



CLAIHR

Canadian Lawyers for International Human Rights
Juristes canadiens pour les droits internationaux de la personne

Delivered by Email

September 7, 2020

To: Capital Markets Modernization Taskforce (Walied Soliman, Chair; Rupert Duchesne, Wesley J. Hall, Melissa Kennedy, and Cindy Tripp, Members)

RE: CONSULTATION – MODERNIZING ONTARIO’S CAPITAL MARKETS

Dear Capital Markets Modernization Taskforce Members,

Thank you for the opportunity to provide comments to Ontario’s Capital Markets Modernization Taskforce (the “**Taskforce**”) on the Capital Markets Modernization Taskforce: Consultation Report.

By way of introduction, Canadian Lawyers for International Human Rights (“**CLAIHR**”) is a non-profit, non-governmental, charitable organization of lawyers, law students, and legal academics working to promote international human rights within and in connection to Canada.

Our response will address the Taskforce proposal to mandate disclosure of ESG (as defined below) information that is compliant with either the TCFD or SASB recommendations for issuers through regulatory filing requirements for the Ontario Securities Commission (“**OSC**”). Our response will also address, in part, what specific material ESG information is needed beyond what is currently captured by existing disclosure requirements in Ontario.

To answer these questions, our submission will focus on the importance of respect for human rights in corporate reporting and explain the critical link between the concept of salience and materiality. Human rights impacts, defined broadly, are those impacts that cause harm to a person’s dignity, freedoms, or bodily integrity. Examples may include battery, shootings, sexual assaults, environmental contamination, and crimes against humanity. While CLAIHR supports the Taskforce’s proposal to mandate disclosure of environmental, social, and governance (“**ESG**”) information, in our view, human rights impacts are neither appropriately nor adequately addressed by either the TCFD or SASB frameworks.

Executive Summary

CLAIHR’s position is that human rights impacts must be appropriately and adequately addressed in any ESG reporting regime that is recommended by the Taskforce. At a minimum, this can be achieved through the adoption of a **saliency lens** (as explained below), which captures those human rights that are at risk of the most severe negative impact by business activities. A saliency lens respects Ontario’s statutory definition of financial materiality from the perspective of the reasonable investor. To integrate the saliency lens, the Taskforce should consider mandating the

UN Guiding Principles Reporting Framework¹ (“UNGP Reporting Framework”) and implementation guidance as part of the ESG disclosure regime.

Should the Taskforce disagree, or be unwilling to recommend the framework, we urge it to at least consider the shifts in the expectations of the reasonable investor, as well as the clarification of fiduciary duty away from a shareholder-centric view under Canadian corporate law. Secondly and similarly, we point to momentum in European Union (“EU”), a more mature market with respect to ESG reporting, toward expanding the conceptualization of materiality (as explained below) to include the perspective of stakeholders beyond the reasonable shareholder. And finally, it would be prudent to consider that the patchwork of mandatory due diligence on human rights legislation in Europe will likely be harmonized by new legal instruments with proposals expected as early as 2021. Momentum on human rights due diligence transparency and disclosure is steadily evolving and the Taskforce has a unique opportunity to recognize these efforts and to provide cohesion by aligning securities law through its recommendations regarding the modernization of Ontario’s ESG disclosure regime.

Part I

1. Why Human Rights Reporting?

It is well-known that Canadian corporations operating abroad are often involved in human rights violations, notably associated with mining operations. Canada has an obligation to ensure that it and other private actors, including corporations brought into existence under its laws, do not violate human rights.² Indeed, the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on Rights of the Child and the Committee on the Elimination of All Forms of Discrimination against Women have all highlighted states’ obligations to take appropriate steps to prevent human rights violations abroad by corporations, whether the corporations were domiciled in their territory, or were incorporated under their laws, etc.³ In CLAIHR’s view,

¹ United Nations Human Rights Office of the High Commission, “Guiding Principles on Business and Human Rights”, online: <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>, UNGP 11 [UNGPs].

² See e.g. Shin Imai et al, The ‘Canada Brand’: Violence and Canadian Mining Companies in Latin America (December 1, 2017). Osgoode Legal Studies Research Paper No. 17/2017, Available at SSRN: <<http://dx.doi.org/10.2139/ssrn.2886584>>; Human Rights Watch, “Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine” (1 February 2011), <<https://www.hrw.org/report/2011/02/01/golds-costly-dividend/human-rights-impacts-papua-new-guineas-porgera-gold-mine>>; Penelope Simons, “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56:2 Can Bus LJ 167 at 168-170; Mining Watch Canada, “Background Brief: Adding Insult to Injury at the North Mara Gold Mine, Tanzania” (September 2016), online: <https://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf>. Numerous international treaty bodies have expressed concern about allegations of human rights violations associated with Canadian companies operating abroad. See Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc CCPR/C/CAN/CO/6 (2015) at para 6; Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc. E/C.12/CAN/CO/6 (2016) at paras 15-16; United Nations Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada, UN Doc CEDAW/C/CAN/CO/8-9 (2016) at paras 18-19.

