



Canadian Business and Human Rights in the Global Supply Chain

Canadian Poverty Institute of Ambrose University

Submission to:

**The Subcommittee on International Human Rights of
the Standing Committee on Foreign Affairs and
International Development**

***Re: Child Labour and Modern Slavery (Studies – 42nd
Parliament, 1st Session)***

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Summary

1. Modern Slavery, Globalization, and International Responses

Various sources suggest that 40 million people continue to be enslaved globally. There is often a significant relational distance between Canadian companies and the entity using slaves or engaging in other labour-related human rights violations. However, as the architects of the layers in the supply chain and in the labour chain, it is reasonable to expect businesses to take steps to ensure that the outsourcing model is not being carried out at the expense of core human rights. While absent in Canadian legislation, international organizations have had business and human rights on the forefront for some time. The growing body of soft law includes contributions from the ILO, United Nations and the OECD and other standards are provided by Social Accountability International and ISO. Canada is a signatory to many of these.

2. Changing Business Environment

Frameworks and models for responsible business include shared value, conscious capitalism, stakeholder approach and others. Most businesses ascribe to responsible business practices on some level. Businesses have both the ability and responsibility to limit adverse impacts on human rights and there are numerous supports offered by governmental organizations, professional associations and consultants to aid businesses in addressing their human rights impacts.

3. Considering Supply Chain Legislation

Other ways of encouraging businesses to address human rights issues in their supply chains include market-based pressures and civil litigation, which we are seeing an increase of in Canada. Some countries are now using supply chain legislation to encourage or mandate responsibility for corporate supply chains. Examples of regions implementing disclosure legislation include California, United States and the United Kingdom. Countries with legislation that mandates specific actions like due diligence are France and the Netherlands. Australia, Switzerland and Hong Kong all have pending supply chain initiatives or legislation, with the United Kingdom exploring legislation that goes beyond their current disclosure requirements. The information on existing supply legislation and its results is increasing, with both improvements in practice being noted and challenges to some of the legislation also reported on.

4. Supply Chain Legislation in Canada

Our recommendations on supply chain legislation in Canada include: focusing on disclosure legislation now with practices being mandated later, a robust working group to develop such legislation, and specific components that should be included in Canadian legislation.

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Our Submission

The Canadian Poverty Institute is an inter-disciplinary institute housed within Ambrose University that seeks to heal poverty through teaching, research, and public education. Ambrose University is a private university in Calgary, Alberta, that offers arts and science, business, education, ministry, and seminary programs.

This submission was prepared by Angie Redecopp, Associate Professor at Ambrose University, and a faculty associate with the Canadian Poverty Institute. Ms. Redecopp teaches in the business program and community development minor at Ambrose University and her research focuses on business and human rights. Prior to Ambrose, Ms. Redecopp worked with International Justice Mission, an international NGO that does human rights work in developing countries and prior thereto, Ms. Redecopp was a partner with Borden Ladner Gervais, a large Canadian corporate law firm.

This submission will focus primarily on business practices and labour-related human rights in the context of the global supply chain, both in terms of general responsibilities of businesses and the unique position that businesses are in to reduce the prevalence of forced labour, child labour, and similar human rights violations globally.

Recommendations

The Canadian Poverty Institute recommends that:

1. The Government of Canada commit to introducing supply chain legislation that would, at minimum, require companies of a certain size doing business in Canada to publicly report on steps they are taking to addresses human rights issues, including forced labour, in their global operations and supply chains.
2. The Government of Canada convene a working group consisting of representatives of business and civil society, as well as other experts and advisors, with clear timelines and deliverables to aid in the drafting of supply chain legislation.
3. Canadian supply chain disclosure legislation include:
 - a. Provisions for wide applicability to public and private companies, requiring annual, publicly available disclosure.
 - b. Effective penalties for non-compliance.
 - c. Requirements for a federally maintained list of companies that must report.
 - d. Clear framework on what needs to be reported on, including the areas of: leadership structure concerning supply chain efforts, policies, processes, performance indicators and metrics, and related training.
 - e. Suggested best practices and a requirement for companies to report against them.
 - f. Specific parameters on the depth of reporting required, such depth to go beyond direct operations and first-tier suppliers.

1. Modern Slavery, Globalization, and International Responses

1.1 Modern Slavery

Many human rights and broader sustainability issues can be addressed through business practices and specifically supply chain legislation addressing the practices of Canadian businesses. Perhaps the most significant, far-reaching and unaddressed of these are forced labour and child labour. A recent report prepared by the International Labour Organization (ILO), Walk Free Foundation, and International Organization for Migration shows that more than 40 million people were victims of modern slavery globally in 2016.¹ ILO estimates that about 152 million children, aged between 5 and 17, were subject to child labour.² In 2014, ILO estimated that forced labour in the private economy generated \$150 billion in illegal profits per year, about one third of which resulted from forced economic exploitation,³ which is primarily forced labour. Similar statistics are published by a range of other organizations.

The United States Department of Labor maintains a list of goods, and their source countries, which it has reason to believe are produced by child labour or forced labour. As of September 30, 2016, this list comprised 129 goods from 75 countries.⁴ World Vision Canada studied 50 common goods from this list and cross-referenced them against publicly available import databases and found that over 1,200 companies operating in Canada imported goods at risk of being produced by child labour or forced labour in 2015, representing approximately \$34 billion in imported goods. Most notably, the majority of a smaller subset of these companies sampled by World Vision were disclosing very little about their efforts to prevent and address child labour and forced labour in their global supply chains.⁵

Another international NGO, International Justice Mission, works in field offices across the world to collaborate with local police, courts and other justice advocates to combat modern day slavery and other forms of human trafficking and violence against the poor. International Justice Mission combats forced labour in India, Cambodia, Thailand and Ghana. Investigators estimated that nearly two-thirds of the children they observed working in the fishing industry on Ghana's Lake Volta were likely slaves, working long hours in terrible conditions with little food or sleep.⁶ Other industries and regions in the world have also been identified where it would be unlikely to import product not tainted by slavery.

¹ International Labour Organization, Walk Free Foundation and International Organization for Migration. (2017). *Global estimates of modern slavery: Forced labour and forced marriage*. Retrieved from http://www.alliance87.org/global_estimates_of_modern_slavery-forced_labour_and_forced_marriage.pdf.

² International Labour Organization. (2017). *Global estimates of child labour: Results and trends, 2012-2016*. Retrieved from http://www.alliance87.org/global_estimates_of_child_labour-results_and_trends_2012-2016.pdf.

³ International Labour Organization. (2014). *Profits and Poverty: The economics of forced labour*. Retrieved from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf.

⁴ United States Department of Labor (Bureau of International Labour Affairs). (2016). *List of goods produced by child labour or forced labour*. Retrieved from https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/TVPRA_Report2016.pdf.

