Human Rights Due Diligence: Recommendations for a Canadian Approach

Research Paper #55

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August 2018

This research paper (#55) is the third part of a three-part series on human rights due diligence (HRDD). The first two research papers that are part of this series provide an overview and comparison of the various international principles and guidelines that refer to, or recommend for, human rights due diligence (Research Paper #53 - Human Rights Due Diligence: International Instruments) and a comparative analysis of national pieces of legislation that mandate transparency or due diligence within company operations (Research Paper #54 – Human Rights Due Diligence: Legislative Scan).

Introduction

As the international community begins translating international norms of business and human rights into domestic law, various models for a Canadian approach have emerged.

These fall into two broad categories: reporting and transparency, and mandatory due diligence. Both build on international instruments such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines), to which Canada and all OECD countries adhere. These are in turn based on the human rights recognized, at a minimum, by the International Bill of Human Rights and the International Labour Organization's Declaration of Fundamental Rights at Work.

International law has consistently confirmed that responsible business conduct is a corporate obligation. The general role of these new domestic laws is to stimulate companies to take responsibility for the respect of human rights throughout their international operations and supply chains, regardless of where the company is domiciled or the regulatory context of the countries in which it does business. The specific role of each domestic law is determined by its legislative approach: reporting or due diligence.

These domestic laws exist on a spectrum: at one end, strong laws that mandate companies to develop and implement due diligence plans across their supply chains; at the other end are weaker laws that essentially provide a statutory endorsement to corporate social responsibility programs, often without enforcement. Most recent legislation falls on the weaker end of the spectrum.

As the Canadian government undertakes a study on child labour and modern slavery at the subcommittee level, actively considers the role of responsible business conduct in public procurement, undertakes a review of Export Development Canada's environmental and social risk management policies and faces increasing pressure from civil society organizations to introduce some form of supply chain transparency or due diligence legislation, there is an opportunity to combine these issues in a

comprehensive legislation in order to adopt a strong, progressive regime of human rights protection.

Due diligence is envisioned at the highest level by the UNGPs as the risk-based measures taken to identify, prevent, mitigate and account for the business-related impact on human rights. The OECD Due Diligence Guidance for Responsible Business Conduct (RBC) describes due diligence as a six-stage-process: embed RBC in policies and risk management systems; identify actual and potential adverse impacts in operations, supply chains and business relationships; cease, prevent or mitigate adverse impacts the enterprise may cause or contribute to; track implementation and results; communicate how the impacts were addressed; enable remediation where appropriate. Thus, mandatory reporting provisions and human rights impact assessments should be seen as integral, but ultimately partial, actions in a deeper process that is ongoing, iterative, proactive and reactive. This process involves strong participation and input from various stakeholders, including workers and their representatives, particularly trade unions, in both home and host states.

This paper outlines the best practices, drawn from recent legislative examples around the world, for a legislative and regulatory regime that adheres most closely to international principles that have been affirmed by Canada through the adoption of various international laws. By closing the governance gaps created by globalization, the translation of these soft laws into binding domestic legislation would amount to the next and necessary step on the path to fulfilling the state duty to protect human rights.

Three areas are covered: human rights due diligence, remedy, and the state-business nexus. For each, the Canadian context, international instruments and domestic best practices follow.

Human rights due diligence

INTERNATIONAL INSTRUMENTS. Under the UNGPs and OECD Guidelines, due diligence obligations apply to all enterprises, regardless of size or position in the supply chain, ownership structure, sector or risk level, although the scope of due diligence can vary according to capacity and activity. These obligations extend beyond direct operations and first-tier suppliers. The due diligence process should be understood as a series of steps in a coherent whole, and reaffirms the nature of human rights as indivisible. Stakeholder engagement is predicted throughout the process.

DOMESTIC BEST PRACTICES. All states that have adopted a due diligence law to date have limited its scope to companies that meet a threshold for sales, revenue or employees. France has passed legislation and Switzerland is considering legislation that require large companies to undertake due diligence as envisioned by the UNGPs.

