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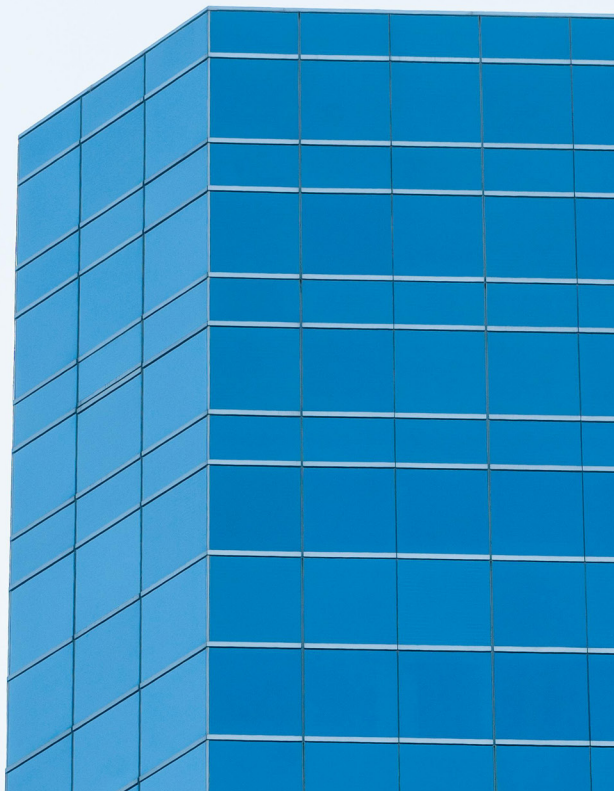

Canada: Law & Practice and Trends & Developments

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CANADA

Law and Practice

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Fasken has a business and human rights (BHR) practice that has been at the forefront of the evolving BHR landscape since the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. As one of the largest law firms in Canada with an international reach, Fasken has adeptly navigated the complexities of BHR, leveraging expertise from various leading practice groups including labour, employment and human rights, corporate social responsibility, and others. Despite the challenges posed by competing ideologies and political headwinds, Fasken remains at the forefront of BHR law and is committed to providing exceptional counsel and advice. Recognised by Chambers Canada as the only law firm in Band 1 of BHR law, Fasken continues to lead in the BHR field, ensuring clients are well-informed and compliant with emerging standards and legal requirements. This dedication positions the firm as a trusted adviser in the dynamic BHR landscape.

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1. Introduction

1.1 Business and Human Rights: A Summary

Canada's approach to business and human rights involves a mixture of law and policy and is very much grounded in – and influenced by – international treaties and standards, as well as the evolving expectations of stakeholders, including the communities in which Canadian businesses operate, investors, NGOs and civil society more broadly.

Canada is a parliamentary democracy with a constitutional system of government that includes a division of legislative powers between federal (national), provincial and territorial governments. Each government has the power to legislate on matters that directly affect various aspects of human rights. As such, the ongoing implementation of Canada's international human rights obligations is a shared responsibility between federal, provincial and territorial governments within their respective areas of jurisdiction and decision-making powers.

Since the unanimous endorsement of the United Nations (UN) Guiding Principles on Business and Human Rights (the *"UNGPs"*) by the UN Human Rights Council in 2011, Canadian initiatives have been guided by Canada's responsibilities under the UNGPs. These responsibilities are:

- to ensure Canadian businesses respect human rights throughout their operations; and
- to establishing dispute resolution processes to remedy business-related human rights abuses.

Historically, the Canadian government has relied primarily on voluntary directives, with its earliest policy efforts framed in the language of corporate social responsibility. Until more recently, with the coming into force of the Fighting Against Forced Labour and Child Labour in Supply Chains Act (the *"Supply Chains Act"*), Canada had taken limited action to codify policy expectations and requirements in legislation.

The most recent iteration of the government's responsible business conduct strategy is the *"Responsible Business Conduct Abroad: Canada's Strategy for The Future"* (the *"2022 RBC*

Strategy"), a five-year strategy (2022–27) that sets out the Canadian government's expectations of Canadian companies operating globally. Pursuant to the 2022 RBC Strategy, Canada expressly recognises the importance of legislation that targets certain areas, including supply chain transparency and supply chain due diligence.

Further legislative activity in the area of business and human rights is anticipated in Canada.

2. Legal Framework

2.1 International

International human rights law, including international human rights treaties signed and ratified by states, underpin and inform the principles of business and human rights – along with the UN's Universal Declaration of Human Rights. As a member of the international community committed to the protection of human rights, Canada has ratified or signed several international human rights treaties, conventions and multilateral agreements related to human rights.

In addition to supporting the principles outlined in the UN's Universal Declaration of Human Rights, Canada has ratified the seven principal UN human rights conventions and covenants, including the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. In signing or ratifying core human rights treaties overseen by the UN, Canada is accountable to the UN and to other member states thereof when it comes to upholding and protecting human rights. In 2019, Canada became a state party to the UN Arms Trade Treaty (ATT). In 2021, Canada also implemented the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Canada has signed and ratified nine of the ten International Labour Organization (ILO) Fundamental Conventions. Canada also adheres to international guidelines that promote business and human rights, including the UNGPs, the OECD Guidelines on Multinational Enterprises on Responsible Business Conduct (the *"OECD Guidelines"*), and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the *"MNE Declaration"*), which sets out guidelines for businesses on labour practices (eg, safe working conditions and the elimination of forced labour).

Canada has adopted the UN's Sustainable Development Goals (SDGs), which are designed to advance corporate sustainability internationally and which include the principles of inclusive development and access to remedy. In line with these commitments, Canada continues to adopt voluntary and mandatory measures to set out expectations and legal requirements for corporate conduct globally.