⁵ World Vision Canada. (2016). *Supply Chain Risk Report*. Retrieved from http://nochildforsale.ca/wp-content/uploads/2016/06/Child-and-forced-labour-report_jun-08.pdf#.

⁶ International Justice Mission. (2016). *IJM Casework Series: Forced Labour Slavery*. Retrieved from <https://www.ijm.ca/upload/editor/case-work/2016-Factsheets/ForcedLabourSlavery-CDN.pdf>.

1.2. Globalization and Outsourcing

There is often a significant relational distance between Canadian companies and the entity using slaves or engaging in other labour-related human rights violations. With the onset of global production and global markets, and outsourcing specifically, Canadian companies are often unaware of the on-the-ground atrocities taking place at their second or third-tier or even further removed suppliers or subcontractors. The implementation of disclosure legislation that requires companies to report on the activities of suppliers further upstream would create additional work for companies.

Not surprisingly, it is estimated that at least 80% of forced labour occurs in the private economy and involves business in same way.⁷ Outsourcing and subcontracting have not come about by happenstance though. These added layers of complexity are the result of a drive for lower prices and increased production, both of which are legitimate business goals. However, as the architects of the layers in the supply chain and in the labour chain, it is reasonable to expect businesses to take steps to ensure that this model is not being carried out at the expense of core human rights.

U.N. Special Representative for Business and Human Rights, John Ruggie, states that:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.

These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.⁸

In the face of globalization, business and human rights is indeed an area where government has a role to play in a free market economy.

1.3. International Business and Human Rights Standards

While attention to human rights in the business sector is a new topic and virtually unheard of in terms of Canadian legislation, international organizations have had this on the forefront for some time. We are seeing a growing body of unenforceable declarations and conventions (“soft law”) as well as guidelines and other support to go along with this. Canada is a signatory to many of these.

The **International Labour Organization** issued Convention No. 182 on the Worst Forms of Child Labour in 1999⁹ and the Protocol of 2014 to the Forced Labour Convention, 1930.¹⁰ *Canada has* ratified both of these conventions but has not yet ratified the Protocol of 2014. The ILO also publishes reports and guides in this and related areas, some of which were referenced earlier in this brief.

⁷ LeBaron, G. (2014). Subcontracting is not Illegal, but is it Ethical? *The Brown Journal of World Affairs*, 20(11), 237-249.

⁸ U.N. Secretary-General’s Special Representative for Business and Human Rights. (2008, April 7). *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*. U.N. Human Rights Council, 189 U.N. Doc. A/HRC/8/5

⁹ International Labour Organization. (1999). *C182 – Worst Forms of Child Labour Convention, 1999 (No. 182)*. Retrieved from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

¹⁰ International Labour Organization. (2014). *P029 – Protocol 2014 to the Forced Labour Convention, 1930 (No. 29)*. Retrieved from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029.

The **United Nations** has several conventions on human rights, most of which Canada is a signatory to, but perhaps most notable with respect to business are the UN Guiding Principles on Human Rights issued in 2011. The Guiding Principles outline the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy. In addition, to avoid human rights impacts through their own activities, Principle 13 requires business enterprises to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” The extent of this obligation is balanced with the leverage of the business to address the adverse impact.¹¹ *Canada has not* responded to the call for member states to develop national action plans with respect to the Guiding Principles.

The Organisation for Economic Co-operation and Development (**OECD**) continues to issue Guidelines for Multinational Enterprises, most recently updated in 2011, along with specific guidance on responsible supply chain of minerals, stakeholder engagement in the extractive sector, responsible supply chain in the garment and footwear sector, responsible agricultural supply chains, and identification of child labour in the mineral supply chain.¹² Global Compact Network Canada recently published a Canadian manual to help Canadian companies better understand and implement the OECD’s due diligence guidance in key sectors.¹³

Auditable standards are also being created in this area. Social Accountability International has created **SA8000**, a social certification standard that measures performance in eight areas, including child labour and forced or compulsory labour. The International Organization for Standardization has created **ISO 26000** – Social Responsibility which offers guidance (not a certification) on operating in an “ethical and transparent way that contributes to the health and welfare of society.”¹⁴

Finally, the **UN Sustainable Development Goals**, issued in 2015, contains target 8.7 to “Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.” *Canada was* one of 193 member states to adopt the related 2030 Agenda for Sustainable Development *and has* committed to supporting the implementation of the SDGs.¹⁵

There are other initiatives on the horizon. In its 26th session in 2014, the Human Rights Council of the United Nations passed a resolution titled “Elaboration of an international legally binding instrument on

¹¹ United Nations Human Rights Office of the High Commissioner. (2011). *Guiding Principles on Business and Human Rights*. Retrieved from http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹² Organisation for Economic Co-operation and Development. (2011). *OECD Guidelines for Multinational Enterprises*. Retrieved from <http://mneguidelines.oecd.org/guidelines/>.

¹³ Global Compact Network Canada. (2018). *OECD Guidelines for Responsible Business Conduct & Sector-Specific Guidance: A Manual for Canada*. Retrieved from <http://www.globalcompact.ca/wp-content/uploads/2018/04/GCNCOECDToolGuideFinal.pdf>.

¹⁴ International Organization for Standardization. (2018). Standards – ISO 26000 – Social Responsibility. Retrieved January 18, 2018, from <https://www.iso.org/iso-26000-social-responsibility.html>.

¹⁵ Government of Canada. (2018). The 2030 Agenda for Sustainable Development. Retrieved January 18, 2018, from http://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/agenda-programme.aspx?lang=eng

transnational corporations and other business enterprises with respect to human rights.”¹⁶ The open-ended intergovernmental working group formed has taken part in three sessions to date – the first two to deliberate on such an international instrument and the third, which took place in October 2017, to prepare elements for the draft instrument.¹⁷ This and other ongoing or anticipated initiatives, along with the soft law already in place, evidences the international momentum for greater accountability of business for human rights. Canada would do well to take a more proactive role in these initiatives and supply chain legislation would indeed be proactive.

2. Changing Business Environment

2.1. Responsible Business as Mainstream

Business is the lifeblood of our society, and specifically of the free market system that we ascribe to. Ultimately, productivity, typically through business structures, underpins or finances all that we do through government, academia and civil society. Even Adam Smith, commonly known as the first philosopher to provide a comprehensive framework and philosophy for the free market system, did not intend that business operate at the expense of the rest of society. His discussion of the ‘invisible hand’, for which he is so well known, does not suggest that individuals or businesses should pursue self-interest to the detriment of the rest of society but rather to add value [to society] and in many cases to “promote an end [a societal end] which was no part of his intention.”¹⁸

Whether you take the position that business as a whole has become far removed from the core purpose of adding value to society or that certain businesses simply need some re-directing, there are now a plethora of frameworks and models for businesses to be both profitable and ‘responsible’. Though it varies by business, and perhaps even industry, being able to describe your business as philanthropic, involved in the communities it works in, safe, a good workplace, and so on, or more broadly as responsible, has arguably become mainstream. While the degree of good may vary, most businesses no longer want to be known as evil.

