

September 29, 2023

Alberta Securities Commission,

Autorité des marchés financiers,

British Columbia Securities Commission,

Financial and Consumer Affairs Authority of Saskatchewan Financial and Consumer Services Commission,

New Brunswick Manitoba Securities Commission,

Nova Scotia Securities Commission Office of the Superintendent of Securities,

Newfoundland and Labrador Office of the Superintendent of Securities,

Northwest Territories Office of the Superintendent of Securities Nunavut,

Office of the Yukon Superintendent of Securities,

Ontario Securities Commission Superintendent of Securities,

Department of Justice and Public Safety, Prince Edward Island.

The Secretary, Ontario Securities Commission, 20 Queen Street West 22nd Floor, Box 55, Toronto,  
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Dear CSA Representatives,

**Re: Proposed Amendments to Form 58-101 F1 and National Instrument 58-101 and Proposed Changes to National Policy 58-201**

I am a mostly retired Canadian CPA. During my 30 years as a partner in one of the large public accounting firms I worked extensively on audit engagements of public companies of all sizes, the setting of accounting and auditing standards and the development of securities regulation. For several years I have been an active DIY investor. I devote 15 – 20 hours a week to this and take it very seriously. I read many annual, interim and sustainability reports, information and management circulars, press releases, information on company websites and analyst reports. I also vote at most shareholder meetings for which I have a vote and watch a great deal of business coverage on TV and online.

My vote is for a Form A approach. It is a reasonable and sufficient response to the needs for disclosure of DEI information. I would support a Form B approach if I believed it would result in an increase in the

quality of boards and a better stewardship of the companies in which I invest but the evidence indicates the opposite would happen.

The OSC's case for a Form B approach is based on a house of cards of faulty, unsupported assumptions. In particular, the OSC is assuming that investors need the proposed Form B information for investment purposes and that providing this information will enhance investor protection. These assumptions seem to be based mostly on taking at face value input from a small but vocal group of investors with motivations other than investing. My assessment of the facts, including the real-life examples I'll describe later in this response, indicates that the gender information that currently has to be disclosed is not needed for investment purposes and is being used with negative consequences for investors. Adding additional requirements will very likely make things worse because all indications are that they will be used in the same ways and with even more negative consequences.

My paraphrasing of the OSC's mandate is that it is primarily to protect investors and the efficiency and integrity of our capital markets. I expect that all CSA members have similar mandates. That being said, there is no doubt that the proposals are wandering into social policy issues that are outside of the mandates of the CSA. I don't think that should be happening but if it is going to happen it should be the focus of specific study. Doing that study might be advisable for a number of reasons, other matters drawing attention such as what climate change disclosures should be required also result in lots of public/social policy issues. I also don't think the CSA should be taking sides in social policy debates.

The CSA release doesn't indicate why the proposals are being made and what the CSA hopes to achieve. The objectives of the CSA should be clearly described in NI 58-101.

The CSA release uses the word "underrepresented" but doesn't indicate what is meant by this. From the context and other information, I infer that the CSA, and particularly the OSC, believe representation on boards and as executive officers should be proportionate to the population as a whole. If this is the case, it should be said in NI 58-101. I believe representation should be based on the characteristics of the person that would make them qualified directors or executive officers and not primarily based on the person's characteristics at birth.

To hopefully make my response more readable I'm going to break it somewhat arbitrarily into two parts, observations and research. My focus will be on directors and gender but much of what I'm going to say also applies to executive officers and issues related to identified groups or designated groups. My perspectives will mostly have larger companies in mind but also apply in general to smaller companies.

The following are my key findings:

- Investors with only the objective of achieving superior investment returns do not use gender information and do not need Form B information.

- It is largely investors that are trying to force social policy change that are supporting a Form B approach.

- The actions of these investors are resulting in negative consequences for investors and our capital markets such as pressure to remove outstanding board members that don't share their social policy views and unnecessary costs.

-The alarming looking 24% figure highlighted in the CSA release as the percentage of women directors and used to imply there is an egregious problem in need of a solution is a misleading number. It's based on out-of-date information and gives undue weight to the large number of small companies that populate our capital markets. More relevant information is that even the out-of-date information that is the basis for the 24% figure shows that issuers with a market capitalization of more than \$1 billion average about 30% women directors and TSX Composite Index issuers that comprise about 70% of the total market capitalization of Canadian issuers average about 38%. There is a good chance these percentages are both higher now. In addition, 45% of openings were filled by women.

