

MEMORANDUM

To: Standing Senate Committee on Human Rights
From: International Justice & Human Rights Clinic, Allard Law School, Univ. of British Columbia
Date: February 1, 2022
Re: Recommendations on Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*

SUMMARY

We congratulate Senator Miville-Dechéne on bringing forward Bill S-211.¹ This bill provides a meaningful opportunity to prevent human rights abuses in Canadian supply chains and to ensure that Canada keeps pace with other human rights-supporting countries. The International Justice and Human Rights Clinic is honoured to have provided research support for both Bill S-211 and its predecessor Bill S-216 as the external research partner for the All-Party Parliamentary Group on Ending Modern Slavery & Human Trafficking. We are especially pleased to see Bill S-211 includes a more contextual definition of child labour.

We wish to supplement our previous recommendations for Bill S-216 by reaffirming our call for due diligence and transparency measures, proposing additional amendments on scope and enforcement, and providing an analysis of the anticipated costs and benefits of these amendments. This memo will address the following six points:

1) Human Rights Due Diligence (“HRDD”)

The Senate should amend Bill S-211 to require businesses to undertake human rights due diligence (“HRDD”) to adequately assess and respond to the adverse human rights impacts caused by – or contributed to – their business activities.

2) Broadening the Scope of Bill S-211

The Senate should amend section 3 to capture businesses engaged in the provision or procurement of *services*, as well as *goods*. Likewise, the Senate should amend the definition of “entity” in section 2 to include small and medium-sized entities.

3) Enhancing Remedies and Enforcement

The Senate should establish a range of remedies, including criminal liability and a civil cause of action to allow victims to seek private remedies for failure to comply with HRDD requirements.

4) Increasing Transparency

The Senate should establish a publicly accessible, state-run registry for all HRDD reports. The Senate should also ensure that whistleblowers who allege violations of HRDD requirements have adequate protections.

5) Costs to businesses

Implementing HRDD requirements in Canada may result in increased costs for businesses, but such costs are quickly becoming unavoidable due to the global trend towards HRDD legislation.

6) Benefits to businesses

Businesses may enjoy increased competitiveness, profitability, and productivity by undertaking HRDD. Harmonization of Canadian law with HRDD legislation abroad may also facilitate international commerce.

We conclude that the amendments proposed will enable Bill S-211 to achieve its important objectives and that the benefits of enacting these amendments will outweigh the costs.

¹ 1st Sess, 44th Parl, 2021, s 11(3) (first reading) [Bill S-211].

1. HUMAN RIGHTS DUE DILIGENCE (“HRDD”)

To combat human rights abuses, including forced labour and child labour, HRDD is rapidly becoming a legal norm in human rights supporting countries. The United Nations Working Group on Human Rights and Transnational Corporations and Other Business Enterprises (“UN Working Group”) has concluded, “the most significant contribution the majority of business enterprises can make to realising the [UN Sustainability] Goals is to respect human rights”.² Whether framed as corporate social responsibility, or as a response to the call for action created by the Sustainable Development Goals, the need for HRDD has been acknowledged by numerous international human rights bodies as well as the European Parliament. In March 2021, the European Parliament voted to adopt a Directive (“EU Directive”) obliging Member States to enforce mandatory corporate human rights, environmental, and good governance due diligence requirements.³ Germany,⁴ France,⁵ the Netherlands,⁶ Switzerland,⁷ and Norway⁸ have already established mandatory domestic HRDD legislation. These laws will impact non-European suppliers, including Canadian companies, as the EU Directive states that failure to comply with due diligence requirements may result in a “ban on operating in the internal [EU] market” for companies governed by the law of a non-Member State.⁹

Introduced by the UN Guiding Principles on Business and Human Rights (“UNGPs”),¹⁰ and endorsed by a unanimous Human Rights Council,¹¹ HRDD was described by the UN Working Group in 2018 as “a norm of expected conduct”.¹² In the same year, the OECD Due Diligence Guidance for Responsible Business Conduct (“OECD Guidance”) was endorsed by all 48 adhering Governments, including Canada.¹³ The OECD Guidance specifies that businesses should monitor for adverse human rights impacts; track the implementation of measures used to identify, prevent, mitigate and, where appropriate, support remediation of these impacts; engage with those affected by adverse human rights impacts; and seek to improve outcomes in the future.¹⁴

Currently, under section 11(3) of Bill S-211, entities subject to the legislation can simply report they have taken no measures to “remediate forced labour or child labour, including its due diligence processes” and still comply with the reporting requirement.¹⁵ This undesirable result is possible because the law only requires reporting.¹⁶ A more robust array of HRDD requirements are necessary, however, to meaningfully address human rights violations

² Working Group on the issue of human rights and transnational corporations and other business enterprises, 73rd sess, 16 July 2018, A/73/163 at para 30.