Some of the most well-known frameworks and models are as follows. Michael Porter and Mark Kramer explain the **shared value** framework as a way that companies can bring business and society back together by redefining business purpose as creating shared value, through generating economic value in a way that also produces value for society by addressing its challenges.¹⁹ The shared value approach typically refers to specific initiatives or divisions within a business as compared to John Mackey’s conscious capitalism approach. **Conscious capitalism** is a model for the entire business, with a focus on greater purpose, the people within the organization, conscious leadership and compensation, and the community that the company works in as well as society at large.²⁰ Another comprehensive approach is

¹⁶ Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9. Retrieved from http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

¹⁷ United Nations Human Rights Council. Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Retrieved January 18, 2018, from <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

¹⁸ Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations* (par. IV.2.9). Scotland: Strahan & Cadell.

¹⁹ Porter, M. E., & Kramer, M. R. (2011). Creating Shared Value. *Harvard Business Review*, 89(1/2), 62–77.

²⁰ Mackey, J., & Sisodia, R. (2013). *Conscious Capitalism*. Harvard Business Review Press.

found in Ed Freeman’s **stakeholder approach** to strategic management, where he asserts that business can be understood as a system of how we create value for stakeholders.²¹

Not all businesses are ascribing to all of these approaches or even on a large scale to any one of these or other approaches, but it would be surprising if the average Canadian business executive was not espousing responsible business to some degree. Motivation for ascribing to responsible business can range from doing the right thing to reputation and beyond, but there is increasing support for the idea that responsible business is indeed good for business (as well as society). Canadian Business for Social Responsibility’s Executive Director Leor Rotchild makes the case that “local sourcing, greenhouse gas reductions and partnerships with the not-for-profit sector, among other CSR activities, do in fact translate into improved economic performance.”²²

2.2. Business and Human Rights

When it comes to human rights in the supply chain, the only way forward is for business to become part of the solution – both because business arrangements have created the supply chain accountability challenges and because of the vast and often unique influence that businesses have.

In the context of setting out a model for social business, Nobel Peace Prize winner Muhammad Yunus defends capitalism as an economic model but asserts that businesses need objectives other than just profit. He recognizes the great influence and potential of business and the limitation of other actors such as government, nonprofits, and multilateral institutions to create a world without poverty.²³

“Businesses can potentially affect nearly all internationally recognized human rights, but common forms of adverse impact on human rights related to work include those associated with forced or compulsory labor, child labor, low wages, excessive hours, and inadequate period of rest.”²⁴ The UN Guiding Principles detail how businesses can be involved in adverse human rights impact – causing the impact, contributing to the impact (i.e. unreasonable deadline for a supplier), and on the basis of its business relationship with another enterprise (i.e. a supplier).²⁵ Businesses can address their involvement in adverse human rights impact through due diligence – a well-known risk-management approach that businesses already apply to operations.²⁶

Business has both the responsibility and the ability to limit adverse impacts on human rights. Supply chain legislation is a tool that can be used to incentivize the exercise of these limits.

2.3. Supports for Business

There is growing support for businesses that are increasing their efforts to address human rights issues in their supply chains. Large networks like Global Compact Network Canada provide frameworks, recognition and education for businesses. Multiple freely accessible resources have been crafted by

²¹ Freeman, R. E. (2010). *Strategic Management: A Stakeholder Approach*. Cambridge University Press.

²² Rotchild, R. (2017, July 5). Does Corporate Social Responsibility Influence our Stock Price? *Huffington Post*. Retrieved from https://www.huffingtonpost.ca/leor-rotchild/does-corporate-social-responsibility-influence-our-stock-price_a_23015651/.

²³ Yunus, M. (2009). *Creating a World Without Poverty: Social Business and the Future of Capitalism*. Publicaffairs.

²⁴ Reider-Gordon, M., & et al. (2013). Corporate Social Responsibility. *International Lawyer*, 47(1), 4.

²⁵ Ibid.

²⁶ Mares, R. (2014). Respect Human Rights. In R. C. Bird, D. R. Cahoy, & J. D. Prenkert (Eds.), *Law, Business and Human Rights*. Edward Elgar Publishing.

consulting companies, international agencies, and others to support companies working towards the SDGs – the SDG Compass created by GRI, UN Global Compact, and World Business Council for Sustainable Development²⁷ and Navigating the SDGs: a business guide to engaging with the UN Global Goals put together by PwC²⁸ – to name a few. Academics and other researchers are identifying best practices, gaps and other creative solutions – see Hult International Business School’s reports on current practice in the UK²⁹ as an example. The author of this brief is in the early stages of a similar research project to talk to Canadian companies about their best practices, challenges, and drivers.

There is growing support in the private sector and as well, both law firms and consulting firms are developing expertise in this area. The American Bar Association released Model Business and Supplier Policies on Labor Trafficking and Child Labor in 2014³⁰, as a reference for both businesses and business lawyers. In Canada, we are seeing lawyers develop practices and law firms develop divisions focused in part on responsible business practices including those related to human rights. Consulting firms are also building up around this area – with organizations such as SHARE operating across Canada to support investors and consultancies such as INLE Social Performance operating out of the West Coast and Public Inc. operating out of Toronto area to support businesses.³¹

There are specific supply chain practices that are being developed and shared, as well as collaborations with NGOs and industry-based networks that are paving the way, some of which will be detailed under “Components of Canadian Legislation” in Section 4 below. As the will to do better increases, so will the innovation to solve these supply chain issues.

3. Considering Supply Chain Legislation

3.1. Other Ways of Addressing the Issue

There are multiple ways of encouraging, pressuring, or requiring businesses to address human rights issues in their supply chains. There are limitations on all of the existing efforts, as there would also be supply chain legislation. No one regime will solve all of the human rights issues associated with supply chains.

Some of the most relevant international regulations and conventions were set out in Section 1.3, along with certain international initiatives that are pending. There are others, and these different forms of soft law are often a turning point. However, until individual countries support their international commitments with domestic law and regulations, these international principles are voluntary only. Companies do respond, but not on the scale necessary to significantly decrease human rights instances in the global supply chain.

²⁷ https://sdgcompass.org/wp-content/uploads/2015/12/019104_SDG_Compass_Guide_2015.pdf

²⁸ <https://www.pwc.com/gx/en/sustainability/publications/PwC-sdg-guide.pdf>

²⁹ https://ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf (2016 report) and https://ethicaltrade.org/sites/default/files/shared_resources/corporate_approaches_to_addressing_modern_slavery.pdf (2015 report)

³⁰ https://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.html

³¹ <https://share.ca>; <http://www.inle.ca>; <http://publicinc.com>

Market-based pressures also often bring about voluntary responses. Maclean's publishes a list of the top 50 socially responsible corporations in Canada.³² Forbes puts out a list of the 10 companies with the best CSR reputations.³³ The growing trend towards responsible business generally was set out in Section 2.1. Ideally, this would be sufficient, but companies are not responding on the scale necessary. Both international soft law and growing market-based pressures do create the environment though for government responses such as supply chain legislation.