2.2 National and Regional

2.2.1 National Action Plan

The Canadian government has not yet developed a national action plan (NAP) on business and human rights as contemplated and encouraged by the UN Working Group on Business and Human Rights.

In 2022, Canada introduced the 2022 RBC Strategy, a five-year strategy that contains measures to support Canadian companies in integrating leading responsible business practices and to position Canada to advance policies and practices within the international responsible busi-

ness conduct ecosystem. (For further detail, see **2.2.7 Soft Law on Business and Human Rights**).

2.2.2 Corporate Human Rights Due Diligence Legislation

To date, Canada has not introduced mandatory human rights due diligence legislation. However, such legislation has been under consideration at the federal level for a number of years.

The previous Canadian Parliament, led by a minority Liberal government, included among its priorities a commitment to enact broader human rights due diligence legislation by 2024 to ensure that Canadian businesses operating abroad do not contribute to human rights abuses and violations. The federal government undertook consultations on how to develop mandatory human rights due diligence legislation in October 2023.

A 2021 report by the Standing Committee on Foreign Affairs and International Development on the mandate of the Canadian Ombudsperson for Responsible Enterprise (CORE) recommended that the Canadian government introduce legislation requiring Canadian corporations to conduct human rights due diligence to identify, prevent, mitigate, and account for any potential adverse human rights, environmental and gendered impacts they may cause throughout their supply chains and operations.

A report published in September 2023 by the Standing Committee on International Trade, entitled *"Canadian Mining and Mineral Exploration Firms Operating Abroad: Impact of the Natural Environment and Human Rights"*, recommended that the *"[g]overnment of Canada, in consultation with relevant stakeholders, consider new or modified strategies, policies and other measures that would further promote and enhance […] responsible business conduct in the foreign operations of Canadian firms"*. In its response to the report, the Canadian government emphasised that the government initiatives in this area are ongoing and that the government is committed to, among other things, *"developing effective measures to enhance Canadian companies' due diligence"*.

It is not yet clear if the newly elected Liberal minority government (which, under a new Prime Minister, replaces the previous Liberal minority government) will prioritise mandatory human rights due diligence legislation as part of its mandate. However, it is anticipated that mandatory human rights legislation will continue to be discussed and promoted in the next Parliament by the government and/or through Senate and private member legislative initiatives.

2.2.3 Modern Slavery Legislation

In accordance with Canada's obligations under the Canada–United States–Mexico Agreement (CUSMA), on 1 July 2020, amendments to Canada's Customs Tariff and the Schedule to the Customs Tariff took effect. These amendments prohibit *"goods mined, manufactured or produced wholly or in part"* by forced or compulsory labour (regardless of country of origin) from being imported into Canada.

On 1 January 2024, the import prohibition was expanded to apply to goods mined or manufactured by child labour (regardless of country of origin), with the coming into force of the Supply Chains Act. Compliance with this import prohibition requires companies importing goods into Canada to conduct ongoing due diligence and review of their supply chains to ensure the absence of forced labour at each step of production.

This initiative forms part of the government's efforts to strengthen compliance with international human and labour rights in supply chains. It also aligns with Canada's ongoing commitments under CUSMA.

Strengthening Enforcement of Import Ban – Measures Under Consideration

In the autumn of 2024, the Canadian government undertook consultations to consider potential new measures to strengthen the enforcement of Canada's ban on the import of goods produced by forced labour, in alignment with Mexico and the USA. These consultations, as well as the public consultations held earlier in October 2023 on the eradication of forced labour from the country's supply chains through mandatory human rights due diligence and other measures, form part of the government's broader effort to strengthen compliance with international human and labour rights in supply chains.

A number of measures are currently being considered by the Canadian government to strengthen Canada's ban on imports of goods from forced labour. One such measure is the publication of a list – informed by ILO indicators and other sources – of *"goods at risk of forced labour"*. The list would identify those goods and their origin countries with a prevalent risk of being produced by forced labour and would likely take a similar form to the US Bureau of International Labor's List of Goods Produced by Forced Labor or Child Labor.

The Canadian government is also considering amending legislation to require importers to provide evidence in order to rebut a presumption that goods from *"goods at risk of forced labour"* list have been manufactured using forced labour or child labour. The creation of such *"reverse onus"* on importers for categories of goods from specific countries would have significant implications for Canada's anti-forced labour regime, increasing the pressure on companies to engage in robust due diligence of their supply chains and expanding traceability requirements. A precedent for such a reverse onus requirement is found in the regulations currently in force in the USA under the Uyghur Forced Labor Prevention Act, which creates a reverse onus on goods sourced from the Xinjiang Uygur Autonomous Region of China.

Penalties for Non-Compliance

A wide range of civil and criminal penalties for non-compliance are available under the Customs Act, including fines, imprisonment, or both.

2.2.4 Transparency and Reporting Requirements

Supply Chain Transparency Legislation

On 1 January 2024, the Supply Chains Act came into force. The Supply Chains Act is Canada's first legislation aimed at preventing and reducing the risk of forced and child labour in supply chains of Canadian companies operating globally.

Reporting obligations

The Supply Chains Act requires certain entities and government institutions to publicly report on the steps taken during the previous financial year to prevent and reduce the risk that forced or child labour is used at any step of the production of goods in Canada or elsewhere by the business or at any step of the production of goods imported into Canada by the business. The Supply Chains Act establishes an ongoing annual reporting obligation, with reports due on or before May 31st of each year.

Penalties and enforcement

The Minister of Public Safety is responsible for the enforcement of the Supply Chains Act. In November 2024, the Department of Public Safety and Emergency Preparedness published its most recent iteration of guidance on its interpretation of the Supply Chains Act and what is expected of entities and government institutions in preparing reports. The guidance imposes an additional requirement on reporting entities to complete and submit a questionnaire.

