# Regulating the Corporation from Within and Without: Corporate Governance and Workers' Interests

Vanisha H. Sukdeo

A DISSERTATION SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW
YORK UNIVERSITY
TORONTO, ONTARIO

October 2022

## Abstract

This dissertation critically explores how the increased legal regulation and governance of corporations can be used to help improve the interests of workers in global supply chains. Chapter one outlines the introduction and provides background information. Chapter two is the literature review. Chapter three examines the expansion of fiduciary duties and changes to corporate governance, including Benefit Corporations, and how expanded fiduciary duties can be used to increase the interests[1] of workers. Chapter four contains a case study of the Rana Plaza disaster to demonstrate how governance models can be used to help increase working conditions in Bangladesh and other parts of the Global South. Chapter five is a case study of the Hudson's Bay Company and three different versions of its code of conduct. Chapter six concludes.


[1] Workers' interests includes but is not limited to better working conditions such as the regulation and control of: working hours, wages, benefits such as health benefits, health and safety, collective bargaining and the right to join a union.

## Dedication

This is dedicated to my Mother, Damwantie Persaud, and my sister, Visha Sukdeo, who have encouraged and supported me along this process. Their love and endorsement have existed since I can remember and I am grateful that it continues to thrive.

**Acknowledgements**

A dissertation is written solely by the author but many people help, encourage, and guide that author along the way. I would like to thank my supervisor Professor Poonam Puri at Osgoode Hall Law School. Learning from such a prolific, well-respected, and accomplished corporate law scholar has pushed me to produce my best work. I thank her for being a confident and forceful model to follow. My committee members, Professors Obiora Okafor and Amar Bhatia, have helped to provide their insight regarding my work. I value their time and support for my research. Thank for your time and effort in reviewing my work and providing comments to ensure a better dissertation.

I would also like to thank Professor Peer Zumbansen for his ongoing support of my research and his confidence in my abilities as a scholar. Professor Zumbansen's zeal for publishing serves as a model for graduate students to strive towards. His genuine concern for graduate students and his desire to serve as mentor and supporter are quite rare to find. I am grateful to know him and consider myself lucky that I was able to co-organize a conference with him in 2012.

I would like to thank Professor Benjamin J. Richardson, who was the Graduate Program Director when I started my Ph.D. at Osgoode. Professor Richardson has been a supporter of my abilities as a scholar and has been sincerely interested in my research product as well as projects that I am currently working on. To have a scholar of his caliber show interest in my work has been rewarding. I value and respect his feedback on

my work as it is evident that his feedback is well thought out and just. I appreciate his support and encouragement throughout the years, and I am thankful for his kindness.

I would also like to thank the numerous professors who spent time with me to discuss my research. I truly value the time and energy it requires to meet with graduate students who are 'not your own'. These generous individuals include Professors Eric Tucker, Dirk Matten, Harry Arthurs, Ed Waitzer, and Wes Cragg (may he rest in peace). Thanks to (former) Dean William Flanagan, Dean Mark Walters, and Minister Anita Anand, who I had the pleasure of learning from while at Queen's Law and whose support while I pursued my Doctorate was much appreciated. Thanks to Professor Shelley Kierstead who is the nicest boss that a Graduate student could possibly ask for. Her warmth and kindness have been appreciated.

Thanks also to my friends who existed prior to my dissertation and those I met while pursuing my Doctorate. Their support and enthusiasm have been priceless. From discussing my research to discussing other topics, it has been a joy and pleasure. Thanks specifically to (in alphabetical order): Anil Aggarwal, Janet Austin, Dragana Bodruzic, Sean Buchanan, Marta Castilho, Christian Chamorro-Courtland, Jamie Chiang, Cheryl Cheon, Dona David, Natasha MacLeod, Andrew McCutcheon, Norm Mizobuchi, Jim Papamanolis, Chris Raybould, Noel Semple, Julia Soberman, and Cathy Wong. Thanks to the people who asked questions about my work at conferences. Though I may forget their names, I was pleased to receive the comments and their insight was welcomed.

Finally, thanks to my former students who help me to remember the importance of legal education and how to best address the concerns and issues of law students. Thanks specifically to Emma Sarkisyan, Justine Lindner, Stuart Woody, and Michela Gregory.

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# 1 Chapter One - Introduction

This dissertation examines how to improve the rights of foreign workers in the Global South who work for suppliers of Canadian corporations. The focus is on the manufacturing sector and the use of foreign factories or suppliers through outsourcing. For a variety of reasons, there is lack of enforcement of the local laws and these workers often face terrible working conditions. The purpose of this dissertation is to examine corporate law mechanisms, by using two case studies that could be implemented to improve the working conditions of these workers in foreign jurisdictions that are outside the reach of Canadian corporate law.

The main issues workers in the Global South face include: unreasonable working hours, health and safety concerns including a lack of proper personal protection equipment and proper ventilation, and low wages. This dissertation will explore the role of Canadian corporate law, and its relative strengths and limits helping workers' interests relative to soft law mechanisms such as codes of conduct including those implemented by individual corporations and industry-wide codes. By attaching liability[2] to the corporation itself through a code of conduct this means that no matter what jurisdiction the corporation is operating in, the code of conduct applies. One of the main factors limiting the impact of Canadian corporate law on these issues is the fact that workers in the Global South who produce and manufacture products for Canadian corporations are often not employees of the corporation. Rather, they are independent contractors of foreign

[2] Liability is meant in a manner that includes nonlegal agreements. This attaches responsibility or obligation in a way that might be termed distinct from liability in the purely legal sense.

suppliers, and they are thus not afforded the same rights under Canadian law as they would be if they were employees of the Canadian corporation. The conditions faced by workers in these jurisdictions are not always reflected in the text of that jurisdiction's laws. Even in jurisdictions where labour and employment law is strong on the books, it may not be well enforced. With lax local laws or lax enforcement of seemingly strong laws, and with Canadian law unable to protect these workers, the role of soft law becomes more important. This dissertation will use case studies from the apparel industry, an industry that has been in focus for human rights abuses in the Global South. Alongside the discussion of the two case studies the dissertation looks at soft law mechanisms. This research will analyze the language of existing soft law mechanisms in the apparel industry and put forward a Model Code of Conduct, as well as suggest possible amendments to corporate law legislation.

Even more egregious than a Canadian corporation's foreign supplier abusing internationally recognized labour rights is a Canadian corporation's subsidiary doing so. When the local labour laws in the Global South do not meet the needs of workers, it should be that the parent corporation has a responsibility to meet those needs[3]. A parent company has controlling interest in another company and can operate subsidiaries in other jurisdictions. The solution to better labour conditions for workers in the Global South can lie in this relationship, and the relationship between corporations and their foreign suppliers – by placing the responsibility on the Canadian parent corporation through codes of conduct and other soft law tools. This dissertation therefore does not

[3] A parent company has a controlling interest versus a supplier factory merely has a contract with a corporation to manufacture products for the corporation.

focus on improving labour law in Canada or jurisdictions in the Global South (though there are certainly cases to be made for doing so), but rather focuses on the corporate responsibility of Canadian corporations towards those individuals who make or produce the goods and products they sell, even if they are not their employees at law. The normative issue is whether these problems should be addressed and the doctrinal issue is how they should be addressed. The normative issue could be framed as follows: Canadian corporate law is not responsible for labour law standards in the Global South. There is a demand for cheap clothing, and this drives corporations to seek out jurisdictions where labour is cheaper than the home jurisdiction. There should be accountability on the part of the supplier for the workers who are left out of the standard labour and employment law structure in both the Global South and Canadian law. This dissertation examines the role that corporate law can play and its limits, and contrasts it to the role that voluntary mechanisms such as codes of conduct can serve in increasing the rights of workers of foreign suppliers. The issues for the corporation include the social license to operate: without social license to operate, communities in which the corporation operates can shun it or protest it, and consumers can launch boycotts by refusing to purchase certain products. This can create local political pressure and can even lead to violence. A story in the Canadian media from November 2021 focuses on Reitmans and its decision to remove clothing that may have been linked to the forced labour.[4] It is an ongoing and pressing issue for Canadian companies to better monitor their supply chains to ensure that clothing is not made with the use of forced labour.

[4] Katie Pedersen and Anu Singh, November 6, 2021 "Reitmans removes clothing from factory suspected of North Korean forced labour after Marketplace investigation" , online at the Canadian Broadcasting Corporation: <www.cbc.ca/amp/1.6240153>.

An examination of major corporate law court cases, including *Peoples Department Stores Inc. (Trustee of) v Wise (Peoples)*[5], and *BCE Inc. v 1976 Debentureholders (BCE)*[6] as well as analyzing Canadian corporations that have signed up for Corporate Social Responsibility (CSR) mechanisms, will lead to a greater understanding of how best to regulate the corporation both internally and externally (from within the corporation itself and from outside) and increase corporate accountability. Corporate regulation and corporate accountability are not mutually exclusive and are not a simple binary. This dissertation will look at the concept of "good corporate citizen" as outlined in *BCE* and developed in the scholarship and will explore what that definition means in regards to workers and employees of suppliers and subsidiaries of Canadian corporations in the Global South.

The core thesis and argument of this dissertation is that Canadian corporate law statutes, including the recent amendments to the *Canada Business Corporations Act* (*CBCA)*[7], provide limited protection for workers who are not "employees" and soft law mechanisms like codes of conduct may be advantageous as a new governance model.

The methodology employed will be two case studies and Canadian jurisprudence including *Peoples*, *BCE*, *Chevron Corp v Yaiguaje (Chevron)*[8] and *Arati Das et al v George Weston Limited et al (Das)*[9]. The Rana Plaza disaster will be used as a case study: after the disaster, there were two competing soft law schemes developed and put in place.

[5] *Peoples Department Stores Inc (Trustee of) v Wise* 2004 SCC 68; 3 SCR 461.
[6] *BCE Inc v 1976 Debentureholders* 2008 SCC 69; 3 SCR 560.
[7] *Canada Business Corporations Act*, RSC 1985, c C-44.
[8] *Chevron Corp v Yaiguaje* 2015 SCC 42.
[9] *Arati Das et al v George Weston Limited et al* 2018 ONCA 1053.

The first case study is used to examine one situation where the loss of life led to changes at some of the corporations manufacturing in Bangladesh and how those changes have used soft law mechanisms to help improve the working conditions for foreign workers. The second case study is on the Hudson's Bay Company (HBC) which dates back to 1670. This second case study focuses on three version of the HBC Code of Conduct.

*Peoples* and *BCE* provide important background of Canadian corporate law's approach to directors' duties, specifically, they expand directors' duties to consider stakeholders' interest beyond merely with a financial interest in the corporation like creditors in *Peoples* and bondholders in *BCE*. 'Stakeholders' as a category has been expanded by both courts and legislators to include employees, consumers and suppliers. Employees are those who work directly for the corporation while foreign workers are deemed to be independent contractors who work for a supplier that supplies the Canadian corporation. While "employees" are included as a stakeholder in both the caselaw and the amendments to the *CBCA*, "independent contractors" such as the foreign workers in the Global South making goods and products for Canadian corporations who do not fit under the moniker "employees" utilized in Section 122 (1.1) are left out. This is where soft law can play a critical role.

Workers and communities in the Global South have sought relief directly from Canadian courts as well. *Chevron* is as an example of this and demonstrates the growing trend of what can be termed the "internationalization of Canadian corporate law". The Supreme Court of Canada said that a Canadian court can hear a claim for enforcement of a foreign judgment because the defendants (Chevron US and Chevron Canada) were

properly served and had enough of a nexus to Canada. Ultimately, on the substantive issues, the Canadian courts decided that the veil could not be pierced to attach liability to the Canadian subsidiary. While the SCC decision in *Chevron* was not ultimately beneficial to the claimants in Ecuador, it did serve to further the discussion about corporate law and obligations to stakeholders beyond those with financial interests as in *Peoples* and *BCE*. Canadian corporations increasingly have to consider possible obligations beyond Canada's borders as they operate in other jurisdictions and are bound by the applicable law in those differing jurisdictions.

*Das* is another important example of the limitations of hard law in helping foreign workers. In that case the class action was not certified and those who suffered harm were ultimately denied their day in a Canadian court to have their concerns heard and adjudicated. The Rana Plaza disaster has a distinct Canadian connection through the George Weston Limited corporation and Joe Fresh, which are both Canadian incorporated corporations. These two corporations were using factories in Bangladesh to manufacture products to be sold in Canadian retail stores.

This dissertation will also examine the differences in how 'soft law'[10] and 'hard law'[11] can be used to help develop the rights of workers. CSR theory attempts to explore

[10] 'Soft law' can be defined as the use of codes of conduct, governmental norms, voluntary standards, the work of advocacy groups and other stakeholders in shaping the responsibilities of corporations. A more detailed definition is offered in "Definition of Terms"

[11] The term 'hard law' is used to describe legislation and legally binding agreements. A more detailed definition is offered in "Definition of Terms"

the idea that corporations should be more socially responsible[12]. The definition of CSR itself is debated among academics and practitioners. The term CSR is used to differentiate from the alternate model of corporations existing solely for their shareholders and to increase profit. CSR means that corporations will consider the interests of other stakeholders beyond shareholders while still focusing on profit maximization. Those stakeholders include, but are not limited to, employees, the environment, and government.

### 1.1 Background of the Problem

This study is situated within a broader debate about CSR (R. Edward Freeman[13], Dirk Matten and Andrew Crane[14]), codes of conduct (Richard Locke[15]), and transnational regulation (Richard Janda[16] and Larry Cata Backer). When the 'sweatshop free movement' started in the early 1990s, certain companies branded themselves as sweatshop free in order to build their consumer base. Companies like American Apparel[17] built their image as sweat free clothing manufacturers. Other companies such

[12] By "socially responsible" the author means that corporations that engage in CSR recognize that corporations have obligations to society at large including to ensure that their products are fairly made, their products are made in an eco-conscious manner among other factors.

[13] R. Edward Freeman et al., *Stakeholder Theory: The State of the Art*, (Cambridge: Cambridge University Press, 2010), at xv.

[14] See Andrew Crane, Dirk Matten & Jeremy Moon. Corporations and Citizenship, (Cambridge: Cambridge University Press, 2008). See also Krista Bondy, Dirk Matten, and Jeremy Moon, "Codes of Conduct as a Tool for Sustainable Governance in MNCs" in Benn, S; Dunphy, D (eds), *Corporate Governance and Sustainability – Challenges for Theory and Practice*, (London: Routledge, 2006). See also: Andrew Crane and Dirk Matten, *Business Ethics, 4 ed*. (Oxford: Oxford University Press, 2016).

[15] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013).

[16] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, (Toronto: LexisNexis Canada Inc., 2009).

[17] It is important to note that American Apparel is no longer in business. This seems due to allegations of abuse against the CEO and Founder and not connected to the company's drive to use only responsibly produced clothing.

as the Gap changed their policies in regards to sweatshops due to external pressure from unions such as UNITE HERE.[18] This research investigates how codes of conduct can be used in such a way that would increase the right of workers. This research will analyze whether it is possible to build corporations that are socially responsible[19] and that can improve the interests of workers. Corporations that are more socially responsible may be those corporations that adopt a code of conduct for suppliers/vendors and subsidiaries. The focus of this dissertation will be on how codes of conduct act as a soft law mechanism to implement change as well as possible amendments to hard law such as the *CBCA.*

## 1.2 Purpose of the Study

This study will critically explore how to employ Canadian corporate law to increase the interests of workers in overseas supply chains through the use of two case studies. Corporations may promote CSR initiatives in order to satisfy external pressures from both home nations, foreign nations, investors, and consumers but may fail to do anything specific to adequately build social responsibility themselves. Corporations may also brand themselves as socially responsible in recognition of the shift in the consumer market to 'ethical consumption'. Ethical consumption is the term used to describe consumers who have a preference for goods and products that have been produced under fair working conditions or are more eco-conscious, among other social concerns.[20] This

[18] See work of UNITE HERE in regards to getting media attention about the Gap and its use of sweatshops. Maquila Solidarity Network: http://en.maquilasolidarity.org/resources/video/StopSweatshops.

[19] Socially responsible means that corporations have obligations to society at large and not simply to their shareholders.

[20] Wayne Visser, at el, *The A to Z of Corporate Social Responsibility: A Complete Guide to Concepts, Codes and Organisations,* (West Sussex: John Wiley & Sons Ltd, 2007) at 195.

may force corporations to put substance behind their claims to be socially responsible. Because consumers are becoming more knowledgeable about products, the demand for ethical products may put pressure on corporations to make its products ethical.

Codes of conduct including industry-wide standards and ethical consumption are linked in that consumer pressure for more ethical products may force corporations to adopt a code of conduct. Professor Compa discusses multi-stakeholders initiatives in Europe which exist in another legal landscape separate and distinct from the Canadian one.[21] He argues that corporate social responsibility is most effective when used alongside strong legislation and trade unions where workers are able to freely bargain and are able to effect change.[22] This statement will be examined as his notion of unions working in conjunction with the corporation to bring about a CSR enlightened code of conduct is quite different from the mainstream discussion which often leaves out union involvement.

### 1.3 Arm's Length Exploitation

This dissertation introduces a new term called 'Arm's Length Exploitation'[23] to describe the phenomenon of companies that, while not directly exploiting workers, hire, contract with, outsource, etc. with others who do directly exploit workers. This allows company A to escape liability because they are the not the actual wrongdoers. An

[21] Lance Compa, "Corporate Social Responsibility and Workers' Rights", Online: <http://digitalcommons.ilr.cornell.edu/articles/183/> at 5.
[22] Lance Compa, "Corporate Social Responsibility and Workers' Rights", Online: <http://digitalcommons.ilr.cornell.edu/articles/183/>, at 6.
[23] While this phrase has been used before it was in a different context from the meaning I ascribe to it. See Jeff Heinrich, "Quality-Improving R&D, Trade Barriers, and Foreign Direct Investment", (1997) online at: <https://www.economics.hawaii.edu/research/workingpapers/88-98/WP_97-12.pdf>, at footnote 2.

instructive example of this is Nike. "Nike does not own any of the factories which manufacture its sports shoes or apparel. Direct control and regulation are thus not feasible. Instead, Nike must manage a network of over 350 factories around the world (employing approximately 500,000 workers) through incentives, suasion, and occasional sanctions."[24] The ability of corporations to avoid liability because they contract with foreign suppliers who are the direct exploiters should not be tolerated by stakeholders as this ultimately allows companies to avoid liability altogether, since foreign suppliers are not held accountable. This creates a situation where those who are exploited or harmed cannot find a target to trace their exploitation or harm to directly.

### 1.4 Research Question

1. What corporate law mechanisms can be used to strengthen the interests of workers in the Global South who produce goods and products for Canadian corporations? Can a code of conduct or other soft law tool be used to guarantee such 'basic rights' as working hours, which essentially fills a governance gap not included in hard law?[25]

### 1.5 Hypothesis

My hypothesis is that corporate law tools such as amending Section 122 of the *Canada Business Corporations Act* can be useful in improving the interests of workers in the Global South who produce goods and products for Canadian corporations, they are

[24] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace" on SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833>, at 21.
[25] Even if included in hard law such laws are often not enforced sufficiently.

but a few tools among many available, and that many tools being used simultaneously for the same purpose will prove more effective than a single tool. These other tools could include changes to directors' duties under Canadian corporate law and changes to labour and employment law, as advocated for by unions. Codes of conduct including industry-wide standards may be effective when the code contains language that is precise and rigorous. The most effective codes of conduct include an external monitoring agency to ensure compliance and enforcement. Codes of conduct can exist in workplaces where unionization if difficult and allow for increased protections for workers in the absence of a collective bargaining system being in place.

## 1.6 Theoretical Framework

This study is situated within a broader debate about CSR that also includes the debates about workers' interests and supply chains more broadly. The debate about CSR can be traced to the Berle and Dodd debates[26] in 1931 where the issue of who managers actually serve was raised – is the obligation owed to shareholders? Or is it owed to some other group? Both American and Canadian corporate law is shareholder-centric with the shareholder primacy model/shareholder wealth maximization mindset still the theory that is predominant.

This unclear law is exacerbated by the fact that CSR is still a relatively recent concept and one universal definition is not necessarily agreed upon. Even the notion of

[26] E. Merrick Dodd, Jr. "For Whom Are Corporate Managers Trustees?, 45 Harv L Rev 1145(1932) and Adolf A Berle, Jr. For Whom Corporate Managers are Trustees: A Note, 45 Harv L Rev 1365 (1932).

corporate philanthropy, and whether this falls under CSR at all, is being debated as if the assertion that shareholders are the owners of the corporation stands: according to agency theory, for example, the directors and officers of a corporation have an obligation to focus on shareholder wealth and giving away the corporation's money through philanthropy is running afoul of agency theory. Scholars including Donaldson[27], and Jensen[28], also have varying theories about CSR and no one theory is held to be definitive and absolute within the academy.