Civil liability is also an avenue through which companies can be held accountable. Key cases in the last few years include:

- Ecuadorian villagers have been seeking to have their ruling from the Ecuadorian trial court (affirmed at the Ecuadorian appellate court) against Chevron Corp. enforced in Ontario against a subsidiary. The original case involved financial and environmental reparation for harms from operations. The Supreme Court of Canada affirmed Ontario's jurisdiction over the action. Chevron Canada later won a motion to dismiss the claim at the Ontario lower court but were unsuccessful at the Ontario Court of Appeal on a motion requiring security for costs from the plaintiffs on their appeal.³⁴
- In three related actions alleging gang-rape, physical assault, and murder on the part of mine security personnel, Guatemalan plaintiffs brought a direct action in Ontario against Hudbay Minerals, arguing that the defendant is vicariously liable for torts of its subsidiary and its subsidiary's employees. The Ontario lower court rejected Hudbay's motion to strike the claim and the parties are in discoveries.³⁵ A similar case involving Guatemalan plaintiffs suing a Canadian parent company conducting mining activities through a foreign subsidiary is before the courts in British Columbia. The British Columbia Court of Appeal allowed this action to proceed against Tahoe Resources and the Supreme Court of Canada refused Tahoe's application for leave to appeal on this ruling.³⁶
- Also in British Columbia, a class action has been filed against Nevsun Resources with a claim of complicity in the Eritrean military's use of forced labour, slavery, and torture at Nevsun

³² <https://www.macleans.ca/economy/business/canadas-top-50-most-socially-responsible-companies/>.

³³ <https://www.forbes.com/sites/karstenstrauss/2017/09/13/the-10-companies-with-the-best-csr-reputations-in-2017>.

³⁴ SCC ruling affirming Ontario jurisdiction: *Chevron Corp v. Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69, retrieved from <https://www.canlii.org/en/ca/scc/doc/2015/2015scc42/2015scc42.html> with a summary at <http://canliiconnects.org/en/commentaries/39489>. ONCA ruling re security for costs: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, [2017] 138 OR (3d) 1, retrieved at <https://www.canlii.org/en/on/onca/doc/2017/2017onca827/2017onca827.html>.

³⁵ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, retrieved from <https://www.canlii.org/en/on/onsc/doc/2013/2013onsc1414/2013onsc1414.pdf> with a comment at <https://www.osler.com/en/resources/cross-border/2013/ontario-court-gives-green-light-to-international-h>.

³⁶ *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, retrieved from <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcc39/2017bcc39.html> with a summary at <http://canliiconnects.org/en/commentaries/45339>.

Resources' mine in Eritrea. The British Columbia Court of Appeal has allowed this action to continue.³⁷

- Bangladeshi citizens sued George Weston Limited (Loblaws) for the negligence of its suppliers and sub-suppliers in the well-known Rana Plaza factory collapse which resulted in both death and injury. The Ontario lower court dismissed the proposed class action and the plaintiffs are appealing.³⁸

On the basis that business is a positive force and adds value to society, litigation is not a preferred option, but it is a tool that we are seeing used in Canada and businesses need to be aware of this risk. Civil litigation is likely more of an impetus to take other action (like the proposed supply chain legislation) versus a solution for a number of reasons. Litigation takes place after the fact – it does not prevent human rights abuses in the short term. Litigation is also long and costly, as can be seen by the examples provided. With the exception of the Loblaws case, all are still in the courts, in most cases still at preliminary proceedings stages. The outcomes are not at all certain in these cases before the courts and we can see from the Loblaws' case that connecting a Canadian company to its supplier for purposes of liability is unlikely to be successful at present.

There may be other novel litigation strategies or arguments. In the United States, liability under the *Trafficking Victims Protection Act*³⁹ has been proposed by one researcher. We do not have similar legislation in Canada but there may be other avenues to make a claim against a company, whether it be through securities law or consumer protection legislation. Another novel approach that involves the courts but not litigation per se, theoretical only at present, is the idea of holding contracts unenforceable if they relate to a supply chain that includes human rights violations.⁴⁰

Upon evaluating the different regimes that exist to combat forced labour specifically, Ashley Feasley concludes that a hybrid is needed and that “such hybrid would consist of international human rights accountability principles codified through strong state-supported legislation that has buy-in from the larger business community as well as strong and integrated implementation that is reinforced with a final remedy for forced labour victims available in the form of civil liability.”⁴¹

³⁷ *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401, retrieved from <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcc401/2017bcc401.html>, with a summary at <http://canliiconnects.org/en/summaries/52050>.

³⁸ *Das v. George Weston Limited*, 2017 ONSC 4129, retrieved from <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4129/2017onsc4129.html> with a summary at <http://www.blakesbusinessclass.com/who-is-my-neighbour-ontario-court-rejects-a-duty-of-care-to-employees-of-foreign-suppliers>.

³⁹ *Victims of Trafficking and Violence Protection Act of 2000* [United States of America], Public Law 106-386 [H.R. 3244].

⁴⁰ Tjon Soei Len, L. (2017). *Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts*. Hart Publishing.

⁴¹ Feasley, A. (2016). Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains. *Journal of Human Trafficking*, 2(1), 15–31.

3.2. Existing Supply Chain Legislation Examples

A number of other jurisdictions have enacted or are considering supply chain legislation. There is a growing number of guides, academic literature, and analysis on these different pieces of legislation.⁴² The following sets out some key elements only, for purposes of making recommendations and comparisons to proposed legislation in Canada.