-It's not necessary to connect the dots to conclude that if the disclosure of gender information is resulting in negative consequences that disclosure of all the Form B information would result in even more negative consequences.

-The CSA release does not consider the consequences of current requirements or the possible consequences of the proposals.

### **Observations**

Being a good director is difficult and time-consuming. It requires a lot of skill, extensive experience, a lot of effort and an independent mind set. I'd estimate that around 10 – 20 percent of directors are outstanding, many are just ok and some are, to put it colloquially, not people I would trust to tie my shoelaces.

It's important to remember that directors act in an oversight capacity. As a result, a good director ideally has deep and broad industry specific expertise and the skills and mindset to challenge management when necessary. These characteristics don't develop overnight. Retired executives and subject matter experts are often more likely than other people to have those characteristics and be good directors. I'm going to refer to these retired people as being "retirement age" and many existing non-management board members are retirement age. Challenging management does not come easily. CEO's often have strong personalities with strong opinions and directors without the characteristics noted above are likely to be ineffectual.

Another important consideration is that directors are highly paid. In large companies the annual fees for a single director can be several hundred thousand dollars or more, often meaning an hourly rate of more than a \$1,000 per hour. It's not surprising that hordes of people are paying to get an ICD designation. Good directors are also difficult and costly to find. These fees and expenses are costs borne by shareholders that should be reflected in the size and composition of the board. Put differently, when these costs aren't justified by good performance, investor protection is not being enhanced and the outflow of resources is hurting investors.

Because of the costs involved and other factors related to the efficiency and effectiveness of a board, I don't want a director with a narrow skillset or perspective that's relevant only sporadically. Narrow skillsets and perspectives can be easily accessed when necessary. With trepidation I'll elaborate in the context of Indigenous issues. Where these issues are important, or even where they are not, I'd be thrilled to have an Indigenous person with the characteristics I think are important as a board member of one of my holdings. I would not be thrilled to have a token Indigenous person or token member of any other "identified group" or "designated group".

It's human nature to want simple solutions to complex issues. Sticking to Indigenous issues and my perspectives as an investor, rather than the simple to do disclosure of whether there are Indigenous board members, I'd far sooner see more disclosure about things like what the issues are, the specifics of Indigenous engagement, the percentage of Indigenous employees, the number of Indigenous persons in non-executive management roles, the training of Indigenous persons and the nature and extent of support provided to affected Indigenous communities. I also fear that a Form B approach will encourage taking the simple action of adding an Indigenous board member but nothing to address more important underlying issues.

I generally vote against proposals to increase the size of a board. When voting on directors I look mostly at four things – company-specific experience, industry experience, specific relevant expertise such as in accounting or legal matters and an ownership interest beyond one that is the result of receiving director's fees in some form of equity interest.

I suspect that the CSA's political masters think that many or even most people are qualified to be a director and that that's putting pressure on the CSA, and particularly the OSC, to act. I also suspect that the masters of, and members behind, many of the public sector investors that will support a Form B approach have a similar misconception. Then, of course, there will be a number of special interest groups and those that make money off the back of disclosure requirements that will support a Form B approach because it is in their interests to do so. One of the lessons I learned from years of work in developing accounting standards is that it's necessary to look beyond expressions of support or need for a particular disclosure – an old adage is that most investors have never met a disclosure they didn't like – to why a proposed disclosure is necessary. I encourage the CSA to do more than just accept expressions of support for a Form B approach and rigorously dig deeper into the reasons behind the support.

When I retired about one in ten of my fellow retirees was a woman and few, if any, of my fellow retirees would have reached age or term limits by now. I doubt that that rate is even 24% now. Many retired partners of large accounting firms have the necessary characteristics to be good directors. These factors suggest that from my perspective women are overrepresented and not underrepresented on boards.

