

BRIEF ON 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*

The Canadian Ombudsperson for Responsible Enterprise (CORE) is pleased to provide this brief to the Standing Senate Committee on Human Rights in its deliberations on Bill S-211, referred to the Committee on December 14, 2021.

SUMMARY

The CORE commends Senator Miville-Dechêne for her persistent and determined efforts to develop and propose supply chain transparency legislation (“transparency legislation”).

Bill S-211 (“the bill”) represents a step forward by proposing transparency legislation that will add to measures to strengthen respect for human rights by Canadian companies in their operations and supply chains abroad. The CORE recommends the following changes to enhance the bill’s effectiveness:

1. Add fighting against labour trafficking to the purpose of the proposed legislation.
2. Add the ability to make regulations to identify other threshold considerations for identifying entities subject to reporting obligations (e.g., in sectors with high-risk supply chains).
3. Make reporting requirements more detailed and specific.
4. Strengthen oversight including by providing for independent audits of annual reports.

The CORE recommends that the adoption of transparency legislation not detract from the need to introduce mandatory human rights due diligence legislation requiring Canadian companies to exercise due diligence with respect to all human rights and to strengthen

access to remedy for impacted individuals and communities by providing the CORE with the ability to compel testimony and documents.¹

Who is the CORE?

1. CORE stands for Canadian Ombudsperson for Responsible Enterprise. The CORE is a human rights ombudsperson or “Ombud” with the following mandate established by [Order in Council 2019-1323](#):
 - **Promote** the implementation of the United Nations *Guiding Principles on Business and Human Rights* and the Organisation for Economic Cooperation and Development’s *Guidelines for Multinational Enterprises*.
 - **Advise** Canadian companies on responsible business conduct.
 - **Review** possible abuses of internationally recognized human rights in the operations abroad of Canadian companies in the garment, mining, and oil and gas sectors.
 - **Recommend** remedies for Canadian companies and others to address the harms caused by human rights abuse and to prevent the same or a similar abuse from happening again.
2. Sheri Meyerhoffer, the Ombud, was appointed on May 1, 2019.

Introduction

3. The CORE welcomes all measures aimed at strengthening respect for human rights by Canadian companies in their operations and supply chains abroad.
4. In supporting Bill S-211, the CORE notes, in particular, that its scope is broader than previous bills. Its purpose extends to fighting against child labour and it places

¹Please see the Recommendations of the Standing Committee on Foreign Affairs and International Development, *Report on the Mandate of the Canadian Ombudsperson for Responsible Enterprise* (June 2021) at 3. <https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/report-8/>

reporting obligations on government institutions as well as private entities.

5. The CORE respectfully submits that Bill S-211 can be further strengthened and recommends the following changes to the bill to enhance its effectiveness.

Add Labour Trafficking to the Purpose Section

6. The addition of “labour trafficking” to the purpose section and in the operative provisions of the legislation will make the intent, scope, and application of the proposed legislation clearer. Labour exploitation includes child labour, forced labour, and labour trafficking yet each of these forms of labour exploitation may have different root and underlying causes, pre-conditions, and pathways. As well, while they share a legal basis as forms of forced labour, they also have distinct legal status and protection. In the case of child labour, Bill S-211 recognizes this by including a definition of child labour and reference to the *Worst Forms of Child Labour Convention, 1999*. The CORE recommends that Bill S-211 be amended to provide for a similar approach to labour trafficking.
7. The United Nations Office on Drugs and Crime (UNDOC) presents a global picture of the patterns and flows of trafficking² in its [Global Report on Trafficking in Persons, 2020](#). In 2018, labour trafficking accounted for approximately 38 per cent of human trafficking worldwide.³ Some of its unique dimensions⁴ are that it tends to be more of a cross-border phenomenon than other forms of labour exploitation. The risk of labour trafficking is higher in the garment, agricultural and fishing sectors. Globally, more men than women are victims; however, labour trafficking has disproportionate impacts for women and children in some regions. Migrant workers are at higher risk.
8. In its report, the UNDOC said that “the private sector.... plays a pivotal role in the fight

² Human trafficking includes sex trafficking, trafficking in organs, and labour trafficking.

