

Forced or Compulsory Labour Laws in Canada

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Introduction

On May 11th, 2023 Bill S-211 *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* received Royal Assent. The legislation will come into force on January 1st, 2024. The first reports under the legislation are due May 31, 2024.

The purpose of the *Act* is to implement Canada's international commitment to combat forced labour and child labour by imposing reporting obligations on (i) government institutions producing, purchasing or distributing goods in Canada or elsewhere; and (ii) certain business entities producing goods in Canada or elsewhere or importing goods produced outside Canada.

The Canada-United States of America – Mexico Agreement (“Cusma”) came into effect on July 1, 2020 and replaced the North American Free Trade Agreement implemented in 1994.

Article 23.6 of CUSMA provides:

The Parties recognize the goal of eliminating all forms of forced or compulsory labor, including forced or compulsory child labor. Accordingly, each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor.

Canada was at risk of a complaint under CUSMA. The United States introduced legislation on forced labour in mid 2022. Canada lagged behind. In late 2022 an Uyghur activist raised concern that Canada (as a US trade partner) was doing little to stop the trade in forced-labour goods. The Canadian government was facing criticism in the press. According to a news article in December 2022, the score was U.S. 2398 v. Canada 1 – for the number of shipments in 2022 stopped at customs over suspicions that they contained forced-labour goods. The sole intercepted shipment, clothing from China, was let in after an appeal by the importer [The Xinjiang region is estimated to account for 20% of the world's cotton production and 80% of China's domestic cotton production]

The International Labour Organization published a report in September 2022. It reported that 27.6 million people are trapped in forced labour—an increase of 2.7 million individuals since 2016. The worsening situation is attributed to the compounding effects of the pandemic, political instability and unsafe migration in recent years.

Canadian Decisions on the Forced Labour Issues in 2022

In *Kilgour v. Canada* 2022 FC 472, the applicants and an Intervener asked the Federal Court of Canada to find that the Canada Border Services Agency (“CBSA”) had the authority under the *Customs Tariff*, SC 1997 c. 36 to implement a presumptive determination with respect to all goods imported from the Xinjiang region of China. They claimed all such goods had an increased likelihood of being produced using forced labour, and thus should be presumptively prohibited from import into Canada, unless the importers provided clear and convincing evidence to the contrary. The original request was made to CBSA to implement the presumptive determination. The CBSA responded that it did not have the authority to implement the presumption. The Court dismissed the application for judicial review. It noted that Held: The application for judicial review was dismissed. The Court noted that (a) CBSA reply was not a matter amenable to judicial review, (b) the applicants did not have standing to bring the application, (c) the CBSA's interpretation of the legislation was reasonable, (d) the border agency's focus on producers or importers, rather than regions or countries, and the prohibition on such goods was correct and was correct in the application on a case-by-case basis and (e) each shipment of goods that arrives in Canada is subject to an officer's determination on origin, tariff and value, and such decisions can be appealed

through administrative mechanisms.

In *Uyghur Rights Advocacy Project v. Canada*, 2023 FC 126, the Uyghur Rights Advocacy Project (“URAP”) brought an application for judicial review of the acts and omissions of the Government of Canada. URAP contended that Canada, by its acts and omissions, was not respecting its international obligations under Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide*, by failing to prevent – or take any steps to prevent – the ongoing genocide against the Uyghur population. This lack of action, according to URAP, contributed to the crimes committed against the Uyghur people of China. URAP asked for five declarations from the Court, namely:

1. The crime of genocide is currently being committed against the Uyghur population on the territory of the PRC, since at least 2014;
2. Canada is bound by the provisions of the *Convention*;
3. Canada knows, or should have known, that the crime of genocide is being committed against the Uyghur population since at least 2014, or alternatively;
4. Canada knows, or should have known, of the existence of a serious risk that genocide would be committed against the Uyghur population on PRC’s territory; and;
5. Canada, by its acts and omissions, is in breach of article I of the *Convention*.

The Federal Court of Canada dismissed the application for judicial review noting:

[80] As Elie Wiesel said in his Nobel Peace Prize acceptance speech on December 10, 1986: “Silence encourages the tormentor, never the tormented. Sometimes we must interfere.” And as Roméo Dallaire wrote in *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, his book chronicling his time spent as Force Commander of the United Nations Assistance Mission for Rwanda in 1993-94:

The international community, of which the UN is only a symbol, failed to move beyond self-interest for the sake of Rwanda. While most nations agreed that something should be done they all had an excuse why they should not be the ones to do it. As a result, the UN was denied the political will and material means to prevent the tragedy.

[81] The Canadian government has obligations under international law, including with respect to international treaties such as the *Convention*. A firm stance against genocide is an undeniable imperative for the world, as articulated by Elie Wiesel and Roméo Dallaire, who were witnesses to genocide. Yet, the mere potential existence of a genocide does not automatically ground proceedings before the Court.

[82] Notwithstanding the gravity of the issues raised by URAP in this Application, I find that these issues are not cognizable in administrative law, nor justiciable under the political question doctrine. As this Court must respect the dividing lines between the three branches of Government, the matters raised in this Application should be left to the executive and legislative branches until such time as those bodies enact law or policy, or make otherwise reviewable decisions.

Legislation in Place Prior to Bill S-211

Canada does have legislation in place that prohibits forced labour or exploitation of labour. The legislation is not as far reaching as Bill S-211 into the supply chain.

The Criminal Code of Canada provides:

Criminal Code of Canada - 279.04 Exploitation

(1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

Factors

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

- (a) used or threatened to use force or another form of coercion;
- (b) used deception; or
- (c) abused a position of trust, power or authority.