³ See e.g. Human Rights Committee, General Comment 36 (2018) on article 6 of the International Covenant on Civil

mandatory human rights reporting is one **critical** aspect of ensuring that Canadian corporations are respecting human rights that ought to be seriously considered in deciding which ESG framework or information to mandate for Canadian issuers.

1.1 Canada's Existing Commitments

Indeed, Canada is one of many states that has endorsed the United Nations Guiding Principles on Business and Human Rights (“**UNGPs**”),⁴ which provide: (1) corporations should respect human rights meaning they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved;⁵ (2) the responsibility of corporations to respect human rights refers to internationally recognized human rights, understood, at least as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights detailed in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work;⁶ (3) the responsibility of corporations to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure;⁷ and (4) in order to meet their responsibility to respect human rights, corporations should, among other things, have a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.⁸

The Organization for Economic Co-operation and Development (“**OECD**”), of which Canada is a founding member, developed the Responsible Business Conduct (“**RBC**”) principles and standards which are implemented through the OECD Guidelines for Multinational Enterprises (“**OECD Guidelines**”).⁹ These OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They are considered the first international instrument which integrates the responsibility to respect human rights as set out in the UNGPs. They also work to incorporate risk-based due diligence into major areas of business ethics. The OECD Guidelines are voluntary and not legally enforceable but indicate that enterprises should avoid causing or contributing to “adverse impacts”¹⁰ on

and Political Rights on the Right to Life, UNCCPR, UN Doc CCPR/C/GC/36 (30 October 2018) at para 22; Committee on Economic, Social and Cultural Rights, General Comment 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UNCESCR, UN Doc E/C.12/GC/24 (23 June 2017) at paras 25-28; Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 34 (2016) on the Rights of Rural Women UNCEDAW, UN Doc CEDAW/C/GC/34 (4 March 2016) at para 13; Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UNCESCR, 46th Sess, UN Doc E/C.12/2011/1 (20 May 2011) at paras 4-6; Committee on the Rights of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, UNCRC, UN Doc CRC/C/GC/16 (17 April 2013) at paras 44–46; Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Sweden, CEDAW, UN Doc CEDAW/C/SEW/CO/8-9 (2016) at para 35.

⁴ Edwin Koster, “The UN Guiding Principles for Business & Human Rights”, Social Accountability International (December 6, 2013), online: <<https://www.3blmedia.com/News/UN-Guiding-Principles-Business-Human-Rights>>.

⁵ UNGPs.

⁶ UNGP 12.

⁷ UNGP 14.

⁸ UNGP 15(b). See UNGP 17 for more on what human rights due diligence requires.

⁹ OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters. Online: <http://www.oecd.org/daf/inv/mnc/48004323.pdf> [OECD Guidelines].

¹⁰ An adverse impact is an act that is caused by, contributed to by, or directly linked to enterprise operations,

matters covered by the guidelines through their own activities and address such impacts when they occur. The 2011 update to the OECD Guidelines introduced a new approach to due diligence and responsible supply chain management.

As a result, in CLAIHR's view, mandating human rights disclosure would work to bring Ontario in line with its commitments to the UNGPs and OECD Guidelines, and would be consistent with the approach of corporations around the world, such as Unilever,¹¹ that have moved to integrate human rights due diligence into their operational framework and public disclosures.

2. Inadequate Coverage of Human Rights Reporting in Canada

The extension of mandatory corporate reporting to include critical human rights related risks is occurring in jurisdictions considered Canada's trading partners abroad, and in jurisdictions in which Canadian companies operate. Examples of transparency and disclosure legislation include the 2015 *UK Modern Slavery Act*,¹² the 2014 EU Non-financial Reporting Directive ("NFRD")¹³ and the 2012 *Transparency in Supply Chains Act*¹⁴ in California. A second category of legislation on due diligence includes mandatory due diligence legislation and other conduct requirements that require companies to prevent or mitigate impacts to human rights in addition to reporting on them. Examples of mandatory due diligence legislation include the 2019 Dutch Child Labour Due Diligence law¹⁵ and the 2017 French Duty of Vigilance law.¹⁶ Human rights due diligence reporting is gaining momentum in Europe and European Commission is examining options for future harmonization of legal instruments.¹⁷

In Canada, human rights reporting remains voluntary and inconsistent as neither transparency and disclosure obligations nor due diligence and conduct requirements exist under national or provincial laws. Moreover, as the Canadian organization, Shareholder Association for Research & Education ("SHARE") reports, it "leav[es] investors without consistent and reliable information on issues including: reputation risk related to adverse human rights impacts; operational risks of supply disruption or blocked shipments of goods made with forced labour; and, legal risk of court action by consumers, investors or workers".¹⁸ Some Canadian companies

products or services by a business relationship. These can be related to human rights, including workers and industrial relations, environment, bribery and corruption disclosure and consumer interests (RBC issues). [OECD Guidelines p 7].

¹¹ Unilever, "Understanding & reporting on our human rights impacts" online at:

<<https://www.unilever.com/sustainable-living/enhancing-livelihoods/fairness-in-the-workplace/understanding-our-human-rights-impacts/>>.