Politically, CSR can be critiqued from the Left[29] as being mere whitewashing and ineffective. It can also be used by corporations to stave off actual state regulation in place of private or self-regulation. CSR can be critiqued from the Right[30] as being beyond the scope of the corporation. If the corporation operates with a view to a profit it can be held that social obligations fall outside the true mandate of the corporation. If the corporation was intended from creation to be socially oriented, then the applicable legislation would reflect the same. The fact that other corporate forms like the Benefit Corporation[31] exist echoes the refrain that the "original" corporate form was not meant to be socially oriented. If all corporations were meant to be CSR-oriented corporations, then Benefit Corporations would never have been created because they would serve no purpose.

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[27] Thomas Donaldson and Lee Preston (1995) "The stakeholder theory of the corporation: concepts, evidence and implications" Academy of Management Review 20(1): 65-91.
Thomas Donaldson and James P. Walsh (2015) "Toward a theory of business." Research in Organizational Behavior 35 (2015) 181–207.

[28] Michael Jensen, "Value Maximization, Stakeholder Theory and the Corporate Objective Function" available on SSRN: <http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=220671>.,

[29] Broadly speaking, left-wing politics infuses economic policy with focuses on social justice.
issues and issues such as equality and fairness.

[30] Broadly speaking, right-wing politics focuses more on core economics and fiscal policy as well as law and order, eschewing social justice in favour of the free market.

[31] Benefit Corporations are corporations that consider additional stakeholders and have a third party standard.

Jensen argues in favour of enlightened shareholder value in that the theories put forward by Milton Friedman fifty years ago in his 1970 article are no longer as relevant. Friedman was an economist who was part of the Chicago School that believed in a Law and Economics approach to corporate law. Due to recent corporate law decisions in Canada we see the Supreme Court of Canada shift towards greater corporate accountability and transparency. These shifts have resulted in a change to the corporate form as it existed years ago when Milton Friedman wrote. Even if the corporation of times past did not have to be socially responsible, the modern day corporation has to be reformed to reflect the changing values in society.

Corporate governance theory can be traced back to Ronald Coase and his article "The Nature of the Firm" and Michael Jensen and his writings on agency theory. Adolf A. Berle published "For Whom Corporate Managers Are Trustees: A Note" in 1932 to continue the debate with Dodd over the obligations of directors. The differing views of corporate governance can be ascribed to Lynn Stout's work on stakeholder theory, and Henry Hansmann and Reinier Kraakman in "What is Corporate Law?". Milton Friedman in 1970 declared that corporations do not have social responsibilities as the responsibility of businesses was merely to increase profit and without doing so by deception and fraud. In contrast, R. Edward Freeman devised stakeholder theory, which is still held up today in opposition to shareholder primacy model/shareholder wealth maximization.

### 1.7 Other frameworks to acknowledge

The frameworks of Critical Race Theory[32], Third World Approaches to International Law (TWAIL)[33], feminist legal studies[34], and the concept of ”intersectionality”[35] are not discussed in depth, as that is beyond the scope of this dissertation. The fact that many of the people working along the supply chains in the Global South are racialized and are women should be acknowledged, however, as their lived experiences are shaped by both how they are labelled and how they choose to self-identify. How they are labelled and viewed by outsiders also shapes how they are treated. Even internally within nation states there are hierarchical structures in place to both create and reinforce forms of inequality such as caste and class divisions, racism, and sexism. Impoverished racialized women in the Global South may not have many options for employment and may be stuck working in sweatshops and other unsafe workplaces. Though this is not the focus of this dissertation it is nevertheless an important point.

As noted by Upendra Baxi in his “Future of Human Rights’, power imbalances exist between nation states in the world and it may be the case that when local laws are not enforced, this is a direct result of nations in the Global South being pressured to engage in lax enforcement by nations in the Global North.[36]

## 1.8 Definition of Terms

[32] See the work of American scholars such as Derrick Bell, Patricia Williams, and Kimberle Crenshaw, and in Canada Joshua Sealy-Harrington, and Priya Gupta.
[33] See the work of Upendra Baxi, R.P. Anand, Bhupinder Chimni, and Obiora Okafor.
[34] See the work of bell hooks, Catharine MacKinnon, and Andrea Dworkin.
[35] See the work of Kimberle Crenshaw, Tressie MacMillan Cottom, and Roxane Gay.
[36] My take on a note by Professor Obiora Okafor regarding how local laws are not enforced.

The term 'corporate social responsibility' is used to differentiate from the former model of corporations existing merely for their shareholders and to increase profit (shareholder primacy model or shareholder wealth maximization) and means that corporations have duties to other stakeholders beyond shareholders[37]. Those stakeholders include, but are not limited to, employees, the environment and government. The definition of CSR itself is debated among academics and practitioners. In his 1999 article, Archie Carroll outlines the history of the definition of CSR.[38] One of the most important definitions is the one devised by Keith Davis:

> For the purposes of this discussion it [CSR] refers to the firm's consideration of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm.[39]

This is the definition I will use for this dissertation, but it is worth addressing that there are competing definitions in the literature: Davis' definition is frequently used and is broader than competing definitions, however. Another definition explored by Carroll is the one provided by S. Prakash Sethi: "social obligation in corporate behaviour 'in response to market forces or legal constraints'."[40] The definition that is used in some of my other work[41] is the one developed by the Corporate Social Responsibility Initiative at the Harvard Kennedy School of Government: "Corporate social responsibility encompasses not only what companies do with their profits, but also how they make them. It goes beyond philanthropy and compliance and addresses how companies manage

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[37] See Freeman and stakeholder theory.

[38] Archie Carroll, "Corporate Social Responsibility: Evolution of a Definitional Construct" Business & Society vol 38 no 3, September 1999 268-295.

[39] Archie Carroll, "Corporate Social Responsibility: Evolution of a Definitional Construct" Business & Society vol 38 no 3, September 1999 268-295 at 277.

[40] Archie Carroll, "Corporate Social Responsibility: Evolution of a Definitional Construct" Business & Society vol 38 no 3, September 1999 268-295 at 279.

[41] Vanisha H. Sukdeo, *Corporate Law, Codes of Conduct and Workers' Rights*. (New York: Routledge, 2019).

their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace, the marketplace, the supply chain, the community, and the public policy realm."[42] Workplaces can be governed by both CSR concepts and soft law mechanisms.

The definition of "corporate governance" is the system which governs corporations and includes the work of the Board of Directors and officers including the Chief Executive Officer (CEO) who are tasked with corporate decision-making. Shareholders and other stakeholders also have a role in the governance of the corporation, roles that have been expanded since the 2000s.

'Soft law' can be defined as the use of codes of conduct, voluntary standards such as certification schemes, and the work of advocacy groups and other stakeholders, all with the goals of shaping the responsibilities of corporations. The term 'hard law' is used to refer to legislation and legally binding agreements. Hard law and soft law can also be thought of as a continuum. Also, within both terms there exist further spectrums. Hard law and soft law both have advantages and disadvantages as hard law includes enforcement that may be lacking in soft law and hard law lacks the flexibility that soft law offers.[43]

[42] Harvard Kennedy School of Government, online: <http://www.hks.harvard.edu/m-rcbg/CSRI/init_approach.html>.
[43] Janis Sarra, "The Corporation as Symphony: Are Shareholders First Violin or Second Fiddle?" (2003) 36 U.B.C. L. Rev. 403 – 442 at 11.

Definitions of the term ‘workers’ interests’ are as varied as the definitions of CSR. Workers’ interests can be as basic as fighting for essential rights like the fight for a living wage to more ‘advanced’ interests such as the right to strike and the right to bargain collectively. For the purpose of this dissertation, the term ‘workers’ interests’ includes remuneration, wages and benefits, working hours, overtime compensation, no child labour, no forced labour, health and safety, nondiscrimination, and no harassment or abuse. Legal rights can include the terms listed above and the same terms can be found in codes of conduct, which makes it even clearer that the lines between soft law and hard law are becoming more blurred and difficult to ascertain.

## 1.9 Contribution to existing literature

I analyze how changes to corporate law can increase the interests of workers as well as how corporate law tools including corporate codes of conduct can be equally important as hard law. Codes of conduct operate on a spectrum as one code can be weak and ineffectual and another can be so strict that it rivals hard law. In addition to the terms of a code, the implementation is equally as important. Who implements and oversees compliance with a code is important. For example, is the CEO invested in the proper implementation of a code? Or does the CEO delegate it to legal counsel without checking it? It is important to note who is at the table during the drafting and implementation process and who is left out. Enforcement of a code usually involves a third party monitoring agency which could roughly be described as taking the role that the government does in enforcing hard law. Competing monitoring agencies are examined to determine which is most impactful and the author concludes that the Worker Rights

Consortium (WRC) is more rigourous than the Fair Labor Association (FLA). The compliance with the code is yet another issue to encourage corporations to comply before there is a breach. Once a breach occurs, there must be a remedy to deal with future behaviour. These steps mimic hard law but go beyond hard law because the process is more malleable in a positive way outside of hard law, accommodating different corporations' realities.

## 1.10 Research Approach

Corporate law is examined with an eye toward how it can be used to help increase the interests of workers. The author discusses codes as well as suggests amendments to the *CBCA*. The author examines new caselaw from the early 2000s to current day to see what changes have been made to corporate law to help workers and other stakeholders. The author suggests a ranking of priority of stakeholders that are listed in the current version of Section 122 as well the author suggests that important stakeholders such as foreign workers of Canadian companies are left out completely. Changing both hard law and soft law will allow for changes to happen simultaneously, rather than choosing to focus on only one option. Both the changes to hard law suggested the codes focus on the corporation as a site of power.

After the analysis, I offer my own Model Code of Conduct in the dissertation. This allows for management to have a template available to build on. I rely on empirical research conducted by scholars to best develop a code of conduct that includes the most

rigorous components of the codes studied. If the code offered is too strict, however, management teams may decline to adopt, so the approach taken in this dissertation is to establish a reasonable code, i.e. that is neither weak nor too strict and that can reasonably be expected to attract some interest from corporations. My Model Code of Conduct includes various amended sections from the codes studied.

Codes of conduct allow for the possibility of greater participation as workers, including foreign workers, could potentially be involved in the drafting process. Having greater worker voice in the drafting of the code may foster legitimacy, as those who are impacted by the code feel a sense of ownership.[44] I use empirical research conducted by Professor Richard Locke as well as other scholars to provide evidence for the efficacy of codes.

There is limited research done at the intersection of corporate law and how foreign workers are treated by Canadian corporations. The solution offered by this dissertation of a Model Code of Conduct allows for greater worker voice in the governance of the workplace itself. The code is malleable, so it can be changed to reflect changes in the workplace. However, it is important to stress that beyond changing hard law and implementing soft law mechanisms like codes, there must be changes on the ground as well. I offer a pro-friendly approach[45] that states that management should seek to create a more civil workplace for various reasons, but if nothing else for the fact that research

[44] See the work in Labour law about collective agreements and worker voice. See Eric Tucker and Judge Fudge *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law, 2010).

[45] See Vanisha Sukdeo "pro-friendly approach" "Creating a Pro-Friendly Classroom" posted on the Canadian Association of Law Teachers (CALT) website, August 14, 2014: <http://www.acpd-calt.org/creating_a_pro_friendly_classroom>.

shows that a happy worker is a productive worker. This is operating out of enlightened self-interest in that what works for management is to be kind to workers in order to make more profit from workers.

My contribution is also distinct because unlike the typical corporate law scholar who may have practiced at a leading corporate law firm before becoming an academic, I articled at a union-side labour law firm and at a union. Prior to that, I spent time in the legal department of what was then CAW and is now Unifor, which is the largest private sector union in Canada. I am currently a CUPE member and have been a CUPE member off and on since my articles commenced in 2006. I approach corporate law from a different perspective from other corporate law scholars in Canada. Their backgrounds at corporate law firms mean that their approach is within the confines of corporate law in the purest sense. However in the era of CSR and the rise of stakeholder power there must be recognition of the role of other disciplines and other approaches outside of corporate law alone.

Along with the rise of CSR and the fact that it has become somewhat ingrained in the corporate culture of numerous corporations, there is also the work of international relations scholars like John Ruggie who focus on helping corporations accept more responsibilities. Ruggie's important work in this area, the 'Ruggie Report', outlines that nation states have a duty to *protect* human rights and the corporation has a responsibility to *respect* human rights. The different burdens placed on nation states versus corporations is needed, but it is notable that corporations did not fall under the purview of the UN until

the 1990s, seemingly showing that corporations have risen to a power that rivals nation states.[46]

Canadian corporate law has changed too. As discussed above, the *BCE* decision by the Supreme Court of Canada in 2008 has aligned Canadian corporate law away from the shareholder primacy model of the corporation towards the stakeholder theory. In that decision, the Court held that directors must consider the interests of stakeholders beyond simply shareholders in the corporate decision-making process. This does not elevate stakeholders to the same level as shareholders but does increase the position of stakeholders from before *BCE*. After *BCE,* the decisions in *Choc v Hudbay*[47] and *Chevron* outlined that Canadian corporations have obligations even when operating on foreign soil. The Court is looking for ways to hold Canadian corporations liable for atrocities committed on foreign soil in Canadian courtrooms. This links back to John Ruggie's work about nation states versus corporations, but also the notion that victims should have greater access to justice. It seems that the Court has made a decision that Canada will be a beacon for human rights and will stretch Canadian law to accommodate victims of corporate abuses if the abuse is done by a Canadian corporation. This widens the reach of Canadian law but in an era of CSR and increased corporate accountability this seems rather in step not out of place with the rest of the world.

[46] Adolf A Berle, and Gardiner C Means. *The Modern Corporation & Private Property*., (New Jersey: Transaction Publishers, 1991).
[47] *Choc v Hudbay Minerals Inc* 2013 ONSC 1414.

### 1.11 Shareholder-Focused Governance

Expanding the fiduciary duty in the corporate law context may ultimately dilute the duty. There may an alternative method whereby there would be increased protection for workers within corporate law through a more stakeholder-focused version of corporate law theory. The shareholder primacy model is akin to shareholder dominance because the theory states that shareholders will be given the utmost importance when corporate decisions are made. Perhaps it is time to replace the shareholder primacy model not with stakeholder theory but with a shareholder focused model that allows shareholders to be lowered from the level in shareholder primacy but not as low as to be considered directly alongside stakeholders. This model of shareholder-focused governance would allow for the theory to be described more broadly as placing shareholders at the forefront but not the only interests that count.

This movement from shareholder wealth maximization and/or the shareholder primacy model can move into the shareholder-focused model then onwards to stakeholder theory. This would allow for a smoother transition from the rather divergent models of shareholder primacy and stakeholder theory; a bridging model that allows for laws to be changed without being drastic.

| Shareholder primacy model |
| --- |

shareholder-focused model

stakeholder theory actualized

Such an approach also allows for corporate culture to change to keep pace with the law. Rather than a sudden shift from one model to another elements can be added in slowly, allowing for corporations and other parties to adapt. Unfortunately, Canadian jurisprudence has failed to adopt such an approach. With *Peoples* and *BCE* this transition model has not been employed.

## 1.12 The Divergent Paths of Corporate Law and Labour Law

The underlying theories behind corporate law and workers' interests are divergent. The competing theories about corporate law explore whether the corporation is 'a nexus of contracts', whether the corporation serves the public or its shareholders; the role of agency; and whether directors and officers are merely agents of the shareholders.[48] The competing theories about workers' interests are as extreme as those promulgated by Bakan[49] and McNally[50] to the less radical theories put forward by Fung, O'Rourke, and Sabel. These scholars explore the extent to which workers are the main vehicle in society and how much protection they deserve due to the corresponding role – if they are major vehicles then perhaps they are more worthy of protection and may be worthy of a greater level of protection than other groups.

The theory that corporations are simply a nexus of contracts means that there are individual contracts acting upon each person that intersects with other contracts. "In the corporate nexus, there are two main kinds of contracting parties: the 'fixed claimants', who specifically negotiate the terms of each contract they have with others in the firm, and the 'residual claimants' who do not negotiate each term, but rely upon a standard

[48] For a comprehensive history of Corporate Law see Henry Hansman and Reinier Kraakman, "The End of History for Corporate Law" (2000), available on SSRN: <http://papers.ssrn.com/paper.taf?abstract_id=204528>.
[49] Abigail Bakan & Eleanor MacDonald, eds. *Critical Political Studies: Debates and Dialogues from the Left*. (McGill-Queen's University Press, 2002).
[50] See David McNally. *Another World is Possible: Globalization and Anti-Capitalism*. (Winnipeg: Arbeiter Ring Publishing, 2002).

statutory structure to define their rights and obligations."[51] If one does not have a binding contract like the bondholders with the corporation then one is left to hold residual rights found in legislation or at common law – such as employment law. This relegates those without a formal contract to a status aptly described as 'second class citizens', who are not afforded the degree of rights and claims as those with contracts. The equality aspect of this argument is explored by various theorists, as those who do not have contracts may be less sophisticated and suffer as a result of their lack of power.

In corporate governance, the Board of Directors of a corporation is elected by the shareholders of the corporation. The duties of the Board include the hiring and firing of executives, executive compensation, and decisions about dividends to be paid out to shareholders. The Board has the task of making sure that the interests of shareholders are protected. The CEO is the highest ranking executive in a company and their duties include managing the overall operations of a company, and being the conduit between the Board and management/staff. The CEO may be responsible for the generation of revenue for the corporation as well as creating strategic plans, financial plans, developing goals, and acting as a liaison to the public, government, etc. There is also the position of Chief Financial Officer (CFO), whose primary responsibilities are managing the financial risks of the corporation. The CFO reports directly to the CEO. The CFO may have duties involving the preparation of financial statements on a quarterly basis, budgetary planning, revenue trends, financial record keeping, etc. The Chief Operating Officer (COO) is

[51] Peer Zumbansen and Simon Archer "The BCE decision: Reflections on the Firm as a Contractual Organization" (2008) Comparative Research in Law & Political Economy. Research Paper No 17/2008, online <http://digitalcommons.osgoode.yorku.ca/clpe/191> at 9-10.

responsible for operations management and for seeing that the CEO's plans and strategies reach fulfillment.

According to Canadian law, a corporation must exist with a 'view to a profit'; whether a profit is actualized is a separate issue. The three basic business associations (sole proprietor, partnership, and corporation) are for-profit ventures which are distinct from charities and not-for-profits (formerly called non-profits).

Table: Types of Business Associations

| | |
|---|---|
| *Sole proprietor* | wholly liable for business |
| *Partnership* | group of individuals join together to run a business |
| General | |
| Limited Liability | |
| *Corporation* | a separate legal person from the individuals who run the corporation |
| Private | |
| Public | |

Besides the three typical ways of carrying on a business (sole proprietor, partnership, and the corporation) note that there exist between those models other less utilized models such as the cooperative[52], benefit corporation[53], and community

[52] A Cooperative ('coop') is a business or enterprise, owned by a group of persons seeking to satisfy common needs. Contrasted with the for-profit and not-for-profit corporations, coops may pay their surplus to members in the form of patronage returns. A coop can either be incorporated with or without membership shares.

contribution companies[54] (in B.C.) and the Community Interest Company (CIC) in the U.K.

### 1.13 Origins of the Corporation and the Corporate Shield

The Salomon Principle is derived from a 19th century U.K. case *Salomon v Salomon & Co Ltd*.[55] which states that the corporation is a separate legal entity from its shareholders, directors, and officers. This gave rise to the term 'the corporate veil', which allows for shareholders, directors, and officers to gain protection from liability by being separate from the corporation itself. The legal distinction between the corporation and its directors and officers is important because without that separation, the directors and officers could be personally liable for the debts and expenses of the corporation. Contrasted with the directors and officers of a corporation, sole proprietors are completely responsible for the businesses they run. The corporate form thus allows for there to be a shield in place between those who work for the corporation and the corporation itself. One can see the evolution from sole proprietor to partnership and on to the corporate form.

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[53] See Vanisha H. Sukdeo, "What is the Benefit of a 'Benefit Corporation'?: Examining the Advantages and Detriment" (2015) 31: 1 *Banking and Finance Law Review* 89-111: "A Benefit Corporation ('BC') is a new corporate form that outlines obligations beyond shareholder wealth maximization developed in the United States of America ('U.S.') that is intended to make corporations more socially responsible. The organization B Lab certifies socially responsible corporations that they term 'B Corporations' or 'B Corps'. This voluntary certification scheme is distinct from BCs established under statute. The first state to pass BC legislation was Maryland in April 2010. Vermont was second in May 2010. There are commonalities among the legislation as all four deal with 'general public benefit', 'specific public benefit' and require a 'third party standard'. There are differences in the wording but the underlying premise is the same."

[54] For more information about community contribution companies please see: Vanisha H. Sukdeo, "What is the Benefit of a 'Benefit Corporation'?: Examining the Advantages and Detriment" (2015) 31: 1 *Banking and Finance Law Review* 89-111.

[55] *Salomon v Salomon & Co Ltd*. [1897] AC 22.