³ “European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL))”, online: *European Parliament* <www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html> [EU Directive].

⁴ *Act on Corporate Due Diligence in Supply Chains*, (2021), online: <www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3>.

⁵ *Loi n° 2017 – 399 du mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, 2017 (FR), online: <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626>>.

⁶ *Wet Zorgplicht Kinderarbeid* (“Child Labour Due Diligence Act”), 2019 (NL), online: <zoek.officielebekendmakingen.nl/stb-2019-401.html>. The Netherlands is also currently considering a broader law: the *Responsible and Sustainable International Business Conduct Act*, online: <www.tweedekamer.nl/downloads/document?id=69db3a5e-b040-41b3-86fc-0e114c1eebbc&title=Voorstel%20van%20wet.pdf>.

⁷ *Federal Act on the Amendment of the Swiss Civil Code, Part V: The Code of Obligations*, of March 30 1911, online: <www.fedlex.admin.ch/eli/cc/27/317_321_377/en>, art 964a – 964l.

⁸ *Proposition 150 L (“Transparency Law”)*, 2020-2021 (NO), online: <stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2020-2021/vedtak-202021-176/>.

⁹ *Supra* note 3, art 13(6).

¹⁰ UNOHCHR, *Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect and Remedy’ Framework*, 2011, HR/PUB/11/04 [UN Guiding Principles].

¹¹ UNHRC, *Human rights and transnational corporations and other business enterprises: resolution adopted by the Human Rights Council*, 6 July 2011, A/HRC/RES/17/4.

¹² *Supra* note 2 at para 20.

¹³ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (31 May 2018), online (pdf): <mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

¹⁴ *Ibid* at 34.

¹⁵ *Supra* note 1.

¹⁶ *Ibid*, s 3.

resulting from business activities. We thus propose, in keeping with the EU Directive,¹⁷ legislation in several European countries,¹⁸ and the findings of the UN Working Group,¹⁹ that Parliament amend Bill S-211 to require businesses to:

- Establish a risk management system to identify human rights-related risks;
- Designate a responsible person or persons within the entity to monitor risk management;
- Monitor the human rights impact of their business activities;
- Lay down preventative measures including the training of employees and subsidiaries and implementation of procurement strategies that prevent or minimise risk;
- Take remedial action to prevent, end or minimise the extent of any violation;
- Establish an effective complaints procedure for individuals to report human rights violations; and
- Document and publicly report the policies and measures adopted to fulfil these obligations and the outcomes and effectiveness of such measures.

By amending Bill S-211 to include these provisions, Canada can address its human rights shortcomings identified by the Committee on Economic, Social and Cultural Rights,²⁰ the Human Rights Committee,²¹ the Committee on the Elimination of Racial Discrimination,²² the Committee on the Elimination of Discrimination against Women,²³ and the Committee on the Rights of the Child.²⁴ The concluding observations from these international treaty bodies highlight the conduct of corporations registered or domiciled in Canada, their harmful impact on human rights abroad, and the need for Canada to establish and implement regulations to monitor for human rights abuses in supply chains and develop appropriate sanctions.²⁵

2. BROADENING THE SCOPE OF BILL S-211

Currently, Bill S-211 does not apply to entities whose business activities concern only services. In 2019 alone, Canada imported \$86.6 billion dollars in commercial services, which includes management services, financial services, and information services.²⁶ Restricting the requirements of Bill S-211 to apply to only goods and not services, is out-of-line with other prominent examples of human rights supply chain legislation, including the *California Transparency in Supply Chains Act*, Australia's *Modern Slavery Act*, France's "*Duty of Vigilance Law*", Norway's "*Transparency Act*", and the proposed EU Directive. We thus recommend Parliament amend section 9 of Bill S-211 as follows:

- 9** This Act applies to any entity
- (a) that produces or sells goods or services in Canada or elsewhere;
 - (b) that imports into Canada goods or services produced outside Canada; or
 - (c) that controls an entity engaged in any activity described in paragraph (a) or (b).

Further, the definition of "entity" in section 2 of Bill S-211 narrows the Bill's scope to apply only to large entities. This threshold of applicability should be lowered to include small and medium-sized entities as follows:

¹⁷ *Supra* note 3.

¹⁸ See *supra* notes 4, 5, 6, 7, and 8.

¹⁹ UNHRC, *Text of the third revised draft legally binding instrument with the concrete textual proposals submitted by States during the seventh session*, 49th sess, Draft addendum, A/HRC/49/65/Add 1.

²⁰ UNCESCR, *Concluding observations on the sixth periodic report of Canada*, E/C.12/CAN/CO/6 (23 March 2016) at para 16.