Pursuant to the Supply Chains Act, failure to comply with the reporting obligation or the accessibility requirement is an offence and will lead to a fine of not more than CAD250,000. Any person or entity that provides false or misleading statements will be guilty of an offence and liable for a fine of not more than CAD250,000.

Director liability

Directors are subject to personal liability if the entities they serve do not comply with the Supply Chains Act's reporting obligations. Such liability includes a fine of up to CAD250,000 for an individual director. Any director, officer, agent or mandatary that directed, authorised, assented to, acquiesced in, or participated in an offence is a party to and guilty of an offence under the Supply Chains Act and is liable on conviction to the punishment, regardless of whether the person or entity that committed the offence has been prosecuted or convicted.

Ongoing consultations and enforcement approach

Throughout 2024, the Department of Public Safety and Emergency Preparedness conducted ongoing informal consultation with Canadian lawyers who are advising companies on their compliance obligations under the new reporting framework created by the Supply Chains Act. A variety of questions and concerns have been raised by companies and their lawyers concerning ambiguities in the Supply Chains Act and the guidance provided by the Department of of Public Safety and Emergency Preparedness. In the face of these legal questions and concerns, public safety officials have stressed the early focus of government efforts on education and awareness-raising, rather than on enforcement of the Supply Chains Act in the early stages of its coming into force.

Disclosure Under Canadian Securities Laws

Mandatory disclosures

Under Canadian securities laws, public companies must disclose all information, including information about environmental and social issues that are material to an investor (ie, information that – if omitted or misstated – would likely influence a reasonable investor's decision to buy, sell or hold a security). The Toronto Stock Exchange (TSX) and TSX Venture Exchange further require that material information is immediately disclosed in accordance with their timely disclosure policies. Other than environmental and social matters determined to be material, a reporting issuer is not required to disclose environmental and social issues in its public disclosures record under securities regulation.

Voluntary disclosures and potential consequences

Companies (including public companies) often choose to report ESG information on a voluntary basis beyond what is required by securities laws, to meet the evolving expectations of stakeholders or to meet the requirements of an industry association or other multi-stakeholder initiative. Where public companies make such voluntary disclosures in relation to social issues, such disclosures are subject to applicable securities laws concerning misrepresentations under the statu-

tory civil liability regime for secondary market disclosures.

Certain industry associations, such as the Mining Association of Canada, require members to report on their corporate social responsibility performance.

2.2.5 Indigenous Rights Legislation

The Canadian Parliament passed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) Act in 2021, requiring government action to ensure laws are consistent with UNDRIP, to implement a plan to achieve UNDRIP's objectives, and to report on progress. Further to this law, in 2023, the Canadian federal government launched the 2023–28 Action Plan (the *"Action Plan"*) to implement UNDRIP.

The Action Plan *"outlines a whole government roadmap for advancing reconciliation with Indigenous Peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change"*. The Action Plan is intended to be a living document that will continue to be developed in consultation with Inuit, Métis, and First Nations communities.

In addition to the federal government, two other Canadian jurisdictions have passed UNDRIP legislation. In 2019, British Columbia became the first jurisdiction in the world to pass legislation incorporating UNDRIP as law through the Declaration on the Rights of Indigenous Peoples Act (the *"BC DRIPA"*).

In 2023, the Northwest Territories enacted UNDRIP legislation with the United Nations Declaration on the Rights of Indigenous Peoples Implementation Act (the *"NWT DRIPA"*).

All three pieces of legislation set out a process approach to developing laws and policies to give effect to UNDRIP principles in domestic law. Canada's relationship with UNDRIP – specifically, its effect on the interpretation of Canadian law – remains an evolving and complex issue. It looks set to continue to develop through legislation and court cases across all Canadian federal, provincial and territorial jurisdictions.

2.2.6 Other

UN Arms Trade Treaty

Canada became a state party to the ATT after enacting legislation to amend the Export and Import Permits Act (SC 2018, c 26) to meet its ATT obligation. Canadian companies engaged in international trade in defence goods or defence technology, either directly or indirectly, are subject to export controls to help protect against the serious adverse human rights impacts of illicit cross-border arms flows.

A core component of Canada's commitment under the ATT is to ensure export permits are not granted where there is *"substantial risk"* that granting the permit will contribute to, among other things:

- a serious violation of international humanitarian law or international human rights law;
- serious acts of gender-based violence; or
- serious acts of violence against women and children.

Where *"substantial risk"* of adverse human rights impacts cannot be mitigated, the Minister of Foreign Affairs must deny the permit application.

Extractive Sector Transparency Measures Act

In 2015, the Extractive Sector Transparency Measures Act (ESTMA) came into force, which creates a regime for mandatory reporting of cer-

tain payments made to governments in Canada and abroad. Its aim is to increase transparency and deter corruption in the oil, gas and mining space. (Quebec has similar legislation – namely, the Act Respecting Transparency Measures in the Mining, Oil and Gas Industries.) Under the ESTMA, all reporting companies are required to report on an annual basis all payments made to governments in Canada and abroad. This legislation is aligned with similar legislation in the EU and the UK.

In June 2024, the federal government passed amendments to the Competition Act to explicitly prohibit deceptive environmental claims (ie, *"greenwashing"*). The Competition Act now includes provisions that require environmental claims to be based on *"adequate and proper tests"*. These amendments underscore a broader concern that the ESG information in sustainability reports may not always be reliable or substantiated.

