ESG MAINSTREAMING IS NOT ENOUGH

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.

Given that ESG reporting increased even during the course of the research, we consider how far it can take us in advancing HRDD in Canadian MNCs. We were introduced to global report standards in 2.1.2 Global Standards, and there we found attempts to bring together the leading standards. We reviewed the increasing investor focus on sustainability and ESG reporting in 2.2 Stakeholder Pressure. Then in our findings, we found multiple references to global standards, investor influence, and an increase in ESG reporting directed at investors specifically. As observed in 5.2.1 International Instruments and Global Standards and 6.2.6 Reporting, we see the BHR norms from the international instruments infused throughout the global standards and ultimately through the actual reporting of the Case Subjects. We do see potential for ESG mainstreaming to influence HRDD in Canadian MNCs, but we have cautions in response to this 'privatization' of the protection of core rights as well. In this section, we first briefly recap our findings on how ESG has increased in influence with our Case Subjects. Next, we consider the benefits of ESG mainstreaming in terms of further influencing HRDD in companies. We conclude by expressing several concerns on ESG mainstreaming and how it may ultimately detract from the furtherance of BHR and HRDD.

We saw the influence of global standards on our Case Subjects, specifically framed as ESG reporting for investors, increase even during the life of the study. As observed in the findings, ESG reporting and terminology increased in the reporting of the Case Subjects from 2020 when most of the interviews were carried out (2019 for FoodCo) to 2021 when their latest sustainability reports came out, and in some cases, websites were updated to add ESG investor hubs. From Table 5.2 and 6.2.6 Reporting, we see that all five of the Case Subjects with extensive sustainability reports use the GRI Standards and to a lesser extent the SASB Standards. Two refer to the WEF Stakeholder Capitalism Metrics in their reporting. In all cases, this reporting is primarily done through indexes listing the standards disclosed against and linking to the location of the specific reporting in the sustainability report or elsewhere. Looking at the commentary from the Case Subjects on investor influence in 5.2.4 Stakeholder Pressure, we see investors increasing in influence, and as already stated from 6.2.6 reporting (or intentions on reporting in the case of ApparelCo) increasing in volume in all cases. In Subsection 5.2.4, we see comments on investors being a key audience for sustainability reporting, investors asking their own questions and seeking their own reporting from MiningCo1 and ApparelCo, 'for all intents and purposes, these are obligatory disclosures' from MiningCo2, and an increase in the focus on social from investors because of Covid for MiningCo3. MiningCo1 provides that they are seeking to be transparent and comprehensive so that stakeholders will have confidence in them. In our findings, we see that the investor pressure is present and increasing, largely responded to through reporting, and presumably actions that support the reporting. Indeed, 'When it becomes clear that the people who decide whether to buy or sell a company's stock have internalized ESG into their calculations, the business leaders will be forced to do the same within their companies'.[1] In our study, ESG has increased in influence with the Case Subjects.

We do see evidence of ESG mainstreaming influencing companies, our Case Subjects in particular, in their HRDD. First, we saw the concept of reporting driving behaviour generally as Case Subject detailed their increased HRDD practices and directly acknowledged investors as a significant influence. From TechCo in 6.2.6 Reporting, 'It is also information for internal – for what this means, how this looks like, what good looks like. So, it is also used to educate and also drive this idea of where we want to go and how we can get better'. Second, we see potential for more BHR specificity and greater detail with standardization. A concern raised in 6.1.4 Decision-Making was on the approach to materiality, specifically the subjectively involved, even though in all cases our Case Subject subscribe to double materiality – material for the company and material for stakeholders. Table 6.1 provides that the importance of human rights varies from medium to high for both stakeholders and companies, getting to very high for stakeholders in one case; responsible sourcing from low to high for companies and low to very high for stakeholders. Health & safety is almost universally very high for all. Labour standards (where reported) were mostly medium for both, and high for one company's stakeholders. This seems rather arbitrary, in contrast to the objectivity of both the GRI Standards and the SASB Standards, which require disclosure on BHR, more significant disclosure with the GRI Standards in most cases. We also see from the modern slavery statements of two of our Case Subjects, how rich disclosure can be in response to specific disclosure requirements on BHR. Given that the standardization initiatives at present, particularly the new International Sustainability Standards Board,[2] focus heavily on SASB, which has industry-specific standards, there may be potential for more BHR specificity and content in future standards from this industry perspective. Given the connection to IFRS, we may also see more of a quantitative focus. Third, with increasing investor pressure and more standardization, we may see more consistency in reporting. In our Case Subject disclosure against specific GRI and SASB Standards, we saw an absence of reporting on required disclosure, something else being reported instead, and

