

Client Update

Increasing State Oversight of Corporate Human Rights Governance: The Canadian Ombudsperson for Responsible Enterprise

On January 17, 2018, Canada announced the creation of an independent Canadian Ombudsperson for Responsible Enterprise (the “CORE”), with a mandate to investigate, report on and issue recommendations regarding alleged human rights abuses linked to Canadian corporate activity abroad.¹ Although the CORE’s specific powers and jurisdictional reach have yet to be articulated, the body will be guided by the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and other “internationally respected norms.”

The CORE’s creation reflects an accelerating international trend of states regulating corporate human rights abuses extraterritorially, through the enactment of legislation and regulation as well as the hardening of soft law norms and voluntary industry standards.

A REFLECTION OF GLOBAL TRENDS MANDATING RESPONSIBLE BUSINESS PRACTICES

The CORE, discussed in greater detail below, is the latest thread in tightening state oversight of extraterritorial corporate human rights impacts and governance. Laws and regulations serving a similar end—albeit varying in scope and structure—have proliferated across various jurisdictions in recent years:

¹ Gov’t of Canada, *Global Affairs Canada: Corporate Social Responsibility* (Jan. 17, 2018), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.

- The French *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, passed in 2017, requires environmental and human rights due diligence by large companies headquartered in France.²
- In Switzerland, the Responsible Business Initiative to amend the constitution is gaining ground and, if approved by voters, would similarly obligate Swiss companies to carry out appropriate due diligence and ensure compliance with human rights standards.³
- The 2015 United Kingdom Modern Slavery Act, modeled on the California Transparency in Supply Chains Act of 2010, requires disclosure of companies' efforts to eliminate slavery and human trafficking from their supply chains and businesses.⁴
- The EU Non-Financial Reporting Directive, 2014/95/EU, requires EU-incorporated companies with over 500 employees to include non-financial statements in their annual reports, including information regarding human rights and environmental protection.

In the United States:

- The Federal Acquisition Regulation, per 48 C.F.R. 52.222–50, requires U.S. federal contractors and subcontractors to conduct due diligence and develop compliance plans for human trafficking and slavery in their supply chains if they acquire goods and services of over \$500,000 abroad.
- Dodd Frank Act Section 1502, albeit with limited enforcement announced by the U.S. Securities and Exchange Commission's Division of Corporation Finance in 2017, requires issuers to disclose certain findings on whether tin, tantalum, tungsten or gold used in their products may have been sourced in support of armed groups in or near the Democratic Republic of the Congo.⁵

² See "Client Update: French Corporate Human Rights and Environmental Due Diligence Legislation," Debevoise & Plimpton LLP, Mar. 29, 2017, available at https://www.debevoise.com/~media/files/insights/publications/2017/03/20170328b_french_law_on_duty_of_due_diligence.pdf.

³ See The Swiss Parliament, *Contre-projet indirect à l'initiative populaire "Entreprises responsables - pour protéger l'être humain et l'environnement"* (Nov. 13, 2017), <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20170498>.

⁴ See "Client Update: Organisations Carrying on Business in the United Kingdom Must Now Publish Annual 'Slavery and Human Trafficking Statement,'" Debevoise & Plimpton LLP, Sept. 14, 2015, available at https://www.debevoise.com/~media/files/insights/publications/2015/09/20150914_organisations_carrying_on_business_in_the_united_kingdom.pdf.

⁵ See Michael S. Piwowar, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule, SECURITIES AND EXCH. COMM'N (Apr. 7, 2017), <https://www.sec.gov/news/public-statement/corpin-updated-statement-court-decision-conflict-minerals-rule>; see also Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015); Nat'l Ass'n of Mfrs. v. SEC, No 13-CF-000635 (D.D.C. 2017). Although the "conflict minerals rule" was held unconstitutional by the U.S. Court of Appeals for the D.C. Circuit to the extent it obliges issuers to report "that any of their products have 'not been found to be 'DRC

- The Global Magnitsky Human Rights Accountability Act, implemented through Executive Order 13818 in December 2017, authorizes sanctions against foreign people and entities deemed responsible for “extrajudicial killings, torture, or other gross violations of internationally recognized human rights.”

Similar trends are evident in the Asia-Pacific region and beyond. Last year, for example, Australia held government consultations regarding the proposed Modern Slavery in Supply Chains Reporting Requirement.⁶

Corporate human rights litigation has increased in tandem with these regulatory developments. In Canada, part of the inspiration for the CORE was the spotlight cast by three ongoing and high-profile lawsuits against mining companies alleging negligent management of extraterritorial human rights risks.⁷ Plaintiffs in these cases have relied, in part, on the UK decision in *Monterrico Metals*,⁸ which created the possibility of parent companies being held liable for negligent risk management related to extraterritorial human rights impacts. A trio of ongoing UK cases—against Vedanta, Shell and Unilever—now seeks to test the contours of that potential liability.⁹ In the United States, Alien Tort Statute claims have recently been complemented by human rights disclosure-related claims in California against Costco and Nestle, among others.¹⁰

THE CORE'S CREATION AND MANDATE

The CORE emerged in the wake of international and national pressure on Canada to hold its extractive companies accountable for their social and community impacts abroad. Initially, the CORE's scope will focus on the mining, oil and gas, and garment sectors. However, the government expects the CORE to expand its scope broadly into other business sectors within a year of the Ombudsperson's taking office.

conflict free,” interpretation of this ruling is still debated and the disclosure requirements under Section 1502 and item 1.01 of Form SD otherwise remain in place.

