



## **Addressing Labour Exploitation through Global Supply Chains: Moving Beyond Window Dressing to Effective Regulation**

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## I. The Problem

There is a mismatch between the global nature of production and the territorial format of human rights and labour rights laws, which is known as the governance gap. Lead firms, most often located in developed countries in the Global North, source production through a chain of subsidiaries and suppliers in developing countries with weak labour and human rights laws, weak law enforcement mechanisms, or both. Global value chains (GVC) transcend national borders and offshore production and supply by carefully choosing venues based on direct economic costs and the local legal regimes.

The term “value chain capitalism” captures the transformation in the organization of production away from vertically integrated firms in which supply, production and distribution are integrated through a network of subsidiaries, to one in which these functions are “disaggregated, geographically dispersed and contractually coordinated” through a chain of suppliers, contractors and subsidiaries.<sup>1</sup> While technological change, especially digitalization, propelled the disaggregation of production from firms to chains, international trade rules such as the General Agreement on Tariffs and Trade initiated the process of creating legal conditions for global trade and commerce beyond the reach of individual nation states.<sup>2</sup> Combined, these processes enabled large transnational firms to disaggregate production and to disperse its components around the globe.

Transnational corporations (TNCs) have constructed complex supply chains by taking advantage of the differences in costs, the availability of low-cost labour and state policies in different places around the world.<sup>3</sup> Since different participants in the chain are interdependent and suppliers depend on access to the chain, large buyer firms have extraordinary bargaining power over suppliers and states. The geographic flexibility of TNCs located in the Global North at the top of the chain enables them to engage in regulatory arbitrage and to extract large markups at the expense of consumers, suppliers and workers in the Global North and South.<sup>4</sup> The two key features of GVCs – the fragmentation of production and its geographic dispersion – distance lead firms from legal liability for the violations of the rights of workers employed further down the chain. These strategies enable lead firms to escape the regulatory reach of territorially based legal jurisdiction.

Public international law, especially International Labour Organization (ILO) and United Nations (UN) human rights conventions, provide strong normative foundations for transnational labour

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<sup>1</sup> D Danielson, ‘Situating Human Rights Approaches to Corporate Accountability in the Political Economy of Supply Chain Capitalism,’ in D Brinks, J Dehm, K Engel and K Taylor (eds), *Power, Participation and Private Regulatory Initiatives: Human Rights under Supply Chain Capitalism* (Philadelphia, U. of Penn. Press, 2021) 224-242, 227.

<sup>2</sup> Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Mass., Harvard University Press, 2018)

<sup>3</sup> A Kumar, *Monopsony Capitalism: Power and Production in the Twilight of the Sweatshop* (Cambridge, UK, Cambridge University Press, 2020) 19.

<sup>4</sup> World Bank, *Trading for Development in the Age of Global Value Chains* (2020) 84-86.

law, but the associated enforcement mechanisms are weak. Moreover, traditionally international human rights do not apply directly to private corporate actors.<sup>5</sup>

During the 1990s, TNCs developed corporate social responsibility (CSR) initiatives, a form of private self-regulation, as a way of bridging the governance gap by linking seemingly private corporate norms to public international law, especially international human and labour rights. These “soft laws”, which include corporate codes of conduct for suppliers, social auditing, reporting and certification programs, have proliferated and expanded over time. Yet, the overwhelming weight of evidence is that voluntary disclosure and due-diligence (corporate social responsibility) initiatives have not worked as mechanisms to eradicate forced labour or human rights abuses in TNCs and their supply chains.<sup>6</sup>

In 2008, the United Nations (UN) Human Rights Council embraced the “Protect, Respect and Remedy” Framework. This framework rests on three pillars:

- the state duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication;
- the corporate responsibility to respect human rights, which means acting with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and
- greater access by victims to effective remedies, both judicial and nonjudicial

In 2011, the UN Human Rights Council endorsed the “Guiding Principles on Business and Human Rights” (UNGPs). The UNGPs introduced the first global standard for “due diligence” and provided a non-binding framework for undertakings to put their responsibility to respect human rights into practice. Subsequently, other international organisations developed due diligence standards based on the UNGPs. The 2011 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises refer extensively to due diligence and in 2018 the OECD adopted the general Due Diligence Guidance for Responsible Business Conduct. Similarly, the International Labour Organisation (ILO) adopted in 2017 the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which encourages undertakings to put in place due diligence mechanisms to identify, prevent, mitigate and account for how they address their business’s actual and potential adverse impacts as regards internationally recognized human rights.

A variety of global, regional, bilateral and unilateral trade laws that have incorporated labour and human rights commitments in side-agreements and social clauses provide a range of remedies, which may include export bans. However, trade laws do not provide opportunities for workers

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<sup>5</sup> See *Nevsun Resources Ltd v Araya*, 2020 SCC 113 in which a majority of the Supreme Court of Canada held that it was time to make corporations directly liable for violations of international customary law, including for violating the prohibition against forced labour and slavery.

<sup>6</sup> European Coalition for Corporate Justice (ECCJ) and the Corporate Responsibility (CORE) Coalition, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check* (Brussels 2020) 5-6.

and other individuals whose rights have been abused to directly assert their claims and seek redress.