²¹ UNHRC, *Concluding observations on the sixth periodic report of Canada*, CCPR/C/CAN/CO/6 (13 August 2015 at para 6.

²² UNCERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/CO/21-23 (13 September 2017) at para 22.

²³ UNCEDAW, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/CAN/CO/8-9 (25 November 2016) at para 19.

²⁴ UNCRC, *Concluding observations on the combined third and fourth periodic reports of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, 4 October 2013, CRC/C/CAN/CO/3-4 at paras 28, 29.

²⁵ *Supra* notes 20, 21, 22, 23, and 24.

²⁶ Statistics Canada, *Commercial services imports by industry, 2016 to 2019*, (Ottawa: Statistics Canada, 2021) <www.150.statcan.gc.ca/n1/daily-quotidien/211207/t002b-eng.htm>.

- 2 [...] **entity** means a corporation or a trust, partnership or other unincorporated organization that
- (a) is listed on a stock exchange in Canada;
 - (b) is a corporation incorporated by or under an Act of Parliament or of any province;
 - (c) has a place of business in Canada, does any business in Canada or has more than \$50,000 in assets in Canada;
 - (d) controls an entity engaged in any activity described in subsections (a), (b) or (c); or
 - (e) is prescribed by regulations.

Broadening the scope of coverage in this way would be consistent with Canada’s international human rights obligations as specified by the five international human rights treaty bodies mentioned above.²⁷ In particular, the Human Rights Committee and the Committee on the Rights of the Child have explicitly recommended that Canada ensure that supply chain legislation applies to “all” Canadian corporations—not just large ones.²⁸

3. ENHANCING REMEDIES AND ENFORCEMENT

Canada has ratified the 2014 Protocol to the Forced Labour Convention, which requires that Member States “ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status ... have access to appropriate and effective remedies, such as compensation”.²⁹ Yet, at present, victims of human rights violations caused by Canadian companies in countries with weak domestic human rights protections are currently without adequate remedy. As studies have found that reporting requirements on their own “do not stimulate change in corporate behaviour”,³⁰ it is important for Bill S-211 to include effective enforcement measures. Though Bill S-211 does impose fines on entities that fail to comply with its reporting and publishing requirements, more is necessary to effectively combat forced and child labour in Canadian supply chains. Canada should follow the lead of other countries, such as France and the Netherlands, and implement a combination of civil, criminal, and administrative liability to enhance enforcement of mandatory HRDD.

Administrative or regulatory fines should be imposed for human rights violations, with the amount of the fine calibrated to the seriousness of the violation. Importantly, any fines imposed for violations should, in part, be based upon the company’s finances, such as a set percentage of their annual revenue.³¹ Fixed-rate fines are insufficient as they can simply be absorbed into the cost of business and passed on to consumers. Entities found in violation should also be prohibited from entering into federal procurement contracts, as this would provide further incentive compliance and uphold the integrity of the federal procurement process.³²

Bill S-211 should specifically create a civil right of action, ensuring victims can file court cases against infringing corporate entity. As the evidentiary burden will fall upon the party filing a complaint, only the most meritorious claims are likely to succeed.³³ The Supreme Court of Canada indicated in its recent decision in *Nevsun v. Araya* that it may be possible for victims of gross human rights violations to sue in Canadian courts.³⁴ However, the *Nevsun* decision has left certain areas ambiguous, which the Senate now has the opportunity to clarify through legislation. Civil liability for any harms or failure to implement due diligence measures can include injunctions, damages for actual losses, restitution, punitive damages, specific performance issuances, legal costs, or a combination of these

²⁷ *Supra* notes 20, 21, 22, 23, and 24.

²⁸ *Supra* note 22 at para 6 and *supra* note 25 at paras 28, 29.

²⁹ ILO, *P029 – Protocol of 2014 to the Forced Labour Convention, 1930*, (“Protocol”) ILC 103rd Sess, art 4(1) (Canada ratified this convention on 17 June 2019).

³⁰ Lise Smit et al, “Study on Due Diligence Requirements Through the Supply Chain” (January 2020) at 101: *British Institute of International and Comparative Law for the European Commission* <op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1>.

³¹ Matthew Banham et al, “The Growing Importance of ESG-Related Supply Chain Due Diligence” (24 January 2022), online: *JDSupra* <jdsupra.com/legalnews/the-growing-importance-of-esg-related-8967175/>.

³² See EU Directive, *supra* note 3 at para 19.

³³ Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, “The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business”, (December 2013) at 21, online: *International Corporate Accountability Roundtable* <<https://corporatejustice.org/publications/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/>>

³⁴ *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

remedies.³⁵

Criminal liability could include individual and corporate liability for offences committed by the company or their suppliers.