2.2.7 Soft Law on Business and Human Rights

Responsible Business Conduct Abroad Strategy

As mentioned in **1.1 Business and Human Rights: A Summary** and **2.2.7 Soft Law on Business and Human Rights**, in 2022, Canada introduced the 2022 RBC Strategy. The 2022 RBC Strategy contains measures to support Canadian companies in integrating leading responsible business practices and to position Canada to advance policies and practices within the international responsible business conduct ecosystem.

The 2022 RBC Strategy builds on earlier government strategies, which were then framed as corporate social responsibility initiatives. The stated goal of the 2022 RBC Strategy is to ensure that *"Canadian companies recognise the value of and implement responsible business practices, meeting or exceeding widely recognised international standards, guidelines and frameworks"*.

The 2022 RBC Strategy is based on three pillars:

- building awareness about responsible business conduct and its value to Canadian businesses;
- increasing corporate uptake of due diligence practice and ensuring accountability – this includes facilitating access to remedy and dispute resolution through Canada's Nation Contact Point (NCP) and the CORE (see **4.3 Grievance Mechanisms**); and
- positioning Canada to contribute to the global *"ecosystem"* of responsible business conduct norms.

The 2022 RBC Strategy clearly communicates the Canadian government's expectation for Canadian businesses to not only comply with local laws of the states in which they operate, but to adopt internationally recognised best practices and internationally respected guidelines on responsible business conduct (eg, the UNGPs and the OECD Guidelines).

The 2022 RBC Strategy does not mandate human rights and environmental due diligence and largely takes a voluntary approach to the implementation by Canadian companies of international responsible business conduct (and business and human rights) standards, but it does advance due diligence as a core component of Canada's approach to responsible business conduct. Canadian companies are expected to take steps towards fulfilling due diligence responsibilities in line with the UNGPs. However, much of this framework remains voluntary.

Canada's 2022 RBC Strategy is an example of *"soft law"* that seeks to encourage compliance, not through binding domestic legislation, but by also linking trade-related government advocacy support for companies operating overseas with whether those companies are meeting or exceeding internationally recognised standards such as the UNGPs and the OECD Guidelines. Trade Commissioner Services (TCS), which provides a variety of support for Canadian companies operating in other countries, could be withdrawn where businesses fail *"to comply with Canada's responsible business conduct laws, policies and standards"*.

Responsible Business Conduct Due Diligence Standard

As noted in the 2022 RBC Strategy, the Canadian government is working with the Canadian General Standards Board to develop a Responsible Business Conduct Due Diligence Standard. This standard has not been released and it remains unclear how responsible business conduct due diligence will be defined. It is uncertain whether this new standard will lay out expectations that companies engage in due diligence in relation to a broad range of human rights impacts, consistent with the UNGPs, or if it will be limited to certain violations of human rights such as forced labour and child labour – thereby aligning it with Canada's import ban and supply chain transparency legislation.

Federal Procurement Policy

The Canadian government has taken several steps to incorporate its business and human rights expectations into federal procurement policy.

Canada has implemented procurement-related requirements for suppliers contracting with the Canadian federal government. All clothing and textile suppliers contracting with the federal government are required to self-certify that they, and their direct Canadian and foreign suppliers, conduct their business in accordance with the eight fundamental human and labour rights contained in the ILO conventions binding on member states.

Since the launch of this policy in 2018, all new apparel procurement contracts entered into with the Canadian government include the ethical procurement certification.

The Code of Conduct for Procurement is mandatory for all Canadian government procurements and requires that suppliers not engage in any form of human and labour rights abuses.

The Canadian federal government's central purchaser, Public Services and Procurement Canada (PSPC), includes anti-forced labour clauses in all standing offers and supply arrangements as well as service contracts. Under the anti-forced labour clauses, suppliers must not provide, deliver or sell goods or services to Canada that have been produced wholly or in part by forced labour.

The PSPC is planning to implement in 2025 a departmental policy on ethical procurement, which will form the basis for the PSPC's ethical procurement initiatives, training programmes, and tools for suppliers. A human rights due diligence framework with specific guidance for suppliers is also under development by the PSPC.

Export Credit Agency

The Canadian government has incorporated its business and human rights expectations into the decision-making processes of its export credit agency, Export Development Canada (EDC). EDC has implemented an internal, risk-

based human rights due diligence process when partnering with Canadian companies operating abroad. EDC has a standalone human rights policy supported by its Due Diligence Guideline: Human Rights, which sets out EDC's approach to identifying and addressing the human rights impacts of its customers' operations.

2.2.8 Regulatory Change

Canada has committed to enact further legislation to mitigate and prevent the risk of forced labour and child labour in the global supply chains of Canadian businesses and ensure that Canadian businesses operating abroad do not contribute to human rights abuses and violations.

With a new Liberal government following elections in April 2025, the timing of advancing legislation in this area remains unclear. However, it remains likely that the Canadian government will continue to pursue business and human rights-related legislative initiatives motivated by international and domestic pressures.

3. Corporate Liability

3.1 Criminal and Civil Corporate Liability

Canadian corporations are subject to the federal Criminal Code. There are no specific offences under the Criminal Code for which corporations can be held criminally liable for human rights abuses conducted in foreign jurisdictions. The Criminal Code does not have general extraterritorial application.

Civil claims brought in Canada against corporations for human rights violations committed abroad, particularly when committed by a foreign subsidiary of the Canadian company, have been considered by Canadian courts on a preliminary basis as viable. These new claims for corporate liability, however, remain to be tested on the merits at trial in Canadian courts.

3.2 Director and Officer Liability

There are no specific offences under Canada's Criminal Code for which directors and officers can be held criminally liable for human rights abuses conducted by corporations in foreign jurisdictions. Directors and officers can be held criminally liable as senior officers, alongside the corporation they serve, when they participate in the organisation's commission of or involvement in offences under the Criminal Code.