Attempts to use transnational litigation strategically to impose a duty on TNCs to prevent harm to workers down the supply chain have garnered limited success. Innovative strategies identify suitable national and transnational jurisdictions, try different legal claims (in contract, torts or international law), invoke a range of legal fields and remedies (civil law and human rights litigation), use inventive procedures (such as class action suits) and inspire consumers' collective action. TNCs rely on the following principles and doctrines of international public and private law and domestic law to shield themselves from liability for harms caused by their business models:

- Territorial jurisdiction and principles of comity at international law – claimants should pursue legal action where the harm occurred.
- International human rights – do not apply directly to corporations.
- Contractual privity – lead firms are not liable for the harms caused by their suppliers or contractors
- Separate legal personality – parent companies are not liable for the harms caused by their subsidiaries

There is, yet, not a single case decided, from beginning to end, *on its merits*, that holds a lead firm headquartered in the Global North responsible for the labour rights violations committed by its suppliers and subsidiaries located in the Global South, although a few cases were settled out of court in the shadow of the law and others have attracted high media visibility.<sup>7</sup> Building on prior case law, in *Nevsun v. Araya* the Supreme Court of Canada developed a common law tort based on customary international law, namely – the prohibition of forced labour, slavery, cruel, inhumane or degrading treatment and crimes against humanity. Noting that “it is not ‘plain and obvious’ that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable and universal norms of international law,” the Court held that this tort could make corporations liable in domestic courts for violations committed in other jurisdictions.<sup>8</sup>

Despite the willingness of some peak courts to address some of the formal legal hurdles to transnational labour and human rights litigation, the practicalities, when added to the legal technicalities, of transnational litigation, especially the cost, make it very difficult to hold TNCs accountable for the harms caused by the business model from which they profit.

## II. Legislative Response: Three Dominant Models

In light of the failure of voluntary CSR and litigation to address the problem of human rights and labour rights violations in TNCs' supply chains, developed states in which TNCs are located and

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<sup>7</sup> N Bueno and C Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International and Comparative Law Quarterly* 789; European Coalition for Corporate Justice (ECCJ), *Suing Goliath* (2021) ([corporatejustice.org/publications/suing-goliath/](https://corporatejustice.org/publications/suing-goliath/)).

<sup>8</sup>*Nevsun Resources Ltd v Araya*, 2020 SCC 5, para. 113.

conduct business have begun to introduce laws that require TNCs to take steps to address human rights and labour rights violations. There are currently three basic legislative models that impose CSR obligations on corporations: 1) corporate transparency or disclosure legislation; 2) due diligence legislation; and 3) due diligence legislation that also provides a civil remedy for victims against businesses that breach a duty of care owed to them.

### *Transparency and Disclosure Laws*

The first model, known as disclosure or supply chain transparency laws, imposes an obligation on businesses to report on activities, if any, they have undertaken to detect, eradicate, mitigate, and compensate for any forced labour, modern slavery, child labour and human trafficking in their supply chains. These laws cover a limited type of harm, involving coercion and exploitation like modern slavery and forced labour. They do not impose a due diligence obligation on companies to prevent forced labour. All they do is impose an obligation to report and the assumption is that consumers and investors will use their financial power to compel companies to put in place plans to detect and remediate practices and policies in their supply chain that are conducive to or result in forced labour. The only penalties are for non-compliance with the disclosure obligation. This was the preferred model adopted by the mainly Anglo-American jurisdictions that were the first to enact modern slavery laws, including California's Transparency in Supply Chains Act 2010, the United Kingdom's Modern Slavery Act 2015, and Australia's Modern Slavery Act 2018.

These laws vary in the scope of application, form and content of reporting required, type of penalties for failing to report, how the reports are lodged and enforcement mechanisms. With the first of these disclosure laws coming into effect in 2012, it is possible to draw some general conclusions on their effectiveness on the basis of evidence. Reporting has tended to be superficial; reporting requirements do not reach the segment of supply chains where the worst human rights abuses occur; certification standards and social auditing have been found to be weak; and reporting requirements can be fulfilled without changing corporate practices that are clearly tied to human rights abuses.<sup>9</sup> There is a growing awareness that the use of disclosure legislation has not produced tangible results, despite the energy and money that has gone into promoting firm compliance and refining disclosure and reporting requirements.<sup>10</sup> At most, these laws raise business, public and political awareness of the problem; at worst, they are a form of window dressing in which reporting substitutes for remedial action.

### *Due Diligence Laws*

The disclosure model has been overtaken by legislation covering a much broader range of harms (international human and labour rights and international environmental standards) and imposes due diligence obligations that range, at the lightest, from making mandatory due diligence processes and reporting obligatory to requiring companies to remediate harms they have caused.

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<sup>9</sup> Re:Structure Lab, *Due Diligence and Transparency Legislation*, April 2021, 7-8 available at [restructurelab.org](http://restructurelab.org)

<sup>10</sup> N Phillips, G LeBaron & S Wallin, 'Mapping and Measuring the Effectiveness of Labour-Related Disclosure Requirements for Global Supply Chains', ILO Working Paper No. 32, Geneva, 2018, 2.

This is the dominant model in Europe, with notable examples including France’s Corporate Duty of Vigilance Law (2017), Germany’s Law on Supply Chain Due Diligence (2021), Norway’s Transparency Act (2021), Switzerland’s Criminal Code reforms and Ordinance on Due Diligence and Transparency Duties (2022). The forthcoming European Union Directive on Corporate Sustainability Due Diligence is also expected to follow this model.

These laws range in the stringency of their requirements and the variety of their components. Some require companies to consult with stakeholders in developing a due diligence plan and provide company-level grievance mechanisms. They also differ in the type and extent of public supervision and enforcement.<sup>11</sup>

### *Due Diligence Laws with Civil Liability*

The third type of law builds on the due diligence model by imposing liability for negligence where companies are found to contribute to human rights breaches in business relations. Duty of care and diligence requirements are found in the French Corporate Duty of Vigilance Law (the French Duty of Vigilance Law). The forthcoming European Union Directive on Corporate Sustainability Due Diligence is also expected to contain a liability provision.<sup>12</sup>

### **III. Current Situation in Canada**

At present, there is no specific modern slavery legislation in Canada. Efforts to introduce a legislative framework for regulating forced labour in supply chains date back to 2009. The major legislative proposals are outlined below, and the key elements of the most recent laws are set out in a table in the appendix of this submission.

