DOMESTIC LAWMAKERS: THEIR ESSENTIAL ROLE & RECOMMENDATIONS

October 23, 2022 – Extracted with slight revisions from Angie Redecopp, *The Role of Law in Corporate Human Rights Due Diligence*, Ph.D. diss., Manchester, University of Salford, 2021. A copy of the PhD dissertation can be requested from info@impactbusinesslaw.com.

This is part of a series of articles that include an outline of the PhD dissertation, conclusions on why corporate self-governance, ESG mainstreaming, and industry associations are not enough to carry out the new narrative, and finally, conclusions on the essential role of Canadian lawmakers and specific recommendations for Canadian lawmakers in advancing this narrative. **Our new narrative requires us to start from the perspective of the entire global value chain and work backwards from that.** Learn more about the series here. Section references in this article refer to content in the dissertation.

Part 1 – Essential Role of Domestic Lawmakers

We see many limitations with ESG mainstreaming and HRDD, and we continue to see voluntariness and limitations with corporate self-governance when considering the entire global value chain. While both investor influences through ESG mainstreaming and the intricacies of corporate self-governance are key elements of polycentric governance, neither can replace the role of domestic lawmakers. Said differently, if ESG mainstreaming and corporate self-governance are not sufficient to lead to HRDD across the entire global value chains for our Case Subjects, the 'good' companies, how then can we expect ESG mainstreaming and self-governance to advance HRDD in all Canadian MNCs? Staying with our Case Subjects for a moment, from 2.2 Stakeholder Pressure, we considered what is driving the investor focus on responsible investing – the inability of large asset managers to mitigate system-level risks stood out.[1] Our Case Subjects do not seem to fully appreciate this in terms of their own size and influence, and they are all large (albeit not the largest) in their industries. We continue to see voluntariness when it comes to BHR issues – not fundamentally but as you get more specific – how many of your suppliers are you going to exercise HRDD with, how deep will you go in understanding your contractor relationship, how quickly will you apply your HRDD procedures to all product areas and locations? From MiningCo1, 'In theory we have a zero tolerance for this stuff and any human rights risk in our supply chain is a big risk, but you cannot do due diligence on all of your suppliers… So how do you be comfortable with your level of risk in your supply chain with whatever level of due diligence you decide you are capable of doing?' Our Case Subjects do not yet have a clear imperative to carry out HRDD on their entire global value chains. Looking at the broader spectrum of Canadian MNCs, we come back to Fancy's essay. Using sports analogies throughout, Fancy explains that we cannot just rely on good sportsmanship, for the reasons outlined in the previous subsection. Rather, he states, 'If the referees won't penalize players for doing business in a way that yields huge profits at our collective expense and then playing down those negative side effects, they'll generally keep on

[1] Robert G Eccles and Svetlana Klimenko, 'The Investor Revolution' (2019) 97 Harvard Business Review 106.

doing it',[2] and calls on the state to be the referee. Using the recent removal of Emmanuel Faber, who made sustainability a key part of strategy as CEO of 'good' food company Danone, as an example, Fancy says that we cannot rely on good companies to meet the world's ESG objectives.[3] Like investment managers, even good companies have competing priorities, namely the financial bottom line.

In this section, we look at the role of domestic laws and lawmakers – what is it that the markets cannot do and what must our Canadian lawmakers do as the 'referee' for BHR? Coming back to the ILO's synergistic governance in the introduction to 2.1 Law as HRDD Influencer, we pull out specific elements that domestic lawmakers can (and we would say should) have a role in from the criteria for corporate compliance. Domestic lawmakers can help create a legal enabling environment, through both laws themselves and enforcement mechanisms. They can also provide for accountability mechanisms and the capacity of other stakeholders to enforce (or influence) compliance.[4] We will explore these elements in this subsection by first revisiting our findings on BHR tensions and the voluntariness associated with HRDD, and then for commentary from our Case Subjects on domestic legislation. Then we look at the role of both domestic legislation and other tools of Canadian lawmakers in response to these findings.