The current administrative avenues for victims of human rights abuses caused by Canadian companies have, to date, not proven effective. While the Canadian Ombudsperson for Responsible Enterprise (“CORE”), which is still in its infancy, has the power to hear complaints of human rights abuse and can facilitate dispute resolution, it lacks the crucial power to compel documents and testimony.³⁶ The CORE process, instead, is dependent on voluntary engagement on the part of the impugned corporation to answer complaints of human rights abuse.³⁷ Complaints brought to the CORE are limited to the garment, mining, oil or gas sectors only.³⁸ And, while parties to a complaint review “are expected to fully participate” by providing the Ombuds with relevant information, documents and witnesses available, they are not compelled to do so and, if they do not, the Ombuds “**may** [or may not] draw appropriate negative conclusions”.³⁹ Ultimately, any suggested financial compensation the CORE may make is in the form of a “recommendation”.⁴⁰ Penalties resulting from a finding that a company has not “acted in good faith”, can be avoided where the company can provide “reasonable explanation”.⁴¹ Were the CORE given the required powers to effectively investigate complaints and issue appropriate remedies, it could potentially oversee administration of forced labour claims.⁴² With its current limited powers, however, the CORE is unlikely to be an effective avenue of redress for victims.

The other administrative avenue to seek redress for human rights abuse by Canadian corporations operating abroad is to submit a complaint to the Canadian National Contact Point (“NCP”).⁴³ However, in 2018, the UN Working Group reported it was “unclear how effective” the penalty, in the form of loss of trade-related government support, had been “with respect to changes in corporate practices”.⁴⁴ Despite access to the NCP process, the UN Working Group “found evidence that victims of human rights abuses continue to struggle in seeking adequate and timely remedies against Canadian businesses”.⁴⁵

4. INCREASING TRANSPARENCY

Though Bill S-211 would promote transparency by requiring the corporation or government institution to publish its mandatory annual report publicly on their website in “a prominent place”,⁴⁶ this reporting requirement, as currently drafted, is likely not sufficient to make the effective change the Bill seeks. In addition, there is significant ministerial discretion in determining the format of these reports. Lacking clear guidance on the “form and manner”⁴⁷

³⁵ “The Corporate Respect for Human Rights and the Environment Abroad Act” (May 2021) at 6, online (pdf): *Canadian Network on Corporate Accountability* <cnca-rcrce.ca/site/wp-content/uploads/2021/05/Executive-Summary-Corporate-Respect-for-Human-Rights-and-the-Environment-Act.pdf>.

³⁶ “Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise (CORE)”, (last modified 3 August 2021) at paras 5.1 and 3.4, online: *Government of Canada* <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/operating_procedures-procedures_exploitation.aspx?lang=eng#10>.

³⁷ *Ibid.*

³⁸ *Ibid* at para 5.7.2.

³⁹ *Ibid* at paras 11.1, 11.3 and 13.3.2.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at paras 12.7 and 12.4.

⁴² See Empowering the CORE, Requirements for an Effective Canadian Ombudsperson for Responsible Enterprise, International Justice and Human Rights Clinic, Peter A. Allard School of Law (2020), online: <https://allard.ubc.ca/sites/default/files/2021-02/Empowering-the-CORE-FINAL.pdf>

⁴³ See Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises”, online: *Global Affairs Canada* <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a5> s 5.

⁴⁴ Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada*, (23 April 2018) A/HRC/38/48/Add 1 at para 33.

⁴⁵ *Ibid* at para 63.

⁴⁶ *Supra* note 1, ss 8, 13(1).

⁴⁷ *Ibid.*, ss 6(3), 11(6).

required may lead to uncertainty on what is expected from year to year, particularly if there are changes in the Ministerial role, which may impact compliance.

Transparency is a key component for effective enforcement of due diligence measures. As the Act currently stands, corporate or government entities are not required to describe the actual impact of their supply chain measures or the outcomes regarding forced labour. Nor are corporate or government entities required to disclose any actual forced labour practices within their operations.⁴⁸

Reports from the United Kingdom demonstrate that having entities publish their required supply chain reports on their company website, as Bill S-211 currently requires, lacks effectiveness and consistency.⁴⁹ Confusion surrounding who meets the specifications necessary to require a report under the legislation has led some UK entities to elect not to create an annual report when they should. Other entities have produced reports but failed to include all required information.⁵⁰ Advocates prefer the Australian approach, which mandates an easily accessible state-run public registry. The public is able to access information in a centralized location and can quickly identify which entities are engaged in forced labour practices and compare the practices of different entities. Additionally, this registry should contain a clear list of each entity required to engage in due diligence standards, if the covered entity section is not amended.⁵¹ With a public list, there can be reputational risk for non-compliance, making compliance more likely.