The case for the proposals reflects some offensive stereotyping. Using gender as an example, do women really have a particular perspective that men don't have? Do all women think the same? I don't think so. The need for the proposals seems to be based on a perception of the world that brings to my mind a scene from the Downton Abbey TV series that covered much of the early 1900's period – the men going off to a luxurious, wood-panelled room after dinner to play cards, drink brandy, smoke cigars and discuss the issues of the world while the women are left to discuss the upcoming social season. That world is long gone and it's not hard to find men, women and members of the other identified groups or designated groups on all sides of a particular debate. The worst groupthink issue I've seen on boards comes from having a predominance of members with similar backgrounds, not from gender.

The case for the proposals reflects outdated thinking. Even when I retired, women were a significant and growing presence at senior levels in my firm and every large client I encountered. More recently, amongst just a few things that have caught my attention, the last announcement of new partners at my old firm indicated that women constituted more than 40% of the group, the CEO's of the Ontario, Quebec and national institutes of CPA's are all women, the new mayor of Toronto is a woman from a racial minority and there are many boards with members from racial minorities and more women than men. It's not surprising that the number of women on boards has risen significantly and rapidly since

2014 and I'd expect that to continue naturally without the aid of the proposals as more women reach retirement age. It seems that similar progress is being made with other identified groups or designated groups. I might add that these developments are obviously a good thing – skills, experience and mindset are not based on gender or other factors and we need all the good directors we can get.

When I saw a section on research that implied massive support for a Form B approach I expected to find something substantive. Such was not the case. It amounted to reference in Annex B to an initiative in one other jurisdiction, the UK. In addition, according to the CSA release, that initiative only requires disclosure of “gender and ethnicity” information, much less than what would be required under a Form B approach. Particularly noteworthy for us because so many of our companies are SEC registrants is that the SEC does not require anything like a Form B approach. In summary, it appears there is not a single precedent for a Form B approach.

The proposals should have considered that the ISSB is likely to address DEI matters in the near to medium term. A strong, maybe compelling, argument can be made that we should wait to see what the ISSB does. I see nothing at all urgent about the proposals and proceeding with them may undermine our status with the ISSB and be inconsistent with the CSA's stated support for the ISSB. The CSA should establish their approach to ISSB developments in the near future.

There is reference to a 24% number as the percentage of female directors. I expect that some respondents will focus unduly on this number and jump to a conclusion that there is a horrible problem caused by horrible men that has to be addressed forcefully. I find the 24% number unhelpful and even misleading given the large number of small public companies we have and all the other information that's necessary to assess whether there is a need for more disclosure requirements. The 24% number appears to come from CSA Multilateral Staff Notice 58-314 so I decided to review the notice, including the detailed spreadsheet supporting it.

I first discovered that the 24% number appears to be based on significantly out of date information, information based on the composition of boards in 2021. I am certain this is the case for one of the companies I'll focus on later because it was included in the spreadsheet. Secondly, the SN indicates that for companies with a market capitalization more than \$1 billion the percentage of women was roughly 30%. Based on a randomly selected section of the spreadsheet that I reviewed, the percentage of women was roughly 38% for companies in the TSX Composite Index that represents about 70% of the market capitalization of our capital markets.

I also looked through the spreadsheet to see what companies have no female board members. It was clear that many of these companies have a very small market capitalization and many are development stage mining companies. There are many reasons why development stage mining companies might have no female directors and I'll look at one such company later. I expect that most of the companies with no female directors also had no female directors in 2014. They obviously weren't influenced to change their approach to board composition by the 2014 requirements and I suspect many of them wouldn't be influenced by the implementation of a Form B approach.

I also noticed disclosure in the SN that 45% of board openings were filled by women, a number that suggests the percentage of women on boards is rising rapidly.

I think all the information in the SN and spreadsheet should be considered but think numbers like the 30%, 38% and 45% are more relevant than the 24%.

I'm going to digress only briefly into the circumstances of another identified group or designated group. An anxiety disorder is a common form of disability and the CPA profession has not been and is not accommodating to people with this disability. I wrote the necessary qualification exam with someone who knew much more going into the exam than I did but suffered from anxiety. He had a breakdown during the exam and never returned to work. Over the roughly 15 years I was heavily involved in student education activities I saw many people who couldn't handle the stress of the exam that would have become good CPA's and good directors if not blocked by the exam. I also know from a more recent close experience that things have not improved – the qualifying exam continues to be an unfair barrier to entry for many people suffering from anxiety. These kinds of circumstances make it difficult to assess how the representation of a group in the director population should be considered and create risks that users of the information in a Form B approach would use it poorly.