[1] Robert G Eccles and Svetlana Klimenko, 'The Investor Revolution' (2019) 97 Harvard Business Review 106.
[2] IFRS, 'ISSB: Frequently Asked Questions' < https://www.ifrs.org/groups/international-sustainability-standards-board/issb-frequently-asked-questions/> (accessed 25 November 2021).

disclosure short of what was being asked for, typically leaving out quantitative information in those cases. If universally taken up by investors, we may see more consistent reporting against a single global standard. With reference to MiningCo3's observation on the increased attention to social topics because of Covid and increased BLM protests, standardization may result in more consistent integration of issues highlighted in the public.

Fourth, any ability to compare companies with one another starts with transparency. In 5.2.2 Industry Associations and Standards, FoodCo highlighted their peers as a driver when they know what their peers are doing, and ApparelCo noted that the bar gets higher when companies work together, specifically when information is shared. In Subsection 5.2.4, TechCo pointed to the importance of ratings and in Subsection 5.2.1 emphasized, 'Transparency in human rights is the right lever to pull'. For companies, rating agencies, or investors to compare companies to each other, they need information, ideally information that is comparable. Similarly, standardized disclosure enables assurances to be provided, as we saw in some instances in 6.2.6 Reporting. Finally, we make brief mention of the benefits of integration of BHR within CSR at an organizational level, which aligns with the integration of BHR within broader sustainability reporting. In 6.2 Organizational Integration, we saw the emphasis in top-level policy and governance on CSR, we then saw some BHR specificity at the policy and supplier code level, and then BHR was again integrated into broader data and supplier management systems for both supplier and site monitoring and ultimately for reporting. We also saw the centralization of governance for CSR and then accountability for CSR dispersed at management levels, with many interviewees commenting on the effectiveness of both the integration and centralization for advancing HRDD. As an example, MiningCo1 offered in Subsection 6.2.2, that there is 'more of a hands-on approach to sustainability broadly and human rights to ensure that there is a really robust management system in place'. There are potential benefits related to ESG mainstreaming: driving HRDD behaviour, more BHR specificity, consistency in reporting, transparency that can be used to compare, and operational integration of HRDD with broader sustainability efforts.

However, there are also challenges and cautions for the advancement of HRDD in MNCs that arise in response to ESG mainstreaming. An interesting voice has arisen in the last year on whether sustainability imperatives should be left 'with decision-makers whose financial interest may not line up with the long-term public interest'.[3] Tariq Fancy was the Chief Investment Officer for Blackrock, the investment management corporation which together with its CEO Larry Fink was referenced in the Introduction as revisiting the purpose of the corporation and prompting CEOs to do more in the area of purpose and sustainability.[4] Fancy's essay came out after the research and most of the analysis for this project was complete, and to a large extent

[3] 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).

[4] BlackRock, 'Larry Fink's 2019 Letter to CEOs: Purpose & Profit' (2019) <https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter> accessed 23 December 2021.

expresses the then developing conclusions that are found here and in the next section. We will go into more detail on Fancy's essay in 7.5 Essential Role of Domestic Lawmakers, but here we draw on two of Fancy's observations, followed by others of our own. First, Fancy refers to ESG information as just 'another data set' for investment managers that are focused on investments strategies and returns.[5] Likely even more so than with the Case Subjects, who under Canadian law are to act 'with a view to the best interests of the corporation' which can include many stakeholders and the environment,[6] with most investments an investment manager has a mandate to manage investments for the highest return possible, which even with a long-term view is going to focus on share price. SASB Standards, the starting point for the social portions of the anticipated global ISSB standards, focus on financial materiality as the basis for whether disclosure should be required on something.[7] As we found in 6.1.4 Decision Making, our Case Subjects are continually making decisions on BHR both in response to competing CSR and other business priorities, financial priorities in particular. From FoodCo, it is easier to make the business case for CSR when it is a product that customers will pay more for. From TechCo, they want to get down to tier 2 but recognize that it is a lower spend. Comparing this with the investment manager whose ultimate priority is returns, we can expect that they are making similar trade-offs.