³UNDOC, *Global Report on Trafficking in Persons*, 2020 at 95. https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf

⁴ *Ibid* at 98-99.

against trafficking by conducting due diligence with respect to their supply chains... ”.⁵ However, the CORE notes that not all guidance regarding due diligence expressly refers to labour trafficking. Without greater clarity on the face of the legislation, Canadian companies may not know that their supply chain reporting should include labour trafficking as a form of forced labour.

9. Human trafficking for the purpose of labour exploitation is recognized as a human rights abuse. The United Nations [Protocol to Prevent, Suppress and Punish Trafficking in Persons](#) (the Palermo Protocol), ratified by Canada in May 2002, expressly addresses labour trafficking:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, ... forced labour or services, slavery or practices similar to slavery, servitude (emphasis added)

10. While the [Protocol of 2014 to the Forced Labour Convention, 1930](#) of the International Labour Organization (ILO) recognizes that labour trafficking is included in the definition of forced labour, the UNDOC report illustrates why acknowledging its separate status is likely to enhance the effectiveness of legal prohibitions against forced labour. Expressly recognizing and including labour trafficking in reporting obligations will increase the likelihood that Canadian companies will identify the risk of labour trafficking, and engage in and report on appropriate measures to assess, address and remediate that specific risk. This may include referring to targeted anti-trafficking measures including crime prevention in many countries such as Canada.
11. In light of the above, the CORE recommends that Bill S-211 be amended to expressly refer to labour trafficking and the *Palermo Protocol*.

⁵ *Ibid* at 19.

Regulatory power to add threshold conditions that define “entity”

12. Bill S-211 proposes to use the same conditions to identify the private sector entities subject to reporting requirements as the *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376 (*ESTMA*). This means that only entities that meet at least two of the following threshold conditions for at least one of its two most recent financial years will be required to report:
- i. it has at least \$20 million in assets
 - ii. it has generated at least \$40 million in revenue; and
 - iii. it employs an average of at least 250 employees. [s. 2 definition of “entity”; see also [s. 8\(1\) of the ESTMA](#)]
13. *ESTMA* is a legislative scheme intended to promote transparency regarding payments in the extractive sectors. The purpose of *ESTMA* is to deter corruption in sectors most at risk, namely, mining, and oil and gas.
14. Bill S-211 proposes legislation that has a different purpose. The CORE is concerned that these threshold conditions will not result in reporting obligations on companies in sectors most at risk of labour exploitation in their supply chains. This may include sectors with a high proportion of small and medium-size enterprises (SMEs) that are less likely to meet the threshold conditions in the *ESTMA*.⁶
15. Research and analysis are required to analyze the implications of certain conditions for identifying “entities”, particularly in sectors that have a higher risk of labour exploitation. Based on this research, a regulation could be adopted to add threshold conditions to the transparency legislation that would extend reporting requirements, appropriately balancing achieving its purpose with regulatory burdens on companies.
16. Subsection 2(c) of the definition of “entity” in Bill S-211 provides for regulations prescribing other entities to which reporting obligations would apply. It is unclear

⁶ Industry Canada, “A Canadian Approach to the Apparel Global Value Chains” at 2. [https://www.ic.gc.ca/eic/site/026.nsf/vwapj/apparel-vetement-gvc-vms_eng.pdf/\\$file/apparel-vetement-gvc-vms_eng.pdf](https://www.ic.gc.ca/eic/site/026.nsf/vwapj/apparel-vetement-gvc-vms_eng.pdf/$file/apparel-vetement-gvc-vms_eng.pdf)

whether this regulatory power is limited to adding specific entities or whether it includes the power to establish different threshold conditions. The CORE believes that a power to create regulations that establish different conditions (as opposed to adding entities) would better address entire sectors or groups of companies. The legislation could establish a deadline for exercising this regulatory power, one that permits further research but also supports the timely introduction of different threshold conditions.