While *Salomon* is a U.K. case, it has to be adopted into Canadian law by a Canadian decision that cites to it. It is common in the Canadian legal landscape for courts to look to the U.K. and U.S.A. for decisions that rule on similar legal issues. Canadian law is very much informed and influenced by U.K. law in particular, given the historic links, but the laws in the U.K. are not binding on Canadian courts. Thus, it is only when a Canadian court has imported a U.K. decision into Canadian law by citing its principles does that law from the U.K. or another country become part of Canadian law.

Canadian law is very much influenced by U.K. law and Flannigan asserts that the U.K. Act in 1844 changed the very structure of corporate governance. He notes that "[i]n the years following the 1844 introduction of the Joint Stock Companies Act there was a failure on the part of some judges to comprehend the transformation in fiduciary accountability that occurred when a partnership converted itself into a corporation".[56] The distinction between a partnership and corporation is quite considerable. In a general partnership liability is spread across all partners with the limited liability partnership sheltering some blame from the partners directly. The corporation acts as a shield or veil for all members of the corporation - be it executives, employees, etc. The decision to move from partnership to corporation is a significant move and the responsibilities and duties that flow from such a decision are vast.

If the *CBCA* was amended to include language from *Peoples*, the Court could be more standardized in its approach to making decisions in the corporate realm. While the

[56] Robert Flannigan, "Shareholder Fiduciary Accountability" (2014) Journal of Business Law Issue 1, at 1-30, at 11.

*CBCA* was amended in June 2019 to include the permissive language that directors "may consider" stakeholder interests, it did not include a ranking of priority among the different stakeholder groups. Outlining the actual stakeholders that should be satisfied allows directors and officers to know who they will be held accountable to. Ideally, this language would detail which groups or entities the corporation is held to have a duty towards. The legislation would be clear about who owes the duty and to whom the duty is owed. This expansion on caselaw and common law becoming legislated is useful as having such language in legislation may make it more difficult for the new duties to be overturned by a new case. Having language from caselaw codified into legislation gives it more clarity as the legislature is able to debate legislation before it gets enacted in a way that caselaw is not able to.

My proposed code of conduct outlines such basic rights as the information about maximum working hours, ventilation systems in factories, and remuneration which are typical items to be found in a collective agreement but go beyond a collective agreement by encouraging employers to create an environment in which workers feel appreciated and their voice is acknowledged. This goes beyond legal structures and touches on psychological studies about inclusion in the workplace versus exclusion.[57] By not allowing workers to voice their concerns, management is not able to fully engage with the workers about potential ways to improve the workplace for *everyone*. Workers may see ways to improve productivity, etc. that management may not be able to witness without being on the shop floor. To be able to control the process can be rewarding for

[57] Jane O'Reilly, "Is Negative Attention Better Than No Attention? The Comparative Effects of Ostracism and Harassment at Work" online: <http://pubsonline.informs.org/doi/abs/10.1287/orsc.2014.0900>.

workers in a way that simple wage increases would not. The same way that employee stock options can help get employees to become more invested in the company, so too can workers who simply feel more appreciated at work help the company to become more productive. It may be argued that an invested worker is a more loyal and devoted worker. This drive could help the worker become more valuable to the organization. In the absence of these improvements, the workers may become stagnant and less willing to devote their time and energy to the organization in a way that a respected worker might.

The model code of conduct offered by this dissertation allows for a company to take a basic outline and build on it to make it work for their particular workplace. The model code selects the strictest aspects of the ten codes examined to come up with the most rigorous code. This code allows for workers to have their rights protected in an environment that respects their rights and freedoms. While there are other codes or models proposed by various authors, this one is detailed and exacting. Other codes may outline what should be included but do not actually detail the language (see Sabel, O'Rouke and Fung). This model code, coupled with the model outlined by Kaptein about constant feedback, allows for a code that can change and respond to the needs of the workers. Once a code is in place, it should not be stagnant, instead, it should become stronger and more robust as times goes on – it is, essentially, malleable. The principles created by Janda, et al and the one devised by Sethi set out a framework to show what underlying rules should be included in codes. This leads to a discussion about rules-based versus principles-based regulation. In this example, it is a rules-based code but there should be acknowledgement that the rules are based on far-reaching principles about respect, dignity, and safety for workers. Also, related to constant improvement is the

model created by Locke about workers being able to voice their concerns and have the code respond accordingly.

As noted by Larry Cata Backer, codes of conduct do not share the special characteristics of hard law (perhaps a more comprehensive enforcement structure) but they also do not suffer the weakness of law: "They reflect a potentially enforceable private law among the parties consenting thereto, provide a more robust basis in consent legitimacy than that offered by the more remote process of law making."[58] He goes on to state that codes are viewed as undemocratic, lack the power of the state to enforce, and party specific so they only benefit a small group.[59] Many different codes acting in isolation can one day become industry-wide standards and then true change can be actualized on a large scale. The idea of creating uniformity across industries in a global sense may be more productive than changing domestic laws in separation from others. Attaching the governance at the site of the corporation will force that corporation to comply with the code in any jurisdiction as opposed to getting various laws to become standardized simultaneously.

[58] Larry Cata Backer blog post on September 21, 2013, online: <http://lcbackerblog.blogspot.ca/2013/09/changing-corporate-behavior-through.html>.
[59] Larry Cata Backer blog post on September 21, 2013, online: <http://lcbackerblog.blogspot.ca/2013/09/changing-corporate-behavior-through.html>.

# 2 Chapter Two - Review of Literature and Methodology

This introductory chapter reviews the literature on CSR theory, provides a history of corporate law from its origins to current day legal landscape. The author also looks at the literature on transnational governance and how it interacts with corporate law. As noted earlier, the underlying theories behind corporate law and workers' interests are divergent. The competing theories about corporate law explore whether the corporation is 'a nexus of contracts', whether the corporation serves the public or its shareholders, the role of agency and whether directors and officers are merely agents of the shareholders. The competing theories about workers' interests are as extreme as those promulgated by Professors Bakan and McNally to the less radical theories put forward by Fung, O'Rourke, and Sabel. These scholars explore the extent to which workers are the main vehicle in society and how much protection they deserve due to the corresponding role – if they are major vehicles then perhaps they are more worthy of protection and may be worthy of a greater level of protection than other groups.

### 2.1.1 Corporate Social Responsibility

The CSR literature encompasses a broad spectrum from those authors who believe that true change can be achieved through the work of corporations modifying the nature of their business and implementing codes of conduct to those authors who are skeptical of the entire CSR movement.

### 2.1.2 CSR discourse in the early and mid 1900s

The debate about CSR can be traced to Berle and Means' *The Modern Corporation and Private Property*[60]. This book lays the foundation for the discussion of CSR and the real role that corporations play in society. *The Modern Corporation* and the work of Milton Friedman have shaped the CSR theories and discourse. In the article "The Social Responsibility of Business is to Increase Profits"[61] Friedman states that businessmen who speak about business' social conscience are: "[i]n fact they are-or would be if they or anyone took them seriously-preaching pure and unadulterated socialism. Businessmen who talk this way are unwittingly puppets of the intellectual forces that have been undermining the basis of a free society these past decades."[62] It is worth noting that Friedman raises the issue of socialism as he was writing in a time of the 'red scare' where countries, America in particular, feared the spread of Communism to their nations. This contrast, that anyone who would say that corporations have duties to those other than shareholders being labeled as socialist, divides those against the capitalists.

> The discussions of the 'social responsibilities of business' are notable for their analytical looseness and lack of rigor. What does it mean to say that 'business' has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but 'business' as a whole cannot be said to have responsibilities, even in this vague sense. The first step toward clarity in examining the doctrine of the social responsibility of business is to ask precisely what it implies for whom.[63]

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[60] Adolf Berle & Gardiner Means. *The Modern Corporation and Private Property*. (New York: The MacMillan Company, 1932).

[61] Milton Friedman. "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970.

[62] Milton Friedman. "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970 at 1.

[63] Milton Friedman. "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970 at 1.

Friedman goes on to examine what the word 'responsibilities' actually means. This is important to establish a definition before a discussion can be advanced about a specific term. "What does it mean to say that the corporate executive has a 'social responsibility' in his capacity as businessman? If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers."[64] However, this author is skeptical about whether this is actually true. This author's research also explores this idea in regard to corporations that brand themselves as socially responsible and may actually increase their consumer base and profits as a result. Friedman states that, "there is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[65] However, the challenge to Friedman is the question of what happens when the rules of the game change? Refraining from deception and fraud is not sufficient. One cannot avoid being a product of one's time and the theories of Friedman and Berle and Means may be labelled 'antiquated' and no longer valid in current times. No one is arguing that shareholders should not be the primary concern – just that they should not be the *only* concern of the corporation. Shareholders themselves sometimes engage in behavior to change the corporation – shareholder proposals and shareholder activism being primary examples. Even the view of shareholder primacy as envisioned by Friedman is no longer the same model supported today. There are new forms of shareholder primacy put forth by scholars like Michael Jensen that are no longer so

[64] Milton Friedman. "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970 at 2.
[65] Milton Friedman. "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970 at 24.

extreme which embrace "enlightened shareholder value"[66] in place of Friedman's model. It is important to note that Friedman is an economist not a legal scholar, so the weight given to him in the realm of corporate law should be limited. Brian Cheffin's recent article[67] argues that less weight should be given to Friedman as he is merely a product of his time, which embraced the antiquated notion of shareholders as the sole concern for directors and officers and focused on the newer model of shareholder primacy.

### 2.1.3 Present Day literature on CSR

A canvass of the literature shows scholars that seem to be divided between those who think that CSR is effective and can help to increase the rights of workers and those who are skeptical. Between those two positions is a multitude of scholars who view CSR as complicated and simply good or bad. Other authors[68] argue that it is in the best interests of corporations to brand themselves as socially responsible to endear themselves to existing and potential customers: under the guise of CSR seems to create or increase brand loyalty among existing customers and increase the corporations' consumer base by attracting new 'ethical consumers'. Sisodia, Wolfe and Sheth argue that "[t]he search for meaning is changing expectations in that marketplace, and in the workplace. Indeed, we believe it is changing the very soul of capitalism."[69] Their arguments are slightly different from the typical arguments in favour of CSR in that the authors state that corporations that are almost more endearing are better able to prosper. This may include such

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[66] Michael Jensen, "Value Maximization, Stakeholder Theory and the Corporate Objective Function" Journal of Applied Corporate Finance 22(1): 32-42.

[67] Brian Cheffins, "Stop Blaming Milton Friedman!" (2020) on SSRN :<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552950>.

[68] Rajendra, Sisodia, David B. Wolfe, & Jagdish N. Sheth, *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose*, (Philadelphia: Wharton School Publishing, 2007).

[69] Rajendra, Sisodia, David B. Wolfe, & Jagdish N. Sheth, *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose*, (Philadelphia: Wharton School Publishing, 2007) at 4.

corporations as the Body Shop and American Apparel, which seem to attract customers to buy their products and let them leave those stores with a sense of activism in that the products they have just purchased are 'doing good for the world.'

Professors Joseph L. Bower and Lynn S. Paine of Harvard Business School and Professor Herman B. Leonard of Harvard's Kennedy School of Government wrote *Capitalism at Risk: Rethinking the Role of Business* to show how capitalism must evolve if it is to endure. They stated that "[w]e examine four views that emerged in our forums: business as bystander, business as activist, business as innovator, and business as usual. We then propose a fifth view – business as leader – that builds on what we heard. We argue that companies can and must do more to advance the healthy functioning of the system both as innovators developing new business models and strategies, and as activists for good government and more effective institutions."[70] The work of Lawrence Mitchell[71] is useful because it discusses how corporations in North America often commit their abuses in other countries. This also raises the issue of risk management and how corporations should end their international abuses because it opens them up to liability and risk. "American corporate law ignores workers. They don't figure into the structure of the corporation or its legal duties. But there is no one group of people more identified with a corporation and more responsible for its day-to-day conduct than corporate workers."[72] The author further states that "[m]y principal proposal to make the workers central is to change the accounting rules to treat employees as assets instead of

[70] Joseph L. Bower, Herman B. Leonard, and Lynn S. Paine, *Capitalism at Risk: Rethinking the Role of* Business, (Boston: Harvard Business Review Press, 2011) at 13.
[71] Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export*, (New Haven: Yale University Press, 2001).
[72] Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export*, (New Haven: Yale University Press, 2001), at 208.

liabilities."[73] Professor Jagdish Bhagwati's arguments are much in line with those of Milton Friedman. He outlines arguments that demonstrate that globalization has had a positive impact and that it is distinct from the rise of the corporation becoming more powerful. His seminal book *In Defense of Globalization* outlines the arguments in favour of globalization while not considering seriously the argument on the part of activists who oppose globalization. Professor Bhagwati mentions numerous times that activists are uninformed, which does not ring true in *all* situations. The rise of the multinational corporation has renewed the backlash against corporations escaping extraterritorial sanctions. The same behaviour that corporations would not be able to get away with on domestic territory may be able to in a host country. This division has allowed for supply chains to go unmanaged. Benefit corporations, with the increased disclosure and transparency, seem to try to remedy this home-host country divide. The way in which Bhagwati writes seems to imply that economics is devoid of values and morals – offering instead that *only* profits and monetary flow equal success and advancement. However, not everything can be quantified in order to be rarefied, which Bhagwati seems to advocate. His basic premise that social justice advocates wrongly equate the extreme power that corporations hold in society to be the direct result of globalization is valid yet is not the only driving force for these advocates. One does not need to understand the economics behind *why* Nike operates factories in Thailand, but instead one's knowledge that workers in Thailand earn low wages making shoes for the North American market is enough to motivate one to become an advocate. Bhagwati observed that "with NGOs and CNN, we have the possibility now of using shame and embarrassment to great

[73] Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export*, (New Haven: Yale University Press, 2001), at 245.

advantage."[74] Bhagwati is outlining that by 'naming, shaming, and blaming' one can bring change. This assumes a link between media attention and the corresponding change in corporate behaviour to get rid of this attention – a change for the better. However, what if naming, shaming, and blaming do not bring much change, if any?

The reason that there are more ethical products available on the market could be traced to consumer demand for such. Andrew Crane[75] outlines the definitions of key terms in the CSR debates. Also, he draws attention to certain changes that have been made in society that were not imagined, e.g. hybrid cars. The impact of consumer pressure for certain items is also explored e.g. free range eggs after abuses of chickens at certain farms were exposed. Whether these changes are a result of external pressure (consumers, etc.) or internal (shareholders) is worthy of examination. Crane also notes the emergence and popularity of products that are ethical/ environmental e.g. such as the Toyota Prius and Ben & Jerry's among others.[76] This discussion about ethical consumption is important as the ethical consumer is one who chooses the goods and products they purchase based on how ethically produced the items were.

CSR from a legal viewpoint was once quite rare as the discourse was dominated by economists and business scholars. In 2009 legal scholars Michael Kerr, Richard Janda

[74] Jagdish Bhagwati, *In Defense of Globalization*, (New York: Oxford University Press, 2007), at 250.
[75] Andrew Crane et al. *The Oxford Handbook of Corporate Social Responsibility*, (Oxford: Oxford University Press, 2008).
[76] Andrew Crane et al. *The Oxford Handbook of Corporate Social Responsibility*, (Oxford: Oxford University Press, 2008) at 288.

& Chip Pitts[77] postulate the core principles that corporations should implement to be able to actually brand themselves as socially responsible:

| | |
|---|---|
| Principle 1 | Integrated, Sustainable Decision-making: Corporate decision-makers must consider environmental and social issues, in addition to economic considerations, when carrying out their duties and responsibilities |
| Principle 2 | Stakeholder Engagement: Corporations must engage not only with shareholders, but also with stakeholders generally, on environmental and social issues within the corporate sphere of influence |
| Principle 3 | Transparency: Corporations must provide periodic public reports on their environmental and social performance and disclose material information relating to environmental and social matters within their sphere of influence |
| Principle 4 | Consistent Best Practices: Whether at home or abroad, corporations must seek to apply the highest environmental and social standards throughout their operations and during their interactions with their business partners |
| Principle 5 | Precautionary Principle: An absence of conclusive scientific evidence that serious and irreversible environmental harm will occur within their sphere of influence must not deter corporations from taking cost-effective precautionary measures. Furthermore, corporations bear the burden of proof of socially acceptable safety when they advocate potentially harmful projects |
| Principle 6 | Accountability: Corporations and their decision-makers must be held accountable both for environmental and social harms and for failure to meet their own proclaimed standards of ethical conduct |
| Principle 7 | Community Investment: Corporations must undertake programs and initiatives that contribute to the social, cultural, economic, or environmental enrichment of the communities in which they operate |

Source: Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, (Toronto: LexisNexis Canada Inc., 2009), at 91.

These principles are important as a guide to look at how corporations actually implement CSR principles into their corporate governance model. If a corporation chooses one or more of those principles as important to be a more socially responsible corporation, it will choose to be responsible in many areas: sustainability, better working conditions, etc. Some corporations like Maple Leaf corporation have decided to go "carbon neutral" so

[77] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, (Toronto: LexisNexis Canada Inc., 2009.

that building a sustainable environmental is built into their core business model – it is not merely an afterthought that could be declared greenwashing.

The existing literature on CSR has many gaps such as the link between positive actions and responsibilities on the part of corporations and the benefit experienced, if any, by workers. When corporations are more responsible in broad terms, the benefit bestowed on workers may still be minimal. This research explores the correlation between CSR and the rights of workers in that an increase in social responsibility on the part of corporations could not directly impact the rights of workers but instead may include or mean things such as an increase in charitable donations or increased environmental protections. While both may help workers indirectly, the nature of direct links must be explored.

## 2.2 Stakeholder Theory

Stakeholder theory falls under the umbrella of CSR. Stakeholder Berle's 1931 article brought to the forefront the need to consider who the corporation was really serving be it shareholders, consumers, workers, etc. "In 1931, Berle advanced the notion that corporate directors would become subject to the implied oversight of a court's equitable jurisdiction and that, in the future, corporate law would become 'in substance, a branch of the law of trust.'"[78] As mentioned earlier in the discussion of Berle and Means, the notion that the shareholder is merely a passive owner is important. Why should the corporation serve the interests of a passive party that may be rather disinterested when it

[78] Ed Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) Osgoode Hall LJ 439-496 at para 68.

can serve in the interests of those who are closer, arguably the consumers and employees? "Now I submit that you can not abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."[79] Berle leaves the reader with the thought that the corporation should serve interests beyond merely shareholders and should serve broad interests. Is this truly the beginning of stakeholder theory? Possibly the beginning of CSR? "Most students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility- a responsibility conceived not merely in terms of stockholders' rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community."[80] The typical rejoinder to a multi-stakeholder model is to argue that a duty to everyone is a duty to no one. "Serving two principals is a breach of fiduciary duty because it creates a de facto inability to serve with utmost good faith and fidelity."[81] Balancing competing interests may be achieved in the non-fiduciary realm but when discussing dual fiduciary duties an apparent paradox arises. How is a Director to decide which stakeholders' interest will trump other stakeholders? Do profits win over the environment? Do profits win over workers? This artificial balancing will lead to problems. It is trite to say that legislation on the books needs to be tested in the courts but it is true that caselaw will help to interpret and understand the true limits of fiduciary duties in corporations' legislation. "It is poignantly clear that a duty premised upon

[79] A. A. Berle, "For Whom Corporate Managers Are Trustees: A Note" (June, 1932) Harvard Law Review, Vo 45 No 8, pp 1365-1372 at 1367.
[80] A. A. Berle, "For Whom Corporate Managers Are Trustees: A Note" (June, 1932) Harvard Law Review, Vo 45 No 8, pp 1365-1372 at 1372.
[81] Mark Ellis, *Fiduciary Duties in Canada,* looseleaf, (Toronto: Carswell, 2011), at para. 3-17.

fidelity, serving two or more parties may be a breach of duty."[82] How is a Director able to balance what seems to be dual fiduciary duties? It seems to be a paradox to ask someone to serve with the utmost fidelity while balancing seemingly contradicting interests. Hopefully future caselaw will help to set parameters on the duties of Directors of Corporations and will make *BCE*, a stakeholder articulation by the Supreme Court of Canada, clear.[83]

One of the leading authors in the area of stakeholder theory is R. Edward Freeman as his work in the early 1980s was essential. R. Edward Freeman is credited with promoting a version of stakeholder theory that allows for others who are impacted by the corporation to have their voices heard. Stakeholders are groups and organizations beyond just shareholders. "As outlined originally in Freeman (1984), stakeholder theory was concerned with the problem of value creation and trade."[84] This view is contrasted with the shareholder primacy model as outlined in Berle and Means. "The stakeholder theory literature seems to represent an abrupt departure from the usual understanding of business as a vehicle to maximize returns to the owners of capital. This more mainstream view—call it 'shareholder capitalism,' or 'the standard account'—has recently come under much criticism, and the 'stakeholder view' is often put forward as an alternative."[85] CSR is very much linked with the stakeholder model as corporate greater corporate accountability will be able to satisfy stakeholders to a greater degree. "This approach is consistent with the

[82] Mark Ellis, *Fiduciary Duties in Canada*, looseleaf, (Toronto: Carswell, 2011),, at para. 1-8.01.
[83] Vanisha H. Sukdeo, Corporate Law, Codes of Conduct and Workers' Rights. (New York: Routledge, 2019).
[84] R. Edward Freeman et al., Stakeholder Theory: The State of the Art, (Cambridge: Cambridge University Press, 2010), at 4.
[85] R. Edward Freeman et al., Stakeholder Theory: The State of the Art, (Cambridge: Cambridge University Press, 2010), at xv.

main ways in which we understand capitalism. In particular we have argued that it is consistent with the market-based approach of Milton Friedman, the agency theory approach of Michael Jensen, the strategic management approach of Michael Porter, and the transactions cost theory of Oliver Williamson."[86] Rather than pitting shareholder primacy against the stakeholder model it may be the case that the shareholder primacy model is being changed or amended to be more in line with the stakeholder model. Rather than the two models being separate and distinct it may be that a new model with is in fact a merger of the two models may emerge. It is very much a symbiotic relationship between stakeholders and the corporation itself as the two have a relationship that is important to each for different reasons. " 'Stakeholder capitalism' takes a different view – a company's overriding responsibility is to its stakeholders – because the corporation is both an economic and social institution. 'It is not only the shareholders (who are here today, gone tomorrow) who have a legitimate stake in the enterprise, but also the employees, communities, and society as a whole' (Kuttner 1997: 190)."[87]

There is much room within stakeholder theory to determine if the model should be egalitarian in that all stakeholders are valued at the same level or if there is a ranking of priority among stakeholders: do shareholders hold the prime position and so on? R. Edward Freeman notes that stakeholders should operate as a symphony with all parties working together in concert rather than the outdated model of stakeholders vying for precedence. Working together and recognizing that many stakeholders are dependent on

[86] R. Edward Freeman et al., Stakeholder Theory: The State of the Art, (Cambridge: Cambridge University Press, 2010), at 29.
[87] Neil Gunningham and Joseph Rees "Industry Self-Regulation: An Institutional Perspective" Law and Policy, Vol 19, No 4 (October 1997) 363-414 at 375.

each other reinforces (or creates) a symbiotic relationship rather than having stakeholders competing for priority after shareholders.

