was created by *the First Nations Fiscal Management Act*, which was passed with all party support in Canada's parliament in 2005.

Our role is to support First Nations governments in the development of strong governance and financial management systems. It is optional to work with us and our services are free of charge, to date 315 First Nations governments from across Canada have scheduled to our Act. These First Nations are a 'coalition of the willing' of First Nations that entrust FMB to seek a new path forward for economic and social development backed by strong financial management and reporting systems.

About the First Nations Major Projects Coalition

The First Nations Major Projects Coalition (FNMPC) is a national not-for-profit collective of over 75 First Nations. FNMPC assists First Nations in making informed business decisions concerning their participation in major natural resource and infrastructure projects through the provision of strategic capacity support concerning economic and environmental considerations.

About NATOA

NATOA is a charity organization and is committed to providing Indigenous Peoples of Canada with the resources and information that will help them efficiently create, manage, and operate trusts as a means to ensure the seven generations yet unborn, can benefit from the goals and dreams of the present generation. NATOA's is highly professional and relevant resource for Indigenous Peoples in becoming self-sustaining and vital economic communities.

The Board of Directors of NATOA are committed to ensuring that the best possible information on areas relevant to trusts, such as investing, trust structures; accounting, tax, management, administration, and legal issues is available through an internet-based research library website and national/regional workshops.

About Dara Kelly

Dr Dara Kelly is from the Leq'á:mel First Nation, part of the Stó:lō Coast Salish. She is an Assistant Professor of Indigenous Business at the Beedie School of Business, SFU. She teaches in the Executive MBA in Indigenous Business and Leadership program, and on Indigenous business environments within full-time and part-time MBA programs.

She is a recipient of the 2020 Early in Career Award for CUFA BC Distinguished Academic Awards. Her research helps fill in gaps in the literature on the economic concepts and practices of the Coast Salish and other Indigenous nations. She has presented in numerous conferences and public spaces in an effort to challenge conventional economical practices and inform positive change by drawing on knowledge of Indigenous economics. She is Co-Chair of the Indigenous Caucus at the Academy of Management and serves on the board of the Association for Economic Research of Indigenous Peoples.

4. Indigenous Peoples
The corporation should establish and implement a mechanism for fostering its relationship with Indigenous peoples which recognizes the unique historical circumstances under which the relationship is created. Ideally, such a mechanism would be jointly developed to apply to the specific Indigenous Peoples affected by any prospective project. Cognizant of the fact that Indigenous peoples are not mere stakeholders with interests but peoples with constitutional rights that are recognized and affirmed by section 35 of the Constitution Act, 1982, and recognizing that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is applicable to the laws of Canada (and is already in BC law), boards must assure that these rights are recognized in any activities that may affect or impact the rights of Indigenous Peoples. Specifically, UNDRIP implementation in Canada may require that corporations obtain the "free, prior and informed consent" from the impacted Indigenous Peoples. Corporations should report activities with and without free prior and informed consent to shareholders as a matter of risk disclosure.

As two settlers writing these guidelines, we want to put special emphasis on the inherent rights of Indigenous Peoples—First Nations, Inuit and Métis and Indigenous peoples in any location where the company operates around the world—and the role of corporations in respecting them. It is important that Indigenous Peoples are not treated simply as one set among many stakeholder groups.[72] Many Indigenous people reject the designation of "stakeholder," which implies that their interests might be balanced with other interests, rather than affirming their inherent rights.[73] In recognizing Indigenous rights, the principles of Truth and Reconciliation apply, and boards of directors have an important role to play in honouring these principles in their own organizations. However, before reconciliation is possible, truth is required. For centuries, corporations have benefited from the diminishment of Indigenous rights, and many have profited directly from infringements on these rights. This cannot continue to be the case in an era of reconciliation as the risks of ignoring and infringing rights becomes greater and greater. Many boards of directors want to do better but lack experience and education, struggling to know how to do the right thing.

Truth and Reconciliation's Call to Action 92 on "Business and Reconciliation" requires businesses to: "(i) Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous Peoples before proceeding with economic development projects. (ii) Ensure that Aboriginal Peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects. (iii) Provide education for management and staff 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."[74]

This language is echoed in the UN Declaration on the Rights of Indigenous Peoples (passed by the UN General Assembly in 2007 and affirmed by Canada in 2016). On December 3, 2020, the federal leadership introduced Bill C-15 to affirm UNDRIP in Canadian law.[75] A similar law has also been passed in British Columbia.[76] While UNDRIP is aimed at what governments should do, companies will be delegated the responsibility for free, prior and informed consent and will be expected to engage in negotiations that may take time to resolve.