As a necessary component of transparency, employees need to know they are protected should they choose to speak out with critical information regarding their company's suspected noncompliance with this legislation. Bill S-211 should therefore contain both a) protections for information and from reprisals⁵² and b) mechanisms to facilitate this disclosure through the addition of whistleblower protection clauses.⁵³ Importantly, the whistleblower's personal data must be protected and strict procedures should be set and followed if their identity needs to be revealed.⁵⁴ There should also be remedies for those who suffer repercussions in violation of the law.⁵⁵ Providing explicit protections for whistleblowers would be critical to the effectiveness of HRDD legislation in Canada given the ineffective whistleblower protection laws currently in place. The European Union has mandated whistleblower protections for all member countries,⁵⁶ and the EU Directive requires whistleblowers making complaints with respect to HRDD measures to receive protection.⁵⁷

5. COSTS TO BUSINESSES

Although mandatory HRDD processes do have a financial cost, organisations such as the Chartered Professional Accountants of Canada, have explained how the current global supply chain model poses significant challenges to Canadian corporations and how the new competitive advantage has shifted from maximising cost efficiency to

⁴⁸ *Ibid*, ss 6(2), 11(3).

⁴⁹ "Reducing Modern Slavery" (25 April 2018) at 5-6, online (pdf): *UK House of Commons* <publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/886/886.pdf>.

⁵⁰ "Joint Statement Calls on Government for Central Modern Slavery Registry" (3 July 2018), online: *Independent Anti-Slavery Commissioner* <antislaverycommissioner.co.uk/news-insights/joint-statement-calls-on-government-for-central-modern-slavery-registry/>.

⁵¹ "Seeing Through Transparency: Making Corporate Accountability Work for Workers" (2018) at 20, online (pdf): *Focus on Labour Exploitation* <labourexploration.org/publications/seeing-through-transparency-making-corporate-accountability-work-workers>.

⁵² See e.g., International Justice and Human Rights Clinic, Peter A. Allard School of Law, "Transparency in Supply Chains Act: A Proposed Model Bill" (April 2019) at ss 33, 38, online (pdf): <allard.ubc.ca/sites/default/files/2021-03/TSCA_proposed_model_bill_with_cover-FINAL.pdf>.

⁵³ *Ibid* at 29, ss 35, 36.

⁵⁴ *Ibid* at 28, s 33.

⁵⁵ *Ibid*, s 39.

⁵⁶ "Directive (EU) 2019/1937 of the European Parliament and of the Council" (23 October 2019), online: *Official Journal of the European Union* <eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1937&from=EN> (entered into force 17 December 2021).

⁵⁷ *Supra* note 3 at para 43.

developing the “flexibility to respond to any array of critical unknown”.⁵⁸ Furthermore, studies have shown that due diligence costs are anticipated to decrease over time, as tracking software and reporting evolves.^{59 60} The most recent studies to estimate the costs of due diligence requirements are summarised in Table 1.

Table 1: Recent studies assessing the costs to businesses of due diligence requirements.

Study	Case and method	Result
Blome et al. (2016) ⁶¹	Cost/benefit analysis for companies of OECD nonbinding guidelines on conflict minerals.	Overall, extra costs for full OECD due diligence implementation are estimated as being rather small. Firms surveyed estimated an average of €270 000 as investment costs in the first year, and then a recurring annual cost of around €535 000 for full implementation. They estimate that these costs can be further reduced significantly through industry and supply chain collaboration.
European Commission, Evaluation of the EU Timber Regulation ⁶²	Source of the report was Member States’ reports on the application of the Regulation, which were submitted to the European Commission and there was also an online public consultation tool.	Costs reported by operators for developing and operating a due diligence system vary significantly. Developing costs were estimated to range from €5,000 to €90,000 and annual operating costs ranging from €1,000 to €70,000. Private sector representatives also described economic consequences as being manageable especially for companies already applying responsible sourcing policies. See for public sector costs too.
BIICL Study on Due Diligence Requirements through supply chain, 2020 ⁶³	Survey conducted of 336 large, medium and small enterprises both with and without due diligence experience.	Annual additional labour costs (including overheads, outsourced activities, and audits) associated with mandatory due diligence throughout the value chain were estimated to be an extra €4.7 million for large companies with revenue of €50 billion and €93 thousand for large companies with revenues of €1 billion. For small and medium enterprises, the additional labour costs (including overheads, outsourced activities and audits) associated with mandatory due diligence throughout the value chains was €69 thousand for companies with revenues of €50 million, and €1,387 for companies with revenues of €1 million.

There may also be additional costs if a company has to rearrange its value chains or find alternative production locations in response to the HRDD process.⁶⁴

Existing Mandatory Reporting Requirements

Canadian businesses are already subject to certain mandatory reporting requirements, particularly financial ones. The *Canada Business Corporations Act* requires an annual financial statement that must be approved by the

⁵⁸ “Supply Chain Security in Uncertain Times” (May 2021) at 2, online: *Chartered Professional Accountants Canada* <www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/supply-chain-security-on-your-radar>.