BHR Tensions and Voluntariness

Here we revisit supply chain structure and the limitations of stakeholder influences on our Case Subjects. Then we look for language around voluntariness with our Case Subjects, finding that this undermines our ability to rely on corporate self-governance. In 3.1.1 Corporate Role in Creation of BHR Complexity, we discussed the MNC's role in the complexities of our supply chains and global value chains and other risks that they take on. We saw this in our Case Subjects in 6.1.2 Supply Chain Structure and we revised this in 7.2 Corporate Self-Governance for Incremental Progress. We saw our mining companies making specific decisions on whether to go into higher-risk areas, with two of them opting not to and MiningCo2 acknowledging that their risks intensified when they began operations in Africa. We also saw our Case Subjects attempting to mitigate some of these complex structure challenges, both through simplifying structures and through seeking to address vulnerabilities (in Subsection 6.1.3). In terms of simplification, ApparelCo was seeking to reduce their number of suppliers and FoodCo was looking for fewer links in the product lines – all were seeking to 'get closer' to their suppliers. The mining companies acknowledged the added complexity of local procurement, which often means more suppliers as the spends can be smaller. We have FoodCo specifically engaging a third party to help assess risks in specific areas in 6.1.4 Decision-Making. In 6.2 Organizational

[2] Tariq Fancy, 'The Secret Diary of a "Sustainable Investor"' (August 2021) <https://www.dropbox.com/s/bvskswxwkro41rh/The%20Secret%20Diary%20of%20a%20Sustainable%20Investor%20-%20Tariq%20Fancy.pdf?dl=0? (accessed 26 November 2021) 25.

[3] ibid 17.

[4] ILO, 'Workplace Compliance in Global Supply Chains' (5 January 2017) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_540914.pdf> accessed 14 October 2021.

Integration, we learned about efforts our Case Subjects were making to eliminate steps and fees in recruitment. All these examples demonstrate decisions that our Case Subjects are making, ultimately determining their global value chain structures. While they may be seeking to simply the chains in most cases, the underlying observation is that they create the structures.

Next, we come back to some of our stakeholder influencers and find that they are not absolute – the market cannot fully influence companies to carry out HRDD. We discussed the limitations of investor influences and ESG mainstreaming in Section 7.3. We find in 5.2.4 Stakeholder Pressure that customers are not consistent influencers either. From FoodCo, whether their consumers value the quality of their goods affected their cost-benefit analysis and TechCo found similar challenges if 'all of your customers only buy based on price'. In contrast, both ApparelCo and TechCo commented on the increase in questions that customers were asking about BHR and CSR. Looking at the materiality assessments discussed in 6.1.4 Decision-Making, we find that broader stakeholders are not consistent either, with responses varying in Table 6.1 on how important BHR is to various stakeholders. Again, we do not think that BHR is something to be voted on.

In addition to the discretion that we see in structuring supply chains and responding to influencers, we heard many direct comments on decision-making and priorities from our Case Subjects. From FoodCo, 'We are a public company, so the risks are always first and foremost in terms of risk for the company'. MiningCo3 needed to get their own house in order first, and ApparelCo and TechCo both detailed when they did and did not carry out HRDD further up the supply chain. The contractual relationship can be a barrier, confidentiality needs to be considered, and so on. Several of the Case Subjects explained how they prioritized which suppliers to focus on – the nature of the products, the value of the contract, the quality of the product to ESG risks, and the list goes on. In our analysis on whether the Case Subjects were making 'company law' in Section 6.3, we concluded that substantively the company laws were sound, but that the laws were not consistently applied across the entire global value chain. Our Case Subjects are the 'good' companies, but the business case is important even with them, and there is not always going to be a clear business case for BHR. Connecting back to CSR, from 3.1 BHR Tensions, 'shifting human rights from the domain of owed obligation into the domain of supererogatory moral discretion [CSR] threatens to undermine the very core of what human rights aim to protect: the unconditional and equal dignity of all human beings.'[5] Good sportsmanship is not enough – we need a referee. As set out in 3.2.2 Using Soft Law and repeated in the Findings and this further analysis, some level of hard law is needed to pressure the self-governance.