It is fair to say that there is controversy on all sides about Bill C-15.[77] From a business standpoint, some might be concerned that "free, prior, and informed consent" might constitute veto power over business projects. Indeed, in some cases, cancellation of a project might end up being the outcome. However, the focus on the idea of the "veto" has taken over the conversation about Indigenous rights in an unhelpful way, framing consultation as a burden rather than as a legal and moral duty.[78] As UBC Professor Shirley Lightfoot has pointed out, "There seems to be a fear somehow that if free, prior and informed consent is upheld that Indigenous

4. Indigenous Peoples cont.

Peoples will have more rights than everyone else. That is completely 180 degrees off." [79] Instead, consent is not about giving Indigenous Peoples more rights than everyone else but rather assuring equal rights.[80] It is also the case that for many projects, several different First Nations or Indigenous communities may be impacted, and their interests may not all be aligned. UNDRIP and Truth and Reconciliation principles are meant to be the minimum threshold for action by companies to find ways to compensate communities and modify plans such that the impacts of corporate actions are accounted for. Modifications to plans should be done in a spirit of consent. Consent includes the right to determine how impacts will be accounted for, not just that they will be accounted for. Consent is not fulfilled with permission alone, but also encompasses the terms and conditions of that permission. While often the focus is on economic growth and employment, the focus should not be solely on monetary compensation and should also consider the social and cultural effects of projects on communities.

The language of UNDRIP has interpreted "free, prior, and informed consent" as an objective to be strived for, something companies seek, something companies make efforts to obtain. Crucially, in the Canadian context, simply having this process in place will not be seen as sufficient. That process should lead to consent as an outcome. What the "right" thing to do will vary by context. Consultation cannot be a "feel good" box-checking exercise where companies listen to concerns but then forge ahead as planned.[81] Pam Palmater, lawyer and Chair in Indigenous Governance at Ryerson University offers a useful analogy to mutual consent that is required in other domains (sexual consent or medical consent): if you are going to go ahead no matter what is revealed in the consultations, then it is not consent.[82]

There are a growing number of examples of projects that have done this fairly successfully.[83] And, industries are working to develop engagement guides that can help companies follow through on these commitments.[84] Yet, recent history has also demonstrated that ignoring or downplaying Indigenous rights can result in significant business and reputational risk. Legal challenges will inevitably cause delay and uncertainty and can result in project cancellation. Resource lawyer Bill Gallagher has documented 300 legal victories for Indigenous Peoples in resource cases.[85] These cases also demonstrate the inadequacy of relying solely on the consultation and accommodation framework with Indian Act Bands alone when other groups such as hereditary chiefs play important roles as well.

There is increasing pressure on investors to embed the principles of reconciliation in conducting due diligence and in exercising their stewardship of companies in which they invest.[86] This movement will increase the salience of Indigenous rights in boardroom discussions. Projects proceeding without free, prior and informed consent have resulted too often in conflict on the ground, which can have a material impact on the corporation's reputation and goodwill and sometimes results in project cancellation. Industrial projects that may have the required regulatory permits and adequate consultation, but do not have the free prior informed consent of all Indigenous Peoples impacted by those projects, can still face

Comments regarding the CFA Institute ESG Disclosure Standards for Investment Products: Exposure Draft (Released May 2021)

Submitted by the First Nations Financial Management Board (FMB)
and the Reconciliation and Responsible Investment Initiative (RRII)

July 14, 2021

Understanding and incorporating Indigenous perspectives in investment decision-making helps investors align their approach with international standards related to Indigenous rights, and in particular the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[1] We applaud the CFA Institute's efforts to build disclosure standards for investment products to facilitate transparent evaluation, comparison, and discussions of ESG products. However, we are writing to communicate our concern that the current exposure draft fails to incorporate Indigenous perspectives and rights as important ESG information related to investment products. To remedy this, we submit the following recommendations for your consideration. We believe that these amendments would help investors whom recognize the materiality of Indigenous rights and respectful relations with Indigenous peoples identify ESG products that match their own values and investment beliefs.

1. **Incorporating Indigenous Perspectives in Defining ESG:**

Term "ESG": A movement has emerged in Canada, as well as in parts of Australia and New Zealand, to apply Indigenous approaches to ESG. This has led to a growing number of investment professionals and other actors to refer to ESG as ESGI, with the "I" being "Indigenous." In nation-states where Indigenous rights are being recognized in domestic law and in practice by companies, such as in Canada, Australia, New Zealand, and some countries in South America, Indigenous rights are material to the success of any investments that may affect Indigenous lands, waters, territories, people, and/or rights. An issuer's development of infrastructure or use of public lands, resources, and/or waterways is at risk when Indigenous rights due diligence is not fully undertaken. Aligning investment products' ESG with Indigenous perspectives and rights is thus critical.[2] We propose changing "ESG" to ESGI," with Indigenous referring to the following:

> Relating to mutually beneficial relationships with Indigenous peoples, including a commitment to upholding Indigenous rights (namely those outlined in UNDRIP, including free, prior, and informed consent); representation of Indigenous peoples in diversity policies and corporate leadership; employment, contracting, and procurement opportunities for Indigenous people and businesses; and Indigenous community investment, support, and participation.