<b>Year</b>	<b>Bill</b>	<b>Title</b>
<b>2009</b>	C-300	An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries
<b>2018</b>	C-423	An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff
<b>2020</b>	S-211	An Act to enact the Modern Slavery Act and to amend the Customs Tariff
<b>2020</b>	S-216	An Act to enact the Modern Slavery Act and to amend the Customs Tariff
<b>2021</b>	S-211	An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff
<b>2022</b>	C-243	An Act respecting the elimination of the use of forced labour and child labour in supply chains
<b>2022</b>	C-262	An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad
<b>2022</b>	C-263	An Act to establish the Office of the Commissioner for Responsible Business Conduct Abroad and to make consequential amendments to other Acts

<sup>11</sup> Hayli Millar Yvon Dandurand Marcella Chan, *Supply Chains Transparency and Due Diligence Legislation to Prevent Child and Forced Labour: A Guide for Policy Makers and Legislators* (International Centre for Criminal Law Reform and Criminal Justice Policy: Vancouver, 2022) 58-69.

<sup>12</sup> *Ibid.*, 69-73.

Canada's initial legislative proposal to tackle human rights abuses linked to corporate behaviour abroad focused exclusively on the extractive sector. Bill C-300 (2009) required companies engaged in mining, oil, and gas operations in the Global South to adhere to environmental best practices and comply with international human rights standards and proposed a complaints procedure by which non-Canadian citizens could bring violations to the government's attention.

In 2018, Canada's Standing Committee on Foreign Affairs and International Development presented *A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains* to Parliament, an investigative report on the use of forced labour and child labour in Canadian supply chains, based on consultations with a wide range of stakeholders. This report formed the basis of Bills C-423 (2018), S-211 (2020) and S-216 (2020), three iterations of a *Modern Slavery Act* focusing on the elimination of child labour and forced labour. Although they differ slightly in detail, the general thrust of these bills was to impose an obligation on businesses to disclose the efforts they had taken to rid their business and supply chains of child and forced labour.

During the 2021 federal election campaign, the Liberal government pledged to introduce legislation to eradicate forced labour from Canadian supply chains and ensure Canadian businesses that operate abroad are not contributing to human rights abuses. Following their electoral win, Bill S-211 (2021) was introduced in the Senate and Bill C-243 (2022) in the House of Commons. The bills are also limited to the elimination of child labour and forced labour in businesses and their supply chain through disclosure obligations. These legislative proposals embraced the first model of modern slavery laws.

Bill C-262, introduced March 2022, goes beyond the earlier legislative proposals by requiring entities to implement a due diligence process *and* providing a cause of action against an entity in respect of the entity's failure to develop and implement due diligence procedures. It is an example of the third legislative model.

## **IV. Recommendations**

### ***Overview***

Since the first legislative proposal to tackle human and labour rights abuses linked to Canadian corporate behaviour was tabled in 2009, the third legislative model – robust due diligence obligations combined with a range of enforcement mechanism, including access to remedies for victims of human and labour rights abuses – has become the preferred model by the EU and many of its Member States. By contrast, large corporations prefer disclosure and transparency legislation.<sup>13</sup>

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<sup>13</sup> G LeBaron & A Rühmkorf, 'Steering CSR through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' 8 *Global Policy* (2017) 12, 15; E Wray-Bliss

The United States-Mexico-Canada Agreement (USMCA) free trade deal, which came into force on July 1, 2020, has a labour chapter, which includes the prohibition against forced labour. These commitments extend beyond domestic activities and encapsulate imports as well, as each country is required to put measures in place to prohibit the importation of goods manufactured wholly or in part by forced or compulsory labour. To meet these obligations, Canada amended its *Customs Tariff Act*, which is enforced by the Canada Border Services Agency, to prohibit the importation of goods produced wholly or in part by forced or compulsory labour. It does not, however, provide any access to remedy for victims of forced labour.

Now is the time for the federal government to demonstrate a commitment to ensuring that Canadian businesses respect human rights and labour rights of all people, not only those who have the good fortune to live in Canada. If Canada were to adopt simple disclosure legislation directed only to modern slavery this would be a step backward, not forward. The European Union, the largest single market, is on the cusp of enacting a directive that will require its 27 Member States to enact mandatory human rights due diligence legislation for corporations that also provides victims with access to a remedy. Canadian companies should operate on a level playing field with their European counterparts and the Canadian government should not embrace a legislative model already known to be ineffective. Moreover, import bans on products made with forced labour without legislation requiring corporations to prevent or mitigate human rights abuses and provide remedies for the victims appear to be more of a form of trade, rather than human rights, protection.

The recommendations below focus on the key elements for designing an effective mandatory human rights due diligence legislation that also provides a remedy for victims of human and labour rights abuses.<sup>14</sup> The goal of these recommendations is to avoid legislation that treats due diligence as a top-down exercise in which lead corporations establish the requisite, but, instead, to involve stakeholders and potential victims in their design, implementation and operation.<sup>15</sup>

### **1) Coverage**

The obligation to practice human rights due diligence should extend to all internationally recognized human rights, including labour rights, without distinction. Moreover, there should be

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and G Michelson, 'Modern Slavery and the Discursive Construction of Property Freedom: Evidence from Australian Business' *Journal of Business Ethics* (2021 doi:10.1007/s10551-021-04845-w

<sup>14</sup> These recommendations draw upon the United Nations Guiding Principles; reports, briefs and commentaries provided by NGOs, governments, the EU and ILO; and academic articles. They do not purport to be original, but to synthesise key design elements for effective legislation and regulation.