Stakeholder theory allows for greater diversity of opinion and actually allows for corporations to better control risk management. By examining and understanding the interests of other stakeholders beyond shareholders the corporation is able to better protect against risk such as the dam collapse in Brazil involving Vale[88]. If the CEO and engineers had engaged in stakeholder theory and considered the safety of the community members they would likely not be facing homicide charges and other related lawsuits. Risk management can help avoid lawsuits by forcing directors and officers to be more engaged with others and thinking about what works for mitigating damages and risks. This point about CSR and stakeholder theory being about mitigating risks is under-explored as being able to foresee creditable risks allows corporations to be prepared and hearing the voices conveying concerns from stakeholders beyond shareholders allows for the directors and officers to avoid unnecessary risks. By being perhaps what can be termed "over-prepared" by utilizing stakeholder theory allows the corporation to avoid lawsuits in the future.

The list of who should be included as a stakeholder varies but the main list to be used in this dissertation is the one outlined in *Peoples*[89] (2004) and in *BCE* (2008):

[88] Reuters, "Brazil charges ex-Vale CEO with homicide for dam disaster" January 21, 2020, online: <reuters.com>.

[89] "We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment." *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at para 42.

"shareholders, employees, creditors, consumers, governments and the environment."[90] Other potential stakeholders include community groups, and as included in the *CBCA* amendments: retirees, pensioners and long-term interests of the corporation.

### 2.2.1 "egalitarian stakeholder theory"

In this model all stakeholders are treated as equal and receive the same level of consideration from directors and officers as shareholders. In the model known as stakeholder theory developed by R. Edward Freeman there is no settled method about establishing equality among stakeholders – it merely states that these different stakeholders should be considered. This was quite a deviation from the standard shareholder-centric model where stakeholders were not given importance. So, establishing that stakeholders deserve consideration in the corporate decisionmaking process does not state that those other stakeholders (other than shareholders) should be on the same level as shareholders. It is one thing that say that another party matters but it is quite another to say that the two parties are of equal importance. As noted elsewhere in this book, should all stakeholders be on the same level or should there be a ranking of priority among stakeholders? There are good arguments on both sides in that a "true" version of stakeholder theory would be egalitarian and all stakeholder groups would be given the same priority but the other side states that in different scenarios there might be a need to consider different stakeholders and leave out others entirely. So a ranking allows for flexibility and a response to differing needs. The ranking could be stagnant like the one I devised in that the same stakeholders will hold the same position in every

[90] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 40.

circumstance or could be malleable and allow for all stakeholders to have their interests considered but in different situations different stakeholders might get priority. This allows for greater participation. And increased inclusion allows for everyone to feel acknowledged.

The more all stakeholders feel included then it is better for everyone. To be appreciated and acknowledged is important for all stakeholders involved with corporation decisionmaking.

#### 2.2.1.1 Situation A

All stakeholders are equal

#### 2.2.1.2 Situation B

Shareholders are still the most important group and all other groups are on the same second tier

#### 2.2.1.3 Situation C

There is a ranking of priority like I suggest:

1) shareholders

2) employees

3) suppliers

4) creditors

5) consumers

6) governments

7) the environment

#### 2.2.1.4 Situation D

The ranking is dependent on each individual set of circumstances so the stakeholder groups listed

### 2.2.2 CSR to ESG

"Environmental, Social and Governance" (ESG) is now the dominant, but not only form of CSR. This is the more current terminology used to describe what former CSR was meant to do: increase the social responsibility of corporations. This new mode of ESG makes what was once difficult to quantify into something more measurable which is encouraged in the business world. This makes the past version of CSR, which was vague and difficult to determine, into measurable metrics that can be used to determine how well a corporation is performing in ESG compared to its competitors. This readily determinable measure allows for more concrete discussions to be had about how to improve on ESG. This also fits well into the world of finance by allowing even what was CSR to become a measurement. As noted by R. Edward Freeman, CSR is still about being focused on profit not simply what is right as in business ethics so ESG fits in with notions of CSR. ESG is the evolution of the earlier "triple bottom line" concept in CSR

as enunciated by John Elkington. While the question of whether CSR performance can be measured is not unique to ESG it is more readily measurable. Most forms of CSR are now subject to increased scrutiny and accountability – e.g. corporate disclosures, accounting and reports pursuant to codes.

By allowing for measurement there is increased certainty as what is quantifiable can be analyzed in a manner that is distinct from qualitative data. That does not mean that qualitative is inferior but perhaps less precise. Also, quantifiable data allows for increased ease of comparison to other corporations. Similar to the B Impact score used by B Lab[91] to rate B Corporations certified using the B Lab "B Corporation" certification scheme (compared to legislatively defined "Benefit Corporations") there is the ability to easily determine which corporation is doing well versus which is lagging behind its competitors. By looking at the metrics used to measure ESG one can determine which precise elements are relevant depending on the corporation itself in that not all corporations will care about the same issues. For example, Patagonia may put greater priority on its "Environmental" ranking over its "Social" ranking due to the nature of its business, the products it sells, and its consumer base.

### 2.2.3 mHRDD

Mandatory Human Rights Due Diligence (mHRDD) is also related to CSR. This can be linked to the notion that CSR is soft law and there can be at times a hardening of that soft law into hard law. mHRDD is part of that hardening as countries such as

[91] B Lab, online: <http://www.bcorporation.net>.

Norway[92] and Germany[93] have adopted legislation that is part of mHRDD as the legislation holds corporations headquartered in those countries responsible for their supply chains in other jurisdictions. This new legislation in both countries confirms that corporations have an obligation to perform due diligence along their supply chains. This builds on the Supreme Court of Canada decision in *Nevsun Resources*[94] (2020) which imposed new obligations on Canadian corporations. These new legislative changes, new international caselaw, and developments impact Canadian corporate law and related fields. The main point to be explored is that changes in how multinational corporations are governed in foreign jurisdictions may impact Canadian corporate law and related fields. This area builds on John Ruggie's work for the United Nations and his "Protect, Respect and Remedy" framework from 2008 and the UN Guiding Principles from 2011[95]. The discussion about what the government responsibility to *protect* human rights is versus the corporate duty to *respect* human rights is important. The distinction between the two will be examined as these duties are distinct. The intersection of human rights and corporate law did not even exist until about 2000. Prior to that date those legal fields were in very different silos and there was not much interaction between the two. Only until 2000 was there examination of how the two fields are connected and related. The shift from voluntary schemes to mandatory will be explained and shown how this impacts Canadian corporations. These principles were once viewed as voluntary but are now very much becoming mandatory throughout the world and it will only result in Canadian corporate law being expected to react and adapt accordingly.

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[92] Norway, "Act on business transparency and work with fundamental human rights and decent work" passed on June 10, 2021.
[93] Germany, "Supply Chain Act" passed on June 11, 2021.
[94] *Nevsun Resources Ltd v Araya* 2020 SCC 5.
[95] The United Nations Guiding Principles on Business and Human Rights 2011.

### 2.2.4 Workers' Interests

While in law school, the author and two other law students were successful in convincing Queen's University to adopt a code of conduct ensuring that products made with the Queen's logo would be made under fair working conditions. This early venture into the anti-sweatshop movement was instrumental in fuelling this author's current research. Codes of conduct are important, but only through compliance and proper enforcement is the document to hold true force. As Sabel et al. found "[s]tudents across the US have won public disclosure agreements from their administrations which require licensees to disclose factory locations. This relatively recent demand for public disclosure has been surprisingly successful (and would not have been predicted even two years ago)."[96] This growing movement of anti-sweatshop concerns became more about ethical consumption in that one is against sweatshops and the other works in favour of rewarding corporations that are ethical or treat workers fairly. This is the difference between punishing corporations deemed to be unethical and rewarding corporations that are deemed ethical.

This literature discusses how activists and unions are helping to build the rights of workers of those that work in sweatshops. The general tone of the literature is one of sympathy for the workers and a desire to ease their abuse. Also, the investigation and

[96] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace" on SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833>, at 25.

monitoring of existing sweatshops and the drive to either put them out of business or force corporations to reform is often the mandate. This need to reform the corporation is paramount and the drive to eliminate corporations is not apparent in this literature compared to the work done by some scholars on the Left.

The group 'Students Against Sweatshops' which sprang up across university and college campuses across North America can be credited with bringing more attention to the anti-sweatshop movement alternatively called the 'sweatshop free movement'. The anti-sweatshop movement in the 1990s spread to university campuses as student activists sought to hold the institutions they attended accountable for manufacturing processes. While the market for college and university apparel in Canada is rather small, the same industry in the U.S. has revenue in the billions[97] which may be due to the greater attention given to college sports including the National Collegiate Athletic Association (NCAA)'s "March Madness" generates more than $800 million in revenue[98], as well as the larger population. Ethel Brooks[99] provides a good overview of the sweatshop free movement, which has gained momentum across university and college campuses throughout North America. Once a school implements a policy, it is ensuring that items bearing the university's logo are made under fair working conditions. The university usually adopts a code of conduct, which governs the relationship between the university and its suppliers and sub-suppliers. While sometimes activists in developed nations can lend their voice to those in developing nations, it must be noted that those trying to help

[97] National Collegiate Athletic Association, online at <www.ncaa.org>.
[98] National Collegiate Athletic Association, online at <www.ncaa.org>.
[99] Ethel Brooks, *Unraveling the Garment Industry: Transnational organizing and women's work*, (Minneapolis: University of Minnesota Press, 2007), at Back Cover.

must not force their values and ideals on to the others and have to avoid being paternalistic. Some successful campaigns to be noted are "The National Labor Committee's 1995 campaign against Gap Inc..."[100] and the Kathie Lee Gifford scandal of the 1996[101].

The need for corporations to adapt flexible approaches in regard to the interests of workers is due to the differences between workplaces around the world. Even in the same apparel industry, the laws in place vary from one nation to another. This difference means that a multinational corporation would have to ensure that it is in compliance with numerous different pieces of legislation. In the work of Archon Fung, Dara O'Rouke & Charles Sabel[102] the authors provide information about the anti-sweatshop movement. This material is useful for this dissertation because the CSR debate encompasses the labour rights movement and the rights of workers more broadly. Contrasted with Kerr's seven principles of CSR[103] they offer four. "Four principles – transparency, competitive comparison, continuous improvement, and sanctions – can guide activists, consumers, public officials, and managers in building an encompassing framework to organize these efforts."[104]

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[100] Ethel Brooks, *Unraveling the Garment Industry: Transnational organizing and women's work*, (Minneapolis: University of Minnesota Press, 2007), at 27.

[101] For those who are not aware, Kathie Lee Gifford was a TV talk show host who created a line of clothing for Wal-Mart, which was eventually linked to child labour abuses. This drove her to tears on her show and she became involved with campaigning for human rights.

[102] Archon Fung, Dara O'Rouke & Charles Sabel, *Can We Put an End to Sweatshops?* (Boston: Beacon Press, 2001).

[103] See page 49 of this dissertation. Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, (Toronto: LexisNexis Canada Inc., 2009), at 91.

[104] Archon Fung, Dara O'Rouke & Charles Sabel, *Can We Put an End to Sweatshops?* (Boston: Beacon Press, 2001) at 19.

### 2.2.5 The Intersection of CSR and Workers' Interests

Codes of conduct outline duties and responsibilities that flow from the corporation to stakeholders (employees, customers, and so on.). These codes can be narrow in scope (e.g. dealing only with environmental issues) or broad in scope (e.g. environmental, labour, and social issues). The codes can be superficial or multifaceted. A more fulsome code would be broad in scope and quite detailed in regard to the language of the code itself and compliance mechanisms. A rather shallow code would be narrow in scope and use language that is vague and non-specific; perhaps such a code would be void of an enforcement mechanism. Codes can be internal, external, or third-party codes. The compliance and enforcement mechanisms used to monitor the code can also be weak or strong or somewhere along the continuum. Bondy, Matten, and Moon note that code characteristics can be sorted as follows: 1) specific versus general and that model codes contain more sweeping language, 2) comprehensive versus selective as multi-stakeholder codes tend to be more comprehensive and include a broader set of issues, 3) positive versus negative in that some codes may be more principles-based while others are more rules-based and include language that is negative about what companies should abstain from doing, 4) voluntary versus mandatory which is self-explanatory, and 5) equilegal versus supralegal as to what codes reflect existing laws and which move beyond minimal requirements.[105] This layering of governance is important as this creates much work for compliance as there are many different regulations to follow rather than a straightforward approach. Essentially, if hard law accomplished the task of protecting the interests of workers there would not be a need for soft law mechanisms like codes of conduct.

[105] Krista Bondy, Dirk Matten, and Jeremy Moon, "Codes of Conduct as a Tool for Sustainable Governance in MNCs" in Benn, S; Dunphy, D (eds), *Corporate Governance and Sustainability – Challenges for Theory and* Practice, (London: Routledge, 2006), at 14-15.

The empirical work done by Richard Locke into working conditions focuses on Nike and its promises to get rid of the use of sweatshops while at the same time making its reputation better. "As early as the 1980s, Nike was criticized for sourcing its products in factories and countries where low wages, poor working conditions, and human rights problems were rampant. Then, over the course of the 1990s, a series of public relations nightmares-involving underpaid workers in Indonesia, child labor in Cambodia and Pakistan, and poor working conditions in China and Vietnam – tarnished Nike's image. As Phil Knight lamented in a May 1998 speech to the National Press Club, 'The Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse.'"[106] Nike has become quite the beacon for criticism from activists about the use of sweatshops in manufacturing products, and perhaps even the poster child for sweatshops.

### 2.2.6 Richard Locke

The work of Professor Richard Locke of MIT in studying the effectiveness of codes is very helpful in this research. Locke was able to personally attend numerous factories with his graduate students and conduct interviews with various stakeholders including workers, and management. Locke's research was conducted between 2005 - 2010 and included factories in Mexico, Bangladesh, China, Vietnam, Honduras, India, and Thailand.[107] While it seemed like Locke commenced his research with optimism that codes of conduct would help to improve working conditions for workers in the

[106] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013), at 49.
[107] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013), at 22.

developing world, he completed his research with a different point of view. He found that due to the complexity of supply chains, it is difficult to make sure that every stage in the process is in compliance with the code. Also, he notes that different factories have different environments so even in a direct comparison between two factories in Mexico producing goods for the same company, there are different interpretations of how to comply with the code. Management at one factory made workers work individually while the other used groupwork, for example. Management at one factory allowed for workers to have input in their workplace while the other employed a command and control model with no input from workers. While this may seem obvious it really does demonstrate the limits of so-called 'private power' which codes of conduct might rightfully be labeled. Only through coordination between governments and corporations can true effects be made in the fight to increase the rights of workers. Some work by its very nature is dangerous, such as mining, but rights can be put in place to ensure that safety precautions are ratified so that dangerous work is made less so.

> Throughout most of the twentieth century, labor standards were regulated largely on a national basis, through a mixture of laws, union-management negotiations, and company policies. Internationally, the conventions and technical services of the ILO provided an additional source of moral authority and advice but lacked significant enforcement power. The emergence of global supply chains, however, has rendered these national and international strategies inadequate because authority is dispersed not only across national regimes but also among global buyers and their myriad suppliers. It is in this context that private initiatives have emerged to fill this regulatory void.[108]

This movement from state-centered regulation to a more private-centered and corporation-centered mode of governance leaves open gaps to be filled in. While the

[108] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013), at 9.

expectation that state-centered regulation has many levels of government to ensure that all concerns can be addressed from federal to provincial to municipal – the regulation of a corporation does have that corresponding level of detail. "The underlying assumption of this model of 'private voluntary regulation' is that information collected through factory audits will be used both by labour rights NGOs and consumer groups to exert pressure on global brands to reform their sourcing practices as well as by the brands themselves, who rely on this information to police and pressure their suppliers into improving standards in their factories."[109] To prove causation would be difficult, however Locke does note that workplaces where there is greater collaboration did have higher outputs, lending support to the theory that a workplace with greater space for worker voice is more productive. This links with the discussion about naming, shaming, and blaming as well as the discussion about ethical consumption. Locke concludes his research on the factory as follows:

> …we analyzed the results of ABC's own audit data for the 210 factories that ABC reported to the FLA and were actively producing for ABC in May 2006. Out of these 210 factories, only 51 (24 percent) were in full compliance with the company's Code of Conduct. Another 53 percent of these suppliers were explicitly 'not approved,' and 22 percent were categorized as either 'in progress' or 'requiring follow-up,' meaning that some combination of 'terminal,' 'significant,' and/or 'minor flaws,' as described by the company's auditing protocol, were found during the audit, and thus, the factory should be placed on hold – not allowed to produce for ABC – until these issues were rectified.[110]

Locke concludes with a less optimistic take on the value of codes of conduct in advancing the rights of workers, since this "order placing power" does not seem to have been exercised. While suppliers who run afoul of the code can be punished through the

[109] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013), at 24.
[110] Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, (New York: Cambridge University Press, 2013), at 41. Please note that Locke has used ABC to hide the true name of the company.

cancellation of contracts, it might not be the case that this is actually done. It seems as though there is a way to get suppliers to be in compliance with the code, but it may rarely be used and might in fact be a hollow threat. These deficiencies that he notes can be remedied as he states that management needs to be trained to know the contents of the codes and how to properly ensure compliance. Problems such as these can be remedied by hosting training sessions to make sure that management knows the contents of the codes.

Locke, Rissing and Pal outline that due to the absence of "strong national enforcement, a range of private regulatory efforts (i.e. codes of conduct, monitoring programmes, and certification schemes) have emerged to address labour and environmental issues…"[111] Where there is a governance gap, the corporation will be allowed that space to self-regulate. In the absence of an alternative, the corporation has to create its own system of accountability. Only with external pressure will such a regulatory plan gain strength. The true target of the activist power is sometimes difficult to determine – whether to target the retail store, the company head office, or elsewhere. The target is difficult to pinpoint as sometimes factories make products for a number of corporations and may be subjected to varying standards.

[111] Richard M Locke, Ben A Rissing and Timea Pal, "Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains" British Journal of Industrial Relations 51:3 September 2013 pp 519-552 at 520.