¹² *UK Modern Slavery Act*, 2015, online: <<https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>>

¹³ Directive 2014/95/EU, online: <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation\[NFRD\]](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation[NFRD])>.

¹⁴ NFRD.

¹⁵ The *California Transparency and Supply Chains Act*, 2015, online: <<https://oag.ca.gov/SB657>>.

¹⁶ Netherlands, Dutch Child Labour Due Diligence Law. Online:

<https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet>.

¹⁷ France, Duty of Vigilance Law, online: <<https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>>.

¹⁸ European Commission, "Study on due diligence requirements through the supply chain", online:

<https://media.business-humanrights.org/media/documents/files/documents/DS0120017ENN.en_.pdf>.

¹⁹ SHARE, 2017. "The Rise of Supply Chain Transparency Legislation: What is at Stake for Canadian Investors".

Online: <https://share.ca/documents/investor_briefs/Social/2017/Supply_Chain_Transparency_Legislation.pdf> at p.4.

are captured by reporting requirements in other jurisdictions. Others, who are not required to report directly, are providing information through supply chain diligence through buyers who are mandated to report. While legislation would help to level the playing field to create a standard of disclosure for all companies, the Taskforce has a unique opportunity to contribute to enhanced reporting for Ontario issuers, specifically on the transparency and disclosure component to increase companies' preparedness to participate in global markets and provide investors with the appropriate information for making investment-related decisions.

2.1 Investor Desire for Increased Transparency on Human Rights Reporting

While there are many sources of evidence to indicate that investors are seeking more information from companies on human rights issues, few are as clear as the support for human rights related shareholder proposals this year. In 2020, for instance, Oxfam filed human rights shareholder resolutions at 4 companies on the topic of human right due diligence disclosure or human rights impact assessments, where they all received greater than 37% support, with one receiving more than majority support at 65%.¹⁹ Historically, such proposals received support closer to the 20% mark. More broadly, support for social related ESG proposals has increased over the past year, as COVID-19 exposed the lack of consistent and comparable information available from companies on issues such as human rights and human capital management.

A case study on Tahoe Resources provided by the Justice and Corporate Accountability Project, which can be reviewed at length in their submission to this Taskforce, provides a narrative and longer-term view of ongoing investor demand for increased human rights related disclosures at a single Canadian issuer. In this particular case, the Norwegian Council on Ethics for the Government Pension Fund Global (“**Council**”) reported they were unable to get an appropriate level of disclosure they required from the company regarding their social license to operate, specifically the process to obtain free prior and informed consent. This resulted in a determination by the Council that there was an unacceptable level of risk that the company contributing to serious human rights violations, such that divestment was recommended.²⁰

Shareholders are seeking increased transparency and disclosure on risks related to human rights impacts. Companies have been either unwilling to disclose or do not adequately understand how to effectively disclose the risks that arise from the activities of their business or business relationships. Mandatory disclosure of human rights impacts, and due diligence should therefore be a critical consideration when shaping the ESG reporting regime in Ontario.

3. **The TCFD and SASB Models**

3.1 The TCFD and SASB Frameworks are Complementary

CLAIHR respectfully submits that the two frameworks proposed, TCFD and SASB are complementary and therefore issuers should be required to consider elements of both in their disclosure obligations.

¹⁹ Diana Kearney and Sharmeen Contractor, Sept 4, 2020, “Investors embrace human rights in the era of Corona”, online at: <<https://www.responsible-investor.com/articles/investors-embrace-human-rights-in-the-era-of-corona>>.

²⁰ Council on Ethics for the Government Pension Fund Global, Annual Report 2014, online: <<https://nettsteder.regjeringen.no/etikkradet3/files/2017/02/Council-on-Ethics-2014-Annual-Report-1.pdf>>.

The TCFD uses a **principles-based approach** to disclosure, through a **systemic risk lens**. It was established to address a cross-industry deficit in financial disclosures related specifically to the systemic risk that climate change poses to the financial system. The provision for a forward-looking discussion and disclosure on scenario analysis, and the clarity provided by the simple categories of governance, strategy, and risk management, and metrics and targets, are particularly valuable elements.

In contrast, SASB provides **industry-specific standards on a range of financially material ESG issues** allowing companies to tailor disclosures to their unique circumstances. The intersection between systemic risks and other ESG issues is inevitable given the ways our populations and markets are linked to the natural environment. Therefore, the frameworks together have the potential to elicit decision-useful information that is reliable, consistent, and comparable.

3.2 Weaknesses in the TCFD and SASB Frameworks

3.2.1 TCFD and related implementation guidance is silent on human rights

It is CLAIHR's position that human rights impacts are not appropriately nor adequately addressed by either the TCFD or SASB frameworks. We hope that our submission reiterates and/or helps the Taskforce recognize the human rights deficiencies of TCFD and SASB and encourages it to address these by supplementing the proposed frameworks with content that attends to these concerns.