United States – *The California Transparency in Supply Chains Act* – became effective in 2012 and requires retailers and manufacturers, with more than \$100 million in annual sales doing business in California, to disclose their efforts to eradicate slavery and human trafficking from their global supply chains. Disclosure is required in specific areas including verification, audits, certification, internal accountability and training, and is to be easily linked to from the company’s homepage. This act is administered through the California Department of Justice and the California Franchise Tax Board and the primary enforcement mechanism is injunctive relief via the California Attorney General.⁴³

United States – *Dodd-Frank Act* – s. 1502 of this act was issued in 2012 and requires U.S. public companies to publicly disclose their use of conflict minerals that originate in the Democratic Republic of the Congo or adjacent countries. This requirement applies to companies with conflict minerals in their supply chains – i.e. where they are contracting out their production, including the production of components. Companies must conduct due diligence regarding the source and chain of custody of the conflict minerals. Companies complete a disclosure form stating whether the minerals are DRC conflict-free or not and if declaring conflict-free, audit and certification requirements apply. The disclosure form is to be posted on the company’s website. This act is administered and enforced through the U.S. Securities and Exchange Commission. Enforcement is effectively stayed though as a result of 2014 and 2017 court finding of a first amendment violation and public statements issued by the acting chair of the SEC in 2017.⁴⁴

United Kingdom (UK) – *Modern Slavery Act 2015* – came into force in 2015 and requires organizations carrying on business the UK with more than £36 million in annual sales to provide an annual slavery and human trafficking statement (in s. 54). This statement sets out the steps the organization has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains, or in any part of its own business. Suggested areas for disclosure regarding slavery and human trafficking include: policies, due diligence practices, risks identified and steps to assess and manager this risk, effectiveness against performance indicators and training and capacity building. This statement is to be easily linked to from the organization’s homepage. Organizations are also required to appropriately deal with any

⁴² See Reider-Gordon, *supra* note 24 for a short summary of United States legislation and see SHARE (Shareholder Association for Research & Education) (2017). *The Rise of Supply Chain Transparency Legislation*, retrieved from https://share.ca/documents/investor_briefs/Social/2017/Supply_Chain_Transparency_Legislation.pdf for a short summary of most of the international legislation that exists in this area. The resource guide to the California Act (see note 43) also has an extensive summary of United States legislation in its Appendix B.

⁴³ California Legislation - https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf. Resource guide - <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>.

⁴⁴ Fact sheet Dodd-Frank - <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html>. Most recent SEC statement - <https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule>.

incidents of modern slavery and make relevant remedies available to potential victims. This act is administered by the Secretary of State and enforcement measures include injunctions for specific performance and fines.⁴⁵

United Kingdom – *Human Rights and Business 2017* – is the report of the UK Parliament’s Joint Committee on Human Rights released in April 2017. Recommendations include public sector procurement requirements, amendments to the *Modern Slavery Act 2015* to increase transparency, new legislation requiring businesses to report on due diligence for all relevant human rights and more broadly to prevent human rights abuses, specific guidance as to best practices to address human rights risks, and additional powers and resources to related government authorities and departments.⁴⁶

France – *Corporate Duty of Vigilance Law* – adopted in February 2017 and upheld (with the exception of large civil penalty provisions) in March 2017. Only large companies are affected – French companies with 5,000 or more employees and French subsidiaries where the parent company has at least 10,000 employees. This law requires companies to develop a due diligence plan to prevent human rights violations and environmental harms throughout their chain of product. This plan must include procedures that identify risks of human rights violations and environment harms both in operations and through subsidiaries and suppliers, actions to mitigate risks and prevent serious violations, mechanisms to alert the company to risks and mechanisms to assess the effectiveness of the plan. This plan must be reported on annually. Interested parties can apply for periodic penalty payment orders against a company for non-compliance and individuals harmed by a company’s failure to establish and implement a plan can bring about civil action against that company.⁴⁷ An original civil fine mechanism was held to be unconstitutional by the French courts, but the above-noted clauses on periodic penalty payment and civil liability action continue to be part of the law.⁴⁸

Netherlands – *Child Labour Due Diligence Law* – this bill was adopted by Dutch Parliament in February 2017 but is awaiting approval by the Dutch Senate, following which it would come into effect in January 2020. Currently the law applies to all companies (including those outside the Netherlands) that deliver products or services to the Dutch market twice or more per year. Companies are to submit a one-time statement declaring that they have carried out due diligence related to child labour in their full supply chains. References to the UN Guiding Principles on Business and Human Rights and the OECD Guidelines

⁴⁵ UK Legislation - <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>. Guidance on section 54 of the act:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf.

⁴⁶ UK Report - <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44302.htm>.

⁴⁷ French law (articles re amendments to *Trade and Industry Code*) - <http://www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf>. English translation - <http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>. 3rd party FAQs - <http://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf>.

⁴⁸ Brabant, S. & Savourey, E. (2017). France’s Corporate Duty of Vigilance Law - A Closer Look at the Penalties Faced by Companies. *International Review of Compliance and Business Ethics*, (n. 50 supp.). English translations of similar articles can be found at <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>. See also Cossart, Sandra. (2017). The French law on duty of care. *Business and Human Rights Journal*, 2(2).

for Multinational Enterprises are made with respect to the due diligence required. Significant fines can be imposed for non-compliance, and multiple fines could lead to criminal proceedings. Several matters regarding interpretation and implementation are still being determined through a general administrative order. Items under consideration include the requirements for the statement, as well as possible limits on the size of companies affected, and exemptions for companies at low risk for child labour.⁴⁹

Australia – *Hidden in Plain Sight* – is the final report of the Joint Standing Committee on Foreign Affairs, Defence and Trade on its inquiry into establishing a modern slavery act in Australia. The final report was issued in December 2017. The inquiry assessed the effectiveness of the UK *Modern Slavery Act 2015*, invited submissions, held public hearings, and ultimately recommended the establishment of a similar modern slavery act in Australia. The proposed legislation is to include global supply chain reporting requirements for companies with over \$50 million (AUD) in revenue. Recommendations also include prohibitions against profiting or gaining competitive advantages from slavery in the supply chain generally, as well as targeted provisions for such matters such as victim support, criminal justice responses and frameworks for visas and labour hire licensing to address labour exploitation. A requirement for government entities to exclusively procure from entities that complete a modern slavery statement is also recommended.⁵⁰

Switzerland – *Parliamentary Initiative* – in November 2017, the Legal Affairs Committee of the Council of State in Switzerland proposed a parliamentary initiative for a bill on the responsibility of Swiss companies to respect human rights. This was in response to a citizens' initiative (Responsible Business Initiative) for the Swiss constitution to mandate human rights due diligence obligations for companies based in Switzerland. The main elements of the future bill include mandatory human rights due diligence, enforcement and parent company liability for subsidiaries.⁵¹

Hong Kong – *Draft Modern Slavery Bill 2017* – a draft bill, similar to the UK's *Modern Slavery Act 2015* was sent to Hong Kong's Chief Executive by a member of the Legislative Council in 2017. This draft bill requires annual reporting requirements for certain companies and imposes criminal sanctions (akin to money laundering offences) and civil causes of action against individuals or companies benefiting from offences. Disclosure is to set out steps taken to ensure that slavery and human trafficking have not

⁴⁹ 3rd party FAQs re Dutch law - <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.

⁵⁰ Australia Report - http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf. Inquiry information - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Modern_Slavery.