⁵⁹ Cecilia Navarra, “Corporate Due Diligence and Corporate Accountability European Added Value Assessment” (October 2020) at 42, online (pdf): *European Parliamentary Research Service* <[www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU\(2020\)654191_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf)>.

⁶⁰ See Lise Smit et al, *supra* note 30 at 447.

⁶¹ Constantin Blome, Hannes Hofmann & Martin Schleper, “Stopping Conflict Minerals with the OECD Guidance for Responsible Mineral Supply Chains: Status Quo in Europe,” (April 2016), online (pdf): *University of Sussex*, <sro.sussex.ac.uk/id/eprint/65452/1/_smbhome.uscs.susx.ac.uk_tjk30_Documents_BlomeHofmannSchleper%20%20S_topping%20conflict%20minerals%20with%20the%20OECD%20guidance%20for%20responsible%20mineral%20supply%20chains.pdf>.

⁶² European Commission, “Commission Staff Working Document: Evaluation of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation)” (February 18 2016), online: *Eur_Lex* <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0034>.

⁶³ See Lise Smit et al, *supra* note 30.

⁶⁴ *Ibid* at 427.

directors of the entity.⁶⁵ Every active corporation, no matter the size, must file this return with the intention of allowing “investors, consumers, financial institutions and many others [to] make informed decisions about your corporation.”⁶⁶ This requirement aligns with due diligence goals. Furthermore, corporations may be dissolved, or their existence legally ended, if they do not file the annual return.⁶⁷ Mandatory reporting is a necessary aspect of doing business and HRDD can become part of a company’s existing annual reporting.

Though provincial securities law only applies to publicly listed companies, HRDD is likely to have overlap with some of the measures companies are already taking to meet securities rules. While securities legislation varies by province, all jurisdictions require that material facts and changes must be disclosed promptly when they occur, requiring entities to remain aware of events occurring within their operations. Entities also must complete an Annual Information Form, which requires them to provide a description of their business and any risk factors facing the business.⁶⁸ Within this form, all information likely to influence a shareholder’s decision to purchase shares should be included, including social policies that are fundamental to operations.⁶⁹ These disclosures likewise align with HRDD goals. The Ontario Securities Commission notes in its Priorities for the Financial year ending in March 2022 the “importance of recognizing environmental, social and governance (ESG) risks arising from global systemic events” as financial stability risks requiring appropriate disclosures “to address investor needs for information to make decisions and contribute to efficient capital markets.”⁷⁰

Modern slavery can be considered a “material fact,” which must be disclosed given the risks to the corporation associated with the practice.⁷¹ “Information regarding modern slavery is material if a reasonable investor’s decision to buy, sell or hold securities of the issuer would likely be influenced or changed if the information in question was omitted or misstated.”⁷² Issues of modern slavery can be tied to “litigation risks, regulatory risks, reputational risks and operational risks”⁷³ and the company can “be exposed to criticism, complaints or boycotts for actions of the company that do not reflect its social and economic responsibilities, or that the company could attract negative media coverage in the event of admitted, alleged or perceived violations of local labour laws or international labour standards, or for unethical labour or other business practices”,⁷⁴ making clear these issues are “material” as they have the potential to significantly harm shareholders’ investment. We now turn to the potential benefits of HRDD to businesses.

6. BENEFITS TO BUSINESSES

When surveyed, just under a quarter of business respondents stated they would expect significant benefits as a result of the proposed EU mandatory HRDD, and stakeholders have indicated that benefits relate to an improvement in competitiveness “through levelling of the playing field so that competitors, peers, suppliers and third parties will be subjected to the same standard”.⁷⁵ More than half of large European companies report they already engage in aspects of HRDD.⁷⁶ In Canada, research in 2019 indicated that almost half of the companies surveyed had or were

⁶⁵ *Canada Business Corporations Act*, RSC 1985, c C-44, ss 155(1), 158(1).

⁶⁶ “Policy on Filing of Annual Returns – *Canada Business Corporations Act*” (last updated 1 October 2020), online: *Government of Canada* <ic.gc.ca/eic/siTe/cd-dgc.nsf/eng/cs02544.html>.

⁶⁷ *Ibid.*

⁶⁸ See e.g. “Form 51-102F2 Annual Information Form”, online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/2020-09/rule_20150630_51-102f2_unofficial-consolidation.pdf>.

⁶⁹ *Ibid* at 10, ss 5.1(4), 5.2.