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The *Canada Labour Code* (which applies to employees of federal undertakings) provides:

178 Minimum wage

- (1) Except as otherwise provided by or under this Division, an employer shall pay to each employee a wage at a rate
- (2) (a) not less than the minimum hourly rate fixed, from time to time, by or under an Act of the legislature of the province where the employee is usually employed and that is generally applicable regardless of occupation, status or work experience; or
- (b) where the wages of the employee are paid on any basis of time other than hourly, not less than the equivalent of the rate under paragraph (a) for the time worked by the employee.

The *Crimes Against Humanity and War Crimes Act (2000)* is a relatively new piece of legislation. Section 6 provides:

Genocide, etc., committed outside Canada

- (1) Every person who, either before or after the coming into force of this section, commits outside Canada
 - (a) genocide,
 - (b) a crime against humanity, or
 - (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence

The legislation defines “crimes against humanity” as “murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

Bill S-211 – What Does it Seek to Accomplish and What Does it Require

Bill S-211 has been criticized as inadequate and a “half measure”. It simply requires Canadian institutions and private sector businesses to report the steps they have taken to prevent and reduce the risk of forced labour and child labour used at any step of the production of goods.

Companies caught by the Bill are required to file a report by May 31st of each year.

The idea is that over time, this increased compliance attention will discourage upstream suppliers from engaging in such practices if they want to continue supplying goods to the Canadian market.

Reporting entities include all Canadian federal government institutions and departments, Crown corporations and their wholly-owned subsidiaries, as well as any other private sector “entity”

It applies to any “entity” that is:

1. producing, selling or distributing goods in Canada or elsewhere;
2. importing into Canada goods produced outside Canada; or
3. controlling an entity engaged in any activity described in paragraph (1) or (2), with control defined broadly as any direct or indirect control or common control “in any manner”.

“Entity” is defined as: as a corporation or a trust, partnership or unincorporated organization that is:

1. is **listed on a stock exchange** in Canada;
2. has a **place of business in Canada, does business in Canada or has assets in Canada** and that, based on its consolidated financial statements, **meets at least two of the following conditions** for at least one of its two most recent financial years:
 1. it has at least C\$20 million in assets,
 2. it has generated at least C\$40 million in revenue, and



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3. it employs an average of at least 250 employees;

or

1. is otherwise prescribed by regulations, (which have yet to be enacted)

Reports must include:

1. the entity's structure, activities and supply chains;
2. its policies and its due diligence processes in relation to forced labour and child labour;
3. the parts of its business and supply chains that carry a risk of forced labour or child labour being used and the steps it has taken to assess and manage that risk;
4. any measures taken to remediate any forced labour or child labour;
5. any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains;
6. the training provided to employees on forced labour and child labour; and
7. how the entity assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

Bill S-211 contains additional elements of note:

1. It extends the import ban under Canada's *Customs Tariff* to goods that are "mined, manufactured or produced wholly or in part" with "child labour" in addition to goods produced with "forced labour" and "prison labour" which are already prohibited.
2. It codifies a Canadian definition of both "child labour" and "forced labour", adopting the definitions from Article 3 of the International Labour Organization (ILO) Worst Forms of Child Labour Convention, 1999 and Article 2 of the ILO Forced Labour Convention, 1930 respectively.
3. It introduces a definition of "production of goods" meaning "the manufacturing, growing, extracting and processing of goods."
4. It gives new enforcement powers to the Minister of Public Safety and Emergency Preparedness, including powers of search, inspection and seizure of documents and evidence.
5. **Importantly, Bill S-211 also creates personal liability for directors and officers, among others, who direct, authorize, assent to, acquiesce in or participate in an offence under the proposed act.**

The Bill does not prescribe the specific measures that a company must take to remediate forced labour or child labour in its supply chains. It also doesn't state the steps they have to take to prevent and reduce the risk of forced labour and child labour used at any step of the production of goods. There is no guidance on what inquiries a company has to make downstream the supply chain. Is a survey of their suppliers sufficient? Should they require declarations from suppliers? Should they incorporate warranties in supply contracts, together with reporting requirements? How should a company structure its procurement process? How is this achieved if multiple intermediaries are involved?

At a minimum an entity must take certain steps. These should include:

1. Conducting due diligence to both identify any forced labour or child labour in their respective supply chains and track the effectiveness of certain frameworks and policies to ensure that the risk of forced labour and child labour is reduced. See for example the United Nations Business and Human Rights Navigator – Due Diligence Considerations[1];
2. Implementing supplier codes of conduct setting out certain necessary prohibitions and monitoring procedures regarding suppliers' labour practices and, specifically, the use of forced labour or child labour;
3. Training directors, officers and internal personnel on their duties in light of the obligations under Bill S-211; and
4. Proactively reviewing and updating contracts with existing suppliers to ensure that any risks associated with forced labour or child labour are promptly addressed and mitigated.

The reports required under Bill S-211 must be approved by each respective entity's governing body and such approval must be "evidenced by the signature of one or more members of the governing body of each entity that approved the report." This leads to the question as to whether the individuals signing the reports can also be held personally liable for any misrepresentations in the report. The government has indicated its intention to hold directors and officers accountable for the disclosure required under the legislation and, based on the current wording, if any such persons direct, authorize, assent to acquiesce in or participate in knowingly providing false or misleading information, they can be fined up to \$250,000. The Bill grants the Minister extensive search powers of premises including residential properties.



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Obviously supply chain transparency should be a vital part of any company's ESG framework. The rise of ESG reporting requirements has put pressure on companies to "greenwash." This has resulted in a sharpened focus of regulators and activist investors through legal proceedings. The cost of inaction may be the greatest impact of Bill S-211. A PDF version is available to download [here](#).

[1] <https://bhr-navigator.unglobalcompact.org/issues/forced-labour/due-diligence-considerations/>

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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