⁵¹ Swiss Parliament press release (in French) re parliamentary initiative - <https://www.parlament.ch/press-releases/Pages/mm-rk-s-2017-11-14.aspx?lang=1036>. 3rd party summary - <http://corporatejustice.org/news/3724-swiss-parliamentarian-committee-calls-for-legal-action-on-human-rights-due-diligence>. Factsheet (English translation) on the Responsible Business Initiative of the Swiss Coalition for Corporate Justice - <http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf>.

occurred in the company's supply chain and is to be published on the company's website with a prominent link on the homepage.⁵²

Brazil – Dirty List – came out of an anti-slavery strategy launched by the government in the mid-90s. The list publicly names companies, from major brands to small enterprise, who have been found to be profiting from slave Labour.⁵³

3.3. Results of Existing Supply Chain Legislation

The body of literature on the existing supply chain legislation is growing. The following includes some brief references only, for the purpose of highlighting outcomes of disclosure legislation, as well as potential pitfalls.

UK Act – One of the findings in the 2016 Hult report referenced in Section 2.3., following in-depth interviews with 25 leading brands and 46 online surveys, was that the UK Act had a significant impact on the companies, through increases in engagement of CEOs, activities related to company supply chains (like training, risk assessments and policy implementation), communication between companies and their suppliers, and collaboration within industry, with NGOs and with other multi-stakeholder initiatives.⁵⁴ Some analysis has been done on the reporting requirement in s. 54 of the UK Act itself. Suggested deficiencies include the lack of direct reference to group structures (though the guidance does attempt to pull in subsidiaries) and the lack of clarity on the scope of the disclosure obligation – i.e. whether it extends to lower tiers in the supply chain and/or those with whom the reporting organization might not have a direct contractual relationship. It is also submitted that the market pressure that results from poor disclosure may not be enough of an incentive for improved corporate behaviours.⁵⁵

Brazil's Dirty List – Though a punitive disclosure measure such as Brazil's 'Dirty List' is not what is being recommended in this brief, a review of responses to this measure in Brazil finds that it has been used by public and private financial institutions, most notably Banco do Brasil and the Brazilian Development Bank, to refuse credit to companies on the Dirty List. It has also been used to exclude companies on the Dirty List from completing for new projects within public programs.⁵⁶ This measure and the composition of the Dirty List have faced a number of legal challenges though.

Dodd-Frank Act – As referenced in Section 3.2, the U.S. Dodd-Frank Act has underwent a number of legal challenges and has effectively been stayed. When it was implemented though, there were significant effects on the mining industry in the DRC. Based on interviews with miners, community

⁵² Legal briefing re Hong Kong bill - <https://www.herbertsmithfreehills.com/latest-thinking/modern-slavery-law-proposed-for-hong-kong>.

⁵³ The Guardian (2013, July 24). Brazil's 'dirty list' names and shames companies involved in slave labour. Retrieved from <https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour>.

⁵⁴ *Supra* note 29 re 2016 report at pp. 12-19.

⁵⁵ Turner, R. J. (2016). Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier. *Melbourne Journal of International Law*, 17(1), 1–22.

⁵⁶ Feasley, A. (2015). Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America. *Anti-Trafficking Review*, (Issue 5: Forced Labour and Human Trafficking), 30–49 at pp. 37-38.

leaders and officials, The Guardian reported that Congo’s government shut down the mining industry for months in order to launch an unsuccessful certification process. This led foreign companies to do business elsewhere.⁵⁷ Proponents suggest though that these requirements do create a strong incentive for change – interrupting a long-standing lack of transparency in supply chains.⁵⁸ Whether or not a region-specific disclosure or certification requirement is effective seems questionable though.

California Act – As discussed in Section 3.2, the only enforcement mechanism in the California Act is injunctive relief, such actions to be brought by the California Attorney General. In 2015, the Attorney General’s office issued letters to more than 1,700 companies listed as manufacturers or retailers, requiring them to advise on whether or not they are compliant with the California Act.⁵⁹ Though the California Act does appear to be having some effect, additional enforcement efforts, which would require court orders,⁶⁰ seem unlikely. A review of website disclosures of 204 retail and manufacturing companies shows some promise. 92 of these companies included information on their websites pursuant to the California Act, with the retailers providing more detailed information than the manufacturers.⁶¹ The very fact that such data can be analyzed is a step in the right direction.

Application to Canadian companies – Finally, it should be noted that Canadian companies may already be subject to disclosure requirements through existing supply chain disclosure legislation. As an example, the *Modern Slavery Act 2015* (UK) applies to all commercial organizations that meet the threshold requirements and “commercial organisations” is defined as a body corporate or partnership which carries on a business in the UK wherever that entity was incorporated or formed.⁶²

4. Supply Chain Legislation in Canada

4.1. Focus of Canadian Legislation

As set out in Section 3.2, different jurisdictions have enacted different types of legislation – ranging from disclosure to due diligence and beyond. We recommend that disclosure legislation be enacted now with further legislation to be considered in the future, much like the UK has done.

Disclosure may be good for business – Disclosure requirements for public companies in particular continue to rise, so some resistance to additional disclosure is expected. Public companies are already set up for disclosure requirements though – they produce financial statements, MD&A, annual information forms and information circulars in the normal course, with detailed prospectuses and circulars when engaging in financings and transactions. Disclosure in annual information forms already

⁵⁷ The Guardian. (2014, December 2). Obama’s conflict minerals law has destroyed everything, say Congo minors. Retrieved from <https://www.theguardian.com/world/2014/dec/02/conflict-minerals-law-congo-poverty>.

⁵⁸ Feasley, *supra* note 56 at p. 45.

⁵⁹ Hogan Lovells. (2015). California enforces supply chain disclosure law. Retrieved from <http://ehoganlovells.com/cv/95764213a9f7fa4cc0de0019ec0be7bbaaf36b81>.

⁶⁰ See Greer, B. T., & Purvis, J. G. (2016). Corporate supply chain transparency: California’s seminal attempt to discourage forced labour. *The International Journal of Human Rights*, 20(1), 55–77.

⁶¹ Ma, Y. J., Lee, H.-H., & Goerlitz, K. (2016). Transparency of Global Apparel Supply Chains: Quantitative Analysis of Corporate Disclosures. *Corporate Social Responsibility & Environmental Management*, 23(5), 308–318.

⁶² *Modern Slavery Act 2015*, UK, c. 30, s. 54(12).

includes disclosure on social or environment policies (s. 5.1(4)) and risk factors (s.5.2),⁶³ so companies already have some experience with the disclosures contemplated herein, but they would need to go further. In addition, many companies are voluntarily disclosing their supply chain practices. The World Vision study described in Section 1.1 refers to voluntary disclosure that some companies are making.