<sup>15</sup> Evidence suggests companies are designing, implementing and measuring the success of, their HRDD without genuine and ongoing involvement of workers. For example, KnowTheChain's 2020 Benchmark, which assessed global companies in the apparel and footwear sector on efforts to address forced labour risks in their supply chains, found that only 6 out of 37 companies disclosed involving workers in their risk assessment processes, and just 4 stated that they involved workers in the design and/or performance of grievance mechanisms (see [https://knowthechain.org/benchmark/?ranking\\_year=2020&ranking\\_sector=apparel-footwear](https://knowthechain.org/benchmark/?ranking_year=2020&ranking_sector=apparel-footwear)).

a gender sensitive approach to the adverse impacts of human rights violations as men and women experience these impacts differently.

The UNGPs highlight an authoritative list of the core internationally recognized human rights:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- ILO Declaration on Fundamental Principles and Rights at Work

These internationally recognized human rights could be supplemented by the broader list set out in Bill C-262, which was introduced in the House of Commons in late March 2022.

## **2) Scope**

The UNGPs (Principle 14) make it clear that while policies and processes will necessarily have to vary in complexity depending on the size of the business enterprise, all companies are required to carry out human rights due diligence. The size and structure of a business enterprise should only effect the modalities of implementation of due diligence. Only small entities in low-risk sectors should be excluded and they should only be excluded on the basis of evidence assessing the nature and severity of the risk.<sup>16</sup>

Entities, which are the duty bearers, should be covered regardless of size or sector.

Entities, including financial institutions, should be within the scope of this law if:

- they are incorporated or formed under a federal or provincial act, or
- they have a place of business in Canada, carry out business, including distribution, in Canada, or have assets in Canada that are used to carry out the entities' business.

An "entity" means a corporation or a trust, partnership or other association but does not include a registered charity, non-profit organization or trade union.

Since there is a broad range of transparency and due diligence obligations, and the requirements differ a great deal, there should be no exemptions for entities that are required to report, implement a due diligence process or are under a duty of care in another jurisdiction. The problem with exemptions is that they create an incentive for entities to take advantage of them by restructuring to fit into them. In this way, exemptions could lead to a race to the bottom. Specifically tailored, evidence-based regulations are preferable to exemptions.

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<sup>16</sup> The term 'entity' is used throughout the submission instead of more typically terms, such as 'business', 'company', 'enterprise', 'corporation' or 'undertaking', in order to avoid terms that have a pre-existing legal meaning.

### **3) General Due Diligence Obligation**

The obligation to practice human rights due diligence should extend to all entities to which entities are connected through investment and contractual relationships regardless of whether they are located within or outside of Canada.

Due diligence obligations regarding subsidiaries and suppliers should not be conditional upon the parent company being effectively involved in the subsidiary's day-to-day operations or exercising a sufficient degree of control on the subsidiary, or conditional on the lead company in the global supply chain being able to exercise decisive influence on the sub-contractor. These kinds of conditions create incentives for companies to remain at arm's length from the operation of the subsidiary or from the practice of the supplier, in order to reduce the scope of their due diligence obligations.

Entities should

- identify and assess actual and potential adverse impacts on human rights resulting from their activities as well as from their business relationships, including with suppliers or contractors;
- cease any activity that led to the adverse impacts and take remedial action;
- mitigate risks of adverse impacts; and
- by means of an internal grievance mechanism, be notified of any potential adverse impacts on human rights.

It is important to provide definitions of the types of entities and relationships to which the due diligence obligation applies. The following definitions are adapted from the European Parliament's 2021 resolution on corporate due diligence and corporate accountability, and they would impose a broad due diligence obligation on covered entities.<sup>17</sup>

- "value chain" means all activities, operations, business relationships and investment chains of an entity and includes entities with which the entity has a direct or indirect business relationship, upstream and downstream, and which either: (a) supply products, parts of products or services that contribute to the entity's own products or services, or (b) receive products or services from the entity.
- "business relationships" means subsidiaries and commercial relationships of an entity throughout its value chain, including suppliers and sub-contractors, which are directly linked to the entity's business operations, products or services;
- "supplier" means any entity that provides a product, part of a product, or service to another entity, either directly or indirectly, in the context of a business relationship;

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<sup>17</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Proposed Directive).

- “sub-contractor” means all business relationships that perform a service or an activity that contributes to the completion of an entity’s operations.

#### **4) Duty to consult**

The expectations of what constitutes meaningful stakeholder consultation for entities should be specified. Consultation should be tailored to the specific rightsholders, like workers and trade unions, and other stakeholders, and should be undertaken in an adaptable and continuous manner.

Entities should:

- adequately, timely and directly consult impacted and potentially impacted stakeholders, including workers and their representatives;
- properly consider stakeholders’ including workers’, perspectives in the definition and implementation of the due diligence measures; and
- ensure that representative trade unions and stakeholders are involved in the definition and implementation of the due diligence measures.

#### **5) Duty to report**

Reporting should go beyond the due diligence process to include reporting on key indicators that are associated with human and labour rights abuses.

The type of information entities are expected to disclose to demonstrate to relevant stakeholders and rightsholders that their due diligence is adequate should be clearly set out.

It is imperative that entities map their business relationships and value chains, including suppliers and contractors below the first tier. The limits of non-disclosure agreements should be clarified and a clear definition of the notion of “commercially sensitive” information should be provided.

Entities should be required publicly to communicate human rights risks and impacts and how the entity has prioritized them, as well as the due diligence processes that are used to address, mitigate and remedy them.

The burden should be on entities to disclose, to the greatest extent possible, this type of human rights due diligence information in a meaningful and user-friendly manner.