⁶ Australian Gov't, Attorney-General's Department, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation* (Oct. 20, 2017), <https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx>.

⁷ See *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414; *Tahoe Resources Inc. v. Garcia*, 2017 CanLII 35114 (SCC); *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401.

⁸ *Tabra Guerrero v. Monterrico Metals Plc*, 2009 EWHC 2475 (QB); see also Leigh Day & Co, *Peruvian torture claimants compensated by UK mining company* (Jul. 20, 2011), <https://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>.

⁹ See *Okpabi v. Royal Dutch Shell Plc*, 2017 EWHC 89 (TCC); *AAA v. Unilever Plc*, 2017 EWHC 371 (QB); *Lungowe v. Vedanta Resources Plc*, 2016 EWHC 975 (TCC).

¹⁰ See, e.g., *Barber v. Nestle USA Inc.*, Case No. 8:15-cv-01364 (C.D. Cal. 2015); *Sud v. Costco Wholesale Corp.*, Case No. 3:15-cv-03783 (N.D. Cal. 2015).

While the CORE's jurisdiction has not yet been specified, its reach could be significant, particularly in the resource sector, as 57% of all publicly traded mining companies in the world were listed on Canada's TSX and TSX-Venture Stock Exchanges as of 2016.¹¹ Complainants alleging abuse of relevant international norms by Canadian companies will be able to submit their grievances through an online portal or by mail. The CORE will have the authority to request relevant evidence from investigated companies; if a company does not voluntarily comply, the government may seek to compel production of documents, witnesses or both. Based on the results of the investigation, the CORE may recommend compensation for victims, ceasing activities, an apology and policy changes, or mitigation measures within a company.

The CORE's findings and recommendations will not have the force of law. Nonetheless, the CORE will have authority to recommend sanctions, which the Minister of International Trade hopes will increase public pressure on companies to follow the CORE's recommendations.¹² Specific sanctions foreseen include withdrawing trade advocacy as well as funding by Export Development Canada, the country's export credit agency. The CORE will also refer evidence of possible criminal wrongdoing to law enforcement authorities, indicating that the CORE's investigations may be the first step in criminal sanctions.

Canada also announced the creation of an Advisory Body on Responsible Business Conduct, comprised of representatives from industry and civil society, to advise the government and the CORE on the "effective implementation and development of its laws, policies and practices related to responsible business conduct by Canadian companies operating abroad in all sectors." The Advisory Body will report to the Minister of International Trade while also guiding the Minister "on the scope and development of the CORE's operating procedures and future direction, as appropriate."

POTENTIAL IMPLICATIONS FOR BUSINESSES

The CORE's practical implications will turn on its precise jurisdiction, which is still to be defined. But the CORE's creation is the latest signal to businesses that human rights governance has become a legal challenge. It sits alongside an increasing number of judicial and nonjudicial

¹¹ See The Mining Association of Canada, *Mining Facts*, <http://www.mining.ca/resources/mining-facts>. The Canadian Network on Corporate Accountability proposed legislation for this type of Ombudsperson in 2016, in which it defined a "Canadian nexus" as encompassing companies incorporated in Canada, having their principal place of business in Canada or with securities listed on a Canadian stock exchange. However, the government's position on this proposal is not yet known. See Canadian Network on Corp. Accountability, *The Global Leadership in Business and Human Rights Act: An act to create an independent human rights ombudsperson for the international extractive sector, Draft model legislation*, Nov. 2, 2016, <http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf>.

¹² See Bill Curry, *Trade Minister plans to confront CEOs over human-rights rules*, THE GLOBE AND MAIL (Jan. 17, 2018), <https://www.theglobeandmail.com/news/politics/trade-minister-plans-to-confront-ceos-over-human-rights-rules/article37653209>.

avenues for redress regarding allegations of corporate human rights abuses, and its authority to recommend sanctions gives the CORE more punitive power than many national grievance bodies. Given the CORE's prospectively broad scope, businesses with a Canadian nexus operating extraterritorially are advised to pay even closer attention to their compliance with the UN Guiding Principles and OECD Guidelines, and to implement policies and procedures mitigating the risk of adverse human rights or environmental impacts. Further, given the plethora of new legislation and regulation throughout the world, all companies should review their policies, procedures and compliance systems to avoid such impacts.

The 35 OECD member states and the 13 countries that adhere to the OECD Guidelines are each required to set up a National Point of Contact, nonjudicial bodies that facilitate voluntary mediation between complainants and businesses. In Canada, the CORE will prospectively complement the NCP with investigations, informal dispute resolution and possible referrals.

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