Despite the TCFD having evolved as the globally accepted standard on climate-related disclosures, the framework does not adequately help to identify the relationship between climate change and risks to human rights and how business activities might contribute to negative impacts to human rights. Climate change is inextricably interconnected with other risks and impacts, notably with respect to human rights. The United Nations, Office of the High Commissioner on Human Rights as affirmed in conjunction with the Intergovernmental Panel on Climate Change in resolution 41/21²¹ emphasizes that "...the adverse effects of climate change have a range of implications which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights". The rights to life, safe drinking water and sanitation, food, health, housing, self-determination, culture, work and development are examples of rights that may be implicated by climate change.

CLAIHR is similarly concerned by the interconnected risks presented by climate change, particularly the impact on human rights. Given the linked nature of these issues, we believe that investors should receive information providing a more holistic and comprehensive understanding of how a company is managing the range of risks that climate change poses, this includes impacts to human rights. The report, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD Implementation Guide")*²² for organizations

²¹ UN Human Rights Council Resolution 41/21 Human rights and climate change (2019). Online: <<https://undocs.org/A/HRC/RES/41/21>>.

²² *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*, June 2017,

with respect to risk management, for instance, is principles-based and therefore not prescriptive other than to recommend disclosure of the processes: for identifying and assessing climate related risks; for managing climate related risks; and how these processes are integrated into the organization's overall risk management. The Appendix of the TCFD Implementation Guide highlights two major categories of climate-related risks which include: transition risks (policy and legal, technology, market and reputation) and physical risks (acute and chronic). **The mention of human right is notably absent in descriptions of those risks and therefore requires that organizations read in the risk to human rights without explicit guidance to do so.** Organizations could benefit from greater clarity in how to identify human rights risks impacted by their business activities which have potential financial impacts and are directly and indirectly linked to climate change.

3.2.2 SASB Materiality Map Leads to Gaps in Addressing Human Rights Risks

CLAIHR recognizes the voluntary adoption of the SASB framework in North America by issuers and investor support therefor. This has increased the amount and quality of ESG data available to the market and stakeholders more broadly. The framework has been touted for its evidence-based focus and careful attention to fiduciary duty and dedication to the concept of financial materiality. On the other hand, the framework is potentially limited by this US-centric construction.

SASB's treatment of human rights in the reporting framework's Materiality Map has attracted significant concern. CLAIHR shares the concern put forth in a comment letter to SASB by NYU Stern's Center for Business and Human Rights and ICAR which questions the overly narrow understanding of human rights through its explicit inclusion of the phrase "human rights" in only the social capital dimension. Yet, other dimensions including human capital management, business model and innovation (which encompasses supply chain issues), and leadership and governance (which contains critical incident risk management) implicate human rights in ways that may also be material. While the SASB framework can be considered the minimum material issues for disclosures, the absence of specific human rights standards and metrics in these other dimensions could be confusing or misleading. Further, the treatment of labour as a general issue category in the human capital management dimension captures only the workers within a company's direct workforce and not workers further down the value chain. We agree that this may lead to uneven disclosure requirements related to labour rights of all workers in the company's value chain.

We would also like to draw the Taskforce's attention to the work being done by the US civil society organization RightsCollab, who recently wrote on precisely the issue of the SASB's shortcomings in addressing human rights. This work identifies illogical gaps in the SASB Materiality Map and provide examples including:

The following standard exists in the Supply Chain Management general issue category for iron and steel producers: "Discussion of the process for managing iron ore and/or coking coal sourcing risks arising from environmental and social issues". This standard may have evolved from a series of reports that U.S. steel producers were importing pig

online: <<https://www.fsb-tcf.org/wp-content/uploads/2017/12/FINAL-TCFD-Annex-Amended-121517.pdf>>.

iron from Brazil produced with forced labor. But it does not appear on the Materiality Map for many other industries that may import materials produced with forced labor, such as construction materials, fuel cells and industrial batteries, electrical and electronic equipment, and industrial machinery and goods.

Looking at the 2018 U.S. Department of Labor’s list of goods produced by child labor or forced labor, steel isn’t mentioned. Iron is only mentioned in connection with North Korea, while forced labor is extensively cited for bricks, cobalt, copper, fluorspar, gold, granite, gravel, gypsum, jade, mica, sand, silver, stones including limestone and pumice, tantalum, tin, tungsten, and zinc. Forced labor may be present in the supply chains of many industries for which there are no SASB supply chain disclosure standards.²³

To some extent, greater data driven evidence would support the more effective implementation of human rights standards. Such work is currently being undertaken at Columbia University, through the Data for Good program of their Data Science Institute, for instance.

We believe, however, the issues related to the shortcomings of SASB’s Materiality Map are also in part related to a lack of comprehensive understanding about how to determine materiality of human rights issues. We recognize this is a complex challenge and that traditional materiality processes often miss significant risks to human rights. Assessing this concept of financial materiality using the market impact test, risks missing identification of the type of information required to assess whether businesses activities could result in negative impacts on human rights which have the potential to materially affect share price. Given the complex nature of the responsibilities to protect human rights, and the potential material impact to share price, a more nuanced lens to guide companies in their materiality assessments is required.