⁷⁰ “OSC Notice 11-792 – Statement of Priorities for Financial Year to end March 31, 2022” (29 June 2021), s 1.10, online: *Ontario Securities Commission* <osc.ca/en/securities-law/instruments-rules-policies/1/11-792/osc-notice-11-792-statement-priorities-financial-year-end-march-31-2022>.

⁷¹ “Notice Relating to Modern Slavery Disclosure Requirements” (4 September 2018) at 3, online (pdf): *Autorité Des Marchés Financiers* <autorite.qc.ca/fileadmin/autorite/reglementation/valeurs-mobilieres/0-avis-amf/2018/2018sept04-avis_esclavage_moderne-en.pdf>.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid* at 5.

⁷⁵ Lise Smit et al, *supra* note 30 at 444.

⁷⁶ *Ibid* at 402.

developing a purpose or mission and engaging with Corporate Social Responsibility initiatives.⁷⁷ The proposed legislation would also increase the leverage with third parties in the value chain due to the non-negotiable standard, which would apply to other businesses tied to the same part of the value chain and so could decrease costs and increase their competitiveness.⁷⁸ This levelling was cited as one of the most important reasons for the introduction of HRDD by business stakeholders.⁷⁹ Harmonisation with EU due diligence standards could also boost Canadian imports to EU member states, as there would be fewer HRDD barriers for Canadian goods and services.⁸⁰

The European Commission anticipates that undertaking HRDD will also contribute to the “productivity, profitability and attractiveness of EU businesses” and better equip them to weather sudden exogenous shocks, like the current global COVID-19 pandemic.⁸¹ A study of 511 companies registered in the EU showed the degree of implementation of policies related to reducing negative environmental and social impacts was directly proportional to profitability, company size and revenue.⁸² The study also found that conservative estimates anticipate that an increase in these policies, and the associated harmonisation across businesses, would be accompanied with a return on the capital employed by 1%, and the return could be as high as 3.05%.⁸³

Contractual opportunities may also arise as a result of HRDD legislation. Both the International Olympic Committee and the Federation Internationale de Football Association have committed to addressing adverse human rights through their selection of host countries and their business relationships.⁸⁴ HRDD may also prime corporations for other forms of commercial pressure. For example, Export Development Canada published in its 2019 Human Rights Policy that it would “track and monitor the human rights performance of [their] customers”.⁸⁵ Notably, it will also use its “leverage to encourage responsible parties to provide appropriate forms of remedy”.⁸⁶ Companies may also receive benefits from HRDD as a result of improved operational knowledge and increased understanding of their supply chain.⁸⁷ HRDD may also support business evolution as the reports generated and actions taken can provide valuable evidence in mergers and acquisitions and can support investment decisions.⁸⁸

HRDD practices also encourage outside investment and shareholder confidence. Accordingly, following the enactment of the French Duty of Vigilance Law, the country received “a record level of foreign direct investment”.⁸⁹ Studies have demonstrated that shareholders increasingly consider human rights as a factor relating to the long-term value of the investment.⁹⁰ A meta-analysis of over 200 studies on sustainability found that, in 80% of the studies, a company’s stock price performance is influenced positively by good sustainability practices.⁹¹ One hundred and

⁷⁷ Coro Strandburg, “Corporate Social Responsibility in Canada: Trends, Barriers and Opportunities” (March 2019), online (pdf): *Strandberg Consulting* <corostrandberg.com/wp-content/uploads/2019/02/csr-in-canada-trends-barriers-opportunities-report.pdf>

⁷⁸ Lise Smit et al, *supra* note 30 at 444.

⁷⁹ *Ibid.*

⁸⁰ Cecilia Navarra, *supra* note 59 at 30.

⁸¹ European Commission, *Inception Impact Assessment*, Ref. Ares (2020) 4034032 (July 2020) at 4.

⁸² *Supra* note 59 at 47.

⁸³ *Supra* note 59 at 50.

⁸⁴ See “The IOC as the Owner of The Olympic Games”, online: *International Olympic Committee* <olympics.com/ioc/human-rights/the-ioc-as-the-owner-of-the-olympic-games> and “FIFA’s Human Rights Policy” (May 2017) at para 3, online (pdf): <digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf>.

⁸⁵ “Human Rights Policy” (1 May 2019) at 3, 5, online (pdf): *Export Development Canada* <www.edc.ca/content/dam/edc/en/corporate/corporate-social-responsibility/environment-people/human-rights-policy.pdf>.

⁸⁶ *Ibid* at 3.

⁸⁷ Lise Smit et al, *supra* note 30 at 452.

⁸⁸ *Ibid.* at 451.

⁸⁹ Claire Bright, “Creating a Legislative Level Playing Field in Business and Human Level: Is the French of Vigilance Law the Way Forward?” (2020) European University Institute Working Paper MWP 2020/01 at 10.