[5] Forian Wettstein, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility' in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 80.

Levelling the Playing Field for MNCs

In this subsection, we revisit our findings related to voluntariness associated with HRDD and then consider the range of tools that Canadian lawmakers have at their disposal, from supply chain legislation to economic initiatives. First, we focus on the role of domestic lawmakers and the perspectives of your Case Subjects on domestic legislation. The UNGPs are intentional in their categories – companies are to respect human rights and states are to protect human rights. While our Case Subjects did not feel they were specifically influenced by domestic legislation or the prospect of legislation, in that they were already doing far more than any such legislation would require, they did make observations and speak of potential benefits from domestic legislation or similar initiatives. In 5.2.2 Industry Associations and Standards, FoodCo was more likely to increase their HRDD commitments where the whole industry was moving in a similar direction. ApparelCo linked Bill S-216 and industry associations, highlighting the learning and leverage that can take place when the industry comes together around developing legislation. In 5.2.3 Domestic Laws and Litigation, MiningCo2 was looking for securities regulators to provide guidance on non-financial disclosures, and similarly, TechCo was looking to disclosure legislation for increased uniformity around the disclosure statements required in different jurisdictions. FoodCo recognized the support that Canadian legislation would bring to the internal business case for their BHR work. ApparelCo and others noted how far Canada was behind in their responsibilities in this area. On balance, we see the Case Subjects looking to legislation for uniformity, to pressure others in their industries to advance their BHR efforts, and to help make their own internal cases for more HRDD. We also recognize the continued tension of whether legislation would be able to be applied with reference to Table 3.3 – would it be understandable and possible to obey for our Case Subject and others in their industry? Then of course we have the overriding goal for all the Case Subjects and BHR as a whole – 'doing better' and ultimately seeing improved protection of human rights across global value chains. In the following paragraphs, we will apply these and other findings from our Case Subjects to the range of tools that Canadian lawmakers have at their disposal, from supply chain legislation to economic initiatives.

We start with disclosure legislation, coming back to Subsection 2.1.5 where we set out the range of supply chain legislation that we are seeing develop in jurisdictions around the world. At present, Canada's Bill S-216 is focused on disclosure. Ford and Nolan state that the assumptions around disclosure legislation are that firms will report, others will evaluate, and reporting will stimulate the furtherance of HRDD within companies.[6] We will come back to others evaluating in 8.2 Recommendations for Canadian Lawmakers, but let us consider the other two assumptions briefly. From 6.2.6 Reporting, we saw the richness of the disclosure in the modern slavery statements of FoodCo and TechCo. However, we know that disclosure could vary significantly in response to the requirements in Table 2.4 Disclosure Legislation, and

[6] Jolyon Ford and Justice Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: the Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) Australian Journal of Human Rights 27.

we see an absence of quantitative requirements. We also saw significant variance in response to the general CSR-related disclosure required by Canadian securities regulators in the early part of Subsection 6.2.6. With respect to reporting stimulating more HRDD, we do see that outcome with reporting generally, but it does not address the voluntariness – the discretion that companies have in choosing when, where, and how far up the chain to apply their HRDD efforts. At the other end of the spectrum though, for the companies making minimal HRDD efforts, our Case Subjects look to disclosure legislation to prompt at least some level of reporting and in turn some level of HRDD activity with all companies. This would be a challenge for some, but should ultimately be understandable and possible to obey, again given that the MNCs choose their structures and relationships. Disclosure legislation as currently envisioned in Canada likely will not fully address the desire for uniformity though as the disclosure requirements set out in Table 2.4 leave significant discretion to the reporter. It would at least consistently ask key HRDD questions though, which we do not see from current global standards, though we recognize that Bill S-216 at present focuses only on some of our core labour rights.