Both laws are considered an obligation of means and not results, meaning companies are in compliance when they implement fulsome due diligence plans, thus creating a new corporate standard of care. Demonstrated adequate due diligence would be seen as an effective defence against liability. In France, this is known as the vigilance plan, and must include “reasonable measures” to identify and prevent risks associated with severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage, resulting directly or indirectly from a company’s operations, main suppliers or subcontractors.

Other states (UK, California, Australia) have passed laws with reporting requirements alone, though these are seen as far less effective in the attempt to eradicate corporate human rights abuses, and raise questions about compliance and enforcement. The UK, California and Australia laws address only modern slavery. The Netherlands, while incorporating due diligence, addresses only child labour.

CANADIAN CONTEXT. The Canadian government is an adherent to the OECD Guidelines and is a member of the ILO and the United Nations. Canada is party to seven core international human rights treaties and has ratified all eight fundamental conventions of the ILO. Canada attended the 2015 G7 summit at which leaders pledged to strive for the better application of internationally recognized standards, singling out the UNGPs, and urged private sector implementation of due diligence. A similar sentiment was repeated at the G20 in 2017. Canada has adopted the UN 2030 Agenda for Sustainable Development, which includes Decent Work, and in particular SDG 8.7, the eradication of forced labour, child labour, modern slavery and human trafficking.

Still, Canadian companies face no mandatory rules or regulations regarding human rights due diligence or transparency in supply chains. A questionnaire drafted by the CLC and sent by email directly to the top 100 Canadian companies in the extraction, retail, food, and information technology sectors requesting information on voluntary corporate social responsibility practices elicited just three responses, one from a major food distributor and two from the extractive sector. Although all three indicated that they have robust due diligence practices, citing the main international frameworks, the low response rate indicates the serious enforcement problems inherent in voluntary transparency laws.

Remedy

INTERNATIONAL INSTRUMENTS. The UNGPs suggest that without enforcement, domestic laws are rendered weak and even meaningless. States must take steps to investigate, punish and redress human rights abuses under their jurisdiction, whether through

judicial, administrative, legislative, or other appropriate means. States must reduce barriers to remedy, including in situations where a claimant faces the denial of justice in a host state and cannot access home state courts, regardless of the merits of the case, as often happens under current interpretations of international private law.

The UNGPs make clear that under international law, states are not *required* to regulate the overseas activity of companies domiciled in their territory or jurisdiction, but *are not prevented from* doing so. No international instrument itself creates liability regimes; this remains the domain of individual states.

Companies must avoid causing or contributing to human rights harms through their own activities, and must address such impacts when they occur. If human rights harms are directly linked to a company's operations, products, services through business relationships, that company should seek to prevent or mitigate such impacts using leverage. These are the general parameters for remedy set out in the OECD Guidelines.

Remedy can be sought outside of legal or judicial recourse via adjudicative or dialogue-based processes, such operational-level grievance mechanisms or the OECD National Contact Point (NCP). The NCP is explicitly extraterritorial in scope and is envisioned to provide a source of conciliation for any individual or organization, regardless of the headquartered location of the enterprise concerned. As indicated below, serious shortcomings of Canada's NCP, including its failure to facilitate remedy to victims of human rights abuses, has been identified by both Canadian CSOs and trade unions, as well as by international bodies.

DOMESTIC BEST PRACTICES. In French and Swiss legislation, due diligence creates a new standard of care to inform civil liability. A Swiss law under consideration requires large Swiss companies to carry out due diligence, take effective measures, and publicly report on the measures taken. Controlled companies and third parties in business relationships must be included in the due diligence process. The proposed Swiss law, which applies only to the most severe impacts on human rights, would create a form of reverse liability in which the burden of proof is applied to the business entity, not the complainant, to show it had taken "all due care" to prevent harm. Liability is limited to legally controlled subsidiaries abroad if they cause damage to life, limb or property. Remedy may also include measures such as apologies and reimbursement. Finally, the Swiss Code of Obligations already contains a provision that victims of human rights abuses in which a Swiss company is implicated can seek redress in Swiss courts.