I also have concerns about the operationality of the proposals. In my roughly 30 years of involvement in the setting of accounting and auditing standards and development of securities regulation a lot of my efforts focussed on operationality. I see many issues with the proposals but am only going to mention two. Several years ago I developed a condition that I think puts me in a "persons with disabilities" group. I have not and would not use that as an edge to get a board position and will not agree to be identified as disabled. I know many people, other than women, that would be members of identified groups or designated groups and I'd be shocked if they would all self-identify as such. We could end up with pressure being put on a company to put one of these members on a board when there already is one that did not self-identify. On the other side of this coin, I hear from recruiting professionals that they sometimes encounter people pushing the envelope on their status in the hope of gaining an edge in hiring decisions.

My second issue is with the definition of persons with disabilities. Because of the references to employment, it seems to indicate that a retired person can't be a person with a disability. I assume that is not the intention.

Not surprisingly, I find the estimate of the costs of implementing the proposals in Annex L to be significantly understated. They don't reflect realities such as the likely effect of the proposals on board size and additional recruiting efforts.

## **Research**

While my research is not exhaustive, I believe it provides compelling evidence that adoption of the proposals would have significant negative consequences to investors.

I'm going to start with some subjective information and move on to some real-life situations where there have been or could be negative consequences to investors. These situations are just ones that appeared before me in the normal course of my investing activities and I expect that more rigorous research would unearth many more similar ones.

In my 40+ years of investing I have never considered gender or any other personal characteristic to be relevant to my investing decisions and have never heard anyone in my circles consider them to be relevant. I'd vote for a Martian as a board member if I thought the Martian would improve the quality of

the board at an appropriate cost. I have no need for, or interest in getting, information on identified groups or designated groups.

In my personal investing activities, I have seen examples of gender being put ahead of board quality, particularly in small companies. I recall one example of a woman in her 30's with no relevant experience becoming a board member. I also have firsthand experience of gender being put ahead of board quality.

I know a large number of directors and hear what I consider to be reliable anecdotal evidence that, amongst other things, outstanding male directors have been asked to step down to create an opening for a woman, male board members have been asked to step down well before they hit age or term limits with detrimental consequences to the quality of the board and board sizes are being increased to add women and members of the identified groups or designated groups.

As noted early on in this response, I spend a lot of time on my investing activities. I have probably read several hundred analyst reports in the past year and not one indicated any relevance of gender. I also watch several hundred hours of business network TV a year, particularly watching shows where money managers talk about stocks, provide stock recommendations etc., and have never seen a money manager indicate any relevance of gender. That seems intuitively obvious doesn't it? In my 40+ years of investing, the next time I hear something like "I have my changed my recommendation to a buy on Company X because the new CEO is a woman" will be the first. I have also not seen a single analyst report or heard a single money manager suggest that they need the information that would be provided for designated groups under a Form B approach.

So if I, people like me and analysts and money managers whose livelihoods depend solely on the consequences of their investing decisions don't need gender information, who does? As far as I can tell, of those who invest, it's primarily organizations like the CPP Investment Board, the BC Investment Management Corporation and others similar to them. I've heard individuals from some of these organizations speak, seen the policies some of them have and read about their activities. It's clear that they have more than just investing mandates, they are advocates for social change and their support for a Form B approach is driven by a desire for social change. They no doubt think they can achieve both mandates but even if that is the case that doesn't mean there are no negative consequences to their actions for others and our capital markets.

I've seen no credible support and certainly no consensus from independent sources that gender information is a factor in investment performance. Women comprise a relatively low level of board membership for small mining companies. If this sector outperforms the market for a period of time does this support a view that it's better to not have women on boards? Surely not.

One of the first things that caught my attention after the release of the proposals was the Globe and Mail article covering the controversy over the composition of the CI Financial board. As I recall, seven directors had been proposed and elected of which two, or 29%, were women. I understand that for some of the organizations noted above 30% is a magic number and that some organizations withheld from voting for Mr. William Holland and another director involved in the nomination process. Again as I recall, 26% of votes cast were withheld for Mr. Holland, in apparent protest for the apparently egregious sin of ending up at 29% rather than 30% or higher. Mr. Holland was the CEO, I think is a large shareholder and has been a director for a long period. It looks to me that he is likely one of the small number of outstanding directors that are around.