4. An Appropriate Lens to Evaluate and Disclose Risks to Human Rights

In this section we introduce a potential solution to aid in the more effective determination material issues for corporate disclosures. A company must understand their business activities and their potential implication on the most severe, negative impacts to human rights and what they are doing to manage such risks—this can be done through the lens of saliency and remains consistent with the current materiality standard. We go on to recommend the Taskforce consider adding the UNGP Reporting Framework as part of a mandated ESG disclosure regime, which would also generate in-demand, decision useful information for shareholders.

4.1 Saliency

A company’s salient human rights issues are those rights that stand out clearly, or are exceedingly prominent, because they are at risk of the **most severe negative impact** (i.e. social, environmental and economic harm) **as a result of a company’s activities or business relationships**.²⁴ Saliency uses a lens of risk to people as the starting point, not risk to the share

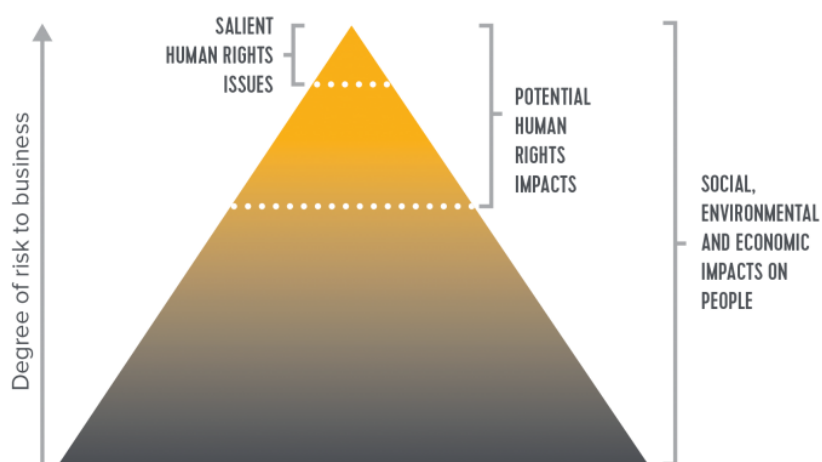
²³ Joanne Bauer, 2020, “Harnessing Big Data for SASB Standards to Improve Corporate Human Rights Practice: Data Project Plan”, online: <<https://rightscolab.org/harnessing-big-data-for-sasb-standards-to-improve-corporate-human-rights-practice-data-project-plan/>>.

²⁴ Shift & Mazars LLP, “Salient Human Rights Issues”, online: <<https://www.ungpreporting.org/resources/salient-human-rights->

price as the materiality standard traditionally does, while acknowledging that **where risk to people’s human rights are the greatest, there is generally a convergence with risk to the business.**²⁵ More specifically, saliency focuses on those human rights impacts that are: (1) the most severe based on how grave and widespread the impact to human rights is and how difficult it would be to right the resulting harm; (2) the potential of the human rights impacts to occur; (3) the ability to avoid harm to human rights; and (4) the impact of human rights violations on people, rather than on share price.²⁶

Saliency differs from materiality but does not displace the OSC’s statutory financial materiality standard. Materiality depends on the choice of a particular reference point, usually shareholders, from the perspective of whose interests human rights issues are assessed (i.e. material or immaterial).²⁷ In effect, the choice of reference point dictates the selection of material issues that are then reported.²⁸ In contrast, saliency does not privilege any particular reference point, but instead takes a holistic approach, identifying the human rights that are at risk of the most severe impact as a result of the company’s activities or business relationships.²⁹ Saliency is therefore necessary for an issuer to understand when evaluating human rights related risks so that it is in a better position to provide relevant disclosures. When a company identifies **risks of severe impacts on human rights, which are likely to converge with risks to the business, how the company is managing such risks and related due diligence processes become relevant pieces of information for investors.** Saliency contributes to assessing materiality by narrowing the type of potential human rights impact that meet the market impact test.

The relationship between salient human rights issues and risk to business is represented in the figure below.



Source: UNGP Reporting Framework

[issues/#:~:text=Materiality%20depends%20on%20the%20choice,judged%20more%20or%20less%20important.&xt=By%20contrast%2C%20salient%20human%20rights,the%20most%20severe%20negative%20impact>](#)

[Saliency].

²⁵ Saliency, *ibid.*

²⁶ Saliency, *ibid.*

²⁷ Saliency, *ibid.*

²⁸ Saliency, *ibid.*

²⁹ Saliency, *ibid.*

In CLAIHR’s view, saliency provides a consistent, predictable and principled means of focusing human rights disclosure and CLAIHR urges the Taskforce to consider saliency as the lens with which to guide the integration of human rights disclosure using the UNGP Reporting Framework, discussed below.

4.1.1 The UNGP Reporting Framework is grounded in saliency and contributes to a company’s understanding of material risks for disclosure

The UNGP Reporting Framework is a framework that provides companies with targeted questions and guidance on how to report on human rights issues in line with their responsibility to respect human rights.