Moving to due diligence legislation and beyond, our Case Subjects are already doing what is required for due diligence under the French and German legislation as examples, depending on how broadly supply chains are defined. From 2.1.5 Domestic Legislation, the French law requires a due diligence plan to prevent human rights violations throughout the chain of the product,[7] and the German law requires companies to take appropriate measures to respect human rights within their supply chains.[8] Both laws address environmental due diligence as well. Of interest, a draft bill developed prior to Bill S-216 and not fully published or tabled, the Transparency in Supply Chains Act, included a supply chain questionnaire and established a duty of care for all businesses of a certain size, going far beyond Bill S-216. Let us consider direct requirements more closely in the context of our Case Subjects using related examples, as we assess whether direct requirements like due diligence would be understandable and possible to obey for MNCs. We referred to USA conflict minerals reporting and corruption legislation in the Findings and the Voluntary Principles in 2.1.3 Industry Associations and Standards and in the Findings. All require specific actions or due diligence, and all appear to have been understood and obeyed where relevant for our Case Subjects, based both on commentary throughout our findings and specifically on the reporting break-down in terms of portion of sustainability report devoted to each in 6.2.6 Reporting. While companies are typically not going to ask for more regulations, TechCo recognized the benefits of regulation in the observation that, 'We went from no smelters in 2010 audited to be conflict free to about

[7] Charles Dauthier and Sabine Smith-Vidal 'French Companies Must Show Duty of Care for Human and Environmental Rights' (Morgan Lewis, 4 April 2017) <http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf> accessed 2 December 2021.

[8] Library of Congress, 'Germany: New Law Obligates Companies to Establish Due Diligence Procedures in Global Supply chains to Safeguard Human Rights and the Environment' <https://www.loc.gov/item/global-legal-monitor/2021-08-17/germany-new-law-obligates-companies-to-establish-due-diligence-procedures-in-global-supply-chains-to-safeguard-human-rights-and-the-environment/> accessed 2 December 2021.

75% of the smelters audited to be conflict free by around 2015', with reference to the conflict minerals reporting related to the Democratic Republic of Congo.

We see from 6.2 Organizational Integration and from 7.2 Corporate Self-Governance for Incremental Progress that our Case Subjects and others in their industry know how to apply standards. We already see the Case Subjects responding to 'smart regulation' in the form of soft law, being responsive regulation that induces companies themselves to acquire the specialized skills and knowledge to self-regulate, subject to state and third party scrutiny.[9] We also see a broader ecosystem that can enable this deeper HRDD in the supply chain, using FoodCo's relationship with a third party NGO to better understand the risks in specific regions as an example, discussed in 6.1.4 Decision-Making. We see evidence of the ability to apply HRDD requirements and their impact on improving human rights protections. It also seems that uniformity, pressure on others in the industry, and adding to the internal business case for more HRDD would naturally result from specific HRDD requirements. Addressing legislation around duty of care and extraterritorial application generally is beyond the scope of this project, but we do note that corruption legislation is specifically intended to apply our rules elsewhere. There is precedent for this in Canada.

Finally, we look at national CSR initiatives in Canada and specific economic legal tools like public procurement and customs. Looking at the work of Export Development Canada and Global Affairs Canada, along with Canada's Enhanced CSR Strategy, we need to understand where our Case Subjects fit with these types of initiatives. While not perfect, our Case Subjects are leading in these areas, so these initiatives are influences for the industry more so than for our companies. Some involvement in Canadian initiatives was referenced by our Case Subjects, but the focus of the interviews was primarily on the industry relationships, so it is difficult to draw meaningful conclusions here. Public procurement is relevant to some of our Case Subjects, TechCo in particular. TechCo advised that they specifically seek to respond to requests where sustainability is a criterion, and they are looking for customers, public and private, to increase such requirements. As it is not taking place yet, we do not have direct evidence on the influence of customs bans, but given the vast supply chains of our Case Subjects, it is hard to imagine that such bans would not direct their buying behaviours. Coming back to what our Case Subjects pointed to with increased federal involvement, Canada is in early stages and these initiatives and tools are varied, so increasing uniformity is likely not going to happen in the near term. It would be helpful if BHR and global value chains became an imperative for the federal government, perhaps along the lines of gender for our current federal government.[10] We need Canadian lawmakers to be the referee and move us toward the new narrative.