If we pretend for a moment that companies don't provide information on the gender of board nominees, is there any chance that 26% of votes cast would have been withheld? The answer to that question is, of course, no. I also don't think that there is any doubt that a failure to elect Mr. Holland would have been detrimental to the company. The obvious conclusion from these realities is that some organizations are using gender disclosure to pressure companies to adhere to their social policy views and not because of investment decision needs. Put differently, these organizations weren't using gender information to decide whether or not to invest in CI Financial (although I know the threat of divestiture is a tactic that is also being used) but to achieve a social policy change.

If the company and directors had capitulated and done something like getting to 30% by adding one woman and two men to the board, it could have increased costs with little or no benefit. Other negative outcomes were also possible. I hope Mr. Holland isn't dissuaded from being a director by what has happened.

I expect you will hear a lot from the 26% and very little from the 74% but those numbers do indicate that most investors do not share the views of the organizations pushing for a Form B approach.

I found the actions of the 26% particularly galling because of Mr. Holland's support for the Holland Bloorview Kids Rehabilitation Hospital, a remarkable facility at which I once volunteered.

My next learning experience hit close to home and is a big reason why I am submitting this response. One of my largest, most successful and longest held investments is in Urbana Corporation, an investment company with public and private holdings. The President, CEO, a director and, I think, founder of Urbana is Thomas Caldwell. I think it's fair to say he has been the heart and soul of Urbana for a long time and is an important reason for its success. I attended the last annual meeting virtually and heard Mr. Caldwell field a question that seemed like a thinly veiled criticism of the composition of the board. That board has five members, certainly enough given the relatively small size of the company and the narrow scope of its activities, comprised of four men and one woman. Some time after the meeting I followed up to see the voting results for the board. The woman, on whom little information was available other than that she is a "retired marketing executive" received close to unanimous support while around 20% of votes from non-insiders were withheld from each of the men.

Much of my analysis of the CI Financial situation also applies here so I won't repeat it. I will say, though, that the actions of those withholding votes for Mr. Caldwell are irresponsible. They could have caused damage to Urbana Corporation and the value of my investment.

Having decided I would submit this response I became mindful of other opportunities to learn more about what has been happening in the marketplace that would be relevant to it. While looking for some information on dividend rates on my holding of shares in a TSX 60 company I noticed on the company's website that the board has a substantial majority of women members and decided to research how this came about. I went back to a 2020 circular which proved to be a good starting point. At the end of 2019 the company had a board that seemed large enough and had a substantial number of women members. Over the next three years the board size was increased by three with the addition of three women. I'm sure this increase was influenced by the 2014 requirements and other outside factors.

Board members are paid on average over \$300,000 per year so after adding in something for estimated incidental costs this means increased annual costs to shareholders of about \$1million.



I noticed several interesting things about the new board members, particularly two of them. All three, though, were about ten years younger than the average age of the incumbent board members so likely less experienced. The incumbents were not a particularly aged group, in large part because the company has term and age limits for board members. Two of the new board members were not retired, lending support to a view that women board members of retirement age are in short supply. More importantly, though, one of the two didn't seem to have much if any relevant experience and both seemed to have very demanding, full-time jobs. I'm skeptical that they have the several hundred or more hours a year available that are needed to be a good board member and the flexibility to put them in when needed.

All in all, it seems that having more women board members was achieved at a substantial cost to shareholders and without sufficient benefits.

My final learning resulted from my holding in an investment company (not Urbana Corporation) that made an investment in a junior mining company. I decided it would be good to know more about this company so went to its website for more information. There I discovered it has a market capitalization of less than a billion dollars, no activities in Canada, no activities in the United States, some activities in Mexico and that most of its activities are in South America. I wasn't surprised to discover that it has no women directors but a little surprised to find that it has only one Canadian director and a number of directors from South America.

I know from my time in public accounting that there are a lot of junior mining companies with most of their activities, management and directors based in jurisdictions that are much different than Canada. I would have been inclined to exclude them from consideration, or at least significantly underweighted them, in deciding what to propose.

I hope the CSA find my comments helpful.

Yours very truly,

James Saloman