3.3 Parent Company Liability

Although no transnational human rights cases have yet been decided on the merits, Canadian courts have shown a willingness to permit these cases to proceed to trial. This includes cases seeking to establish liability of a parent company for the actions of a foreign subsidiary by piercing the corporate veil.

The principle that a corporation is a separate legal entity – distinct from shareholders, directors, officers and employees, and distinct from affiliated corporations and subsidiaries of a corporation – is well established in Canadian law and is one of the foundations of Canadian corporate law. As such, a parent corporation cannot generally be held liable for their subsidiaries' activities. Canadian courts will only pierce the corporate veil under very limited circumstances, which are:

- where the corporation is both completely dominated and controlled by the parent and is being used as a shield for fraudulent or improper conduct;

- where the corporation has acted as the authorised agent of its controllers (corporate or human); or
- where a statute or contract requires it.

A plaintiff would need to demonstrate that a parent corporation and its subsidiary are not truly operating as separate corporations in theory and in practice. In rare circumstances, courts may consider piercing the corporate veil to prevent manifest unfairness. Parent companies may also be liable where a senior officer of the parent corporation, along with the foreign-operating subsidiary, is a party to the offence.

4. Enforcement and Litigation

4.1 Enforcement Activities

The three main avenues for state-based enforcement relating to business and human rights in Canada are through:

- Canada's prohibition against the importation of goods mined, manufactured or produced wholly or in part by forced labour (see **2.2.3 Modern Slavery Legislation**);
- the CORE, which has the power to investigate public complaints and to initiate reviews of potential human rights abuses by Canadian companies operating globally - the decision as to whether to initiate a review is guided by criteria established by the CORE, including whether such a review by the CORE is feasible (see **4.3 Grievance Mechanisms**); and
- the Supply Chains Act, which includes penalties for failing to comply with the reporting obligations under the Supply Chains Act and subjects directors to personal liability (see **2.2.4 Transparency and Reporting Requirements**).

To date, there has been limited state-based enforcement relating to business and human rights; however, Canadian enforcement initiatives are expected to continue to develop, particularly in connection with preventing the use of forced labour and child labour in supply chains.

4.2 Case Law

Emerging Canadian case law shows the willingness of Canadian courts to allow claims by foreign plaintiffs to proceed against Canadian parent companies for human rights abuses connected to said companies' international operations (and, specifically, for harms caused by a foreign subsidiary abroad).

Foreign plaintiffs seeking to hold Canadian companies responsible for the actions of their foreign subsidiaries have generally proceeded along two paths:

- *"piercing"* the corporate veil to advance claims that the Canadian parent company is responsible for alleged human rights abuses caused by a foreign subsidiary; or
- arguing that the Canadian parent owes a duty of care directly to foreign plaintiffs for alleged human rights abuses committed by its foreign subsidiary.

Four main cases have been brought against Canadian companies by foreign litigants alleging that the company is directly or indirectly responsible and liable for human rights abuses committed in foreign jurisdictions. To date, no cases have proceeded to trial on the merits, as the case was either dismissed by the court or – more frequently – the parties settled prior proceeding to trial. The four main cases are:

- Araya Eritrean et al v Nevsun Resources;
- Choc v Hudbay Minerals Inc et al;

- Garcia v Tahoe Resources Inc (settled in 2020 after company's motion to strike failed at the BC Supreme Court and the BC Court of Appeal); and
- Das v Weston (Rana Plaza Disaster and Loblaws) (suit dismissed after motion to strike successful at the Ontario Superior Court and the Ontario Court of Appeal).

The decisions in Araya Eritrean et al v Nevsun Resources and Choc v Hudbay Minerals Inc et al open Canadian corporations operating overseas, including through foreign subsidiaries, to potential new types of corporate civil liability claims for human rights violations committed overseas. As none of the cases have proceeded to trial, there is no case law assessing the scope and potential for liability arising from such claims, including the extent to which a Canadian company may be liable in its oversight of the operations of foreign subsidiaries.

Araya Eritrean et al v Nevsun Resources

In Araya Eritrean et al v Nevsun Resources Ltd, workers filed a claim before the BC Supreme Court against the parent company of a foreign subsidiary in Eritrea seeking damages for private law torts and alleged violations of customary international law prohibitions against slavery, forced labour, torture, and crimes against humanity in connection with a mining operation in Eritrea. After Nevsun Resources Ltd unsuccessfully moved in the BC courts to strike the plaintiffs' customary international law claims, certain issues were appealed to the Supreme Court of Canada, including whether the plaintiffs' claims for breach of customary international law should go to trial.

In a 5-4 decision, the Supreme Court of Canada ruled as follows.

- The novel claims for breach of customary international law norms brought by the alleged victims disclosed a reasonable cause of action and could proceed against the Canadian parent company for its complicity in the abuses.
- It was not *"plain and obvious"* that a civil action seeking to hold Canadian companies liable for violations of customary international law committed outside Canada would fail.
- Both majority and dissenting judges agreed that certain norms of customary international law prohibit specific conduct, regardless of whether the perpetrator is a state or private actor.

The plaintiffs reached an out-of-court settlement with Nevsun Resources Ltd in October 2020.

Choc v Hudbay Minerals Inc et al

In the 2013 decision of Choc v Hudbay Minerals Inc et al, Hudbay unsuccessfully applied to strike the claims brought by a group of indigenous peoples from Guatemala for alleged human rights abuses at a Guatemalan mining project owned through Compania Guatemalteca De Niquel (CGN), its Guatemalan subsidiary. Choc v Hudbay Minerals Inc et al involved three related actions that were consolidated into one claim before the courts in Ontario.