The duty to report must be enforced by a public oversight body that has the capacity and powers to address inaccurate and missing reports.

A designated government body or official should be required to report annually to parliament on entities’ compliance with the law. Such a report has the potential to raise political and public

awareness about the risks of prescribed human and environmental harms in business activities and global supply chains.

Entities should

- identify all types of business relationships they have with business partners and entities along their entire value chain (suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, vendors, subcontractors, homeworkers);
- report on their due diligence and consultation processes and their results in a public, accessible and appropriate manner;
- report on outcomes, that is, the actions taken to cease and remedy existing abuses and to prevent and mitigate risks of abuse, as well as their outcomes;
- report on the measures and results of monitoring the implementation and effectiveness of such actions (e.g. non-compliances detected, their resolution, and measures to prevent reoccurrence);
- report in a reliable and comparable way on the indicators that matter most for human and labour right violations (For forced labour, for example, entities should report on the following indicators: percentage paid over costs of production, percentage of supply chain workforce receiving living wage, percentage of workers with temporary contracts);
- update their reports annually; and
- file their reports with a public register that contains both a list of all entities that are due to report, and the actual reports that have been submitted.

## **6) Duty to document**

To assist the supervisory body charged with ensuring that entities meet their due diligence obligations, it is critical that entities maintain records of their actions and results of those actions.

Entities should

- maintain a written record of all due diligence actions and their results, and make them available to the competent authorities on request.

## **7) Workplace grievance and remedy mechanisms**

Effective operational-level grievance mechanisms are critical to conducting human rights due diligence. They support the identification of adverse human rights impacts as a part of an entity's ongoing human rights due diligence by providing an avenue for those directly impacted by an entity's operations to raise concerns when they believe they are being or will be adversely impacted. Moreover, these mechanisms can make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.<sup>18</sup>

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<sup>18</sup> Legislative provisions on the establishment of operational-level grievance mechanisms should be built on the effectiveness criteria laid out in Principle 31 of the UNGPs and the recommendations of the OHCHR Accountability

Operational-level grievance mechanism should be developed with the stakeholder groups for which they are intended.<sup>19</sup> Workers and trade unions should be involved both in the design and operation of grievance mechanisms.

Remedy seekers should retain the ability to alter a remedial course of action in response to evolving circumstances, including by choosing to pursue a remedy using a state-based mechanism as well as (or instead of) a non-state-based grievance mechanism. Operational-level grievance mechanisms should make provision for affected people to seek collective redress for human rights harms. In case of non-implementation of the remedial outcomes, remedy seekers should be able to seek enforcement through judicial mechanisms. Public authorities should monitor and impose sanctions against entities for failing to implement remedial outcomes.

Entities should

- be required to consult with rightsholders in developing effective operational-level grievance mechanisms;
- establish or participate in effective operational-level grievance mechanisms with a view to identify and remediate adverse human rights impacts;
- protect workers and other users of operational-level grievance mechanisms from retaliatory and intimidatory behaviour connected with their actual or possible use of the grievance mechanism;
- be prohibited from requiring remedy seekers to waive their rights to seek a remedy using judicial mechanisms as a condition of access to operational-level grievance mechanisms; and
- provide a mechanism for collective redress.

### **8) Public enforcement**

A robust supervisory mechanism, responsible to the Minister of Labour, is necessary to ensure that measures adopted by entities to discharge their human rights due diligence obligations are effective in preventing violations from occurring and are not merely cosmetic.

A public supervisory agency should be established with the responsibility for overseeing entities' compliance with their due diligence obligations and be given the authority to effectively sanction entities that do not carry out their duties, for example, by financial penalties.

The supervisory agency's assessments of whether an entity has fulfilled its due diligence obligations should not be based only on the entity's reports. Individuals and communities (potentially) impacted by human rights abuses, as well as trade unions and civil society

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and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse.

<sup>19</sup> France's Duty of Vigilance Law, as an example, specifies that an alert mechanism under the vigilance plan be developed in partnership with the trade union organization representatives of the company.

organizations, should have access to the public agency. Moreover, the public agency should be vested with the mandate, capacity and resources to carry out on-site, territorial and extraterritorial, visits and investigations.

Where entities fail to produce regular reports or produce reports that fail to meet minimum requirements or have not taken the necessary steps to address human rights risks, the public agency should be empowered to impose sanctions, including fines and exclusion from participation in schemes linked formally or informally to the state, such as public procurement schemes, or products or services provided by export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions; and/or in relevant contracts with the state.

The supervisory agency should be given powers to investigate (such as the production of documents and testimony), including entities and individuals outside of Canada.

The legislation should reinforce the due diligence duties by:

- providing for proportionate, effective and dissuasive penalties and sanctions where non-compliance contributes to, or aggravates, abuses or the risk of abuse;
- authorizing the supervisory agency to order an entity to take corrective measures necessary to comply with its obligations under the law;
- designating competent investigating and enforcement authorities;
- ensuring that members of the public may challenge non-compliance before the judicial or administrative authorities; and
- requiring the supervisory agency to report annually to Parliament on entities' compliance with the law.

### ***9) Access to remedy and civil liability***

To be truly effective, mandatory due diligence legislation must be accompanied by a robust liability regime, with an adequate limitation period, and strong enforcement measures that ensure accountability for failure to perform due diligence, as well as to provide access to justice and remedy for victims of human and labour rights abuses. It is critical that victims be provided with access to effective remedies. Collective redress mechanisms, such as class actions, should be available to the claimants. Canadian courts should have jurisdiction over legal actions under this law, regardless of whether related proceedings against an entity's subsidiary, supplier or subcontractor are brought in the courts of a third state. A foreign ruling against the liability of a subsidiary, supplier or subcontractor should not prevent Canadian courts from determining the liability of an entity for the same harm.