Second, Fancy postulates that even if investor pressure was consistent and effective in influencing ESG improvements for the companies they invest in, it still would not change the rules for everyone. He asserts that even 'fossil fuel divestment campaigns have little real-world impact'.[8] One member of the investment community responds by explaining that investment managers can do some good through ESG investing, but 'they do not have the capacity to translate societal moral priorities into economic, technological and corporate strategy outcomes'.[9] Their intent is not to change the rules for everyone – they are focused on their own investments. We do see evidence of other players and standard setters, such as the World Gold Council creating the Responsible Gold Mining Principles largely to meet the needs of customers like the London Bullion Market Association, according to our mining companies in 5.2.4 Stakeholder Pressure. We acknowledge this and other examples, but as the entire investment and business world is being encouraged to move to a common standard through the ISSB, it seems that the rules are being set, or at least influenced, for many companies through ESG mainstreaming. The question is whether these rules are good enough to advance HRDD. As an example with our Case Subjects, if they move solely towards a SASB-like standard, will they drop even the pretext of looking at materiality for stakeholders? And then of course, we are still left with many companies that are oblivious to ESG or any of its iterations or components.

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[5] Fancy (n 3) 14.
[6] *Canada Business Corporations Act*, RSC 1985, c C-44, s122.
[7] SASB, 'Standards Overview' <https://www.sasb.org/standards/> accessed 30 October 2021.
[8] Fancy (n 3) 27.
[9] Broc Romanek, 'What is the Role of ESG Investors?' (ESG Professionals Network, 23 November 2021) <https://www.esgprofessionalsnetwork.com/what-is-the-role-of-esg-investors/> (accessed 26 November 2021).

So, we are not sure how important ESG disclosure is to the investment manager in the larger scheme of things, and we are surmise that ESG mainstreaming is the dominant movement in sustainability right now. What does this mean for BHR and HRDD in companies? First, we question the priority that BHR has within broader ESG. Like we see with our Case Subjects, BHR is one of many ESG or sustainability imperatives. In fact, whether divestitures are effective or not, we don't see many examples of divestures because of companies' human rights records. We see a full set of comprehensive standards for climate-related disclosures coming through the Task Force on Climate-Related Financial Disclosures. Not to minimize climate imperatives, but where is the equivalent for core rights?

Second, as we say in 6.2.6 Reporting, neither the SASB Standards nor the GRI Standards consistently and comprehensively require disclosure, both qualitative and quantitative, on all steps associated with HRDD pursuant to the UNGPs. As an example, HRIAs at the business activity level (i.e. operational or regional) are an integral step in the UNGPs,[10] and this involves both consultation with stakeholders and 'internal and/or independent external human right expertise'. This makes sense – assume that there are human rights risks and figure out what they are so you can deal with them. However, in Table 6.4A, we see that none of the SASB Standards used by our Case Subjects refer to HRIAs. The GRI Standards do, requiring both reporting on management approach and specific quantitative data on human rights assessments for operations and supplier social assessments. We turn to the core labour rights, which are largely absent in the SASB Standards and inconsistent in the GRI Standards. The GRI Standards reference them all as we see again in Table 6.4A, but the information requested in each disclosure is inconsistent – asking for # of incidents with respect to discrimination, but with child labour and forced labour asking generally if operations or suppliers are at risk (no say our Case Subjects) and measures to generally address the risk. We see from Table 6.4B that the WEF Stakeholder Capital Metrics include minimal BHR disclosure in its core metrics. In the preceding paragraphs on the benefits of ESG mainstreaming, we suggest the potential of industry-specific disclosures if at the level we saw in the modern slavery statements, but this is not presently being borne out.

Finally, we come back to our discussion on values versus rules-based frameworks in Subsection 3.2.1 and in the Findings. From MiningCo2 in Subsection 5.2.2, 'There are too many frameworks out there right now'. We see the increasing detail and complexity in the reporting in the Case Subject documents. Will the importance of the core rights that are emphasized at the policy level of our Case Subjects get lost in the myriad of disclosures now 'required' and likely to be required in the future?

To summarize, when HRDD reporting is required in global standards, we see BHR norms and various laws influencing ESG reporting, and according to our Case Subjects their HRDD efforts. These global standards are inconsistent though, and SASB and WEF in particular do not

[10] 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 18.

consistently require qualitative and quantitative disclosure on core BHR compliance matters. Even if the standards were consistent and detailed enough, we have no assurance that companies would consistently and comprehensively respond to them or that the HRDD disclosures would be a priority for investment managers or others. Finally, we recognize that many MNCs, both in Canada and elsewhere, are not motivated to respond to these global standards. ESG mainstreaming, while perhaps doing some good, is not enough to change the narrative on HRDD, and in fact may be a distraction.