17. In light of the above, the CORE recommends:

- a. A regulatory power to prescribe different threshold conditions be added to the definition of “entity” at section 2(d); and,
- b. A deadline for making such a regulation be added to the bill.⁷

Consistent and Comprehensive Reporting

18. The provisions establishing the information that must be included in annual reports (see ss. 6(2) and 11(3)) could be strengthened to better support consistent and comprehensive reporting in two ways: the scope of activities subject to reporting by entities and the nature of the reporting.

19. Currently Bill S-211 requires reporting on an obligation holder’s “... structure, activities and supply chains”. Supply chain is not a defined term in Bill S-211. While adding an exhaustive definition of supply chain or value chain may not be desirable, the CORE recommends the legislation be clear that a supply chain includes “business relationships”, as defined in the commentary to Principle 13(b) of the United Nations [*Guiding Principles on Business and Human Rights*](#);

Business enterprises may be involved with adverse impacts either through their own activities or as a result of their business relationships with other

⁷ For example, [s. 45 \(1.1\)](#) of the *Accessible Canada Act*, S.C. 2019, c. 10 requires the Canadian Radio-Television and Telecommunications Commission to make a regulation under a specified provision within two years of the relevant subsection coming into force.

parties. ... “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

20. While subsections 6(2) and 11(3) of Bill S-211 provide some guidance regarding the content of reports, further guidance to obligation holders would be helpful and would better support realizing the legislative purpose. Supply chain monitoring and mapping is an emerging and evolving set of activities that may vary between sectors. A supply chain may be long, complex and include frequently changing business relationships that span more than one continent. Obligation holders need more guidance in order to report consistently and comprehensively. Given this, the CORE recommends that, at a minimum, Bill S-211 include non-exhaustive definitions for “supply chain” and “due diligence”.

21. The CORE recommends the power to make regulations regarding the content of annual reports be added to section 23. Subsections 6(3) and 11(6) provide that the Minister may specify the form and content of reports; however, this power does not extend to the substance of reporting. A regulatory power to provide additional guidance to obligations holders, including on a sectoral basis, will permit the application of the legislation to keep pace with developments on how best to report on and ensure supply chain transparency.

Strengthening Oversight

22. The CORE notes that some jurisdictions establish an independent body with oversight responsibility including monitoring reports and conducting audits⁸. A specialized body could bring relevant expertise and a variety of tools to the oversight

⁸ For example, the [Dutch Child Labour Due Diligence Act](https://www.lexology.com/library/detail.aspx?g=71c05fde-fe25-44cb-971b-ac03e268d567) establishes a regulator that can deal with complaints from the public: <https://www.lexology.com/library/detail.aspx?g=71c05fde-fe25-44cb-971b-ac03e268d567>.

of the relatively new and evolving area of responsible business conduct. While the context of the current bill may not permit doing so, there could be future consideration of having an existing body such as the CORE take on new roles.

Audits

23. While many of the provisions in Bill S-211 directly parallel *ESTMA*, a key oversight provision is absent. Section 14 of *ESTMA* gives the Minister the power to order an independent audit of the annual report to verify compliance with the legislation. The audit must be carried out in accordance with generally accepted auditing standards by an independent auditor.
24. The CORE recommends adding a comparable provision to Bill S-211. Additionally, where an audit of an annual report is required and submitted, it should be published with the relevant annual report in the same manner as provided for under section 13. The Auditor General of Canada could be named as the independent auditor for reports from government institutions.

Certification of Annual Report

25. Bill S-211 reflects a different approach to certifying reports than under the *ESTMA*. Subsection 9(4) of *ESTMA* requires a director or officer of the entity, or an independent auditor or accountant to attest that the information in the report is “true, accurate and complete”. Under section 11(4) of Bill S-211, the governing body of an entity must “approve” the report. There is no certification requirement relating to annual reports from government institutions.
26. This difference in certification requirements between the *ESTMA* and Bill S-211 suggests that reporting on financial transparency warrants more rigour than reporting on transparency regarding labour exploitation. The CORE recommends that the certification provisions in Bill S-211 be amended to be consistent with the provisions in the *ESTMA* and, to the extent that doing so is permitted by government accountability structures, that the requirement to attest that a report is “true, accurate and complete” be extended to government institutions.

The CORE appreciates the opportunity to provide this brief and looks forward to following the progress of Bill S-211.