[9] Neil Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press 2010).

[10] One of many examples, Government of Canada, *Women in Canada: A Gender-based Statistical Report* (8 March 2017) < https://www150.statcan.gc.ca/n1/pub/89-503-x/89-503-x2015001-eng.htm> accessed 3 December 2021.

Part 2 – Further Defining the New Narrative and Recommendations for Canadian Lawmakers

Ultimately, domestic lawmakers in Canada must set the agenda. In support of this new narrative of each company addressing their entire global value chain, this agenda needs to include BHR specificity and recognize the importance and uniqueness of the protection of human rights. In the paragraphs that follow, we first set out what this new narrative could look like from the perspective of MNCs, and then we make some specific recommendations for Canadian lawmakers. Finally, we conclude with other avenues for Canadian lawmakers to enhance the polycentric legal universe that already exists.

We start with our overall orientation with respect to HRDD. We recognized that the complex global value chains that exist have been created largely by the MNCs in 2.1.1 Corporate Role in Creation of BHR Complexity and we came back to that in 7.5.1 BHR Tensions and Voluntariness, recognizing that in our findings that our Case Subjects choose where and how and with whom they do business. Even with that recognition though, we seem to accept that there are limits to how far the Case Subjects can go with their HRDD. One of our own findings in this study in 6.3 Are the Case Subjects Making Company Law, in response to whether company laws were possible to obey and not contradictory was, 'It is not currently practically possible to carry out HRDD for all products, suppliers, and products all the way to source for any of our Case Subjects'. How can it be that our Case Subjects, all successful and relatively large in their industries, cannot be fully responsible for the global value chains that they have created? To address this, the orientation needs to change from 'how much can we do' to 'how can we address our entire global value chain'? This is alluded to with the impact and leverage differentiation in the UNGPs, discussed in 3.1.3 Impact versus Leverage, but this fails to address the reality that the MNCs create their own relationships and can have significant control, direct and indirect, over individuals and entities further up the chain – the MNCs hold most of the power.

We do see some movement towards clarity on this starting point. From 2.1.5 Domestic Laws we find that after recognizing the control of the MNCs, the EU Sustainable Governance Directive states that 'due diligence should encompass the entire value chain',[11] with a prioritization policy that was detailed in the discussion on materiality in 3.1.4 Risk Orientation. From Table 2.4 Disclosure Legislation, we do not see limitations on the extent of the supply chain that is to be covered in the reporting, but the reality with the two modern slavery statements reviewed in 6.2.6 Reporting is that the disclosure is selective. Practically, right now we start with prioritization and various versions of materiality, resulting in voluntariness for our Case Subjects. We assume there is even more voluntariness for MNCs less advanced on BHR than our

[11] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15 November 2014. See also European Commission. *Commission Guidelines on Non-Financial Reporting.* (26 June 2017, updated 18 June 2019) <https://ec.europa.eu/info/publications/170626-non-financial-reporting-guidelines_en> accessed 2 December 2021.

companies. None of our Case Subjects gave any indication that they have a master plan for their entire global value chain. Such a plan could require simplification, which our Case Subjects are familiar with. It could require working with on-the-ground NGOs and MSIs that understand the risks and relationships in the regions that the companies are in, and in other instances provide certifications for certain products and materials, which many of our Case Subjects are already doing. Such a plan could involve creative ways to 'reach' individuals and entities further up the chain, which our Case Subjects are doing in some instances through supplier codes, supplier training on their own chains, working with the higher risk tier of farmers in FoodCo's case. Indeed, it would be complicated, and implementation would require time and effort, but that is simply a reflection of the global value chains that the MNCs themselves have created.