The UNGP Reporting Framework is based on the standard of “saliency” as set out in the UN Guiding Principles on Business and Human Rights. The UNGP Reporting Framework operates through seven core reporting principles, and is divided into three parts: (1) Part A has two overarching questions that focus on a company’s commitment to and governance of human rights risk management; (2) Part B provides a “filter point” for a reporting company to narrow the range of salient human rights issues for the purposes of Part C; and (3) Part C has six overarching questions that focus on the effective management of the identified salient human rights issues on which the company is reporting.³⁰ A summary of the UNGP Reporting Framework can be found in the Appendix to this submission and guidance on implementing the framework is also available.³¹

CLAIHR urges the Taskforce to seriously consider including the UNGP Reporting Framework in its reporting regime, because it incorporates the lens of saliency which provides for comprehensive, robust human rights risk disclosure. Notably, the UNGP Reporting Framework has strong support globally of 88 investors representing \$5.3 trillion assets under management³² and, as referenced above, is supported by the Canadian government.

Part II

5. Opportunities for the Taskforce

The Taskforce has a unique opportunity through its mandate to recognize: shifts in the expectations of the reasonable investor as well as the clarification of fiduciary duty away from a shareholder-centric view under Canadian corporate law; efforts to expand the conceptualization of materiality to include the perspective of a broader set of stakeholders; and monitor potential legislative proposals in Europe requiring businesses to carry out due diligence in relation to the potential human rights and environmental impacts of their operations and supply chains when proposing parameters of a mandatory ESG disclosure regime for Ontario.

³⁰ Shift & Mazars LLP, “UN Guiding Principles Reporting Framework”, online: <<https://www.ungpreporting.org/framework-guidance/>>.

³¹ UNGP Reporting Framework with Guidance, online <https://www.ungpreporting.org/wp-content/uploads/UNGPreportingFramework_withguidance2017.pdf>.

³² Shift & Mazars LLP, “Users and Supporters”, online: <<https://www.ungpreporting.org/about-us/support-and-users/>>.

5.1 Creating Cohesion between Canadian Corporate Law and Securities Law

Given the evolution of corporate law from a shareholder-centric to a stakeholder-centric view, the Taskforce should seriously consider aligning itself with Canadian corporate law.

Under Ontario securities law, the definitions of “material fact” and “material change” are based on a market impact test. A fact is material where it: (i) significantly affects the market price or value of a security; or (ii) would reasonably be expected to have a significant effect on the market price or value of a security. A change is material where the change would: (i) reasonably be expected to have a significant effect on the market price or value of a security; or (ii) such a change is probable. Materiality is determined based solely on its market price; it is a shareholder-centric conception.

Under Canadian corporate law, directors and officers have a statutory fiduciary duty requires to act in the “best interests of the corporation.” As Canada’s highest court found in 2004 in *Peoples Department Stores Inc. (Trustee of) v. Wise*, and reaffirmed in 2008 in *BCE Inc., Re*, the “best interests of the corporation” encompasses more than just the interests of shareholders. It involves considering the impact of corporate decisions on stakeholders such as shareholders, employees, creditors, consumers, governments and the environment. Moreover, this principle has recently been codified in the *Canada Business Corporation Act*. On June 21, 2019, the federal government codified the stakeholder interpretation of “best interests of the corporation” to incorporate the interests of shareholders, employees, retirees and pensioners, creditors, consumers and government, the environment and the long-term interests of the corporation.

Recognizing that the fiduciary duty of directors and officers of institutional investors may also require human rights due diligence, the OECD issued “The Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises”.³³ This guide is intended to help institutional investors prevent or address adverse impacts related to human rights, among other issues, in their investment portfolios. Thus, aligning disclosure requirements for public issuers may have the added benefit of enhancing the ability of directors and officers of Canadian institutional investors to carry out their duties. In Canada, institutional investors dominate the ownership of public companies, holding 47% of the equity of Canadian listed public companies.³⁴

In our view, as currently understood, the TCFD and SASB frameworks, which use only the existing shareholder-centric/market-price centric definition of materiality, are incongruent with Canadian corporate law. We support efforts by the Taskforce that would help to bridge the gap and align Canadian corporate and securities law as we believe such efforts would also improve the capacity of directors and officers to carry out their fiduciary duties.

5.2 Aligning with Trends to Broaden the Conceptualization of Materiality

³³ OECD MNE Guidelines, online: <<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>>.

³⁴ Adriana De La Cruz, Yung Tang & Alejandra Medina (2019), “Owners of the World’s Listed Companies”, OECD Capital Market Series, online: <<https://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf>> at pp. 11 and 23 [2019 OECD Report].

In early 2020, the European Commission, which currently requires large companies to publish regular reports on the social and environmental impacts of their activities, undertook a review of Directive 2014/95/EU (NFRD).³⁵ In the review, they suggest expanding the scope of mandatory disclosures beyond financial materiality. According to that proposal, “a company is required to disclose information on environmental, social and employee matters, respect of human rights, and bribery and corruption, to the extent that such information is necessary for an understanding of the company’s development, performance, position and impact of its activities”.³⁶

- The reference to the company’s “development, performance [and] position” indicates financial materiality... This perspective is typically of most interest to investors.
- The reference to “impact of [the company’s] activities” indicates environmental and social materiality... This perspective is typically of most interest to citizens, consumers, employees, communities and civil society organisations.