SHARE details the reputational, operational, and legal risks associated with a lack of understanding and action regarding human rights infractions in the supply chain and contrasts this with the benefits to investors (and indirectly the companies they choose to invest in) derived from increased disclosure on these matters.⁶⁴ In a survey done by the Economist Intelligence Unit, “83% of respondents agree (74% of whom do so strongly) that human rights are a matter for business as well as governments. Similarly, 71% say that their company’s responsibility to respect these rights goes beyond simple obedience to local laws.”⁶⁵ From the perspective of a corporate responsibility lead within a resource company, disclosure requirements trigger orderly reviews and improvements across the company in anticipation of having to disclose.⁶⁶

Some companies see mandatory supply chain disclosure legislation as a way to level the playing field – requiring all companies in a specific industry or region to disclose instead of just those subject to higher levels of public pressure or those that choose to disclose as a part of their responsible business efforts.⁶⁷ Well-known brands like J.C. Penney and Joe Fresh (Loblaws) involved in the Rana Plaza incident (referenced in Section 3.1 on litigation) may appreciate greater scrutiny for the lesser known brands involved.⁶⁸

Canadian disclosure examples – A specific example of disclosure requirements being used to influence corporate behaviour, instead of mandating such behaviour, is found in National Instrument 58-101 *Disclosure of Corporate Governance Practices* which requires disclosure for public companies respecting the representation of women on boards and in executive officer positions.⁶⁹ Osler, Hoskin & Harcourt law firm publishes an annual report on diversity disclosure practices and found that the portion of board seats held by women in reporting companies had increased to 14.5% and the portion of reporting companies with a written board diversity policy increased to 47% in 2017.⁷⁰ Broadly speaking, many

⁶³ https://www.bccsc.bc.ca/For_Companies/Continuous_Disclosure

⁶⁴ SHARE, *supra* note 42.

⁶⁵ The road from principles to practice: Today’s challenges for business in respecting human rights. (2015, October 13). *Economist* at p. 4. Retrieved from <https://eiuperspectives.com/strategy-leadership/road-principles-practice/white-paper/road-principles-practice-todays-challenges-business-respecting-human-rights>.

⁶⁶ Preliminary interview with resource company A as part of the author’s supply chain and human rights research project.

⁶⁷ Preliminary interview with a resource company B as part of the author’s supply chain and human rights research project.

⁶⁸ See <https://cleanclothes.org/safety/ranaplaza/rana-plaza-actual-and-potential-donors-listed-by-g7-country/view> for one NGO’s list of the companies linked to Rana Plaza and sourcing from Bangladesh generally.

⁶⁹ See NI 58-101 F2 ss. 11-15. Retrieved from https://www.bccsc.bc.ca/Securities_Law/Policies/Policy5/PDF/58-101F1_F_December_31_2016/.

⁷⁰ Osler, Hoskin & Harcourt. (2017). *2017 Diversity Disclosure Practices*. Retrieved from <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Gender-diversity-board-of-directors-executive-officers-Canada-2017.pdf>.

changes were seen in Canadian boards once general disclosure requirements were brought into force in 2005 and onwards following various corporate governance failures internationally.

Another example of transparency legislation in Canada is the *Extractive Sector Transparency Measures Act* which came into force in 2015, and requires extractive companies to disclose public payments made to governments around the world. This was patterned after US and UK legislation, all of which came about following the participation of these countries in the global Extractives Industry Transparency Initiative and commitments at the 2013 G8 Leaders' Summit.⁷¹ Minimum thresholds apply but application is not limited to public companies – any entity that does business in Canada or has assets in Canada is included. Reports are to be publically available and links are included on a Government of Canada website. 755 entries are listed for 2016-17.⁷²

Due Diligence and Beyond – The French and Dutch legislation described in Section 3.2 both contain due diligence requirements – specific requirements to have plans to root out human rights issues throughout a company's supply chains. The Ethical Trading Initiative in the UK published a Human Rights Due Diligence Framework in 2016, through collaboration with trade unions, companies and NGOs. Suggested best practices include mapping out human rights risks in the supply chain, identifying related actions and relationships, setting up a remediation system, and monitoring conditions.⁷³ Other models exist.

Another approach that could be utilized to mandate specific corporate behavior in other jurisdictions (host jurisdiction) is enforcing laws in Canada that govern action that takes place in the host jurisdiction (whether relying on Canadian laws or foreign laws). A general example of enforcing Canadian laws, where actions take place in a host jurisdiction, is what is commonly referred to as our “sex tourism” laws. In 2012, Bill C-310 amended the *Criminal Code* to add extraterritorial jurisdiction to trafficking in persons offences such that a trafficker can be prosecuted in Canada for offences that take place elsewhere, regardless of whether charged or convicted in the host jurisdiction.⁷⁴ Another example that governs actions in a host jurisdiction is the *Corruption of Foreign Public Officials Act*, which prohibits bribery of foreign public officials. In this case, we have domestic legislation that specifically addresses behavior in a host jurisdiction.⁷⁵ An example in Australia, referenced as a model to be used for legislation patterned after but improving upon the UK Act, is the *Illegal Logging Prohibition Act*. This Act introduces a regime in Australia to enforce laws enacted in the host jurisdiction related to unlawful logging practices.⁷⁶ Virtually all countries in the world have laws against slavery now, as well as against

⁷¹ Milin, Z. (2016). Mapping Recent Developments in Transparency of Extractive Industries. *Business and Human Rights Journal*, 1(2).

⁷² <https://www.nrcan.gc.ca/mining-materials/estma/18198>

⁷³ Ethical Trading Initiative. (2016). *Human Rights Due Diligence Framework* at p. 15. Retrieved from <https://ethicaltrade.org/resources/human-rights-due-diligence-framework>.

⁷⁴ Canadian Federation of Business and Professional Women. *Briefing on Bill C-310*. Retrieved from https://bpwcanada.com/images/stories/resolutions/Briefing_on_Bill_C-310.pdf.

⁷⁵ CFPOA Act - <http://laws.justice.gc.ca/eng/acts/C-45.2/page-1.html>.

⁷⁶ Turner, R. J. (2016). Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier. *Melbourne Journal of International Law*, 17(1), 1–22.

most human rights issues that are under contemplation. Enforcement of these laws is lacking to non-existent in many regions.

Applicability and Enforcement – A natural fit for disclosure legislation is in the securities law realm. As the securities references earlier in this Section 4.1 suggest, disclosure requirements are normal course for public issues. While securities are regulated provincially, most disclosure-related instruments are national. However, this would limit application to public issuers only, which is not recommended. Privately-held companies, and companies that do business in Canada but are incorporated elsewhere (and are not listed in Canada), should also be covered by the legislation in question where minimum thresholds are met. Stand-alone federal legislation would give the federal government of Canada the opportunity to take leadership on this issue, in keeping with responsible business type announcements and commitments that have been made in recent years.