### 2.2.7 The Work of Other Scholars

Judge Helen Keller formerly of the University of Zurich, Faculty of Law now a Judge at the European Court of Human Rights notes that in Professor Rhys Jenkins' (University of East Anglia, School of Development Studies) work, he found that in company codes, 41.6% contained clauses to the effect that there should be no forced labour and 46.5% contained clauses that there should be no child labour, while only 23.8% mentioned freedom of association and collective bargaining.[112] Keller notes "[i]n contrast to such internal monitoring, the credibility of the monitoring exercise and hence the legitimacy of the code will be heightened by external mechanisms. External monitoring involves the on-site inspection by a third-party, i.e. an external auditing firm hired by the corporation, to which the auditor reports."[113] Also, even if the code itself is weak or less stringent there is room for a very competent enforcement mechanism. "A survey of 132 codes by Kolk, for instance, found that 41% of the codes did not specifically mention monitoring and that where monitoring systems indeed had been in place, in 44% they relied on internal monitoring."[114] In her work, Keller notes that the Worker Rights Consortium was founded by the United Students Against Sweatshops in 2000. The factory inspections are conducted by the WRC itself and reports are posted on the WRC website.[115] This differs from the work of the FLA, which does not

[112] Helen Keller, "Corporate Codes of Conduct and their Implementation: The Question of Legitimacy" University of Zurich website:. at 21.
[113] Helen Keller, "Corporate Codes of Conduct and their Implementation: The Question of Legitimacy" University of Zurich website:. at 22.
[114] Helen Keller, "Corporate Codes of Conduct and their Implementation: The Question of Legitimacy" University of Zurich website:. at 23.
[115] Helen Keller, "Corporate Codes of Conduct and their Implementation: The Question of Legitimacy" University of Zurich website:. at 53.

independently inspect factories. Also, the FLA is seen as more aligned with corporate interests.

Lakhani, Kuruvilla, and Avgar note that "supplier firms in value chain configurations associated with low-skilled employees and low-employment stability will be less likely to invest in employment relations practices aimed at skill development and worker loyalty and more likely to adopt practices that minimize costs."[116] This is an important point to note because when much of the factory work done is unskilled or low skilled, then the workers are easily replaced. There is less incentive for the company to keep on some workers over others as opposed to workplaces where workers are highly skilled and more difficult to replace.

Oka notes that unions help reduce violations of labour standards but "union presence affects certain dimensions of labour standards more than others. The regression analysis shows union presence is highly significant with regard to wage, hours, and leave standards, but much less so vis-à-vis safety and health issues."[117]

Weil and Mallo argue that there are three general mechanisms that address global labour standards: 1) a more traditional government role of monitoring codes or standards, 2) certification-based systems such as Social Accountability International (SAI) which has outside auditors, and 3) a mode that connects unions and organizations such as the

[116] Tashlin Lakhani, Sarosh Kuruvilla, and Ariel Avgar "From the Firm to the Network: Global Value Chains and Employment Relations Theory" British Journal of Industrial Relations 51:3 September 2013 pp 440-472 at 451.
[117] Chikako Oka, "Improving Working Conditions in Garment Supply Chains: The Role of Unions in Cambodia" British Journal of Industrial Relations 2015 pp 1-26 at 20.

Workers Rights Consortium (WRC) that is complaints-based.[118] The third model also makes use of the naming, shaming, and blaming approach to garner media attention about abusive labour practices to encourage consumers to boycott or buycott.[119]

Bondy, Matten and Moon note that "[s]elf-regulatory initiatives offer a means to control corporate behaviour across borders as they are not tied to any particular political system or territory, and therefore can be applied in a variety of locations within corporations, industries or sectors, depending on the scope of the initiative and the will of the corporation in implementation."[120] The authors offer a definition of codes of conduct: "CoCs can be defined as a voluntary set of commitments that either influence corporate attitudes and behaviours or are undertaken by the corporation to define their intentions and/or actions with regard to ethical and other issues, or towards a range of stakeholders from a market-based perspective."[121] The work of scholars and activists align to help increase protections for workers. Through such initiatives like the Clean Clothes Campaign there is the ability to bring together different stakeholder groups. The Clean Clothes Campaign outlines four major faults in codes of conduct: 1) they are vaguely defined, 2) they are incomplete which may exclude the right to organize, 3) if they are not implemented properly as they may lack information about how the codes are employed or

[118] David Weil and Carlos Mallo, "Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance" British Journal of Industrial Relations 45:4 December 2007 pp 791-814 at 793.

[119] See note on page X about activists and targets.

[120] Krista Bondy, Dirk Matten, and Jeremy Moon, "Codes of Conduct as a Tool for Sustainable Governance in MNCs" in Benn, S; Dunphy, D (eds), *Corporate Governance and Sustainability – Challenges for Theory and Practice*, (London: Routledge, 2006), at 6.

[121] Krista Bondy, Dirk Matten, and Jeremy Moon, "Codes of Conduct as a Tool for Sustainable Governance in MNCs" in Benn, S; Dunphy, D (eds), *Corporate Governance and Sustainability – Challenges for Theory and Practice*, (London: Routledge, 2006), at 7.

monitored, and 4) if they are not independently monitored as an internal monitoring system may not be sufficient.[122]

Williams, Davies and Chinguno write about International Framework Agreements (IFAs) as a potential route to advance the rights of workers.[123] They note that IFAs are formed between MNCs and 'global union federations'. The authors note that approximately 80 agreements have been enacted.[124] While the authors are skeptical about how useful IFAs may be, they note that "IFAs have been seen as a step towards the internationalization of collective bargaining…By framing labour rights as universal human rights, IFAs can be seen as a form of 'stateless' regulation…"[125] IFAs do seem to be more centered on local unions rather than codes of conduct which may be seen as being distant as codes do not necessarily involve unions while IFAs attempt to work alongside unions. "Rather than attempting to 'ratchet up' standards from afar, IFAs hold out the possibility of building sustainable local union capacity. It is this aim alone that avoids the charge made of voluntary corporate arrangements, that by casting workers as

[122] Krista Bondy, Dirk Matten, and Jeremy Moon, "Codes of Conduct as a Tool for Sustainable Governance in MNCs" in Benn, S; Dunphy, D (eds), *Corporate Governance and Sustainability – Challenges for Theory and Practice*, (London: Routledge, 2006), at 9.

[123] I must note that I am skeptical about the promise of IFAs as I first heard about them in the summer of 2011 from a Senior Partner at a management-side labour and employment law firm. If management-side law firms see them as beneficial then maybe they are not very advantageous for workers.

[124] Glynne Williams, Steve Davies and Crispen Chinguno, "Subcontracting and Labour Standards: Reassessing the Potential of International Framework Agreements" British Journal of Industrial Relations 53:2 June 2015 pp 181-203 at 184.

[125] Glynne Williams, Steve Davies and Crispen Chinguno, "Subcontracting and Labour Standards: Reassessing the Potential of International Framework Agreements" British Journal of Industrial Relations 53:2 June 2015 pp 181-203 at 185.

victims, rather than active agents, they risk further disempowering labour (Seidman 2007)."[126]

Foxconn in China has been studied for its abuses against workers. Smyth et al. discuss the increase in suicides in Shenzhen, China`s Foxconn factories in January to May 2010. "A report by the workers' rights watchdog, Solidarity International, suggests that a primary reason for the suicides is the adverse effects of excessive working hours."[127] Certain parts of the world have higher rates of overtime work which in some cases may be termed excessive hours. "According to the ILO (2006), in Thailand, 46.7 per cent of people work in excess of 48 hours per week, which is the third highest in the world."[128] Smyth's study concludes that 48 per cent of workers reported working in excess of 60 hours per week which is the FLA code limit.[129] This may be more prevalent in workplaces where workers live onsite in dormitories as the worker is less distanced from the workplace and more controlled by management. Hsieh notes that it is argued that developed nations have a duty to those in developing nations. "The general idea of a duty to rescue has been articulated and discussed by a number of scholars as a plausible way to account for intuitions about a duty to provide aid to others."[130] This idea can be

[126] Glynne Williams, Steve Davies and Crispen Chinguno, "Subcontracting and Labour Standards: Reassessing the Potential of International Framework Agreements" British Journal of Industrial Relations 53:2 June 2015 pp 181-203 at 198.
[127] Russell Smyth et al., "Working Hours in Supply Chain Chinese and Thai Factories: Evidence from the Fair Labor Association's 'Soccer Project'" British Journal of Industrial Relations 51:2 June 2013 pp 382-408 at 383.
[128] Russell Smyth et al., "Working Hours in Supply Chain Chinese and Thai Factories: Evidence from the Fair Labor Association's 'Soccer Project'" British Journal of Industrial Relations 51:2 June 2013 pp 382-408 at 387.
[129] Russell Smyth et al., "Working Hours in Supply Chain Chinese and Thai Factories: Evidence from the Fair Labor Association's 'Soccer Project'" British Journal of Industrial Relations 51:2 June 2013 pp 382-408 at 390.
[130] Nien-he Hsieh, "Voluntary Codes of Conduct for Multinational Corporations: Coordinating Duties of Rescue and Justice" Business Ethics Quarterly 2006 Vol 16 Issue 2 pp 119-135 at 123.

attributed to Peter Singer's work in 1972 about saving a drowning child if the only consequence to the rescuer is to muddy their clothes. "In turn, to the extent that members of developed economies can be considered to be in a state of emergency, citizens of developed economies are under a duty of rescue to provide assistance to members of developing economies (Ashford 2000)."[131]

In "Corporate Social Responsibility and Workers' Rights"[132] by Lance Compa, of Cornell University's School of Industrial and Labor Relations, the author summarizes how the debate surrounding the rights of workers is very broad as it spans across law, political science, philosophy and industrial relations. Corporations may rally around corporate social responsibility in order to appease the masses, and in recognition of the shift to ethical consumption. This may force corporations to put substance behind their claims to be socially responsible. Because consumers are becoming more knowledgeable about products, the demand for ethical products may put pressure on corporations to adopt the same.

I favour an approach that sees value in corporate codes for the ability of codes to transcend borders in a way that domestic law cannot, the malleability of codes in that they can keep getting amended to get stronger, and they allow for the potential of worker involvement in a way that legislation does not. Codes are increasingly become more similar to the strength and enforceability of hard law and allow for a private governance system outside of the domestic sphere allowing corporations to become more accountable

[131] Nien-he Hsieh, "Voluntary Codes of Conduct for Multinational Corporations: Coordinating Duties of Rescue and Justice" Business Ethics Quarterly 2006 Vol 16 Issue 2 pp 119-135 at 123.
[132] Lance Compa, "Corporate Social Responsibility and Workers' Rights", online at: <http://digitalcommons.ilr.cornell.edu/articles/183/>.

by using an internal tool like the code instead of external regulation. In the following methodology section the specific approach to the examination of codes and the case study on Rana Plaza is outlined and detailed.

## 2.3 The United Nations and John Ruggie

In 2005 Professor John Ruggie was appointed as The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. His mandate included "identifying and clarifying standards of corporate responsibility and accountability with regard to human rights."[133] The UN Global Compact[134] had been launched in July 2000 and was to be a platform to engage corporations to abide by the governing principles and work with the UN in order to achieve increased social responsibility. Within his Final Report Ruggie made the recommendation that the UN support the "Protect, Respect and Remedy" Framework that had been developed by the Special Representative previously.[135] The Framework is comprised of three parts:

> The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they

[133] UN, online: < http://www.un.org/News/Press/docs/2005/sga934.doc.htm>.
[134] See UN Global Compact online: <http://www.unglobalcompact.org/>. See also Principles for Responsible Investment, online: <http://www.unpri.org/>. See also Global Reporting Initiative, online: <https://www.globalreporting.org/Pages/default.aspx>.
[135] John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf> at 3.

> are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.[136]

The issue of how to bring together numerous different obligations to create one framework is a large task, but it was achieved by Ruggie and his team. The concern among academic and practitioners was, and remains, how to operationalize this document especially in regard to the role of the UN. "Nothing in these Guiding Principles should be read as creating new international law obligationsm or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[137] The Framework merely acts alongside existing obligations, it does not create new ones. Even the document itself is voluntary, not mandatory. The document often relates back to the State's role in governance. "The failure to enforce existing laws directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice."[138] While the law on the books may be strong, the lack of enforcement of a strong law will prove ineffective. In regard to the 'Remedy' part of the Framework the report outlines a section on grievance mechanisms. "A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to

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[136] John Ruggie. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf> at 4.

[137] John Ruggie. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf> at 6.

[138] John Ruggie. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf> at 8.

help ensure that it is effective in practice."[139] It is important to keep the UN's role in perspective. "The United Nations is not a centralized command-and-control system that can impose its will on the world-indeed it has no 'will' apart from that with which Member States endow it. But it can and must lead intellectually and by settling expectations and aspirations."[140] There are positives and negatives in having a principles-based approach rather than rules-based.

The connection between the groundbreaking work done by Ruggie to this dissertation is that the movement and changes happening in international law and international human rights in the context of corporate abuses entails increased obligations forced on to corporations results in greater transparency and accountability which leads to decreases in mistreatment against workers and other stakeholders. Codes of conduct are an example of soft law mechanisms and amendments to legislation is a form of hard law, the changes happening at the United Nations and in the newly created field of "business and human rights" exists between those two: belonging to neither in form or function but belonging to both.

[139] John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf> at 27.

[140] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/5 (April 7, 2008), at 28, online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

This dissertation also suggests further amendments to the *CBCA* that will help embrace greater protection for different stakeholder groups such as the expansion of employees to include foreign workers along supply chains. By clarifying the directors' duties enunciated in *Peoples* and *BCE* by using a ranking of priority for stakeholder groups, there will be increased accountability and transparency. This will contribute to the existing literature as there is a need for further research to be done in the area of corporate governance and labour and employment law. Much of the research in CSR relates to sustainability and the focus is on environmental protection rather than protecting humans against suffering and abuse. More recent decisions from the SCC have raised awareness not just about sweatshops in the Global South but about forced labour as well.[141] So while cases involving climate change have been increasing as well as SRI, there has been increased attention to workers' interests with a particular focus on forced labour.

[141] *Nevsun Resources Ltd v Araya* 2020 SCC 5.

## 2.4 UNGC

The United Nations Global Compact was developed in 2000 to try to encourage corporations to incorporate the 10 principles[142] put forth in the areas of sustainability, human rights, fair treatment for workers, and to reduce corruption. Sethi and Schepers mention that the KPCS as being more transparent than other schemes.[143] They conclude that the UNGC is "long on promises, short on performance".[144]

Eight conditions that can be applied to ensure a higher level of effectiveness in codes

| | |
|---|---|
| 1 | The code must be substantive in addressing broad areas of public concern pertaining to industry's conduct. |
| 2 | Code principles or standards must be specific in addressing issues embodied in those principles. |
| 3 | Code performance standards must be realistic in the context of industry's financial strength and competitive environment. The industry should not make exaggerated promises or claim implausible achievements. |
| 4 | Member companies must create an effective internal implementation system to ensure effective code compliance. |
| 5 | Code compliance must be an integral part of a management performance evaluation and reward system. |
| 6 | The industry must create an independent governance structure that is not controlled by the executives of the member companies. |

[142] Principle 1: Business should support and respect the protection of internationally proclaimed human rights
Principle 2: Make sure that they are not complicit in human rights abuses
Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining
Principle 4: The elimination of all forms of forced and compulsory labor
Principle 5: The effective abolition of child labor
Principle 6: The elimination of discrimination in respect of employment and occupation
Principle 7: Businesses should support a precautionary approach to environmental challenges
Principle 8: Undertake initiatives to promote greater environmental responsibility
Principle 9: Encourage the development and diffusion of environmentally friendly techniques
Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery

[143] S Prakash Sethi and Donald H Schepers, "United Nations Global Compact: The Promise-Performance Gap" J Bus Ethics (2014) 122:193-208 at 197.

[144] S Prakash Sethi and Donald H Schepers, "United Nations Global Compact: The Promise-Performance Gap" J Bus Ethics (2014) 122:193-208 at 207.

| | |
|---|---|
| 7 | There must be an independent external monitoring and compliance verification system to engender public trust and credibility in the industry's claims of performance. |
| 8 | There should be a maximum transparency and verifiable disclosure of industry's performance to the public. Standards of performance disclosure should be the sole province of the code's governing board. |

Source: S Prakash Sethi and Donald H Schepers, "United Nations Global Compact: The Promise-Performance Gap" J Bus Ethics (2014) 122:193-208 at 198.

When examining the effectiveness of codes, it is not obvious that codes make a dramatic difference in advancing the rights of workers. Professor Patrick Erwin at the Center for Marine Science at the University of North Carolina Wilmington notes that a recent study indicated that over four decades of empirical research on codes only 27 studies reported a significantly positive effect as result of codes, 13 studies reported a weak effect, 26 studies reported no significant effects, 11 studies produced mixed results and one produced a negative result (see table below).[145] The study cited by Professor Erwin was from a paper by Professor Muel Kaptein and Professor Mark S. Schwartz, where the authors include a table listing the findings of the studies they examined.[146] Kaptein and Schwartz note that business codes contain such varied language as mission statements, beliefs, values, principles, guidelines, standards, and rules.[147] Kaptein and Schwartz examine 'business codes', for which they use a broad term to cover codes of conduct to internal codes about employee behaviour. While it is important to use their

[145] Patrick M Erwin, "Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance" Journal of Business Ethics (2011) 99: 535-548 at 536.

[146] Muel Kaptein, Mark S Schwartz, "The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model" Journal of Business Ethics (2008) 77: 111-127.

[147] Muel Kaptein, Mark S Schwartz, "The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model" Journal of Business Ethics (2008) 77: 111-127 at 113.

study, it is useful to distinguish it from studies that deal only with codes of conduct such as Locke.[148]

[148] As an aside I communicated with one of the authors via email and he did caution me that the article was 'dated'. This is important to note because the article is from 2008 and uses some research from the 1980s which is even more dated. As time goes on, some codes become more robust so it is better to focus on research such as that of Locke and Gereffi which is from 2010s.

## 2.5 Methodology

### 2.5.1 Research Design and Sampling Frame

This dissertation is comprised of two case studies: one focuses on the Rana Plaza disaster and the second focuses on HBC. Rana Plaza was chosen because there were fourteen Canadian companies that used suppliers that operated factories in Bangladesh with links to the Rana Plaza disaster (in alphabetical order): 1) Abercrombie and Fitch, 2) Gap, 3) H & M, 4) Hudson's Bay, 5) Jacob, 6) Loblaw, 7) Lululemon, 8) Mark's, 9) Reitmans, 10) Roots, 11) Sears Canada, 12) Tristan, 13) Walmart, and 14) YM Inc. From that disaster there were soft law mechanisms implemented. The dissertation's author chose to focus on HBC as that corporation was manufacturing in Rana Plaza so there is a connection to the first case study as well as the fact that HBC has such a strong connection to Canadian identity. HBC occupies a significant role in Canadian society including branding such as the distinctive HBC stripes quintessential to Canadian culture. Some corporations link and connect to the culture of the society in which it was founded like Harrod's in England and Coca-Cola in the U.S.

This dissertation will also examine the Rana Plaza disaster to be used as case study of what governance structures were set up in the aftermath. It will use books, articles, government documents, and corporate documents to look at the best approach to protect workers in the Global South who manufacture goods and products for Canadian corporations. This dissertation uses a transnational law approach to the examination of how corporations can better manage their supply chains as the companies are usually

headquartered in the Global North and the factories are often located in the Global South. There should be accountability along supply chains no matter the jurisdiction.

## 2.6 Transnational Governance Models

This section critically explores how to implement changes to corporate behaviour in regard to labour-related issues through codes of conducts that would strengthen the rights of workers. The corporation essentially allows for its own reformation from within. There are many ways the link between corporate governance or CSR and workers' interests can be explored. The term CSR is used to differentiate from the alternate model of a corporation existing solely for its shareholders and to increase profit, and means that corporations have duties to other stakeholders beyond shareholders. Those stakeholders include, but are not limited to, employees and those who produce goods and provide services[149], the environmental agencies, and government. Codes are a soft law mechanism that may be used to create a voluntary standard or set of rules to which corporations are bound. While this may be viewed as rather insubstantial compared to legislation, codes have value in terms of allowing the two (or more) parties that are bound by the code to have direct input in drafting the code.

Corporations may rally around CSR in order to appear responsive to social concerns, and in recognition of the shift to ethical consumption. This may force

[149] Sometimes those who produce goods and services for a certain company may not be 'employees' of that company but still have rights and obligations that flow from such a relationship even though it may not be termed 'an employment relationship'.

corporations to put substance behind their claims of being socially responsible. Because consumers are becoming more knowledgeable about products, the demand for ethical products may put pressure on corporations to adopt the same. Compa credits Levi's and Reebok for adopting internal codes of conduct in the 1990s.[150] But he also notes that "[c]ompanies monitoring and enforcing their own codes of conduct led inevitably to charges that the fox was monitoring the henhouse."[151] This is also shown by such organizations as the FLA, which was essentially created by the U.S. government under President Bill Clinton, so the FLA is questioned as to whether it is as effective as it could be. The FLA is viewed as a governmental soft mechanism to counter critics rather than an effective monitoring agency. This draws out the fact that there are sometimes negative repercussions of trying to help workers in that if a corporation is not able to meet certain standards then it might shut down, resulting in workers losing jobs. The emphasis is often on trying to reform corporate practices, not put corporations out of business.

## 2.7 Governance Models

If the aim is to create and strengthen existing labour interests then the best way forward may be to construct how to implement CSR changes through changes to corporations themselves by either external or internal sources. This can be achieved through two ways:

1) changes to legislation (hard law)
    a) This can be accomplished by expanding duties of directors and officers beyond shareholders to include employees.