This “double materiality” concept broadens materiality from the investors use case, to a multi-constituency use case. In articulating this standard, the European Commission’s guidance also notes that the **likelihood of convergence of these risk perspectives is expected to increase in the future**. With respect to human rights impacts, CLAIHR strongly agrees with this position.

In the submission by Shift, the leading centre of expertise on the UNGPs, to the EU’s NFRD, they provide a comprehensive summary of the opportunities the regulator has to improve human rights reporting, and we believe the Taskforce should consider that submission in order to most effectively implement the rollout of its ESG disclosure mandate including with respect to human rights. In particular, section 3 on materiality, they write “...once the definition of materiality extends – as it must— beyond narrow financial materiality as relevant to shareholder decision making, the focus on severity of impacts becomes essential”.³⁷ Importantly, the UNGPs support the concept of double-materiality but maintain that saliency is an instructive lens for the determination of materiality. We welcome the opportunity to work with the Taskforce to do the same for our local regulations.

It is also significant to note that SASB supports the concept of double materiality. In their comment letter to the European Commission’s public consultation on the NFRD, they write, “[w]e also observe that the double materiality concept usefully recognizes the dynamic nature of materiality in the context of sustainable business practices—that is, the idea that an issue that is material solely from a social or environmental impact perspective can also become financially material over time”.³⁸ SASB also specifically recognizes that the double materiality standard appropriately acknowledges that non-financial information is important to multiple constituencies. CLAIHR is aligned with the comments provided by SASB in this regard. SASB has teamed up with GRI to suggest that these frameworks together could serve investor and

³⁵ Directive 2014/95/EU, online: <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation>> [NFRD].

³⁶ Ibid.

³⁷ Shift’s Submission on Human Rights Opportunities in the EU Non-Financial Reporting Directive Review Process, online: <<https://shiftproject.org/nfrd/>>.

³⁸ SASB submission to EU Commission on NFRD, online, <<https://www.sasb.org/wp-content/uploads/2020/06/SASB.NFRDWhitepaper.FINAL-005.pdf>>.

stakeholder needs under a dual materiality standard.

Injecting dynamism into the conceptualization of materiality is an opportunity for the Taskforce to ensure Canada does not fall out of step with evolving norms around environmental and social impacts.

5.3 Recognizing Due Diligence Harmonization across Europe

On April 29, 2020, the European Commissioner for Justice, Didier Reynders announced³⁹ the intention to propose legislation in 2021 requiring businesses to carry out due diligence in relation to potential human rights and environmental impacts of their operations. The Commissioner emphasized that any new law would be aligned with existing standards including the UNGPs and the OECD Guidelines suggesting that companies with existing human rights policies and due diligence processes might be well positioned to comply under new mandatory requirements. This point is particularly important for the Taskforce to consider as any first mover efforts, to mandate ESG disclosure should be comprehensive in order to prepare issuers for mandatory due diligence requirements that may originate from another source. **In a broader sense, preparation for disclosures on human rights and environmental due diligence will minimize the impact of the reporting burden on issuers in the future.**

Support for an EU framework on mandatory human rights and environmental due diligence has received broad support from large public companies, business associations, and civil society alike. They cite the COVID-19 crisis as evidence of the underlying impetus for information related to the “fragility of global supply chains the vulnerabilities this creates and exacerbates for workers, communities and businesses around the world”.⁴⁰ We agree that such regulation could contribute to more impactful and effective action on the ground. We similarly believe that regulation could also increase legal certainty around the expectation of disclosure, and clarify legal consequences where responsibilities are not met.

6. Conclusion

CLAIHR commends the Taskforce for undertaking this much-needed review of Ontario’s capital markets and recognizing the need for robust ESG reporting. In our view, the Taskforce should seriously and independently consider human rights reporting. Human rights reporting is not only a critical aspect of ensuring that Canadian corporations are respecting human rights, but investors are demanding human rights disclosure for investment decision making. Such disclosure has the dual ability to foster efforts by Canada to meet its existing commitments to business and human rights and to support directors and officers of institutional investors in meeting their fiduciary duties.

As we have demonstrated above, human rights impacts are not appropriately or adequately

³⁹ European Commission Promises Mandatory Due Diligence Legislation in 2021, online: <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>.

⁴⁰ Support for EU framework on mandatory human rights and environmental due diligence, online: https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf.

addressed by either the TCFD or SASB frameworks. CLAIHR's position is that human rights must be appropriately and adequately addressed in any ESG reporting regime that the Taskforce recommends, and at a minimum, this can be achieved through the adoption of guidance that uses a saliency lens. Not only does a saliency lens respect Ontario's statutory definition of financial materiality, it will significantly improve the quality of human rights disclosure. One existing framework that uses saliency is the UNGP Reporting Framework, a well-regarded and used global framework whose adoption would prepare issuers for disclosure that may in future be required of them by other regulators.