We turn to Canadian lawmakers. As Canada continues to work on its supply chain legislation and other BHR initiatives, this orientation could be significant, but is largely absent. With this orientation on the entire global value chain, not only would the playing field be levelled, but it would also be widened. Using a different analogy, the domestic legislation currently contemplated would raise the floor, but this entire global value chain analogy would raise the ceiling. Ideally, Canadian legislation would be revised to include both a disclosure and due diligence component, focused again on the entire global supply chain. There would need to be time allowed, and some materiality thresholds for a time, but the focus would be on MNCs having a master plan for the entire global value chain, and then working towards that master plan. We have two specific recommendations on the disclosure aspects of Canadian legislation, and then one more general recommendation for Canadian lawmakers.

The first recommendation seems rather simplistic, but it exists only sporadically with some of the private assessments, not in legislation, and minimally in global standards. We need both qualitative and quantitative disclosure requirements for each of the HRDD steps in the UNGPs, ideally in both Canadian supply chain legislation and in global standards. One important quantitative element is quantifying the company's entire global value chain, and we see some elements of this in Table 6.4A with disclosure on such things as supplier spend, # of suppliers, # suppliers screened and so on. This goes along with the qualitative disclosure requirement to explain the supply chain and its structure found in Table 2.4 Disclosure Legislation.

Our second recommendation is that we need a disclosure standard that is the equivalent of the Task Force on Climate-related Financial Disclosure in terms of prominence and uptake, again patterned after the UNGPs that everyone is already selectively using. The climate crisis is real and needs attention, but so are our ongoing global human rights crises. We come back to Table 6.4A Case Subject HRDD Disclosures by Standard for both the inconsistent requirements and actual disclosure that was at times absent, lacking, or different than what was asked for, for our basis on these two recommendations. We also look to the richness of the two modern slavery statements of our Case Subjects, and even though we have criticized them for lack of completeness on the entire global value chain and lack of quantitative disclosure, it is still the most fulsome and specific disclosure on HRDD of any of the documents reviewed in this study.

Examples of disclosure requirements that could meet these recommendations exist as we turn to raters and in some cases industry specific disclosure standards. Our domestic lawmakers have much to choose from. One final note on both the depth and specificity of the disclosure we are calling for on the entire global value chain is that we know the bounds. It is complicated, but companies ultimately know or can know the bounds of their global value chains. This is unique from environmental issues or other types of issues where the company's impact may be unclear. We do not need a materiality assessment to determine what the company should focus on, rather we need companies to use all the tools in their toolbox to fully quantify and qualify their entire global value chains, and only then turn to prioritization.

Our third recommendation is on orientation from a different perspective, and it is not on lawmaking specifically. This may be limited in application to larger companies or those part of larger industry associations. It can be supported by domestic lawmakers, specifically in how Canada interacts with and supports the UN SDGs. The impetus for this recommendation comes from TechCo, arguably the most significant of our Case Subjects relative to their industries and overall influence. From 6.2.6 Reporting, TechCo wants to move their reporting more towards overall impact. This connects to the 'outside in approach' set out in the guidance on the UN SDGs for businesses.[12] 'By looking at what is needed externally from a global perspective and setting goals accordingly (say in a specific region), businesses will bridge the gap between current performance and required performance' versus an 'internally focused approach to goal setting'. Again, this is a matter of orientation – start with the whole problem and recognize the significant roles that individual companies or groups of companies play in the larger system. There is another role Canadian lawmakers in this was well, in industries where we are significant world players, as in the mining industry. On a grander scale, in responding to COVID-19, we have seen the world come together on addressing a big systems level issue, through COVAX[13] and numerous other initiatives.