[150] Lance Compa, "Corporate Social Responsibility and Workers' Rights", available at: <http://digitalcommons.ilr.cornell.edu/articles/183/>, at 4.
[151] Lance Compa, "Corporate Social Responsibility and Workers' Rights", available at: <http://digitalcommons.ilr.cornell.edu/articles/183/>, at 4.

b) This can be attained by implementing a mandatory code of conduct for companies, possibly embedded in the *CBCA*[152]. This still leaves the question as to what form this would take and what an ideal code would look like.

2) strengthen existing voluntary codes of conduct (which is a move from soft law to hard law) which is often termed a 'hardening of soft law'.

These questions will lead to answers that can be used to change policy and should be useful for government when deciding how best to implement new rules or laws and how to strengthen existing rules and laws. Trying to change legislation is more time consuming. Even if legislation is passed by one government it can be easily removed by the next government as is often the case in regards to labour legislation. Because labour issues are very politically isolating, the government in power may choose to curtail workers' interests in their administration that the next party in power may change. In the case of codes of conduct, there is less chance of codes being changed as key officials may remain in those positions of power.

Once codes are implemented, the real force and effect comes from having external monitoring agencies that are paid to monitor compliance with the code. Depending on the code itself, the remedy for a breach of the code is usually to try to get the company to fix the problem rather than terminating the contract with the supplier automatically. The nature of the code varies from corporation to corporation, but most identify that suppliers and sub-suppliers must be governed by the code, otherwise the

[152] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

efficacy is reduced. If the attempt to try to rectify the wrong does not happen, then the relationship may be terminated. "The ultimate sanction against non-compliance is the threat of being de-listed as a supplier. Codes are thus only 'voluntary' to the suppliers in that the alternative is to find new outlets."[153] This is often stipulated in the language of the code itself.

[153] Stephanie Barrientos, "Mapping codes through the value chain: from researcher to detective" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, 67 (London: Earthscan Publications Ltd., 2002) at 67.

## 2.8 Codes of Conduct in the Transnational Context

Codes are essential in current society as the reach of transnational corporations is vast and domestic laws are not able to fully provide a regulatory system that is needed for policing such an organization. Critics may argue that codes allow corporations to get away with behaviour that hard law mechanisms would punish (possibly severely so). Arthurs notes, "[h]owever voluntary codes take the process one step further: they allow corporations to make something resembling 'law' without state approval *ex ante* or *ex post* (Teubner 1997)."[154] The question becomes more akin to what corporations should do when the state fails to act, rather than corporations vying to usurp the power of the state. While it may be true that corporations turn to self-regulation as opposed to calling for state regulation it is not necessarily true that self-regulation is futile. Self-regulation may also be a first step towards increased regulation.

Codes do not offer the protection that hard law does but may allow coverage for areas that legislation does not – while legislation may govern hours of work there is room within a code to allow for formation of advantages akin to those gained in a collective agreement. A code of conduct may give workers rights above and beyond what is enacted in legislation. The flexibility of codes can be beneficial to workers. In jurisdictions where union organizing is difficult there may be ground covered in a code that may not be able to be achieved through hard law as a code may stretch beyond national borders to offer foreign workers protection that would be otherwise unavailable in their nation. While the

[154] Harry Arthurs, "Profit, Power and Law in the Global Economy" in Wesley Cragg, ed., *Ethics Codes, Corporations, and the Challenge of Globalization*, (Northampton, Edward Elgar Publishing Limited, 2003). at 55.

future outcome of numerous codes is yet to be realized the potential of codes is compelling. Only through the establishment of voluntary codes and onwards towards getting those same rights entrenched in legislation will the fight for workers rights move forward. "They [codes of conduct] should be seen as a contested terrain which can be used to advance the cause of workers in the South and to carve out space for them to organize and to struggle to improve their own wages and working conditions."[155] Again, a first step in the fight for workers' interests is better than waiting for a perfect model to emerge.

### 2.8.1 Consumer Regulation

The next step from state control to private regulation is consumer regulation. If we have moved from the state-centered model of governance and regulation to the private regulation model where non-state actors such as corporations and NGOs help to shape the legal pluralist landscape then what is the next step? This dissertation argues that the next step is governments essentially handing over the mechanisms of control to the consumers. Why should governments be held responsible for the goods that cross their borders when they can download that power to the ordinary consumers? Where is the government's responsibility or liability in allowing its citizens to purchase and consume products that are socially irresponsible? Whose culpability is it? If CSR is about corporations choosing to become more socially responsible then governments are able to shirk the responsibility of forcing corporations to become more socially responsible.

[155] Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 28.

In the model the author terms ‘consumer regulation’ the regulation of consumer goods is left to consumers themselves. While codes and certification agencies allow for a certain level of standards to be complied with, they also create a corresponding obligation on consumers. If these codes and certifications exist in the world where consumers purchase goods and services, is the obligation not placed on consumers to be knowledgeable about these codes and certifications? This creates a new ‘informed ethical consumer,’ one who has to not only recognize these certifications when encountered with them, but also be able to understand the distinctions between the competing agencies. This new ‘informed ethical consumer’ must know that the Forest Stewardship Council (‘FSC’) and Rainforest Alliance exist and must be able to differentiate and extol the virtues of each, to use one example. Not only must consumers notice such certifications but must be knowledgeable about the organizations that implement these certifications, hence not being just an ethical consumer but an ‘informed ethical consumer’.

### 2.8.2 Codes versus Certifications

Codes of conduct are rather malleable as they can be altered and changed to fit new working conditions in a way that legislation is not able to. This is a positive aspect of codes because the expectation is that codes can be improved in later years to make sure that corporations are competitive, especially in the face of their competitors adopting similar codes. Codes are a tool that allow for competition as they encourage corporations to constantly improve upon the standards already agreed upon. In the alternative certification agencies are rather static in that once a logo is imprinted on a product then it cannot be altered unless the certification itself changes to be improved or lowered. Certification schemes are more static when compared to codes.

Moreover, what the FSC logo means today may not be what it means tomorrow. FSC in particular has been criticized as being too lenient and maybe having too many products bear their stamp of approval – leading consumers to lose trust in the symbols and what they stand for. However, the 'informed ethical consumers' may be the only ones who are skeptical. It might be that the average consumer does not notice these symbols or in the alternative maybe they only need to see one logo on a product to be satisfied about its ethical nature. "As in the case of investors, a minority of consumers are also concerned about the ethical dimension of the products which they purchase, as illustrated by the growth in demand for fair-traded coffee and other such products. However, these examples remain niche markets, supplying a predominantly middle class and relatively affluent and educated customer base."[156] The argument that ethical consumers are rather affluent consumers is not true as many consumers may simply be informed about socially responsible products and choose to purchase such.[157] It does not mean that ethical consumers are all rich individuals who can afford the often higher prices that are linked to ethical products. Some consumers may choose to spend their money in this manner rather than on other purchasing choices. The discussion should be more focused on why certain consumers are willing to pay more for ethical products.

[156] Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 15.

[157] See the work of students on campuses – many of these are not rich yet make choices due to social considerations. Vladimir Baranov et al. "Student Attitude to Ethical Consumption as New Ecological Practice" (2019) Humanities and Social Sciences Reviews Vol 7, No 4, pp 1173-1179.

Also, the effect of guilt may be explored to understand why people choose ethical products once they are better informed.[158]

Because of the ability of capital to cross borders in a distinct way from laws, it may be easier to regulate the corporation through codes, which traverse borders, than to bind it to national laws."The effect of these developments has been to give multinational corporations remarkable freedom to choose the legal systems that will govern their operations. Corporations are now free to seek out those environments in which the laws in place provide the most favourable conditions for maximizing profits."[159] There should be a rule/law that moves with the corporation such as a code. The code is in place no matter what jurisdiction the company is in. This bridges the divide between host nations and home nation as the corporation is bound by the code no matter what border it crosses. This allows for consistency and predictability as the code is the same in every jurisdiction rather than trying to navigate and manage the differing employment laws that exists in different nations.

Corporations do not have the same availability of enforcement that is available to the state. Murray notes that "[i]t is argued here that it is both valid and useful to study the ILO Conventions in their own right, independently of their ratification and implementation at the national level. The Conventions can be studied as a body of rules

[158] I hope to explore the intersection of guilt and ethical consumption in later work as it is important to note that once consumers are better informed they may feel guilty purchasing products that are not ethically produced.

[159] Wesley Cragg, ed., *Ethics Codes, Corporations, and the Challenge of Globalization*, (Northampton, Edward Elgar Publishing Limited, 2003), at 2.

which reflects the views of the tripartite delegates of the ILO Member States at the International Labour Conference in any given year."[160] Because of the malleability of the Conventions she argues that they are not quite as useful as planned. Murray states "[t]he character of transnational labour rules of the ILO and the Community is thus at times rather difficult to capture. For the most part, they are not instruments of direct 'governance', and they do not 'regulate' as national legislation does. The details in international rules are often templates for multiple outcomes within and between national jurisdictions."[161] The fact that ILO conventions are directed at nation states and not corporations is an important distinction to remember.

### 2.8.3 Increasing Labour Standards on a Worldwide Level

Private regulation is outside of the state-centred regulation model and instead attempts to build a standard that is not based on national borders. Sabel, O'Rourke and Fung seem to imply that codes of conduct have some value in building the rights of workers. This RLS model that the authors devised does not set out a regulatory framework or a way of making the theory practical. This notion of an industry-wide standard is worth pursuing as then one is comparing like with like rather than trying to transcribe norms from one industry to another.

#### 2.8.3.1 International Labor Organization

[160] Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared*, (Norwell, Kluwer Law International, 2001), at 5.
[161] Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared*, (Norwell, Kluwer Law International, 2001), at 7.

The International Labor Organization ('ILO') Conventions outline core labour standards. However, even Canada is not signatory to all of the conventions. Even if a country signs on to the ILO Conventions, the task of enforcing such standards operates on the domestic front. How are breaches of a country's ILO obligations treated? What is the remedy for a breach? "The open and crucial questions, then, is how to construct a regulatory framework that protects vulnerable groups against the abuses identified in core labor standards?"[162] While discussing divisions such as North-South and developed-developing it is worth exploring the notion of paternalism. Sometimes the developed countries are motivated by self-protection and restrict economic activities in developing countries.[163] Is this not a form of paternalism? We, the developed countries, telling those in developing countries what is in their best interests? At times, is this not a veiled self-interest? The likely answer is yes, that there is self-interest at play and that there is an aspect of the Global North trying to assert dominance over the Global South.

Also, the inclusion of ILO Conventions in corporate codes may be misreading the intent of the ILO. As stated by Professor Jill Murray:

> ILO conventions are designed to place obligations on states. That is so in a purely technical sense, because conventions are instruments which are 'addressed' to states. Each member state of the ILO must decide whether or not it ratifies an individual convention, and the form which implementation of a ratified convention will take.[164]

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[162] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 4.

[163] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 5.

[164] Jill Murray, "Labour rights/corporate responsibilities: the role of ILO labour standards" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 33.

Trying to get corporations to adopt conventions that are geared at states is ineffective as the state may possess the proper mechanisms for enforcement that a corporation may lack.

# 3 Chapter Three - Changes to Corporate Governance

This chapter explores hard law or legislative changes: in particular, the author focuses on Benefit Corporations and the expansion of fiduciary duties in 2019 in the *CBCA* Section 122. Another route besides implementing codes of conduct to help regulate corporations, as discussed in Chapter Two, is the approach used by B Lab and other such organizations in getting hard law enacted. The movement from soft law to hard law in regard to corporations becoming more socially responsible can be termed 'the hardening of CSR' in that what was once merely voluntary can become mandatory. This development can be seen in the creation of Benefit Corporations, which originated from the work of B Lab pushing for the establishment of Benefit Corporations to force corporations that claimed to be socially responsible to put substance behind those claims. In addition to the introduction of another corporate form such as Benefit Corporations is the expansion of fiduciary duties for all corporations, not just those corporations who hold themselves out as socially responsible. It is important to hold all corporations to a standard that is consistent and fair rather than expecting a select group of good corporations to be leaders in regard to governance. These two actions of moving all corporations to become more socially responsible and having some corporations act as CSR leaders is able to happen at the same time. It is not an either-or situation. This chapter will examine the changes to corporate governance that happen beyond codes of conduct, which includes the expansion of fiduciary duties in legislation and caselaw such as *Peoples* and *BCE*.

## 3.1 Expansion of fiduciary duties

Fiduciary duties can be expanded through caselaw and through legislation. Below I discuss the cases of *Peoples* and *BCE*, as well as the fiduciary duties outlined in the *CBCA*. I will also describe how Benefit Corporations would fit within the Canadian legal landscape. A Benefit Corporation ('BC') is a new corporate form implemented in the United States of America ('U.S.') that is intended to make corporations more socially responsible by outlining obligations beyond shareholder wealth maximization.

If the aim is to increase protection for foreign workers along supply chains then one way beyond codes of conduct which extend corporate liability to other jurisdictions is to expand the directors' duties under the *CBCA* section 122 to include foreign workers as another stakeholder group.[165] The inclusion of this additional stakeholder group will be discussed after the analysis of the caselaw on expanding directors' duties.

## 3.2 Summary of Peoples

[165] Simply beyond foreign workers, which is the focus of this dissertation, Aboriginal groups are also absent in Section 122
Aboriginal groups have separate and distinct concerns from the other stakeholders included in the 2019 amendments to the *CBCA*. Areas of law beyond purely "Aboriginal" or "Indigenous" law have to be responsive to the concerns of Aboriginal groups in response to the Truth and Reconciliation Commission of Canada's Report in 2015.
As a personal aside, I have been lecturing my students in all courses from Business Associations to Legal Research & Writing about the TRC as well as Aboriginal issues more broadly for years. This is an issue I care about and is reflected in my teaching evaluations and feedback from students. TRC website: <www.trc.ca>

The 2004 Supreme Court of Canada case of *Peoples Department Stores Inc (Trustee of) v Wise* dealt with issues involving section 122 of the *CBCA* and directors' duties during an insolvency. Wise Stores Inc. acquired Peoples Department Stores Inc. from Marks and Spencer Canada Inc. The three Wise brothers were majority shareholders, officers and directors of Wise, and the only directors of Peoples. They devised an arrangement by which Peoples would make all purchases from North American suppliers and Wise would make all purchases from all other suppliers. The new policy was implemented on February 1, 1994 but before the end of the year, both Wise and Peoples declared bankruptcy. Peoples' trustee filed a petition against the Wise brothers. The trustee claimed that they had breached their duties as directors under section 122 of the *CBCA* as they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors. The fiduciary duty under s. 122(1)(*a*) of the *CBCA* requires directors and officers to act in good faith and honestly *vis-à-vis* the corporation. Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the *CBCA* if they act prudently and on a reasonably informed basis. The decisions of directors and officers must be reasonable business decisions in light of all the circumstances, including the prevailing socio-economic conditions, about which they knew or ought to have known. "The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of the Quebec Court of Appeal. The appeal is therefore dismissed."[166]

[166] *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at para 1.

### 3.3 Summary of *BCE*

The 2008 Supreme Court of Canada case of *BCE Inc v 1976 Debentureholders* was a challenge by a group of debentureholder (bondholders) to the acquisition of BCE by a group of purchasers led by the Ontario Teachers Pension Plan Board. The deal, by way of leveraged buyout, might have increased market price of the shares so that shareholders would benefit but the bondholders would likely see a reduction in the market value of their bonds by 20 percent. All three offers contemplated the addition of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. The Supreme Court rejected the challenge by the debentureholders holding that the Board had taken into account their interests. The bondholders sought relief by way of the oppression remedy under section 241 of the *CBCA*. The Quebec Superior Court approved the arrangement and the Quebec Court of Appeal found that the arrangement had not been shown to be fair and should not have been approved and found it not needed to consider the oppression claim.[167] Expanding on the decision in *Peoples* the Court held that where there is conflict among stakeholders that directors and officers must treat each stakeholder group fairly. The debentureholders sought relief under the oppression provision in s. 241 of the *CBCA* and opposed court approval of the arrangement, as required by s. 192 of the *CBCA*.[168] As stated by Professor Anthony VanDuzer of the University of Ottawa, Faculty of Law the *BCE* decision "creates a new but incomplete regime for the responsibilities of corporate directors and officers."[169] VanDuzer means that the expansion of directors' duties provided in *BCE* created new duties and the court

[167] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 2.
[168] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 22.
[169] J Anthony VanDuzer, "*BCE v 1976 Debentureholders*: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision since *Peoples*" (2010) UBC Law Review vol 43:1 205-258.

did not explain the limits of those duties in an adequate manner. What does it mean to "consider" interests? This questions still leaves open room for debate. This incomplete regime can be corrected by outlining the duties in legislation perhaps through changes to the *CBCA*. Codifying rights and duties in legislation allows for the duties to be clarified. It also allows for the government through the legislative branch to refine what the intentions are rather than force judges to interpret rather vague statements in the law as it currently stands.

### 3.4 Relevance of *BCE*

Before the SCC decision was handed down in June *The Globe and Mail* ran the headline on May 28, 2008 "It all came down to the Revlon rule" and declared that BCE's lawyers relied on the Revlon rule, which is an important American legal principle from 1986, to sway the court to decide in their favour.[170] The Revlon rule stands for the principle that in the context of a change of control, the Board of Directors for a corporation should choose the option that maximizes shareholder wealth. This rule is in line with the premise that corporations act in the best interests of shareholders to the exclusion of other stakeholder groups. In *Revlon*, the corporation was faced with a takeover bid situation which is distinct from the leveraged buyout that BCE faced.[171] It is

[170] Jacquie McNish, The Globe and Mail, "It all came down to the Revlon rule" May 28, 2008.

[171] There are different ways that a change of control of a corporation can happen. The two typical ones are the merger and the acquisition. In a merger two corporations merge to form a new corporation – this is usually between two relatively equal corporations. In an acquisition a big corporation buys a small corporation. The acquisition is a takeover and these can be either friendly or hostile. A leveraged buyout is one accomplished by borrowed money or the corporation can issue more shares. The shareholders ultimately decide whether to sell the business or not. Buyouts can be friendly or hostile. A leveraged buyout can be financed through debt. A change of control can also occur where the buyer does not acquire the entire company.

noted that bondholders have the protection of their contracts which shareholders do not. It can be argued that if bondholders need more protection then they should fight for it within the confines of their contract rather than go to the courts to argue for rights that are absent from the contract.

Noteworthy is the fact that most corporate law cases do not go to trial and even those which go to trial rarely get to the appellate level. "One of the things that's important to remember is that the number of business transactions that lead to litigation are few; of those relatively small number of cases that are launched, the number that are not settled before reaching the courts are fewer still; and of that small number of cases that are heard by courts, even fewer are appealed."[172] This is a rare corporate/commercial case that gets heard at the SCC. It is also dealing with an essential point in corporate governance about whether the corporation serves the shareholders to the exclusion of others. Professor Nicholls ends his online discussion by noting that the proposed BCE deal and the BCE decision are both of the utmost importance in corporate law in Canada. "The BCE case is remarkable in so many ways: the size of the transaction; the fact that it involved an iconic Canadian company; the fact that the Supreme Court agreed to hear an appeal of a corporate law decision on an expedited real-time basis; and the fact that it involves issues of law that those of us interested in the mergers and acquisitions area have been long awaiting authoritative guidance."[173] The fact that the case was expedited due to its importance is also a mark of how significant the case is. The court decided that

[172] Christopher Nicholls and Chris Hanney, The Globe and Mail, "Ask Prof. Chris Nicholls about the BCE decision" June 23, 2008. Quoting Nicholls.
[173] Christopher Nicholls and Chris Hanney, The Globe and Mail, "Ask Prof. Chris Nicholls about the BCE decision" June 23, 2008. Quoting Nicholls.

because of the closing date of the deal it was best to expedite the case to allow the deal to move forward.

The decision with the SCC was unanimous. The Quebec Superior Court had initially approved the arrangement. However, the Quebec Court of Appeal decided that the arrangement was not fair due to the arguments put forward by the bondholders that they would suffer and could not go ahead. Because the first argument succeeded, the court found it unnecessary to consider the oppression remedy, meaning that the court did not render a decision on the oppression remedy issue leaving open a ground for appeal. The SCC decided that the plan was affirmed, and the Court of Appeal decision was set aside so the initial ruling by the Superior Court stands.

This was, of course, not the first case at the Supreme Court that addressed this issue. Rather, *BCE* built on the Supreme Court's changes to corporate law established in *Peoples*[174] where the court ruled that Section 122 of the *CBCA,* which outlines the duty of care of directors and officers of the corporation to act in the "best interests of the corporation" was expanded to include groups beyond shareholders. With the rise of CSR, the topic of shareholders versus stakeholders becomes more important. *BCE* is widely viewed as the central case for the movement away from the traditional shareholder-centric corporate law and towards a stakeholder model of corporate governance. This is important because such issues as corporate philanthropy and ethical consumption[175] relate

[174] *Peoples Department Stores Inc (Trustee of) v Wise* 2004 SCC 68; 3 SCR 461.