The plaintiffs advanced two main grounds for the claims – namely, that the parent company, Hudbay:

- was negligent in failing to prevent the harm that the security personnel committed at the mine in Guatemala – Hudbay owed a direct duty of care to the plaintiffs; and
- was liable for the torts committed by the foreign subsidiary's employees or agents.

Hudbay sought to strike the claims, including on the basis that the claims improperly relied on *"piercing the corporate veil"* or ignoring the separate corporate personalities of Hudbay (a Canadian corporation) and CGN. The court concluded that it was not *"plain and obvious"* that the claims made would fail at trial.

Duty of care

According to the court, the plaintiffs had pled all the material facts that – if proven at trial – would establish a novel duty of care. The harm was a reasonably foreseeable consequence of the defendants' conduct and there was a sufficiently proximate relationship between Hudbay and the plaintiffs. Although novel, it was not *"plain and obvious"* that a prima facie, duty of care could not be made out.

Piercing the corporate veil

In response to the claim that the corporate veil should be pierced to impose liability on Hudbay for the torts committed by CGN's employees or agents, the court found that the plaintiffs had pled the required elements of the agency exception to the rule of separate legal personality. It was not *"plain and obvious"* that a claim requiring an agency relationship to have existed between a parent company and its foreign subsidiary at the relevant time would fail if it proceeded to trial.

In the autumn of 2024, parties to the Hudbay action settled the case.

4.3 Grievance Mechanisms

In Canada, there are two state-based, non-judicial dispute resolution mechanisms through which business-related human rights complaints can be made.

OECD National Contact Point

As an adherent to the OECD Declaration on International Investment and Multinational Enterprises and to the OECD Guidelines, Canada maintains an NCP for responsible business conduct.

In addition to being responsible for promoting the adoption by Canadian companies of the OECD Guidelines, the NCP also provides a voluntary, non-judicial process to help resolve disputes concerning implementation of the OECD Guidelines by multinational enterprises operating in or from Canada. The NCP can review and help contribute to the resolution of complaints made against multinational enterprises operating in or from Canada in any economic sector.

Complaints can be related to observance of any of the guidance outlined in the OECD Guidelines' 11 chapters (including chapters dealing with disclosure, labour, human rights, bribery and the environment), whether abroad or in Canada.

The Canadian NCP:

- does not render rulings on guilt or determine damages but rather provides a mediated path to achieve resolution – when companies do not engage with the NCP's process *"in good faith"*, the NCP can impose trade measures, including withdrawing government trade advocacy support and recommending that the EDC deny future financial support; and
- does not have the power to launch investigations or to make public the findings of the matters undertaken.

Canadian Ombudsperson for Responsible Enterprise

The Canadian government announced the creation of the CORE in January 2018 to supplement

the Canadian NCP. The CORE became operational in 2021.

The CORE's mandate is to:

- promote and advise Canadian companies on their practices and policies with regard to responsible business conduct;
- mediate disputes and conduct investigations of human rights abuses associated with Canadian corporations operating abroad in the mining, oil and gas and garment sectors; and
- make recommendations for resolving dispute and providing remedy and for monitoring the implementation of recommendations.

The CORE functions within Canada's broader responsible business conduct framework, as reflected also in the 2022 RBC Strategy. The scope of the CORE is currently limited to the mining, oil and gas, and garment sectors.

The CORE's mandate specifies two types of reviews: complaint-initiated reviews and Ombud-initiated reviews. Both types of reviews require all parties to act in good faith, respect the confidentiality of the process, personal and business information, and refrain from providing false information. The CORE may consider a party to not be acting in good faith if the party is not actively participating in the process and fails to provide relevant information and documents within the timelines established by the Ombudsperson.

Following a review, the CORE may publicly report the results of its findings and make recommendations to the Minister of International Trade, which may include the imposition of trade measures against the company in question – for example, withdrawal of trade advocacy services provided to the Canadian company by the Department of Foreign Affairs, Trade and Development.

CORE's mandate currently under review

In response to a recommendation from the House of Commons Standing Committee on International Trade contained in a September 2023 report, *"Canadian Mining and Mineral Exploration Firms Operating Abroad: Impact of the Natural Environment and Human Rights"*, in 2024 the Canadian government undertook to commence a review of the operations and effectiveness of the CORE over a six-month period.

The interim CORE's mandate expired in April 2024 and the post is currently vacant.

5. Business and Human Rights in Action

5.1 Best Practices

Canadian Government's Business and Human Rights Policy Expectations

The Canadian government has in place responsible business conduct expectations for Canadian companies operating globally to integrate responsible business practices throughout their operations, including international supply chains. These expectations are set out in the 2022 RBC Strategy, which emphasises the central importance of effective human rights due diligence for businesses in identifying, preventing and mitigating – as well as accounting for how they address – actual and potential adverse impacts of their business operations and global supply chains. Businesses are expected to adopt and implement human rights due diligence processes in their operations in line with international standards, including the UNGPs.

Industry Association Business and Human Rights Expectations of Members

Industry associations such as the Mining Association of Canada (MAC) and the Prospectors and Developers Association of Canada (PDAC) have developed industry-wide responsible business conduct policies, as follows.

- The PDAC developed *"e3"*, a framework for responsible exploration. This comprehensive resource is aimed at helping exploration companies improve their social, environmental and health and safety performance.
- The MAC produced the Towards Sustainable Mining (TSM) initiative to promote social, economic and environmental best practices among its members. All member companies of MAC are required to endorse the TSM Guiding Principles and commit to reporting on TSM performance elements.

