

## STUDY OUTLINE: METHODOLOGY AND FINDINGS

October 23, 2022 – Extracted with slight revisions from Angie Redecopp, *The Role of Law in Corporate Human Rights Due Diligence*, Ph.D. diss., Manchester, University of Salford, 2021. A copy of the PhD dissertation can be requested from [info@impactbusinesslaw.com](mailto:info@impactbusinesslaw.com).

This is part of a series of articles that include an outline of the PhD dissertation, conclusions on why corporate self-governance, ESG mainstreaming, and industry associations are not enough to carry out the new narrative, and finally, conclusions on the essential role of Canadian lawmakers and specific recommendations for Canadian lawmakers in advancing this narrative.

**Our new narrative requires us to start from the perspective of the entire global value chain and work backwards from that.** Learn more about the series [here](#).

### Introduction

The overall aim of this research is to better understand the relationship between law and the decisions that multinational companies (MNCs) make about efforts to protect recognized core international human rights. This is achieved through case studies of Canadian MNCs where we engage in interviews and document review to look deeply at how various types of written laws, both formal and informal, serve to influence MNCs on their human rights due diligence (HRDD) commitments.

While the positive momentum on both corporate social responsibility (CSR) and human rights is encouraging, respecting core rights continues to be a significant challenge for many Canadian MNCs, spanning several industry sectors. The extractives industry is of particular concern for Canada, as are construction, consumer products, and food sectors. There is often a significant relational distance between Canadian head offices and the entity or operations engaging in human rights violations, as the Canadian court found in dismissing the claims against George Weston Limited.<sup>1</sup> Of note, at least two of the factories in the Rana Plaza complex had passed social audits by Business Social Compliance Initiative, a partner to many Canadian MNCs on their HRDD efforts in global supply chains.<sup>2</sup> In another example, Canadian Tahoe Resources, conducting mining activities through a subsidiary in Guatemala, was sued by Guatemalan plaintiffs who allege they were shot by security personnel during a protest at a mine owned by the Guatemalan subsidiary.<sup>3</sup> This case is still proceeding was settled following an acquisition of Tahoe Resources by Pan American.<sup>4</sup>

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<sup>1</sup> *Das v George Weston Limited*, 2017 ONSC 4129 [455]-[458].

<sup>2</sup> Jolyon Ford and Justice Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: the Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) Australian Journal of Human Rights 27.

<sup>3</sup> *Garcia v Tahoe Resources Inc*, 2017 BCCA 39.

<sup>4</sup> Gabriel Friedman, 'Big Win for Foreign Plaintiffs as Pan American Settles Guatemala Mine Case' (Financial Post, 31 July 2019) < <https://financialpost.com/commodities/mining/big-win-for-foreign-plaintiffs-as-pan-american-settles-guatemala-mine-case> > accessed December 23, 2021.

Looking at forced labour and child labour as two core labour rights identified in the International Labour Organization (ILO) Declaration, in 2016 there were an estimated 40.3 million slaves worldwide, 62% of them in forced labour.<sup>5</sup> The 21<sup>st</sup> century has seen the highest recorded number of slaves in history. In addition, the ILO and others further estimate that an average of about 152 million children are subject to child labour.<sup>6</sup> Supply chains today are increasingly global and outsourced, increasing the likelihood of slave labour being present in most industries, from 'electronics, high-tech, automotive and steel to agriculture, seafood, mining, garment and textiles'.<sup>7</sup> In 2014, the ILO estimated that forced labour in the private economy generates US\$150 billion in illegal profits per year.<sup>8</sup> The United States Department of Labor maintains a list of goods, and their source countries, which it has reason to believe are produced by child labour or forced labour. The 2018 list comprised 148 goods from 76 countries.<sup>9</sup> World Vision Canada studied 50 common goods from an earlier list and cross-referenced them against publicly available import databases and found that over 1,200 companies operating in Canada imported goods at risk of being produced by child labour or forced labour in 2015, representing approximately \$34 billion (CAD) in imported goods.<sup>10</sup> Slavery is one example of human rights violations in the globalized workplace, with unsafe working conditions, sub-standard pay, assault and other potential violations set out in international instruments that will be discussed in this study.