We close by considering the influence that Canadian lawmakers can have in the wider BHR ecosystem. Drawing again on the ILO's synergistic governance criteria, along with helping to create a legal enabling environment through laws and enforcement of those laws, domestic lawmakers can also provide for accountability mechanisms and the capacity of other stakeholders to enforce (or influence) compliance.[14] Looking first at accountability, from 6.2.4 Remediation, all our Case Subjects have internal grievance mechanisms to varying degrees, typically for employees, or suppliers, or community stakeholders. All have anonymous whistleblowing options in place. Ultimately though, these grievance mechanisms are controlled by and adjudicated by the Case Subjects themselves. Even for our Case Subjects, much less those companies not yet focused on BHR, it seems that some form of objective state-based mechanisms should also be available. The UNGPs call for both state-based judicial mechanisms

[12] GRI, UN Global Compact and World Business Council for Sustainable Development, 'SDG Compass: The Guide for Business Action on the SDGs' (2015) 19.
[13] See https://www.who.int/initiatives/act-accelerator/covax.
[14] ILO (n 4).

and state-based non-judicial mechanisms.[15] We saw the limitations on our current judicial mechanisms in Canada, both procedurally and substantively in 2.1.4 Civil Remedies. Procedurally, there is much that the federal and provincial governments can directly do, with the Court Jurisdiction and Proceedings Transfer Act in the province of British Columbia[16] as an example. Substantively, legislation can address such things as defining duty of care and extraterritorial application of our laws, as previously discussed. We also look to the evolution of the common law within the Canadian courts, perhaps with an eye to our UK neighbours.

Canadian lawmakers can also increase the capacity of other stakeholders to influence corporate uptake of HRDD. Here we briefly look at consumers, investment managers, rating agencies, and general access to information. From 5.2.4 Stakeholder Pressure, TechCo is focused on 'How do we change how Canadians buy' in the technology sector. Through education and perhaps direct consumer incentives, Canadian lawmakers can be part of and even lead in consumer education. Looking to investment management and ratings agencies, Pucker laments that the lack of standardized impact reporting makes ESG impacts hard to verify and that ESG ratings really look to relative performance and not planetary level goals.[17] From Fancy, 'A market economy is at its core a collection of rules. No rules, no market'.[18] Regulators elsewhere are slowly responding to the lack of definitions and regulations in the world of ESG investing. For environmentally oriented economic activities, the European Union is looking to develop a classification system for sustainability.[19] The USA Securities and Exchange Commission has proposed amendments on non-financial disclosure, including requiring human capital disclosure. The proposal falls short of requiring reporters to use a global standard, but does advance at least principles-based disclosure requirements.[20] Perhaps most importantly for Canada, the International Organization of Securities Commissions (IOSCO), of which the Canadian provincial securities commissions are members, recently called for the oversight of ESG ratings and data product providers.[21] In response to the report that IOSCO put out, one commentator criticized its lack of focus on 'accuracy of the raw ESG data reported by companies being rated',[22] but this is still progress

[15] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011) s 26 and 27.
[16] Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28.
[17] Kenneth P Pucker, 'The Trillion-Dollar Fantasy' (Institutional Investor, 13 September 2021) <https://www.institutionalinvestor.com/article/b1tkr826880fy2/The-Trillion-Dollar-Fantasy> (accessed 5 December 2021).
[18] Fancy (n 2) 23.
[19] EU, 'EU Taxonomy for Sustainable Activities' < https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en> (accessed 5 December 2021).
[20] Thomas Riesenberg, 'A View on the SEC Rules Regarding Human Capital Disclosures' (Harvard Law School Forum on Corporate Governance, 12 September 2020) < https://corpgov.law.harvard.edu/2020/09/12/a-view-on-the-sec-rule-regarding-human-capital-disclosures/> (accessed 5 December 2021).
[21] IOSCO, 'IOSCO Calls for Oversight of ESG Ratings and Data Product Providers' (23 November 2021) < https://www.iosco.org/news/pdf/IOSCONEWS627.pdf> accessed 5 December 2021.
[22] Lawrence Heim, 'What Was Missed in IOSCO's ESG Ratings & Data Providers Report' (PracticalESG.com, 2 December 2021) < https://practicalesg.com/2021/12/what-was-missed-in-ioscos-esg-ratings-data-providers-report> (accessed 5 December 2021).

and an opportunity for Canadian securities regulators to engage on rulemaking in the investment and ratings arena.