Alternatively, we propose that the definitions of the constituent parts of "ESG" be broadened to include Indigenous peoples and rights, as outlined below:

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[1] SHARE. Energy and Mining Investment: Assessing Accountability for Indigenous Rights in Complex Investment Chains. SHARE, 2020. https://share.ca/wp-content/uploads/2020/08/SHARE_Mining-Report_FINAL_Web-High-Res.pdf;
Fredericks, C. F., Meaney, M., Pelosi, N., & Finn, K. R., Social Cost and Material Lost: The Dakota Access Pipeline. U of Colorado Law Legal Studies Research Paper No. 19-1. First Peoples Worldwide, 2018. https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf

[2] For instance, see First Nations Major Projects Coalition (FNMPC). 2021. *Indigenous Sustainable Investment: Discussing Opportunities in ESG*. Available at https://static1.squarespace.com/static/5fb6c54cff80bc6dfe29ad2c/t/6009dc280d5f7c464a330584/1611258929977/FNMPC_ESG_Primer_2021_Final.pdf

Term "Environmental": the definition of Environmental centres a western view of environment as separate and apart from people. The definition negates the human dimensions of environmental systems and change, and does not speak to the relationship of Indigenous peoples with the land. Instead of:

> Relating to the quality and functioning of the natural environment and natural systems.

We propose:

> Relating to effects on the environment and nature, including, but not limited to, climate change, resource depletion, waste and pollution, deforestation, greenhouse gas emissions, and alteration of the relationship between people and nature, including that between Indigenous peoples and their traditional territories.

Term "Social": the definition of social does not speak to the rights and title of Indigenous peoples, nor to social licence to operate. Instead of:

> Relating to the rights, well-being, and interests of people, communities, and society.

We propose:

> Relating to the sustainability of social fabric, including workers' rights, Indigenous rights and reconciliation, human rights, and respectful community relations including social licence to operate, both within companies and other investee entities, and their supply chains.

Term "Governance": the definition of Governance does not speak to the transparency and equitable organizational structure of the corporation and other investee entities, including the participation of underrepresented groups at all levels of the relevant organization. Instead of:

> Relating to the policies and procedures used to direct, control, and monitor companies and other investee entities.

We propose:

> Relating to the good and ethical stewardship of a company or other investee entities, including factors such as executive pay, bribery and corruption, political lobbying, board diversity and structure, tax strategy, and compliance.

Examples used: There are many kinds of ESG examples given on pages 35 and 36 of the draft disclosure standards. However, there is no mention of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), nor of Free Prior and Informed Consent (FPIC), a key tenet of the UN Declaration in the standards. Also absent are other human rights standards related to Indigenous rights such as ILO Convention 169, as well as the need for the inclusion of Indigenous peoples in corporate leadership and business partnerships. We suggest that you consider including examples of relevance to Indigenous rights and economic development within this list. For instance, the list would benefit from featuring points related to UNDRIP due diligence and compliance, as well as Indigenous inclusion in company operations and governance, Indigenous partnerships, among other forms of ESG strategies.

2. Process Underlying the Disclosure Standards' Development:

The process of developing the standards did not appear to include or consult Indigenous peoples or Indigenous-led organizations. As a result, the proposed disclosure standards may overlook Indigenous peoples, including their inherent and internationally-recognized rights. In our view, the marked absence of considerations related to Indigenous peoples is a significant shortcoming in the draft standards. We suggest that the CFA Institute engage directly with Indigenous peoples prior to finalizing these draft disclosure standards, and in future processes undertaken in relation to ESG standards, which may be facilitated through national CFA branches.

About the First Nations Financial Management Board (FMB):

Canada has almost 1.7 million Indigenous people, the majority of which are 'First Nations' peoples ('North American Indians') who are members of First Nations bands/governments. There are more than 600 unique First Nations bands/governments in Canada. The First Nations Financial Management Board is an Indigenous led organization that was created by the *First Nations Fiscal Management Act*, which was passed with all party support in Canada's parliament in 2005.

Our role is to support First Nations governments in the development of strong governance and financial management systems. More broadly, FMB enables the economic and social development of First Nations by assisting them. in the development, implementation, and improvement of financial relationships with financial institutions, business partners and other governments. It is optional to work with us and our services are free of charge, to date 315 First Nations governments from across Canada have scheduled to our Act.

About the Reconciliation and Responsible Investment Initiative (RRII):

The Reconciliation and Responsible Investment Initiative (RRII) is a partnership between the Shareholder Association for Research and Education (SHARE) and the National Aboriginal Trust Officers Association (NATOA). SHARE is a non-profit organization dedicated to mobilizing investor leadership for a sustainable, inclusive, and productive economy. NATOA is a charitable organization committed to providing Indigenous peoples with the resources and information that will help them efficiently create, manage, and operate trusts as a means to ensure the seven generations yet unborn can benefit from the goals and dreams of the present generation. Together through RRII, we work with Indigenous and non-Indigenous investors to foster a financial system that empowers Indigenous perspectives, recognizes the role of community values in investment decision making, creates positive economic outcomes for Indigenous peoples, and contributes to protecting Indigenous rights and title. For more information, please visit reconciliationandinvestment.ca