Human rights compliance continues to be an issue for Canadian MNCs. Industries at risk for human rights violations operate based on supply and demand, as do all industries. Some contend that if there is demand for cheap products and the raw materials that often result from slavery-riddled manual labour jobs, inadequate safety standards, or other human rights violations, then unchecked, it becomes profitable and desirable to permit human rights violations to occur to maximize their profit gains.<sup>11</sup> With the onset of global production and global markets, and outsourcing specifically, Canadian corporations can be unaware of the specific on-the-ground human rights violations taking place at their second or third-tier or even further removed suppliers or subcontractors. Outsourcing and subcontracting have not come

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<sup>5</sup> International Labour Organization (ILO) and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (ILO and Walk Free Foundation 19 September 2017) 21.

<sup>6</sup> ILO, *Global Estimates of Child Labour: Results and Trends, 2012-2016* (ILO 19 September 2017) 23.

<sup>7</sup> Stefan Gold, Alexander Trautrim and Zoe Trodd, 'Modern Slavery Challenges to Supply Chain Management' (2015) 20 *Supply Chain Management: An International Journal* 485, 486.

<sup>8</sup> ILO, *Profits and Poverty: The Economics of Forced Labour* (ILO 20 May 2014) 13.

<sup>9</sup> United States Department of Labor (Bureau of International Labour Affairs), '2018 List of Goods Produced by Child Labour or Forced Labor' (2018) 8.

<sup>10</sup> World Vision Canada, 'Supply Chain Risk Report' (2016) <[https://www.worldvision.ca/getattachment/No-Child-For-Sale/Resources/Supply-Chain-Risk/Risk-report-Child-and-forced-labour-report\\_jun-08.pdf.aspx?lang=en-CA](https://www.worldvision.ca/getattachment/No-Child-For-Sale/Resources/Supply-Chain-Risk/Risk-report-Child-and-forced-labour-report_jun-08.pdf.aspx?lang=en-CA)> accessed 23 December 2021.

<sup>11</sup> Siddharth Kara, 'Supply and Demand' (2001) 33(2) *Harvard International Review* 66.

about by happenstance though. These added layers of complexity are the result of a drive for lower prices and increased production.<sup>12</sup>

Prior to the development of United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011, a key international development,<sup>13</sup> and some of the other instruments we now have, John Ruggie pointed to three attributes of globalization that lead to concerns: unequal distribution of benefits, imbalance in global rule-making, and an identity crisis on who is in control of globalization and its externalities.<sup>14</sup> A few years later, in the early stages of the development of the UNGPs and in his role as United Nations (UN) Special Representative for Business and Human Rights, Ruggie stated:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.<sup>15</sup>

Though strides are being made in business compliance with core rights, globalization has created gaps. While most of us recognize fundamental human rights, MNCs are making decisions as to when, how, and to what extent these rights are being prioritized and followed up on in their global value chains. We have a myriad of laws, conventions, standards, and other legal-related initiatives, yet it remains to be seen whether these laws can ultimately influence MNCs to take responsibility for core rights across their entire global value chains.

### **Research Statement**

The central research question is formulated as follows: How does law influence the HRDD of Canadian MNCs across their global value chains? The central research question leads to three practical sub-questions that need to be answered:

- Why do companies commit to HRDD? What are the key influencers, legal or otherwise, that motivate the commitment to HRDD? How salient are different laws to companies?

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<sup>12</sup> Genevieve LeBaron, 'Subcontracting is not Illegal but is it Ethical? Business Ethics, Forced Labor, and Economic Success (2014) 20 *Brown Journal of World Affairs* 237, 242.

<sup>13</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011) (UNGPs).

<sup>14</sup> John Gerard Ruggie, 'The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact' (2002) 5 *Journal of Corporate Citizenship* 27.

<sup>15</sup> U.N. Secretary-General's Special Representative for Business and Human Rights, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights' A/HRC/8/5 (7 April 2008).