Since the victims of human and labour rights abuses are typically based in producer countries, workers' and community organizations, trade unions and NGOs should be given standing to bring claims on the behalf of victims, subject to their full participation and consent.

Conducting due diligence should not automatically absolve an entity from liability for the harm it has directly or indirectly caused or contributed to. Simply providing a due diligence plan or going through the motions should not be sufficient for the entity to avoid liability in the event of harm. The UN Guiding Principles on Business and Human Rights (Principle 17) clearly state that the duty of care an entity owes to those who may be affected by its activities, including indirectly (through the acts of its subsidiaries or business partners), is not fulfilled simply by an entity discharging its due diligence obligations.

The key question is how to establish the liability of lead entities for the harmful actions of entities in their global value chains. The conventional legal approach is to hold them liable for those harms for which they are directly responsible. The problem with this approach is that it ignores the extent to which key components of private law enable lead entities to fragment and disperse production around the globe in order to distance themselves from the violations of the human rights of workers employed further down the chain and the communities from which value is extracted.

Contract is another essential component of global value chains. Companies in the chain are distinct legal entities linked together via a series of bilateral contracts. At the same time contractual privity binds the parties who have consented to the contract, it distances them from interference by, and responsibility to, third parties, thereby imposing “an individualistic operating logic” that typically restricts the possibility of legal claims by chain actors only to those actors with whom they have a direct contractual relationship.<sup>20</sup> Although contracts within the chain are conventionally treated by private law as independent and separate legal arrangements, in fact, they are embedded within a web of interdependent relationships.<sup>21</sup>

Private law distancing devices have come to be seen as essential components of free markets and critical to value production, rather than as norms backed by state sanctions that are designed to promote the public good by facilitating individual freedom and initiative. There are, however, occasions, when these private law devices have been modified to ensure the public good. In the context of expanding manufacturers’ liability to consumers, the private law in both common law jurisdictions and civil law systems developed in response to the rise of mass production by lifting strict notions of contractual privity.<sup>22</sup>

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<sup>20</sup> A Rühmkorf, ‘Towards sustainable supply chain networks: Mandatory human rights due diligence as a new governance tool?’ in R M Barker and I h-Y Chiu (eds), *The Law and Business of Decentralised Business Models: Between Hierarchies and Markets* (Routledge 2020) 713-712.

<sup>21</sup> F Cafaggi and P Iamiceli, ‘Regulating Contracting in Global Value Chains. Institutional Alternatives and their Implications for Transnational Contract Law’ (2020) 16 *European Review of Contract Law* 44, 57.

<sup>22</sup> J Salminen, ‘From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production’ (2019) 23 *Competition & Change* 420; See generally, S Whittaker, (ed) *The Development of Product Liability* (Cambridge, Cambridge University Press, 2010).

Moreover, increasingly peak courts are lifting the corporate veil when separate legal personality is used to shield lead firms from liability for the harms caused by the subsidiaries and suppliers they control.<sup>23</sup>

Imposing joint and several liability on entities for the harms arising out of human rights abuses caused or contributed to by controlled or economically dependent entities is a simple mechanism for ensuring that lead entities are liable for the harms caused by business models from which they profit.

Entities should be:

- jointly and severally liable for harm arising out of human rights abuses caused or contributed to by controlled or economically dependent entities;
- liable for harm arising out of human rights and environmental abuses directly linked to their products, services or operations through a business relationship, unless they can prove they acted with due care and took all reasonable measures that could have prevented the harm;
- be penalized for taking reprisals against a claimant; and
- not be absolved of liability for simply undertaking a due diligence process. Entities should be required to establish that they took all due care to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, if they are not to be held liable for that harm.

Since it is very difficult for those who have suffered harms to prove the violation of their human or labour rights, it is important that the legislation shift the burden of proof so that the entity is required to adduce evidence if a prima facie case of a human or labour rights violation has been made out. Where a claimant has presented reasonably available facts and evidence sufficient to support their action, the entity against whom the claim has been brought should bear the burden of proving:

- the nature of its relationship with the entities involved in the harm; and
- whether it acted with due care and took all reasonable measures to prevent the harm from occurring.

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<sup>23</sup> *Vedanta Resources plc. v Lungowe* [2019] UKSC 20. This case was further extended in cases concerning environmental claims - *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3. As issue in *Vedanta Resources plc. v Lungowe* was whether the parent corporation located in the UK was liable for the failure of its subsidiaries in Zambia to comply with health, safety and environmental standards. Significantly, the Court extended proximity and responsibility beyond the criterion of “active” control, stating

[t]he parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken (55).

The Court specifically asserted that in a case of tortious liability for harms to persons affected by activities there is nothing “special or conclusive about the bare parent/subsidiary relationship”; control and assumption of responsibility are the key elements for establishing a duty of care (54).

The costs of pursuing a remedy creates an almost insurmountable barrier for victims. The legislation should require that, in cases where the claimant is successful, legal costs can be fully recoverable from the defendant entity; and, where a claimant loses, costs can be balanced by the court in light of the disparity of resources between the parties.

Rules on legal aid and litigation funding should consider the financial barriers claimants face in judicial proceedings relating to business-related human and labour rights abuses.

### ***10) Additional Matters***

Government financial support for entities (e.g., COVID-19 related grant, loan, and rebate schemes) should be conditional on entities having due diligence processes and mechanisms in place.

Expert advisory groups should be established and given a central role in designing laws and implementation processes. These groups should include workers, trade unions representing workers employed by home state parent companies and business actors along the supply chain, survivors of previous abuses, representatives of industry bodies for key sectors, NGOs, and academic experts on forced labour, human rights, and due diligence laws.