Should the Taskforce disagree, or be unwilling to recommend the above, we urge it to at least consider the shifts in the expectations of the reasonable investor as well as the clarification of fiduciary duty away from a shareholder-centric view under Canadian corporate law. As we have explained above, in the EU, there has been a movement to expand the conceptualization of materiality to include the perspective of stakeholders beyond the reasonable shareholder. Further efforts to harmonize due diligence reporting in the region are also underway. The Taskforce can recognize these efforts through its recommendation regarding the modernization of Ontario's ESG disclosure regime and thereby provide cohesion to ensure Ontario does not fall out of step with federal and international developments.

CLAIHR thanks the Taskforce for its efforts and for taking our comments into consideration. We would be pleased to discuss our submission and its recommendations further.

Yours truly,

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APPENDIX: UN GUIDING PRINCIPLES REPORTING FRAMEWORK

THE UN GUIDING PRINCIPLES REPORTING FRAMEWORK

PART A: GOVERNANCE OF RESPECT FOR HUMAN RIGHTS

POLICY COMMITMENT

A1 What does the company say publicly about its commitment to respect human rights?

- A1.1** How has the public commitment been developed?
- A1.2** Whose human rights does the public commitment address?
- A1.3** How is the public commitment disseminated?

EMBEDDING RESPECT FOR HUMAN RIGHTS

A2 How does the company demonstrate the importance it attaches to the implementation of its human rights commitment?

- A2.1** How is day-to-day responsibility for human rights performance organized within the company, and why?
- A2.2** What kinds of human rights issues are discussed by senior management and by the Board, and why?
- A2.3** How are employees and contract workers made aware of the ways in which respect for human rights should inform their decisions and actions?
- A2.4** How does the company make clear in its business relationships the importance it places on respect for human rights?
- A2.5** What lessons has the company learned during the reporting period about achieving respect for human rights, and what has changed as a result?

PART B: DEFINING THE FOCUS OF REPORTING

B1 **Statement of salient issues:** State the salient human rights issues associated with the company's activities and business relationships during the reporting period.

B2 **Determination of salient issues:** Describe how the salient human rights issues were determined, including any input from stakeholders.

B3 **Choice of focal geographies:** If reporting on the salient human rights issues focuses on particular geographies, explain how that choice was made.

B4 **Additional severe impacts:** Identify any severe impacts on human rights that occurred or were still being addressed during the reporting period, but which fall outside of the salient human rights issues, and explain how they have been addressed.

PART C: MANAGEMENT OF SALIENT HUMAN RIGHTS ISSUES

SPECIFIC POLICIES

C1 Does the company have any specific policies that address its salient human rights issues and, if so, what are they?

- C1.1** How does the company make clear the relevance and significance of such policies to those who need to implement them?

STAKEHOLDER ENGAGEMENT

C2 What is the company's approach to engagement with stakeholders in relation to each salient human rights issue?

- C2.1** How does the company identify which stakeholders to engage with in relation to each salient issue, and when and how to do so?
- C2.2** During the reporting period, which stakeholders has the company engaged with regarding each salient issue, and why?
- C2.3** During the reporting period, how have the views of stakeholders influenced the company's understanding of each salient issue and/or its approach to addressing it?

ASSESSING IMPACTS

C3 How does the company identify any changes in the nature of each salient human rights issue over time?

- C3.1** During the reporting period, were there any notable trends or patterns in impacts related to a salient issue and, if so, what were they?
- C3.2** During the reporting period, did any severe impacts occur that were related to a salient issue and, if so, what were they?

INTEGRATING FINDINGS AND TAKING ACTION

C4 How does the company integrate its findings about each salient human rights issue into its decision-making processes and actions?

- C4.1** How are those parts of the company whose decisions and actions can affect the management of salient issues, involved in finding and implementing solutions?
- C4.2** When tensions arise between the prevention or mitigation of impacts related to a salient issue and other business objectives, how are these tensions addressed?
- C4.3** During the reporting period, what action has the company taken to prevent or mitigate potential impacts related to each salient issue?

TRACKING PERFORMANCE

C5 How does the company know if its efforts to address each salient human rights issue are effective in practice?

- C5.1** What specific examples from the reporting period illustrate whether each salient issue is being managed effectively?

REMEDICATION

C6 How does the company enable effective remedy if people are harmed by its actions or decisions in relation to a salient human rights issue?

- C6.1** Through what means can the company receive complaints or concerns related to each salient issue?
- C6.2** How does the company know if people feel able and empowered to raise complaints or concerns?
- C6.3** How does the company process complaints and assess the effectiveness of outcomes?
- C6.4** During the reporting period, what were the trends and patterns in complaints or concerns and their outcomes regarding each salient issue, and what lessons has the company learned?
- C6.5** During the reporting period, did the company provide or enable remedy for any actual impacts related to a salient issue and, if so, what are typical or significant examples?