- How does the company navigate the tensions in BHR that influence them to make HRDD something less than a binding commitment, or to minimize the extent or depth of their HRDD?
- How is HRDD internalized throughout the organization and across the supply chain? How are decisions made as to the extent of the HRDD commitments?

This research ultimately finds that to address the voluntariness that pervades business and human rights, instead of seeking to incrementally reach further across the global value chain, the starting point must be the entire global value chain and then companies work backwards from that. Canadian lawmakers must set this agenda for Canadian MNCs, and it needs to include BHR specificity and recognize the importance and uniqueness of the protection of human rights.

### **Literature Review**

An extensive literature review was completed for the PhD study. To establish a foundation for the research, we need to understand the laws in the BHR field and the existing literature on how these laws do and do not influence corporate HRDD. We also need to consider the key stakeholders that influence Canadian MNCs, both generally and with respect to the laws identified. This is developed Chapter 2 of the Thesis. Then we canvas theory surrounding the internalization of HRDD, considering what BHR tensions exist and how companies are thought to respond to them, frameworks for internalizing HRDD, and theories around how companies make ‘company law’. This is developed in Chapter 3 of the Thesis. We also draw from typologies and frameworks throughout our literature review, such that we can use this to discuss different elements of our findings.

### **Methodology**

This study uses a qualitative case study strategy. Six Canadian MNCs are being used as cases. Three of our Case Subjects are from the mining industry and three are from the retail industry, including food, apparel, and tech sectors. All Case Subjects have made a public commitment to CSR, generally with a specific commitment to HRDD. All Case Subjects have a supply chain (production or suppliers) that involves countries at high risk for human rights violations. Our research, involving both interviews and document review of our Case Subjects, delves into how the companies address BHR tensions and how they internalize HRDD, both in response to the influence of laws and legal influencers.

### **Key Findings on Influencing Commitments to HRDD**

Findings on how different types of laws influence commitments to HRDD for the Case Subjects are set out in chapter 5 of the Thesis. The following is a brief summary of key findings.

#### International Instruments and Global Standards

- Though not recognized by Case Subjects as direct influences and not directly enforceable, international instruments are used as a source or otherwise referenced in

many company BHR policies and most global and industry standards. We see specificity and practical guidance in these ensuing policies and standards.

- Global reporting frameworks and rating systems are increasing in importance and volume. The move towards universal standards is met by mixed reviews, with concerns about complexity, lack of BHR specificity, lack of industry specificity, contrasted with the need for comparability across different industries.

#### Industry Associations and Standards

- The bar is being raised across companies and across supply chains as companies work together through industry associations - learning opportunities, establishing best practices, setting HRDD priorities, peer pressure.
- Companies can increase their leverage when working together through industry organizations – influencing and supporting suppliers and local governments, addressing large systemic issues, promoting industries and their ESG/BHR successes, policymaking, influencing consumer behaviours.
- Industry associations can create a learning forum through which corporate practice is reshaped.

#### Domestic Laws & Litigation

- Domestic laws have minimal influence on our Case Subjects, not surprising given Canada’s lack of domestic laws on HRDD and how far advanced our Case Subjects already are in this area.
- Many of the Case Subjects or the industries they represent have been subject to litigation. Again, with our Case Subjects being well along their HRDD journeys, their litigation risk is minimal but does manifest itself in stakeholder pressure.

#### Stakeholder Pressure

- The investor community continues to increase in importance and is successfully setting expectations through the mainstreaming of increasingly standardized ESG reporting.
- Customer pressures vary by industry, and we see direct pressure from sophisticated business customers in business-to-business interactions and the importance of brand reputation in direct-to-consumer industries. A challenge for leading companies is when they are ahead of their customers on ESG or BHR issues.
- While investor and customer expectations are intensifying, they continue to increase in scope as well. BHR is just one of many ESG concerns.