## V. Appendix : Canadian Legislative Proposals

ELEMENTS		Bill S-216 (2020)	Bill S-211 (2021)	Bill C-243 (2022)	Bill C-262 (2022)
<b>Title</b>		<i>The Modern Slavery Act</i>	<i>The Fighting Against Forced Labour and Child Labour in Supply Chains Act</i>	<i>The Ending the Use of Forced Labour and Child Labour in Supply Chains Act</i>	<i>The Corporate Responsibility to Protect Human Rights Act</i>
<b>Purpose/Rationale</b>		To contribute to the fight against modern slavery through the imposition of reporting obligations on entities (producers and importers)	To contribute to the fight against child labour and forced labour through the imposition of reporting obligations on entities (producers and importers) and government institutions (producers, purchasers, and importers)	To contribute to fight against child labour and forced labour in supply chains through the imposition of reporting obligations on entities (producers and importers)	To prevent, address, and remedy the adverse impacts on human rights that occur in relation to business activities conducted by entities abroad.
<b>Coverage</b>		Child labour, as defined under Canadian law and in the <i>Worst Forms of Child Labour Convention</i> , 1999 Forced labour, as defined under Canadian law and in the <i>Forced Labour Convention</i> , 1930			Human rights, including the right to a healthy environment and rights recognized under the identified international human rights instruments <sup>24</sup>
<b>Scope</b>	<b>Legal Form</b>	Corporations, trusts, partnerships, and other unincorporated organizations	Corporations, trusts, partnerships, other unincorporated organizations, and government entities	Corporations, trusts, partnerships, other unincorporated organizations, and government entities (via amendment to the <i>Department of Public Works and Government Services Act</i> )	Corporations, trusts, partnerships, and other associations, but specifically excluding registered charities, non-profit organizations, and trade unions
	<b>Nexus</b>	<ul style="list-style-type: none"> <li>▪ Listed on a stock exchange in Canada; or</li> <li>▪ Has a place of business in Canada, does business in Canada, or has assets in Canada, and meets at least two of the following conditions for at least one of the two most recent financial years: <ul style="list-style-type: none"> <li>i. At least \$20 million in assets</li> <li>ii. At least \$40 million in revenue generated</li> <li>iii. An average of at least 250 employees</li> </ul> </li> </ul>			<ul style="list-style-type: none"> <li>▪ incorporated or formed in Canada; or</li> <li>▪ has a place of business in Canada, carries on business in Canada, or has assets in Canada that are used in carrying on the entity's business</li> </ul>

<sup>24</sup> The Schedule to Bill C-262 lists 22 international human rights instruments.

ELEMENTS		Bill S-216 (2020)	Bill S-211 (2021)	Bill C-243 (2022)	Bill C-262 (2022)
	<b>Covered business activities</b>	<ul style="list-style-type: none"> <li>▪ Produces or sells goods in Canada or elsewhere</li> <li>▪ Imports goods produced outside Canada; or</li> <li>▪ Controls an entity that does either of the above</li> </ul>	<ul style="list-style-type: none"> <li>▪ Produces, sells, or distributes goods in Canada or elsewhere</li> <li>▪ Imports goods produced outside Canada; or</li> <li>▪ Controls an entity that does either of the above</li> </ul>	Same as Bill S-216	<ul style="list-style-type: none"> <li>▪ Carries out business activities abroad</li> <li>▪ Has affiliates (incl. subsidiaries and other controlled or controlling entities) which carry out business activities abroad</li> <li>▪ Has business relationships, including with individuals and entities that are in its supply chain, or directly linked to its operations, products, or services</li> </ul>
<b>Duty of due diligence</b>	<b>General obligation</b>	None			<ul style="list-style-type: none"> <li>▪ Duty to avoid causing adverse impacts on human rights resulting from the entity or its affiliates' acts or omissions, to occur outside Canada</li> <li>▪ Duty to prevent adverse impacts on human rights resulting from the entity's business relationships from occurring outside Canada</li> </ul>
	<b>Due diligence procedures</b>	None			<ul style="list-style-type: none"> <li>▪ Identify and assess actual and potential adverse impacts on human rights resulting from activities and business relationships</li> <li>▪ Cease any activity that leads to adverse impacts and take remedial action</li> <li>▪ Mitigate risks of adverse impacts</li> <li>▪ Develop internal alert mechanisms to warn of any potential adverse impacts on human rights.</li> </ul>
<b>Duty to consult</b>		None			<p>Due diligence procedures must be developed and implemented in consultation with:</p> <ul style="list-style-type: none"> <li>▪ directly affected individuals (or their representatives)</li> <li>▪ trade unions</li> <li>▪ employees</li> <li>▪ affected communities; and</li> <li>▪ other relevant stakeholders, incl. independent experts</li> </ul>