When and if Canada does bring Bill S-216 or similar into force, another role that Canadian lawmakers can play is access to and creative use of disclosure data. Making it available on a central registry is a good first step, but government can do or enable other influencers to do more. Instead of penalizing all companies for misbehavior, leaders can be rewarded and laggards exposed.[23] One proposal for this is adding 'tracermarks' to information networks, where stakeholders can disclose and disseminate additional information.[24] Hess calls for something similar in his recommendations for policy makers on how to use mandatory transparency to actually improve a corporation's HRDD. As part of his framework for regulatory pluralism, he sets out the government role of facilitating external monitoring.[25] Government can create such an expanded central registry itself, or fund and support others to do so. One example of a third party doing this in the UK is the Business and Human Rights Centre, which provides information on company reporting, and is a conduit for human rights allegations and company responses.[26] Another in the UK is the Corporate Human Rights Benchmark, which we mentioned in 2.1.2 Global Standards initially, which assesses large publicly traded companies across the world on a set of human rights indicators.[27] Circling back though, any registries or raters making the disclosure information more accessible and usable, need to have rules.

There is a final stakeholder that Canadian lawmakers can influence, with the goal of increasing BHR efforts beyond our Canadian MNCs. From ApparelCo in 6.2.5 Supplier Collaboration in reference to the collaborative efforts being made in Bangladesh, 'There are still factories that have never had anyone go through them and look at them from a safety perspective'. We have talked about on-the-ground coalitions, but Canadian lawmakers can influence the increase of governance at the state level in these higher-risk countries. Trade agreements and negotiations were introduced in 2.1.5 Domestic Legislation. This needs to continue to be a priority for the Canadian government. Human rights compliance should be a part of every discussion, while other topics that are also important may be determined through some sort of materiality assessment. As one example, Canada is currently negotiating a comprehensive partnership agreement with India.[28] BHR should be a part of this discussion.

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[23] Radu Mares, 'Corporate Transparency Laws' (2018) 36(3) Netherlands Quarterly of Human Rights 189.
[24] ibid.
[25] David Hess, 'The Transparency Trap' (2019) 56(1) American Business Law Journal 5, 48.
[26] Business and Human Rights Resource Centre, 'About Us' <https://www.business-humanrights.org/en/about-us/about-us> accessed 6 December 2021.
[27] World Benchmarking Alliance, 'Corporte Human Rights Benchmark' <https://www.worldbenchmarkingalliance.org/corporate-human-rights-benchmark/> accessed 6 December 2021.
[28] Government of Canada, 'Canada-India Comprehensive Economic Partnership Agreement Negotiations' https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/india-inde/fta-ale/background-contexte.aspx?lang=eng (accessed 5 December 2021).

To conclude, as put forth in 3.1.1 Corporate Role in Creation of BHR Complexity, 'Supply chain regulation has adopted a distinct model of outsourcing to manage their complexity whereby regulation is outsourced to the regulated parties themselves… this has significant implications for public accountability'.[29] From comprehensive supply legislation to counteract the voluntariness of HRDD currently and address the entire global value chain to influencing other stakeholders, the Canadian government has a significant role to play in public accountability. They can further the legal enabling environment through laws and enforcement mechanisms, and they can provide for accountability and the capacity of other stakeholders. Through this, Canada can aspire to achieve the uniformity, pressure on peers, and internal leverage that our Case Subjects are looking for from legislative efforts, and ultimately catch up to or even surpass other global leaders and further BHR globally.

[29] Falit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 Harv Int'l LJ 419, 424-425.