### **Key Findings on Internalizing HRDD**

Findings on how the Case Subjects address BHR tensions area are set out in Chapter 6.1 of the Thesis, findings on organizational integration are set out in Chapter 6.2, and findings on whether or not the Case Subjects are making company law are set out in Chapter 6.3. The following is a brief summary of key findings.

## ***BHR Tensions***

### CSR and BHR

- BHR compliance generally evolved with our Case Subjects as part of a broader CSR mindset, though the mining companies have been responding to BHR issues for years, and BHR issues came to the forefront in the retail industry with the Rana Plaza disaster.
- All the Case Subjects situate their human rights compliance efforts in their broader CSR or
- sustainability efforts. We see some specificity at the operational level, and we see varying levels of specificity in the reporting for BHR.
- All Case Subjects were ethics oriented in terms of motivation, but both FoodCo and ApparelCo allude to a business case for their human rights compliance as well.

### Supply Chain Structure

- We see several of the risks and complexities from operating in high-risk regions and having multitier chains in labour supply to layers, subcontracting and low profit margins.
- There is an intentionality behind the decisions for our Case Subjects on where to do business, how many suppliers to have, and whether to work directly with suppliers, with consideration given to the nuances of the different regions, the uniqueness of different types of suppliers, and the needs of the companies.
- Many of our Case Subjects are seeking to address both quality and social issues by working cooperatively with suppliers and others to address issues and develop suppliers, in some cases paying higher prices than they might need to.

### Addressing Vulnerabilities

- We saw efforts ranging from investment in community projects, inclusion programs, projects to develop farmers, and focuses on recruitment and other supplier practices.
- We saw a common theme of intentional efforts to recruit local employees and suppliers.

### Decision Making: Risk Orientation and Trade-Offs

- We see all Case Subjects aligning with the GRI approach of looking at more than just financial risk for the company, specifically looking at where there are significant impacts on the economy, environment, or people, including human rights. Companies are often having stakeholders vote on which issues should be prioritized. What seems to be
- missing here is specific data on where the impacts on rights are, specifically looking at rights from the perspective of the rights-holders.
- We continue to see trade-offs with decision making on scope, depth, and day-to-day improvements and issues, with varying approaches on how to make these trade-offs. Coming back to structure, perhaps the starting point should be that companies do not work with a particular ingredient or in a particular location until they do understand and can manage the supply chain – instead of getting comfortable with the company’s level of risk based on the HRDD that they can reasonably do.

## ***Organizational Integration***

### Governance and Accountability

- Top-level policy refers to CSR and typically BHR is at a lower but noticeable level in all Case Subjects. With respect to governance, the mining companies all have specific CSR committees at the board level. The retail companies vary on the committee designations, but all are clear on where board responsibility sits.
- All but ApparelCo describe the existence of or move towards a centralized approach with standards and oversight, then BHR compliance being carried out on the ground, and reporting coming back up to senior levels.
- CSR metrics are specifically set out as part of compensation for the senior mining executives, but this information is not clear with the retail companies. Case Subjects vary with both accountabilities and compensation at the management level and throughout the organization.
- Situated within CSR in all cases, BHR compliance is one of multiple CSR priorities for each company. Operationally it makes sense for BHR to be integrated into other systems as we will learn in later subsections, but from a higher-level governance and accountability perspective, there are pros and cons to this. Ultimately, we need enough from the top levels for there to be policies, processes, and systems in place for BHR compliance, and accountability at the operational level where the BHR compliance is carried out is critical.

### BHR Policies and Supplier Codes

- With all Case Subjects, human rights policies and human rights approaches referred to international instruments. The approaches had similar contents and were largely patterned after the steps recommend in the United Nations Guiding Principles and the OECD Guidelines.
- Supplier codes had similarities in terms of content and some variation in terms of format, whether signed by suppliers, and whether suppliers were obligated to push the code up their supply chains.
- Soft law is present throughout, in the form of both international instruments, and in some cases industry standards, which in turn rely on international instruments.