ELEMENTS		Bill S-216 (2020)	Bill S-211 (2021)	Bill C-243 (2022)	Bill C-262 (2022)
<b>Duty to report</b>	<b>Reporting obligation</b>	A report that sets out the steps the entity has taken to prevent and reduce the risk that forced labour or child labour is used at any step of the entity's production (in Canada or elsewhere) or import of goods	<i>Replicates S-216</i> and, in addition, permits entities to produce reports jointly and to revise their reports	<i>Replicates S-216</i> and, in addition, requires entities to report on steps taken with respect to entities they control, and allows entities to revise reports	A report on the entity's due diligence
	<b>Content of report</b>	<ul style="list-style-type: none"> <li>▪ Structure and goods produced or imported</li> <li>▪ Policies on child labour and forced labour</li> <li>▪ Activities that carry a risk and steps taken to assess and manage risk</li> <li>▪ Remediation measures taken</li> <li>▪ Training provided to employees</li> </ul>	<ul style="list-style-type: none"> <li>▪ Structure, activities, and supply chains</li> <li>▪ Policies and due diligence processes</li> <li>▪ Parts of business and supply chains that carry risk and steps taken to assess and manage risk</li> <li>▪ Remediation measures</li> <li>▪ Training provided to employees</li> <li>▪ Methods for assessing effectiveness in ensuring that forced labour and child labour are not being used in business and supply chains</li> </ul>	<ul style="list-style-type: none"> <li>▪ Structure, business. and supply chains</li> <li>▪ Policies on child labour and forced labour</li> <li>▪ Parts of business and supply chains that carry risk and steps taken to assess and manage risk</li> <li>▪ Remediation, including due diligence processes</li> <li>▪ Training provided to employees</li> <li>▪ Methods for assessing effectiveness in ensuring that forced labour and child labour are not being used in business and supply chains</li> </ul>	<ul style="list-style-type: none"> <li>▪ Due diligence procedures implemented and their effectiveness</li> <li>▪ Business activities and business relationships covered by due diligence procedures</li> <li>▪ List of affiliates covered by due diligence procedures</li> <li>▪ Activities in respect of which a risk of adverse impacts on human rights has been identified and measures taken to assess and mitigate the risk</li> </ul>
	<b>Publication requirement</b>	The report must be made available to the public, including publication in a prominent place on the entity's website.	<i>Replicates S-216</i> and, in addition, requires federal corporations to provide report to shareholders along with annual financial statements	<i>Replicates S-216</i> and, in addition, requires all corporations to provide report to shareholders along with annual financial statements	The report must be made public.
	<b>Registry</b>	Minister must maintain an electronic registry of reports that is made publicly available on the Ministry's website			None
	<b>Approval</b>	The report must include an attestation by a director or officer of the entity	The report must include a statement of approval from the entity's governing body	The report must be approved by the governing body of entity and	None

ELEMENTS		Bill S-216 (2020)	Bill S-211 (2021)	Bill C-243 (2022)	Bill C-262 (2022)
			and the manual signature of one or more of its members	evidenced by the manual signature of one or more of its members of	
	<b>Frequency of reporting</b>	Annual - 180 days after the end of each financial year	Annual - On or before May 31 of each <sup>[P]</sup> SEP year		Annual
<b>Duty to document</b>		None			Entities must monitor and document the implementation and effectiveness of their due diligence procedures
<b>Workplace grievance and remedy mechanisms</b>		None			
<b>Public enforcement</b>	<b>Penalties</b>	<ul style="list-style-type: none"> <li>▪ Summary conviction offence and maximum fine of \$250,000 for entities which fail to report or knowingly make false or misleading statements or information</li> <li>▪ Officers and directors are liable if they directed, authorized, assented to, acquiesced, or participated in the commission of the offence</li> <li>▪ Offences committed by employees will be attributed to the entity unless the entity exercised due diligence to prevent its commission</li> </ul>			None
	<b>Powers to compel</b>	<ul style="list-style-type: none"> <li>▪ Designated persons may enter any relevant place to obtain and examine documents and data</li> <li>▪ The Minister may require non-compliant entities to take measures to comply</li> </ul>			None
	<b>Withdrawal of government support</b>	None			Government support or funding to an entity may be withdrawn if there are reasonable grounds to believe it has failed to meet its obligations
	<b>Supervisory agency</b>	None			Appointment of a commissioner with a mandate to ensure compliance by entities with business activities or relationships abroad
<b>Access to remedy and civil liability</b>	<b>Civil liability regime</b>	None			An entity is liable for any injury that results from its failure to comply with obligation to prevent adverse impacts
	<b>Rights of action and limitation periods</b>	None			<ul style="list-style-type: none"> <li>▪ Action against an entity for loss or damage resulting from failure to comply with obligation to prevent adverse impacts <ul style="list-style-type: none"> <li>➤ Limitation period: 5 years, except allegations of sexual assault for which there is no limitation period</li> </ul> </li> </ul>

ELEMENTS		Bill S-216 (2020)	Bill S-211 (2021)	Bill C-243 (2022)	Bill C-262 (2022)
					<ul style="list-style-type: none"> <li>▪ Action against an entity for failure to develop and implement due diligence procedures (limited to matters arising in the human rights protection context) <ul style="list-style-type: none"> <li>➤ Limitation period: 2 years</li> </ul> </li> </ul>
	<b>Jurisdiction</b>	N/A			<p>Canadian courts will have jurisdiction if entity is:</p> <ul style="list-style-type: none"> <li>▪ domiciled or ordinary resident in the jurisdiction; or</li> <li>▪ explicitly submits to the jurisdiction; or</li> <li>▪ there is a real and substantial connection between the facts of the action and the jurisdiction</li> </ul>
	<b>Standing</b>	N/A			<p>Any person who:</p> <p>(a) raises a serious issue and is directly affected by the matter; or</p> <p>(b) has a genuine interest in the matter, presents a reasonable means of advancing the proceeding, and has no conflict of interest</p>
	<b>Remedies</b>	N/A			Damages for loss suffered, aggravated or punitive damages, injunction, specific performance order, costs of the action
	<b>Defences</b>	N/A			The entity must establish that it exercised all due diligence to prevent the adverse impact
<b>Import prohibition</b>		Introduces an amendment to the <i>Customs Tariff</i> to exclude goods that are mined, manufactured, or produced wholly or in part by forced labour or child labour		N/A <sup>25</sup>	N/A <sup>25</sup>

<sup>25</sup> On July 1, 2020, the *Customs Tariff Act* was amended to prohibit the importation of goods produced by forced labour or prison labour, as part of the implementation of the Canada-United States-Mexico Agreement.