Trends and Developments

Contributed by:
Claudia Feldkamp and Chris Pigott
Fasken

Fasken has a business and human rights (BHR) practice that has been at the forefront of the evolving BHR landscape since the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. As one of the largest law firms in Canada with an international reach, Fasken has adeptly navigated the complexities of BHR, leveraging expertise from various leading practice groups including labour, employment and human rights, corporate social responsibility, and others. Despite the challenges posed by competing ideologies and political headwinds, Fasken remains at the forefront of BHR law and is committed to providing exceptional counsel and advice. Recognised by Chambers Canada as the only law firm in Band 1 of BHR law, Fasken continues to lead in the BHR field, ensuring clients are well-informed and compliant with emerging standards and legal requirements. This dedication positions the firm as a trusted adviser in the dynamic BHR landscape.

Authors

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The Business and Human Rights Landscape in Canada: Evolution in an Age of Uncertainty

Like most nations in the global community, Canada is experiencing the uncertainty and vulnerability brought forth by recent significant geopolitical and geoeconomic shifts, which have also fundamentally changed its political and social discourse domestically. The influences of these shifts were reflected in the most recent federal election in Canada, held on 28 April 2025. A Liberal Party that had been governing for ten years overcame a seemingly insurmountable unpopularity compared to a front-running Conservative Party to form a Liberal minority government (again). Largely seen as motivated by negative sentiment towards Trump administration 2.0's priorities and actions, and as a referendum on which party leader was best able to deal the threats of an uncertain world, Prime Minister Mark Carney and his new government will now face enormous challenges.

Economic fears of looming recession propelled by inflation, tariffs, supply-chain disruption and global investment uncertainty are testing, if not the commitment, then the pace of progress toward a sustainable economy. These domestic and international concerns will have implications for the ongoing evolution of business and human rights in Canada.

Canada's historical approach to business and human rights (and corporate social responsibility)

Canada's approach to business and human rights has always been heavily influenced by international developments, the activities of its strategic trading partners, and the evolving expectations of stakeholders and the Canadian public.

Canada's legal framework is also continuously evolving as a mix of law and policy, with increasing pressure to pursue legislative initiatives to promote supply chain transparency and due diligence to mitigate and prevent the risk of the use of forced labour and child labour in supply chains. At the same time, growing demands for the imposition and enforcement of import bans in order to combat forced labour in the making of goods are underscoring the imperative of human rights due diligence for businesses.

Canada was considered an early mover in corporate social responsibility (CSR), proceeding first with *"soft law"* initiatives – largely focused on Canada's extractive sector – that required Canadian companies to respect human rights abroad. The government's first CSR strategy was launched in 2009 and replaced in 2014 with an *"enhanced"* CSR strategy, entitled *"Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Mining Sector Abroad"*. Between these iterations of government strategy, the United Nations (UN) Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (the *"UNGPS"*) as a foundational transformation in the expectations on international business. After this early *"soft law"* progress, Canada was seen as lagging behind other jurisdictions (including the EU) in pursuing *"hard law"* legislative initiatives, particularly those related to addressing forced labour in global supply chains.

And now, most recently, the Canadian government has passed its first legislation in this area, with the coming into force of the Fighting Against Forced Labour and Child Labour in Supply Chains Act. The Canadian government has also committed to introducing mandatory human rights due diligence legislation modelled on similar legislation in other jurisdictions, including the EU.

Canada's approach to business and human rights moving forward

The coming into force of Canada's supply chain transparency legislation, as well as the promise of still more legislation targeting supply chains, appear to mark a shift towards the implementation of domestic legislation to support Canada meeting its obligations under the UNGPs, in line with global developments. This move was foreshadowed by the current, overarching federal government strategy for responsible business conduct, entitled *"Responsible Business Conduct Abroad: Canada's strategy for the Future"*, which centres due diligence in Canada's approach to responsible business enterprise and commits the government to enacting legislation to *"…eradicate forced labour from Canadian supply chains and ensure that Canadian businesses operating abroad do not contribute to human rights abuses"*.

With a newly elected minority Liberal government, the progress of certain business and human rights initiatives (including legislative initiatives) is again uncertain and now against a backdrop of shifting political and geopolitical winds and increased emphasis on enhancing Canadian economic competitiveness, national security, and sovereignty. Canada will continue to be strongly influenced by its strategic partners, including the EU. International trading dynamics will influence developments in the enforcement of Canada's import ban on goods manufactured in whole or part using forced labour, consistent with its obligations under the Canada-United States-Mexico Agreement (CUSMA).

Specific areas of government focus in the ongoing evolution of business and human rights in Canada

Mandatory human rights due diligence

The newly elected federal government will continue to consider the implementation of mandatory human rights due diligence legislation, strongly influenced by the EU and particularly the EU Corporate Sustainability Due Diligence Directive (CSDDD). With the EU possibly pulling back on its expectations on businesses under the CSDDD through the EC's Omnibus Simplification Package, Canada's progress may slow as it also considers the final EU approach taken.

In the absence of forward progress by the Canadian government in the near-to-mid term, mandatory human rights due diligence legislation may be advanced by way of a Senate public bill or a private members' bill in the House of Commons. During the past several years, there have been several attempts to advance business and human rights-related legislative initiatives through Senate and private members' bills in the House of Commons. A Senate public bill can successfully become law – as demonstrated recently with Canada's supply chain transparency legislation, which started as a Senate public bill and ultimately obtained Royal Assent, coming into force on 1 January 2024.

Such legislative initiatives can act as an impetus for the government to move forward more quickly with its own legislative initiative, particularly where there is sufficient political support and pressure from the stakeholder community. A key feature of business and human rights has been the coalescence of a broad range of stakeholders around business and human rights principles.