Enforcement should be carefully considered when determining how, or where, to enact legislation. Other legislation in Canada, some of which has been mentioned herein, and global examples should be considered for comparison. Existing reporting systems should be considered and perhaps one should be used. There are a variety of regimes to consider. In terms of enforcement, one American researcher focuses on fines, with a ban on imports of products into the United States, as the ultimate enforcement tool in the US context for lack of compliance.⁷⁷ This extreme is not recommended for Canada but penalties for non-compliance do need to be significant. When asked about the major challenges given Canada's multi-jurisdictional framework, Peter Talibart stated "if the federal government makes an important step, it doesn't matter that federal law will restrict its application: you're putting a marker down for both the provinces and the rest of the world. There are a bunch of ways for you to do this, from a customs law to, as I suggested, the Human Rights Act, and you can look at the federal business legislation. If you want to do it, you can do it."⁷⁸

Recommendation 1: The Government of Canada commit to introducing supply chain legislation that would, at minimum, require companies of a certain size doing business in Canada to publicly report on steps they are taking to addresses human rights issues, including forced labour, in their global operations and supply chains.

4.2. Collaboration in the Design of Canadian Legislation

As an example of how to successfully introduce legislation that will significantly affect Canadian business and how not to, let us consider two major announcements made in Alberta in 2015. On November 22, 2015, Premier Rachel Notley announced that the Government of Alberta would cap oil sands emissions, implement a carbon tax, and phase out coal power. This announcement was specifically backed by senior leaders from Suncor, Shell, Cenovus and Canadian Natural Resources.⁷⁹ This plan and its

⁷⁷ Beatty, S. (2016). Justice by Proxy: Combatting Forced Labor in the Greater Mekong Subregion by Holding U.S. Corporations Liable. *Vanderbilt Journal of Transnational Law*, 49(4), 1109–1142.

⁷⁸ Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development. 42 Parliament, 1st session, SDIR-89 (December 5, 2017), evidence - para 1335. Retrieved at <https://www.ourcommons.ca/DocumentViewer/en/42-1/SDIR/meeting-89/evidence#Int-9863663>.

⁷⁹ Maimann, K. (2015, November 22). Carbon tax announced in Alberta's Climate Leadership Plan. *Edmonton Sun*. Retrieved from <http://edmontonsun.com/2015/11/22/carbon-tax-announced-in-albertas-climate-leadership-plan/wcm/133c692a-4b4f-4514-ad3c-f8606a5b7e83>.

implementation are not without its detractors but, all in all, it is proceeding and industry is not in an uproar. Contrast this with the contentious farm-safety bill that was passed on December 20, 2015, legislation with far less reach than the carbon program, but passed in a setting described as “one of the most turbulent Alberta legislature sittings” and amidst public protests.⁸⁰ There were likely many other differences too, but there were no farmers standing beside Premier Notley in the various press briefings that ensued on this farm bill.

Three important groups need to be included in the process to design Canadian supply chain legislation. Businesses that will be effected need to be included. On the ground organizations like International Justice Mission that see human rights violations, when and where they occur, need to be included. Other experts and advisors that study and work in this area, like academic researchers, consultants, and other service providers should also be included. Such experts and advisors could include investor organizations, such that investors (and perhaps by proxy consumers) are represented. The *Extractive Sector Transparency Measures Act* referenced in Section 4.1 is an example of such a collaboration. Civil society and the mining industry joined to form the Resource Revenue Transparency Working Group, which in turn helped shape that law.⁸¹ Perhaps the challenges faced by the French legislation and the Dodd-Frank Act could have been mitigated through a collaborative working group of engaged, informed, and representative individuals.

Recommendation 2: The Government of Canada convene a working group consisting of representatives of business and civil society, as well as other experts and advisors, with clear timelines and deliverables to aid in the drafting of supply chain legislation.

4.3. Components of Canadian Legislation

In terms of structure and enforcement of supply chain legislation, wide applicability and the need for penalties has already been discussed. In addition, annual, publicly available disclosure should be required with a certification by a senior officer. A list of companies that are required to report should also be published.

In terms of what is to be reported on, a clear framework needs to be provided and reported on, including the areas of: leadership structure concerning supply chain efforts, policies, processes, performance indicators and metrics, and related training. Within each of these areas, suggested best practices, and the requirement to report on which of these best practices are in place, are key.

As examples of identifying and reporting against best practices, common policies include supplier codes and common practices include audits and third party certifications. More advanced practices include direct engagement and financial support for improved business practices of suppliers and technology applications that aid in the tracking of the supply chain. With reference to a 2014 report by Deloitte

⁸⁰ Bennett, D. (2015, December 10). Alberta passes controversial farm-safety bill. *The Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/alberta-passes-controversial-farm-safety-bill/article27686844/>.

⁸¹ Transparency International Canada. (2014, September 17). Resource Revenue Transparency Working Group released its recommendation. Retrieved from <http://www.transparencycanada.ca/news/resource-revenue-transparency-working-group-rrtwg-released-its-recommendation/>.

Consulting LLP,⁸² researchers in Dublin, Ireland, identify broad disclosure strategies that companies can use.⁸³ The depth of assessment and the degree of disclosure in terms of supply chain membership, provenance, environmental information, and social information is referenced. Transparency, being high depth of assessment, and a high degree of disclosure are of course the goal. In terms of what to disclose, the risk in the supply chain and the value to the company are compared – in our case we may want to think of this as value to the public or the consumer. Where risk and value are both high, information is deemed as critical and should be a priority for disclosure. Collaborative relationships, leading to both better information and better practices, are also emphasized.

Finally, specific parameters on the depth of the reporting required should be detailed and should go beyond direct operations or first-tier suppliers. Depth of reporting should be tied to such factors as the amount of the product being supplied, regional risks of human rights violations and influence of the reporting company. This is where the involvement of business representatives and on the ground experts will be key as companies will need practical guidance as to how and when to wade through the myriad of relationships and layers involved. This will be challenging, but again, companies created the complexity and thus should be responsible to work within it. Business representatives should also be given the opportunity to advise on how this can most effectively be approached.

Recommendation 3: Canadian supply chain disclosure legislation include:

- a. Provisions for wide applicability to public and private companies, requiring annual, publicly available disclosure.
- b. Effective penalties for non-compliance.
- c. Requirements for a federally maintained list of companies that must report.
- d. Clear framework on what needs to be reported on, including the areas of: leadership structure concerning supply chain efforts, policies, processes, performance indicators and metrics, and related training.
- e. Suggested best practices and a requirement for companies to report against them.
- f. Specific parameters on the depth of reporting required, such depth to go beyond direct operations and first-tier suppliers.

⁸² Linich, D. (July 2014). *The Path to Supply Chain Transparency*. Deloitte University Press. Retrieved from https://www2.deloitte.com/content/dam/insights/us/articles/supply-chain-transparency/DUP785_ThePathtoSupplyChainTransparency.pdf.

⁸³ Marshall, D., McCarthy, L., McGrath, P., & Harrigan, F. (2016). What's Your Strategy for Supply Chain Disclosure? *MIT Sloan Management Review*, 57(2), 37.