[175] From Wayne Visser at el. *The A to Z of Corporate Social Responsibility: A Complete Guide to Concepts, Codes and Organisations*, (West Sussex: John Wiley & Sons Ltd, 2007) at 195.: "Ethical consumption refers to retail customers' opting for goods that are perceived to create more preferable social economic or environmental impacts and outcomes than competing equivalent."

to decisions made at the Board level, and who the Board is ultimately accountable to goes back to corporate law. Any individual who invests in mutual funds, own shares, or has a pension plan should be concerned about corporate governance issues and how the law functions to allow those outside of shareholders have their interests matter.

The notion that other stakeholders, including investors such as bondholders, could be on the same level as shareholders would have been considered absurd in the past but the movement towards stakeholder theory being actualized is fast becoming the reality in Canadian corporate law. It is argued by Zumbansen and Archer that bondholders and other groups have contracts with the corporation that offer protection in a manner not available to shareholders, who are without a contract. However, in the case in *BCE* these are not vulnerable investors who lack knowledge but are sophisticated and well-informed powerhouses. As noted by Professor Zumbansen and Mr. Archer, "Bondholders can contract the terms they need, so if things don't go right, *caveat emptor*."[176] Let the buyer beware when purchasing bonds but not so for when the buyer purchases shares. This seems unfair and inconsistent. That one group, when both may be sophisticated, is deserving of protection and the other is left vulnerable. Instead of the focus being on the designated group of being a shareholder or a bondholder the emphasis and protection should perhaps come from the ability to be knowledgeable and the level of investment – a smaller size may reflect a less wealthy individual, etc.

[176] Peer Zumbansen and Simon Archer "The BCE decision: Reflections on the Firm as a Contractual Organization" (2008) Comparative Research in Law & Political Economy. Research Paper No 17/2008, online <http://digitalcommons.osgoode.yorku.ca/clpe/191> at 2.

As noted by Zumbansen and Archer, "[t]he SCC's relatively rare interjection into the heart of corporate law - where angels fear to tread - is the more remarkable as corporate law has become one if not the most intensively contested regulatory areas."[177] Corporate law cases rarely go to the appellate level and rarely to the highest court in Canada. The importance of the issues in *BCE* makes the case worthy of being decided at the SCC - where their say is final. As the highest court in Canada, there is no ability to appeal beyond and their ruling is absolute. The only change that can be made is if the legislature steps in to enact laws that run counter to the court's decision, or if the SCC itself amends its precedent for some reason. A legislative change in particular is not unheard of as the government has threatened to enact laws that counteract court decisions that do not fit with their political agendas.

### 3.4.1 *Peoples, BCE* and stakeholder theory

Expanding on the decision in *Peoples,* the Court held that where there is conflict among stakeholders, that directors and officers must treat each stakeholder group fairly.

Codification allows for greater depth of meaning and allows for the responsibility of government matters to be made by government rather than judges. These changes will be discussed later in the dissertation. Significant matters about directors' duties and the true purpose of the corporation and corporate governance are too vital to be left unclear. The best route forward may be to codify this new enhanced duty into the *CBCA*. This

[177] Peer Zumbansen and Simon Archer "The BCE decision: Reflections on the Firm as a Contractual Organization" (2008) Comparative Research in Law & Political Economy. Research Paper No 17/2008, online <http://digitalcommons.osgoode.yorku.ca/clpe/191> at 2.

allows the language to be drafted in a manner that may be clearer and more direct than leaving the rules to be explained solely within caselaw. Duties of such great weight should be written into legislation and then explained through caselaw rather than existing only within caselaw without legislation to support it. It is not surprising that there have been amendments to the *CBCA* after the *BCE* decision to reflect the changes enunciated. This was meant to help clarify the obligations under the statute.[178] Although the government has changed the legislation, there still exist the potential for further changes to be made in the near future. Past changes proved unsuccessful, but those were before *BCE*. The importance of codification is to signal to those who are governed by the rules that these duties are of the utmost importance to be turned into law and to indicate to directors and officers that there are groups beyond shareholders who are worthy of protection. In order to give strength to other stakeholders beyond shareholders, there should be codification. By putting certain items into law it signals that these are the most important issues in society.[179] This is the movement from soft law, customs, and norms to hard law with the power of the state behind the law. This indicates to all that the groups beyond shareholders are worthy of protection in the same way that shareholders are. Bondholders and other investors have the power of contract law behind their agreements that explain and protect their relationship with the corporation.

[178] J Anthony VanDuzer, "*BCE v 1976 Debentureholders*: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision since *Peoples*" (2010) UBC Law Review vol 43:1 205-258.

[179] Peer Zumbansen and Simon Archer "The BCE decision: Reflections on the Firm as a Contractual Organization" (2008) Comparative Research in Law & Political Economy. Research Paper No 17/2008, online <http://digitalcommons.osgoode.yorku.ca/clpe/191>.

So, by having *BCE* be decided in 2008 one can see how these cases[180] decided years later are able to draw upon the same line of reasoning found in *BCE*. These cases broaden and widen the duties outlined in legislation and are able to ground these transnational corporate issues in Canadian law. Canadian law is also becoming more informed by international law, including the work of the UN through its Global Compact and the Guiding Principles[181] as written by John Ruggie. The court must make decisions in line with the increasing weight given to international law and Canada's international obligations. These obligations flow from treaties signed by the Canadian governments to international customs and norms to the work of the UN.

The focus of the UN work regarding corporate accountability and increased transparency are quick becoming the norm rather than the exception. If the SCC decides to give weight to international obligations then it becomes clear that Canadian law will move in line with international obligations. It used to be that the Canadian government could sign treaties and they were only enforced in Canada when they were enacted into Canadian law. This is still the accepted practice, but the influence of soft law mechanisms (both domestic and international) is helping to move the law into realms that were unknown - soft law dictating changes in hard law. This movement from soft law to hard law is a shift in normal law because soft law is growing in importance with the rise of codes of conduct and other soft law mechanisms gaining importance on the international scene the law will adjust to incorporate. This especially pertains to transnational

[180] *Choc*, *Chevron*, *Das*, and *Nevsun Resources*.

[181] John Ruggie. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf>.

corporations and how they are governed both domestically and internationally. This is evidenced by the decision in *Nevsun Resources* in that Canadian companies cannot avoid liability by simply committing wrongs on foreign soil as those wrongs can be, and will be, heard in Canadian courts. This act of returning complaints to the nation state in which the company is incorporated allows for a drain to be placed on that jurisdictions's court system instead of burdening the court system of the foreign jurisdiction. Even though corporations cannot be signatories to international conventions like the ILO, they can still be held accountable to the norms espoused in those documents. John Ruggie's report to the UN about guiding principles[182] also means that the corporate community has increased respect for international customs and norms.

### 3.5 *CBCA* and Directors' Duties

Directors' duties are outlined in Section 122 of the *CBCA*. While these duties are statute-based, there are also fiduciary duties at common law that need to be explored in regard to Benefit Corporations. In 2008 when *BCE* was decided Section 122 stated:

> **122.** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
> (*a*) act honestly and in good faith with a view to the best interests of the corporation; and
> (*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
> Duty to comply
> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
> No exculpation
> (3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.[183]

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[182] John Ruggie. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Document A/HRC/17/31 (March 21, 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf>.

[183] *Canada Business Corporations Act*, RSC 1985, c C-44 at s 122 (2008 version when BCE was decided).

The *CBCA* is part of the bigger Canadian legal landscape in regard to governance. The provincial statutes relating to corporations, securities regulation, and tax legislation among others, play a vital role in the entire picture that comprises the governance of corporations.

In 2019 there was an amendment to Section 122 so it currently states:

> **122** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
> Best interests of the corporation
> (1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:
> (a) the interests of
> (i) shareholders,
> (ii) employees,
> (iii) retirees and pensioners,
> (iv) creditors,
> (v) consumers, and
> (vi) governments;
> (b) the environment; and
> (c) the long-term interests of the corporation.
> Duty to comply
> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
> No exculpation
> (3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.[184]

This amendment uses language that is permissive not mandatory. The amendment includes language from both *Peoples* and *BCE* as both cases contain the same list of stakeholders. After *BCE*, the questions surrounding the corporate governance decision-making process become centered on interests and which interests are of the utmost importance. So, the question changes to not only whose interests matter, but to what extent those interests matter. This artificial balancing among competing interests has to

[184] *Canada Business Corporations Act*, RSC 1985, c C-44 at s 122.

be settled. Those who must settle it would be the legislature and the need for amending the *CBCA* is crucial to include a ranking of priority. These issues need to be clarified through the governmental decision-making process and through the drafting of legislation that clearly outlines the duties and the extent of the duty. By drafting new legislation or amending existing legislation, the focus is allowed to be reflected by the ruling government rather than left to the SCC. The amendments to Section 122, while helpful, are not complete. There is still uncertainty about which stakeholder group gets priority. As discussed in section 3.3 of this dissertation, a ranking of priority would lead to greater clarity for directors. Also, the link between workers and directors is now made clearer as employees are included as a stakeholder. The author argues that the category of "employee" should be expanded to include foreign workers of Canadian companies so that Canadian companies are not able to avoid liability for abuses and wrongdoings by simply moving those actions on to the territory of another jurisdiction. Expanding the scope of directors' duties to include employees is simply a first step, not a last step, so the expansion to include a larger group of workers is not a preposterous law reform. With the movement of full-time work to contract work and gig workers, there should be recognition reflected in the applicable legislation that reflects the same trend: the changing nature of work means that workers need to gain protections across different statutes and modes of governance be it through hard law like legislative change in Canada or through industry-wide standards like the Accord.

After *Peoples* and *BCE*, it can be said that the shareholder primacy model is no longer the model used in assessing the duties of directors as directors now have to consider the interests of other stakeholders beyond shareholders in the corporate

decision-making process. Instead, directors now operate under the duty towards the "best interests of the corporation". This duty forces directors to consider interests beyond mere shareholder wealth maximization and instead makes them include other stakeholders when making decisions.

While the Court has somewhat altered the duty, it is still reluctant to expand the duty too widely. "This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the *CBCA*. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the 'best interests of the corporation' should be read not simply as the 'best interests of the shareholders'."[185] What is the extent of the duty? And to whom is it owed? "We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."[186]

In *BCE*, the SCC again altered the duty of directors but so slightly that how these effects changes on the ground is still being discussed by academics and practitioners[187]. The Court outlined that shareholders are not the only concern for directors. This context of pitting shareholders against bondholders is rather limited in that the true conflict is between those who have an actual contract with the corporation, the bondholders, and the shareholders. Shares are not just an isolated piece of property but are a "bundle of rights"

[185] *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at para 42
[186] *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at para 42.
[187] See the work of Guy Dupont, Anthony VanDuzer, Anita Anand, Mohamed Khimji among others.

as stated by Justice La Forest in *Sparling v Quebec* [1988] 2 SCR 1015.[188] Those rights include but are not limited to the right to elect the Board of Directors and residual rights upon dissolution of the corporation. However, if directors are in what appears to be a conflict between whose rights take priority, the duty is to the corporation itself, not to the shareholders. The fiduciary duty dictates that Directors have to act in the best interests of the corporation, which is often thought to be the same as the best interests of shareholders, but when there is a conflict then the directors much hold firm that the duty is to the corporation itself.[189] In paragraph 40 of the decision, the Court is borrowing the language from paragraph 42 of *Peoples*. "In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule."[190]

The Court also introduces this concept of 'fairness' into its analysis of *BCE*. "Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly."[191] The Court also introduces the notion of a corporation as a 'good corporate citizen'. "The

[188] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 35.
[189] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 37.
[190] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 40.
[191] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 64.

Court provides no substance or context for the assertions that both the directors and the corporation itself have a duty of 'good corporate citizenship.'"[192] Is the Court unilaterally imposing CSR standards on to corporations?

> Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation.[193]

The Court's distinction of whether the directors owe a duty to shareholders or the corporation itself is rather hollow as the corporation itself encompasses shareholders plus other stakeholders. A duty to just the corporation is rather meaningless as the corporation is a separate legal entity which contains no people, etc. and having a duty to such an entity must mean that others are owed the duty instead. "In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation."[194]

In *BCE,* the Court is in fact revisiting the stakeholder debates from the 1930s. This is evidenced in paragraph 81 of the decision. "As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the

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[192] Sarah P Bradley, "BCE Inc. v. 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2009-2010) 41 Ottawa L Rev 325-349 at para 42.
[193] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 66.
[194] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 66.

corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen."[195] Dodd wrote that Directors' have a sole responsibility to shareholders. "The directors and other agents are fiduciaries carrying on the business in the sole interest of the stockholders."[196] This is far removed from the argument of stakeholders have interests in the corporation. Berle argued that Directors have a duty to others beyond shareholders[197]. "Now I submit that you cannot abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."[198] More current literature such as Baron notes that not all actions that can be termed to be socially responsible are for the good of the public. "That is, if the motivation is to serve society, at the cost of profits, the action is socially responsible, but if the motivation is to serve the bottom line, then the action is privately responsible."[199]

The failure of the amendments to the *CBCA* Section 122 to adequately reflect the decision in *BCE* has been the topic of much discussion; as noted by Waitzer, for example,

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[195] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 at para 81.

[196] E Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (May, 1932) Harvard Law Review, Vol 45 No 7, pp 1145-1163 at 1146.

[197] "Most students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility- a responsibility conceived not merely in terms of stockholders' rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community."
Adolf A Berle, "For Whom Corporate Managers Are Trustees: A Note" (June, 1932) Harvard Law Review, Vol 45 No 8, pp 1365-1372 at 1372.

[198] A A Berle, "For Whom Corporate Managers Are Trustees: A Note" (June, 1932) Harvard Law Review, Vol 45 No 8, pp 1365-1372 at 1367.

[199] Abigail McWilliams, Donald S. Siegel, & Patrick M. Wright, "Corporate Social Responsibility: Strategic Implications" Journal of Management Studies 43:1 (January 2006) 0022-2380 at 9.

the codification of *BCE* would be important, but the amendments fail to do that sufficiently. This dissertation proposes new amendments to Section 122 that would make it more aligned to the *BCE* decision. It also suggests a ranking of stakeholder groups as a base template to follow so that those who are in charge of corporate decision-making are able to have more concrete guidelines. The change of the language from voluntary to mandatory might also help to make corporations more ethical. The movement from shareholder primacy towards stakeholder theory actualized is within reach and may possibly be achieved soon enough. It has been a long time since Freeman developed stakeholder theory back in 1984 and the time has come for it to be adopted readily.

### 3.5.1 Corporate Law beyond shareholders

Corporate law is examined as to how it can be used to help increase the interests of those forgotten stakeholders such as foreign workers of Canadian companies as well as Aboriginal groups. Moving from simple shareholder wealth maximization onwards towards including other stakeholders' interests was an incremental change in that the first stakeholders to have their matters decided at the SCC in *Peoples* were creditors and in *BCE* were bondholders. Both of these stakeholder groups were purely financial interests attached to the corporation. Both stakeholder groups were also very much Canadian. The caselaw since those two cases have traversed to other stakeholders beyond those with purely financial interests in the corporation. As well as those stakeholders beyond the Canadian borders. Simultaneously the model grew in two directions to include stakeholders with non-financial interests like consumers, Aboriginal groups and the environment and to include those stakeholders based in other jurisdictions outside

Canada. This made the corporation have to re-position as a profit making enterprise and a domestic enterprise as the non-financial interests became more relevant and pressing at the same time that the internationalization of Canadian corporate law became stronger.

This amendment uses language that is permissive not mandatory. The amendment includes language from both *Peoples* and *BCE* as both cases contain the same list of stakeholders. After *BCE* the questions surrounding the corporate governance decision-making process become centred on interests and which interests are of the utmost importance. So the question changes to not only whose interests matter but to what extent those interests matter? This artificial balancing among competing interests has to be settled. Those who must settle it would be the legislature and the need for amending the *CBCA* is crucial to include a ranking of priority. These issues need to be clarified through the governmental decision-making process and through the drafting of legislation that clearly outlines the duties and the extent of the duty. By drafting new legislation or amending existing legislation the focus is allowed to be reflected by the ruling government rather than left to the SCC. The amendments to Section 122, while helpful, are not complete. There is still uncertainty about which stakeholder group gets priority.

### 3.5.2 A) The interests of…

The list of stakeholders is examined in detail below to show why each stakeholder might be important to the corporation and why the corporation should consider its specific interests.

### 3.5.3 Shareholders

How the corporation functions must start with the notion that shareholders are the true owners of the corporation. With their initial investment the corporation is then able to pay rent, electricity bills, etc. in order to have an office space – if it is a brick and mortar company. Shareholders have the right to elect the Board of Directors, may be paid dividends, and are residual claimants if the corporation is dissolved. Shareholders have the ability to bring forward shareholder proposals that speak to governance of the corporation whether it is about increasing corporate social responsibility issues like accepting fair labour practices in its supply chain or more standard corporate governance issues.

Shareholder remedies in corporate law include the oppression remedy and the derivative action as being the most commonly used. These are termed "shareholder remedies" yet are available to other stakeholders as in *BCE* it was bondholders who brought forward an oppression remedy claim and in *Peoples* it was creditors not shareholders who brought forward a claim.

### 3.5.4 Employees

Employees were included as a stakeholder group in the 2019 amendment which shows the increased importance given to employees. The problem with the use of the term "employees" is that it is not inclusive enough. Employees might only include full-time employees and leave out part-time. And with the rise of the gig economy the use of the term "employees" rather than "workers" is seen as being used intentionally to exclude some workers and intending to leave out others. For a corporation like Uber does "employees" only mean those who work at the head office? As Uber claims that Uber drivers are not Uber employees. The gig economy is a rather recent development so it is understandable that Canadian corporate law is not advanced enough to be aware of these changes in Labour & Employment Law.

### 3.5.5 Retirees and pensioners

The inclusion of this group is the most puzzling because if the amendments to Section 122 in 2019 were intended to be the codification of *BCE* then there is no mention of "retirees and pensioners" in the decision itself. Why was this group included when it was not included in the decision?

### 3.5.6 Creditors

The inclusion of creditors is not surprising seeing that creditors received elevated status in *Peoples* so it follows that they should be given protection as a separate group.

### 3.5.7 Consumers

All consumers deserve consideration in the corporate decisionmaking process but it seems as though the focus is on ethical consumers – those who demand that products be ethically sourced and manufactured. These consumers may be viewed as activists who demand change to improve supply chains around the world. Why should someone in the Global North care about the manufacturing process behind their purchases? The simple answer is that you may be viewed as complicit – part of the problem as without consumer demand there would not be the supply. If consumers are demanding lower retail prices then companies may choose to lower labour costs. Obviously there are other ways to lower costs but the go to seems to be to choose to manufacture in countries where wages are lower. Even if consumers are not ethical consumers their interests should be appreciated.

#### 3.5.7.1 Ethical Consumers

The rise of ethical consumption indicates that consumers are able to successfully use their buying power to influence the behaviour of corporations. The recent decision by Canada Goose to stop using coyote fur in their jackets may be traced to consumer pressure to do so. Ethical consumption is used to describe the phenomenon of consumers choosing products and services based on the ethics behind the same. “Ethical consumption refers to retail customers’ opting for goods that are perceived to create more preferable social economic or environmental impacts and outcomes than competing

equivalent."[200] Ethical consumption – even if you choose not to purchase an "unethical" product it is still left on the shelf to be purchased by someone else. It has not disappeared. Even if consumer preference changes it is not known to the corporation instantaneously. "There is much debate about whether the ethical consumer actually exists. Even if that person does exist they are likely a very small group with certain privileges – they are likely more affluent than the average consumer, and likely to be more educated. This may be different from the conception of a corporation that ensures that all of its products are fairly produced. In the case of Starbucks it not be that all of its products are fair but some – it is up to the consumer to choose which of Starbucks' products it will be purchase rather than choosing another corporation where all of the items are fairly produced."[201] The East India Company once tried to label products as "Not made with slave labour" back in the 1800s. This might be the first documented attempt at ethical consumption. Was that claim true or not? How can we know? Even if corporations make assertions about their products being ethical we have to rely on them to tell the truth or be signed up with a certification scheme that conveys the truth.[202]

We are still dealing with forced labour/slavery in supply chains today. How can this be combated? Perhaps with more rigourous laws and legislation?

> The evolution of the ethical consumer also raises issues about ethical versus unethical corporations and the market share occupied by each. These issues are all interconnected with the principles decided in recent court cases and how the corporation functions in Canadian society. These broad rather disconnected issues

[200] Wayne Visser, at el, The A to Z of Corporate Social Responsibility: A Complete Guide to Concepts, Codes and Organisations, (West Sussex: John Wiley & Sons Ltd, 2007) at 195.
[201] Vanisha H. Sukdeo, Corporate Law, Codes of Conduct and Workers' Rights. (New York: Routledge, 2019).
[202] Vanisha H. Sukdeo, Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines (Toronto: LexisNexis, 2020).