In France, the vigilance plan must be drafted in collaboration with stakeholders, including workers and their representatives. An operational-level grievance mechanism must be developed in partnership with relevant trade unions. Victims harmed outside France are also empowered to apply for remedy in French court, and any third party

with a “legitimate interest,” including trade unions, can request a legal injunction against a company failing to report its vigilance plan as required. A causal link between a human rights harm and insufficient due diligence can result in liability. The French Constitutional Council confirmed the importance of civil liability principles and the ability to apply them worldwide without being inhibited by the corporate veil of opaque and complex corporate structures.

CANADIAN CONTEXT. Canada’s NCP is a committee of seven departments, chaired by Global Affairs Canada, and serves as the non-judicial forum for remedy at the heart of the OECD Guidelines. Canada also recently announced the creation of an office of an independent Ombudsperson for Responsible Enterprise, which is expected to receive a mandate this year. The NCP is perceived as less than independent due to its location in a trade ministry and its lack of external oversight or advisory bodies. The UN Working Group on the Issue of Human Rights recently recommended increased efficacy and independence of the NCP and its clear differentiation from the incoming ombudsperson. The NCP has been criticized by civil society actors for consistently failing to provide effective remedy, in part due to its lack of statutory powers.

In Canada, at least one court has accepted the concept of “direct liability,” which requires proof a parent company had assumed direct control over a subsidiary and was therefore liable for the actions of the subsidiary, and that case (*Choc v. Hudbay Minerals*) was allowed to proceed in Ontario on its merits. However, eight claims containing allegations of environmental or human rights abuses have been filed in Canadian courts but to date, no foreign plaintiff has been successful in a claim against a Canadian company. The main challenges faced by complainants include complex and opaque corporate structures and Canadian courts’ refusal to accept jurisdiction for overseas harms.

State-business nexus

INTERNATIONAL INSTRUMENTS. Under the UNGPs, states do not relinquish their obligations when they privatize services or conduct commercial transactions, such as through sub-contracting or procurement. The OECD Guidelines cover all forms of ownership, whether private, state, or mixed.

DOMESTIC BEST PRACTICES. Although the UNGPs and OECD Guidelines are clear that government-run enterprises are subject to the same rules and considerations, almost no domestic law addressing human rights, modern slavery or child labour explicitly include procurement, export credit or trade agreements. Possibly this is because European countries are already bound by other rules, such as the OECD Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, and the UN directive on public procurement. In France, an executive decree

governing contracting authorities mandates contract holders observe the labour laws in the countries in which workers are hired, or observe the eight fundamental ILO conventions where the former does not exist. The same principle holds in Swiss procurement law.

The Australian law, if it passes without amendments, will include the Commonwealth of Australia as an entity subject to the new rules when state-associated enterprises meet the revenue threshold. In the UK, an amendment to the 2015 Modern Slavery Act may broaden the provisions of that law to include public bodies, and would ban enterprises that failed to produce their modern slavery statement from winning any contracts with local, regional or state authorities.

CANADIAN CONTEXT. The Canadian government is actively considering the role of responsible business conduct in procurement and, separately, undertaking a review of Export Development Canada's environmental and social risk management policies. These policies have been criticized as minimal and vague, and for failing to screen out companies that have caused serious harms. Canada's federal procurement policy does not include due diligence.

Recommendations for a Canadian approach

Canada should introduce supply chain due diligence legislation that explicitly builds on the UNGPs and OECD Guidelines. Such legislation should:

- be mandatory, specific, require regular reporting on outcome and not just effort, cover the supply chain beyond first-tier suppliers and contractors, be enforceable, include penalties for non-compliance, and include provisions for extraterritorial remedy at judicial and non-judicial level;
- introduce a new duty of care standard that can be applied to civil liability claims;
- address all human rights including, at a minimum, those espoused in the International Bill of Rights and ILO's eight fundamental conventions;
- include government procurement and subcontracting;
- align with the OECD Common Approaches;
- require stakeholder engagement throughout the entire due diligence process, especially the operational-level grievance mechanism; and
- set a reasonable threshold for applicability, capturing the majority of large companies domiciled in Canada.

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