### Supplier Monitoring

- While we continue to suggest that BHR needs to be distinct at some levels, through our Case Subjects we see the need for the integration of HRDD with broader ERM systems and in supplier management systems.
- We also witness integration at a personnel level, with procurement and social compliance working together, making decisions together, and deciding how to solve problems together.
- We see the desire for a strong presence in the factories, particularly with ApparelCo, but the need to balance with third party audits, both for objectivity and efficiencies.

- Focusing on corrective actions, all the Case Subjects that discuss this used language around continuous improvement and working with suppliers, though the level of commitment on the part of the companies varied in some cases with importance of supplier.

#### Remediation (with the company)

- All the Case Subjects have a means for employees, contractors, and suppliers to report issues, either to the company or to an independent service provider, with various anonymous reporting options.
- Some companies specifically reference community stakeholders' grievance or engagement mechanisms.

#### Supplier Collaboration

- The Case Subjects vary with respect to site-level training, with some doing base-level training on BHR, one focusing on a specific product line for supplier development, and another with a heavy focus on responsible labour recruitment.
- Collaboration with third party service providers and other customers using the same factories
- or farms was important for our retail companies. From common certification to common
- factory audits to common standards development, many benefits to collaboration were
- identified.

#### Reporting

- We see minimal BHR compliance disclosure in the required general public company disclosure. From the modern slavery statements, we see the value in a specific BHR focus. Though qualitative, the level of detail and specificity in the modern slavery statements is unparalleled in the other Case Subject documents.
- In sustainability reports, we see a limited but clear focus on BHR with all five Case Subjects with extensive reports. Most of this disclosure is qualitative, focusing on approach, with limited quantitative data on how much they are doing. Looking at the standards being reported against, GRI and SASB specifically, there are limitations in the disclosure requirements, inconsistencies in the type of information being asked for and key questions not being answered.

#### ***Are the Case Subjects Making Company Law?***

- Using a model that looks at both substance and application, we find that the Case Subjects have the substance of their own company law in the areas of BHR – there are clear elements of commitment in the language, the laws consist of substantive norms, there are valid internal lawmakers, and there are reasonable pre-existing frameworks.
- The case for application at the corporate level is less clear in that laws make now always be known and understood across the organization and its supply chains, BHR laws

compete with other imperatives, and there is not always congruence between the rules and the way they are applied.

- Looking at application at the supplier level, laws are usual understandable and possible to obey for tier 1 suppliers, but not necessarily further up the supply chain. Congruence on incentives and consequences are not consistent.
- We see conceptions of law and compliance evolve and learning forums that shape and reshape corporate practice, as our Case Subjects work with industry partners and associations.

### **Conclusions**

Though we see incremental progress through corporate self-governance, great potential with industry associations, the increasing influence of global standards, and the potential of domestic legislation in Canada, even collectively these laws cannot sufficiently influence HRDD in Canadian MNCs across their entire global value chains. For our polycentric universe of laws to have the necessary influence, the narrative must change. The voluntarism we observed throughout the findings, in the Case Subjects, in the industry organizations, in the global standards, and to a lesser extent in the international instruments and legislation, is rooted around the current narrative of accepting incremental improvements and starting from what companies and those interacting with them think they can do. The complexities of the supply chains and the global value chains are being accepted as a barrier to HRDD across the entire global value chain, even though these structures were created by the MNCs themselves.

**Our new narrative requires us to start from the perspective of the entire global value chain and work backwards from that** – an outside in approach. The starting point needs to be companies taking responsibility for HRDD across their entire supply chains, in response to which they can address the complexities or simplify their supply chains or both. This will take time and effort, but we know that companies can solve complex problems and they are already evidencing their ability to manage supply chain, operational, and labour chain issues. Industry associations have a role to play as well, as do global standard setters and other stakeholders. Chapter 7 of the Thesis continues with limitations of corporate self-governance, ESG mainstreaming, and industry associations, reflecting on our findings and previous analysis – they are not enough to carry out this new narrative. This is followed by a discussion of the essential role of Canadian lawmakers and specific recommendations for Canadian lawmakers. The conclusions are set out in their near entirety in the other articles in this series. These articles can be found [here](#).