⁹⁰ Chat Ortved & Rachele Wong, “Corporate Governance and Directors’ Duties in Canada: Overview” (1 August 2021) s 4, online: *Thomson Reuters Practical Law* <content.next.westlaw.com/2-502-2944?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

⁹¹ Gordon L Clark, Andreas Feiner & Michael Viehs, “From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance” (March 2015) at 9, online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281>.

five international investors, representing assets under management to the value of five trillion USD, have called on all governments to “develop, implement and enforce mandatory human rights due diligence”.⁹² Investors are increasingly interested in receiving reports on ESG information and, importantly, having a uniform standard for these disclosures.⁹³ Corporate social responsibility is a growing concern for shareholders as they use the information to make informed decisions and thus there is increased shareholder satisfaction when companies take concrete steps to address any human rights issues. Sustainability has been demonstrated to be better for long-term investments, stability, corporate financial performance, and enhanced returns.⁹⁴ HRDD may also guard against shareholder derivative actions. Where a board of directors fails to consider all material information, such as human rights violations, available to them prior to making corporate decisions, a derivative action, where a shareholder files a claim on behalf of the corporation, may be possible.⁹⁵

Furthermore, significant human rights abuses have been associated with a decrease in the stock value of a corporation or divestment of the stock once it becomes public knowledge.⁹⁶ “Companies are increasingly dependent on third-party suppliers or local subsidiaries, whose potential contribution to human rights violations, if undetected or unresolved, could significantly impact a company’s reputation, brand image, and sales.”⁹⁷ Institutional investors often have the resources to conduct their own investigations and upon discovering human rights violations, tend to divest their shares.⁹⁸ Human rights abuses perpetrated by companies have been tied to reputational damage, lawsuits, fines, workplace closures, consumer boycotts, and high turnover of staff – all of which can impact the stability of the investment.⁹⁹

Consideration of companies’ impact on human rights and environmental harm is expected to grow in coming years as millennials and women control more personal wealth.¹⁰⁰ Millennials are twice as likely to invest in companies that focus on social outcomes and women are 23% more likely to elect sustainable investments.¹⁰¹ These shareholders are also more likely to divest when objectionable corporate activity occurs. In conclusion, as noted in the OECD Guidance, HRDD can “help enterprises create more value”, “maximise positive contributions to society, improve stakeholder relationships and protect its reputation.”¹⁰² Overall, the benefits for businesses of HRDD appear to outweigh the costs.

In sum, we conclude that the amendments proposed above will enable Bill S-211 to achieve its important objectives and that the benefits of enacting these amendments will outweigh the costs.

⁹² “The Investor Case for Mandatory Human Rights Due Diligence” (April 2020) at 1, online (pdf): *Investor Alliance for Human Rights* <[investorsforhumanrights.org/sites/default/files/attachments/2020-04/The Investor Case for mHRDD - FINAL_0.pdf](https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_0.pdf)>.

⁹³ “OSC Notice 11-792 – Statement of Priorities for Financial Year to end March 31, 2022” (29 June 2021) s 1.10, online: *Ontario Securities Commission* <osc.ca/en/securities-law/instruments-rules-policies/1/11-792/osc-notice-11-792-statement-priorities-financial-year-end-march-31-2022>.

⁹⁴ Casey O’Connor & Sarah Labowitz, “Putting the ‘S’ in ESG: Measuring Human Rights Performance for Investors” (March 2017) at 66, online (pdf): *NYU Stern Center for Business and Human Rights* <cclg.rutgers.edu/wpcontent/uploads/Rise_of_SelfExpression_in_Investment_materials_2019.09.27.pdf#page=59>.

⁹⁵ *Canada Business Corporations Act*, *supra* note 65, s 239.

⁹⁶ David Kreitmeir et al, “The Value of Names – Civil Society, Information, and Governing Multinationals on the Global Periphery” (2020) at 3 SocArXiv, DOI: <[10.31235/osf.io/aw7sq](https://doi.org/10.31235/osf.io/aw7sq)>. A study found the killing of activists led to significantly lower returns “with a cumulative median loss of over USD 100 million in the 10 days following the event”.

⁹⁷ Galit A Sarfaty, “Human Rights Meets Securities Regulation” (2013) 54:1 Va J Int’l L 97 at 124.

⁹⁸ Shin Imai & Sarah-Grace Ross, “Empirical Data on How Investors are Harmed when Companies do not Disclose Information about Violence and Lack of Indigenous Consent” (2020) Osgoode Leg Studies Research Paper at 5, online (pdf) : <ssrn.com/abstract=3690013>.

⁹⁹ *Investor Alliance for Human Rights*, *supra* note 92 at 68.

¹⁰⁰ *Ibid* at 65.

¹⁰¹ *Ibid* at 66.

¹⁰² OECD Guidance, *supra* note 13 at 16.