Measures to strengthen enforcement of import ban

With the impending CUSMA negotiations and informed by the recent 2024 consultations undertaken by the Canadian government on Canada's import ban, there will be pressure on Canada to follow through with measures to strengthen its ban on imports of goods manufactured in whole or in part using forced labour. One of the measures under consideration is the implementation of a reverse onus on the importer regarding *"goods at risk"* for forced labour; this would require the importer to rebut the presumption that the *"goods at risk"* were made using forced labour. Such a rebuttable presumption would likely be modelled on the US precedent under the Uyghur Forced Labor Prevention Act and would significantly expand Canada's forced labour regime and the due diligence and supply chain traceability requirements for businesses.

Canada may also be influenced by the import ban in the EU. EU Regulation 2024/3015, which will be applicable as of 14 December 2027, prohibits economic operators from placing or making available on the EU market – or exporting from it – any products made using forced labour. Although the EC will establish a database on forced labour to identify risks based on specific geographic areas or with regard to specific products or product groups, the EU regulation does not create a reverse onus for *"goods at risk"* based on country of origin or nature of the goods. Of note, the EU regulation encourages co-operation with other countries, which remains critical to addressing forced labour in complex supply chains and may help mitigate against jurisdictional divergence on compliance and enforcement.

As Canada considers measures to strengthen its import ban and step up enforcement, there will be increased pressure on businesses that have not already done so to undertake and document due diligence in relation to forced labour and child labour, in line with the expectations of the UNGPs – even in the absence of mandatory human rights due diligence legislation in Canada.

Federal procurement policy

Government procurement policy is another avenue Canada is increasingly using to encourage businesses to embed human rights due diligence in business practices. The Canadian federal government's central purchaser, Public Services and Procurement Canada (PSPC), has taken several steps to embed human rights expectations on its

suppliers into its agreements, including standing offers and supply arrangements and service contracts.

To further embed human rights expectations into its procurement policies and processes in a more comprehensive and consistent manner, the PSPC is planning to implement in 2025 a departmental policy on ethical procurement. This will form the basis for the PSPC's ethical procurement initiatives, training programmes, and tools for suppliers. A human rights due diligence framework with specific guidance for suppliers is also under development by PSPC.

Canadian Ombudsperson for Responsible Enterprise (CORE)

The CORE, as an example of a state-based non-judicial mechanism, has been both promoted both as a source of timely and effective resolution and remedy and criticised for failing to live up to its stated promise.

The third pillar of the UNGPs provides that there must be effective remedies for business-related human rights harms, consistent with international human rights law. The UNGPs contemplate a landscape of state-based, judicial and non-judicial processes forming the foundation of a wider system of remedy that also includes non-State-based company and multi-stakeholder grievance mechanisms.

When the CORE was first announced in 2018, replacing the previous CSR counsellor, it was advanced as an important forum for the mediation and resolution of disputes related to allegations of human rights abuses brought against Canadian companies operating globally, consistent with the expectations of the UNGPs. The CORE was designed to provide effective and timely remedy, be less costly and time-consuming than judicial processes, and be capable of crafting more tailored appropriate remedies beyond simply ordering the payment of monetary damages.

From the outset, there was controversy focused largely on the powers of the CORE but also on its scope. Does the CORE – as a state-based, non-judicial mechanism – require the power to compel documents and witnesses to fulfil its mandate to address allegations of human rights abuses brought against Canadian companies operating globally? A 2021 report on the CORE's mandate by the Standing Committee on Foreign Affairs and International Development recommended that the Canadian government appoint the CORE as a commissioner pursuant to Part I of Canada's Inquiries Act, with the appointment remaining in place until legislation endowing the CORE with the power to compel witnesses and documents has been adopted by the Canadian Parliament.

While there have been persistent calls for enhancing the powers of the CORE, others have cautioned that these powers will be accompanied by more complex procedural protections – making the process more adversarial, lengthier and costlier and, in effect, reducing the CORE's capacity to operate as an accessible and cost-effective non-judicial mechanism for remedy.

The second, persisting question is when (and how) the scope of the CORE will be expanded. When first established, the CORE was limited to the oil and gas, extractive and garment industries – with an undertaking from the Canadian government to extend the scope to other sectors after the first year of operation. To date, this expansion has not occurred.

The CORE post is now vacant while the Canadian government completes a review of the CORE's mandate. The results of this review are anticipated in 2025 and will provide stakeholders with a better sense of the Canadian government's approach to non-judicial remedy going forward.

State-based judicial remedy

The right to an effective remedy for victims of human rights abuses is a fundamental human right that is enshrined in core human rights treaties ratified by Canada. In this context, there has been an ongoing question as to the role of Canadian courts in considering judicially corporate civil liability claims related to human rights abuses committed outside Canada by foreign actors, including the foreign subsidiaries of Canadian companies.

Canadian courts have opened the door to such claims and these decisions – albeit preliminary decisions with a low bar for proceeding to trial – have changed the landscape of potential liability for Canadian companies with operations overseas. These cases have also highlighted the importance of taking seriously the corporate obligation to respect human rights as delineated and operationalised by the UNGPs. It remains to be seen the extent to which Canadian courts are willing to extend corporate liability to international business activities.

Outlook

Internationally, the increase in business and human rights-related regulation has led to a period of *"blow back"*, owing to perceived risks to the competitiveness of businesses that are navigating uncertain trading and geoeconomic forces. Still, belief in the imperatives of sustainability and enduring international commitments to business and human rights remains strong in Canada and globally. It is unlikely that the concrete, intersecting business and human rights-related initiatives currently in play in Canada, the EU and elsewhere will be abandoned.

International trading pressures may possibly also serve as a driver of human rights due diligence, even if there is some loss of momentum in the near term with regard to legislative initiatives requiring mandatory human rights due diligence. The anticipated increase in enforcement of Canada's import ban on goods from forced and child labour will require businesses to more proactively manage their exposure to human rights due diligence investigations and compliance.

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