> and theories come together in *Peoples* and *BCE* as it heralds in a new corporate era - one in which the shareholder no longer occupies a pedestal without falling off. The move towards stakeholder theory actualized means that while the pedestal may still exist it has been lowered and is on shaky ground. The shareholder as a protected and honoured person in the realm of the corporation is no longer the ideal held to be continued but the fall from grace is rather a short trip to a less honoured position but one still being adored. Shareholders in *BCE* were relegated to just another stakeholder group but one that gets to vote to approve arrangements and other such powers that they hold exclusively. As noted elsewhere rather than say that Canada has accepted stakeholder theory as actualization it is better to say that Canada is transitioning to stakeholder theory so shareholder-focused theory is more apt.[203]

### 3.5.8 Governments

The inclusion of governments is rather circular as the government is deciding to include itself as a stakeholder. Why should corporations have obligations to the government as a stakeholder? Is the obligation to the government not simply to be a law abiding corporation? Similar to Friedman's assertion that the law dictates that businesses need simply to not engage in deception or fraud there is a corresponding obligation to simply obey the law. This seems illogical – can a government mandate itself as a stakeholder? Is a government not separate and distinct and the corporation has obligations to be lawabiding?

The plural is used as "governments" not "government" so perhaps that includes the various levels of government from Federal to Provincial and Municipal.

Does this include the interests of foreign governments? Or only the interests of the Canadian government? Because currently Canadian corporations do not seem to

[203] Vanisha H. Sukdeo, Regulation and Inequality at Work: Isolation and Inequality Beyond the Regulation of Labour (New York: Routledge, 2018).

regard foreign governments in the same way as its obligations to the Canadian government which may be true in a legal sense but in an ethical sense there may be some form of obligation.

Is there an obligation on a Canadian corporation towards a foreign government? If so, what is the standard?

### 3.5.9 B) The environment

The environment was not included in the A list of stakeholder but was set aside as B by itself. Does this elevate the environment above the others because it is by itself or does it lower it below those stakeholders listed above it?

With the increased internationalization of Canadian corporate law the question becomes: which environment? The Canadian environment or does foreign soil enjoy protection as well? This is important because in cases like Chevron in Ecuador and Shell in Nigeria there is less protection given to Ecuadorian and Nigerian environments. Who is your neighbour and who do you have a duty towards? Whose environment is worthy of protection and whose can be sacrificed to destruction? These are the most fundamental of questions – who deserves protection and who can be sacrificed? More pressing every day as climate change morphs into climate crisis and as deaths from Covid-19 continue to rise particularly in the Global South. As I have written about in my prior work, if we decide that lives in the Global South are less valuable than the Global North then by how much?

50% or 5%? The vaccine inequity that existed in 2021 was evidence that the world community valued lives in Africa less than those in North America and Europe.

The environment is becoming an increasing concern for corporations and is more instrumental in the decisionmaking process. The ravages of climate change are becoming more apparent every year. The severe floods in Germany and Belgium in July 2021 resulted in 188 lives lost[204]. The worst flooding that Europe has seen in decades. The increased number of hurricanes in the Atlantic, the wildfires in California, British Columbia, and Australia all show the real consequences of climate change. Flooding, fires, hurricanes, and food insecurity are all indicative of a planet in crisis and the language used has moved from climate change to climate crisis to climate emergency.

> Another issue that both lawyers and businesspersons should be concerned about and have knowledge of is climate change. In 2020 the phrase climate crisis is used to describe the heightening environmental devastation such as the locusts in Africa and the bushfires across Australia. The movements started by Greta Thunberg and other activists have brought greater awareness to the issue. But what has been done to stop climate change? Will 2021 be yet another year in "climate crisis"? How long can a crisis last before it simply becomes the way of life?[205]

[204] Reuters " 'It's terrifying': Merkel shaken as flood deaths rise to 188 in Europe" July 18, 2021. <https://www.reuters.com/world/europe/bavaria-hit-by-floods-german-death-toll-climbs-156-2021-07-18/>.

[205] Vanisha H. Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines* (Toronto: LexisNexis, 2020).

Language is important and we have to determine which phrase is the most suitable. "The weakest language is climate change and the more strict or rigourous is climate crisis but what about climate emergency? What term will instill the most movement?"[206]

### 3.5.10 C) The long-term interests of the corporation

This is the most puzzling of the stakeholders to consider as it is vague and undefined. What is meant by this language? Is it intended to be vague so that future caselaw can read in certain meanings? Why include such a vague phrase that reads as rather meaningless? What was the meaning it was intended to convey?

Short-term profit goals and strategies for a corporation can be different from the long-term goals in that sometimes corporations know they have to invest in the near future say to transition from oil and gas to clean energy but in the long run that loss in the near future will result in more money in the long run. Short term investment which may result in capital outlay can pay off in the long term. How do we measure that in regard to stakeholders? What would qualify to satisfy?

Tied to the environment as a stakeholder is the notion of intergenerational support as in certain Indigenous cultures there is a notion that you do not own land but are holding it in trust for future generations "seven generations" in the future. So we can tie together the notion of the environment as stakeholder with the long-term interests of the corporation to protect the environment to allow the corporation to exist in the future (one that the corporation helps to secure). It is easy to observe the impact of climate change

[206] Vanisha H. Sukdeo, Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines (Toronto: LexisNexis, 2020).

currently happening all over the world. Lockdowns due to covid-19 made it seem like "nature was healing" and animals could return to their habitants when no longer occupied by humans. However, in 2021 we see more hurricanes in the Atlantic, forest fires in British Columbia forcing the province to declare a state of emergency and fires in Northern Ontario. Climate change is no longer something to be feared in the near future as it is already being seen and the impact on the planet and humans continues to increase.

### 3.6 How has this recent caselaw impacted Canadian corporate law

Globalization and the increase of capital flow worldwide have allowed companies to expand their markets and consumers. This also increases the attention given to huge companies as the limelight is brighter on a bigger stage. Corporations are less likely to be able to cover up wrongdoing in current times versus in past times. "The effect of these developments has been to give multinational corporations remarkable freedom to choose the legal systems that will govern their operations. Corporations are now free to seek out those environments in which the laws in place provide the most favourable conditions for maximizing profits."[207] It may be true that corporations were once able to engage in misbehaviour on foreign soil and not face consequences that would not be tolerated on domestic soil that may soon be changed. With recent caselaw including *Nevsun Resources* there is greater corporate accountability. With increased usage of codes of conduct, increased pressure to build on human rights, increased discussion about companies and human rights, those companies that choose to be stagnant may face the consequences as a result. "The real issue here is whether corporations are likely to honour commitments where risk reduction or enhanced profitability is unlikely to follow. The record in this respect is not encouraging. This, of course, is why many critics have argued that self-regulation is no substitute for legal regulation."[208] Self-regulation is a form of private regulation and while it might not be the ideal according to many scholars, it is worth pursuing as a basic level of governance. Once a basic level is implemented there is room for further progress to take place. Like the hardening of soft into hard law so too

[207] Wesley Cragg, ed., Ethics Codes, Corporations, and the Challenge of Globalization, (Northampton, Edward Elgar Publishing Limited, 2003), at 2.
[208] Wesley Cragg, ed., Ethics Codes, Corporations, and the Challenge of Globalization, (Northampton, Edward Elgar Publishing Limited, 2003), at 46.

can weak mechanisms be replaced by more rigourous ones in the future. "Codes are an element of governance that extends beyond simply those who the code targets but extends beyond. Whether this extension (arguably over-extension) of the code's scope is needed or desired is another issue. Whether those beyond the code are impacted by the code depends on the individual circumstances and how connected the specific individual or organization is to the proponents of the code. Does a particular supplier provide a lot of business to a certain company? Or is this particular company just one of many?"[209]

The use of soft law mechanisms like codes of conduct to regulate corporate behavior can be viewed as using the current resources available to make a bad situation better. Unless there is a huge overall of corporate governance and commercial trade on an international level then the current system must be tailored to help those stakeholders who are often left out. Waiting for the system to change is pretty hopeless and somewhat naïve. To think that corporations will one day stop polluting and will one day stop using cheap labour in the Global South when it is readily available is naïve and quite unattainable at the current time. Making working conditions for those in the Global South right now is of the utmost importance not waiting for a systemic overhaul, which might never come. That is the viewpoint of this author that corporations will focus on responding to consumer pressure and boycotts that impact their business and will not simply change out of the goodness of their hearts (do corporations even have hearts?).

[209] Vanisha H. Sukdeo, Regulation and Inequality at Work: Isolation and Inequality Beyond the Regulation of Labour (New York: Routledge, 2018), at 110.

While corporations may be able to avoid legal liability in the context of global supply chains and in the aftermath and continuance of globalization the impact of business ethics should not be ignored.

### 3.6.1 The forgotten (or ignored) stakeholders

This section will examine how to improve the rights of foreign workers in the Global South who work for suppliers of Canadian corporations. The focus is on the manufacturing sector and the use of foreign factories or suppliers through outsourcing. For a variety of reasons, lack of enforcement of the local laws, these workers could face terrible working conditions. The purpose of this chapter is to examine corporate law mechanisms and codes of conduct that could be implemented to improve the working conditions for these workers in foreign countries outside the reach of Canadian corporate law. The main issues for workers in the Global South include: 1) reasonable working hours, 2) health & safety concerns including proper personal protection equipment and proper ventilation, and 3) wages. This section will explore the role of Canadian corporate law and the relative strengths and limits of Canadian corporate law in helping workers' interests relative to soft law mechanisms such as codes of conduct. By attaching liability to the corporation itself through a code of conduct this means that no matter what jurisdiction the corporation is operating in the code of conduct applies. Because workers in the Global South who produce and manufacture products for Canadian corporations are often not employees of the corporation but rather independent contractors of foreign suppliers, they are not afforded the same rights under the law as employees. Even in jurisdictions where labour and employment law is strong on the books it may not be well enforced..

The local labour laws in the Global South may not meet those needs for workers and it should be that the parent corporation has a responsibility to meet those needs. A parent company has controlling interest in another company. The parent company can operate subsidiaries that often exist in other jurisdictions. This chapter does not focus on improving labour law in Canada or Bangladesh (or other nations in the Global South) but rather about corporate responsibility of Canadian corporations towards those individuals who make or produce the goods and products they sell, if not technically their employees at law. The normative issue is whether these issues should be addressed and the doctrinal issue is how those issues should be addressed. The normative issue could be framed as Canadian corporate law is not responsible for labour law standards in developing nations. There is a demand for cheap clothing and this drives corporations to seek nations where labour is cheaper than the home nation. There should be accountability on the part of the supplier for the workers who are left out of the standard labour and employment law structure in both the Global South and Canadian law. This book examines the role that corporate law can play and its limits and contrasts it to the role that voluntary mechanisms such as codes of conduct can serve in increasing the rights of workers of foreign suppliers. The issues for the corporation include the social license to operate in that communities in which the corporation operates can choose to welcome the corporation or shun the corporation, consumer boycotts by refusing to purchase certain products, among other factors. Through an examination of *Peoples*[210], *BCE*[211] and subsequent cases as well as looking at Canadian corporations signing up for CSR mechanisms this will lead to a greater understanding of how best to regulate the

[210] *Peoples Department Stores Inc (Trustee of) v Wise* 2004 SCC 68; 3 SCR 461.
[211] *BCE Inc v 1976 Debentureholders* 2008 SCC 69; 3 SCR 560.

corporation and increase corporate accountability. These two are not mutually exclusive in that we need to get over the binary. I will look at the concept of "good corporate citizen" as outlined in *BCE* and developed in the scholarship as to what that definition means in regards to workers and employees.

*Peoples* and *BCE* are important to provide the background of Canadian corporate law on the issue of directors' duties and the expansion of directors' duties to consider stakeholders' interest to include those beyond merely with a financial interest in the corporation like creditors in Peoples and bondholders in BCE. Stakeholders as a category has been expanded by both courts and legislators to include employees, consumers and suppliers. Employees are those who work directly for the corporation while foreign workers are deemed to be independent contractors who work for a supplier that supplies the Canadian corporation. While "employees" are included as a stakeholder in both the caselaw and the amendments to the CBCA, "independent contactors" such as the foreign workers in the Global South making goods and products for Canadian corporations who do not fit u Foreign workers of Canadian companies

The main issue in the Rana Plaza disaster is the workers who died, were injured, and otherwise impacted were not employees of Joe Fresh or Loblaw Companies Limtied. While they are not workers it could be that the corporation owes a duty similar to an employer-employee relationship to the workers in Bangladesh. Why allow corporations to completely avoid that obligation? Who benefits from the absolution of the corporation?

As discussed earlier, the inclusion of employees in the list of stakeholders does not mean that all workers will gain benefits as the definition of "employee" can be quite narrow rather than broad. The further exclusion of those who manufacture products for a corporation while not being labeled as employees of the corporation further complicates and distances the corporation from the worker.

### 3.7 New caselaw

The author maps how corporate law is moving from a shareholder primacy model towards stakeholder theory being actualized. The dissertation looks at the history of corporate law, and then examines important Supreme Court of Canada decisions such as *Peoples*, *BCE*, *Chevron*[212], and *Nevsun Resources*[213]. We see the movement from 2004 to 2008 and then to 2015 and 2020. There are gaps in these decisions meanwhile in 2014 there was the *Choc v Hudbay Minerals*[214] decision from the Ontario Superior Court and the two *Das*[215] decisions from the Ontario Superior Court in 2017 and in 2018 from the Ontario Court of Appeal.

Supreme Court of Canada (SCC)

*Peoples* 2004 ⇨ *BCE* 2008 ⇨ *Chevron* 2015 ⇨ *Nevsun Resources* 2020

Both *Peoples* and *BCE* were cases that originated in Quebec

Ontario Court of Appeal (ONCA)

*Das* 2018

[212] *Chevron Corp v Yaiguaje* 2015 SCC 42.
[213] *Nevsun Resources Ltd v Araya* 2020 SCC 5.
[214] *Choc v Hudbay Minerals Inc* 2013 ONSC 1414.
[215] *Arati Das et al v George Weston Limited et al* 2017 ONSC 4129 and *Arati Das et al v George Weston Limited et al* 2018 ONCA 1053.
*Das* was denied leave to appeal to the SCC.

Ontario Superior Court of Justice (ONSC)

*Choc* 2014 ⇨ *Das* 2017 (2 decisions)

All three merged

*Peoples* 2004 ⇨ *BCE* 2008 ⇨ *Choc* 2014 ⇨ *Chevron* 2015 ⇨ *Das* 2017 (x2) ⇨ *Das* 2018 ⇨ *Nevsun Resources* 2020

The author included *Das* twice to include both the ONSC decisions and ONCA 2018 decision. These important cases from the SCC and the lower courts showcase how Canadian corporate law is moving in two directions at the same time.: 1) stakeholders who do not only have a financial interest (such as creditors and bondholders) are being included like consumers, and community members and 2) the focus has turned to the international realm to consider interests beyond Canadian borders to examine and rule on corporate behaviour on foreign soil. The impact of these two major changes is seen in the caselaw and the changes to the legislation. Both of these changes can be viewed as necessary and important. Some may question how Canadian law can be stretched beyond Canadian borders as that seems like extraterritorial application that does not respect the sovereignty of other nations to decide on matters on their own soil. Yet, stretching Canadian law beyond Canadian borders allows for greater corporate accountability to attach to Canadian companies so they cannot escape liability simply by operating elsewhere in the world and turning their backs on Canadian legal standards.

In the past corporations were able to avoid liability by restructuring their operations such as outsourcing manufacturing to the other parts of the world – mostly in the Global South. It should have given someone pause to consider why labour costs in some parts of the world are so low and what could cause the costs to be so low: are workers being paid fairly? Is prison labour used? Is forced labour used?

### 3.8 *Choc v Hudbay Minerals Inc.*

In *Choc v Hudbay Minerals Inc*,[216] the trial court handed down an endorsement on the preliminary motion to strike by finding that the claim could be brought in Canada as the court of first instance. Hudbay Minerals is a Canadian mining company, and the cause of action was that the corporation and its subsidiaries were committing human rights abuses by shooting, killing, and raping those who were against their mining project. Angelica Choc alleges that her husband, Adolfo Ich, was killed by the head of security at the Guatemalan Nickel Company.[217] The plaintiffs are indigenous Mayan Q'eqchi' people and the case included a discussion about land claims due to contested land claims.[218] Justice Brown explores the notion of the corporation as a distinct legal entity and what grounds allow for the piercing of the corporate veil. It explores whether the corporation is able to sue and be sued regarding tort claims. While Justice Brown does not directly cite to *BCE* it is apparent that the ruling in *BCE* has allowed for greater accountability on the part of the corporation when considering the interests of various stakeholders. After *BCE* the corporation is no longer focused solely on shareholders and increasing the wealth of shareholders, but there is now an acknowledgment that the corporation has obligations beyond mere financial ones including the discussion about greater liability for torts which would have not been possible prior to *BCE*. The case rests on the position that the corporation can be sued for acts done by the security company it hired to guard a mine in Guatemala. The Mayans also assert that their human rights were

[216] *Choc v Hudbay Minerals Inc* 2013 ONSC 1414.
[217] *Choc v Hudbay Minerals Inc* 2013 ONSC 1414 at para 6.
[218] *Choc v Hudbay Minerals Inc* 2013 ONSC 1414 at paras 11 and 12.

abused by Hudbay. There were three actions, for ease of reference I will refer to them as: Angelica Choc claim, Margarita Caal Caal claim, and German Chub Choc claim. Amnesty International Canada was granted intervener status. Counsel for the defendants argues that there was no reasonable cause of action for the claims.

One of the main issues was about whether a parent company owes a supervisory duty to its subsidiaries. The defendants argued that a parent company cannot be held liable for the actions of its subsidiaries. The defendants argued that allowing the suit to go forward would be to overturn the principles enunciated in *Salomon* more than one hundred years prior that the corporate entity is legally distinct. The court notes that most of the claims are based on direct corporate liability and only in the Angelica Choc claim does the plaintiff argue that the corporate veil should be pierced. The judge found that the *Anns* test[219] for a novel duty of care was possibly met and there was no reason to not allow the claim to go forward on the argument that there was no reasonable cause of action. The judge struck all three motions. This case is decided in the light of *BCE* which allowed for greater accountability and transparency to be imposed on to corporations. *BCE* also increased the weight of transnational law on corporations.

### 3.9 *Chevron Corp v Yaiguaje*

In *Chevron,* the case builds on the theories outlined in *BCE* and *Choc v Hudbay*. The court was tasked with deciding if an Ontario court has jurisdiction to enforce a court order from Ecuador. The successful claim against Chevron was awarded in Ecuador to

[219] The *Anns* test is the test to establish a novel duty of care which considers factors like policy considerations as well to limit those duties.

forty seven claimants who represented approximately thirty thousand villagers, who alleged that Chevron knowingly polluted waterways in the Lago Agrio region in Ecuador for decades which resulted in increased rates of cancer among community members which included Indigenous persons.[220] The original award was for $9.51 billion USD.[221] After failing to secure enforcement of a foreign judgment in the U.S. the claimants attempted to gain enforcement in a Canadian court. The test is whether there is a real and substantial connection to the jurisdiction of the court. "Jurisdiction also exists here with respect to Chevron Canada because it was validly served at a place of business it operates in the province."[222] The court did not accept the argument that this would be a piercing of the corporate veil. Nor was it against the ruling in *BCE* about corporate separateness. While the decision in *Chevron* did not advance the interests of the claimants it did help to progress the ongoing conversation about stakeholder interests.

In *Chevron Corp v Yaiguaje* [223] the claimants were ultimately unsuccessful in being granted an award for damages for the environmental devastation to the land and the health problems that were a direct result of the pollution including an increased rate of cancer. While they were not given a remedy for the breach of their rights, so it is not a victory for the claimants it does help to further the discussion about corporate accountability. The corporation did not face damages, but the academic debate progressed after the case was decided[224]. The SCC decision was in 2015 and having that

[220] *Chevron Corp v Yaiguaje* 2015 SCC 42 at para 4.
[221] *Chevron Corp v Yaiguaje* 2015 SCC 42 at para 6.
[222] *Chevron Corp v Yaiguaje* 2015 SCC 42 at para 3.
[223] *Chevron Corp v Yaiguaje* 2015 SCC 42.
[224] See the work of Jason MacLean, "*Chevron Corp. v. Yaiguaje*: Canadian Law and the New Global Economic and Environmental Realities" (2016) 57 Canadian Business Law Journal 367, Jason MacLean "The Political Reality of Corporate Law: *Yaiguaje v Chevron Corporation*" (2020) Canadian Business Law Journal 62:3, and Fenner Stewart "Foreign judgments, judicial trailblazing and the costs of cross-border

analysis at the highest court in Canada was a big step forward in corporate accountability and the concerns of stakeholders.

## 3.10 *Arati Das et al v George Weston Limited et al*

### 3.10.1 ONSC decisions

The first ONSC decision was handed down on July 5, 2017.

The second ONSC decision was handed down on September 20, 2017.

### 3.10.2 ONCA decision

The ONCA decision was handed down on December 20, 2018.

### 3.10.3 Appeal to the SCC

In *Das v George Weston Limited*[225] the case was about the certification of a class action. The cause of action was the Rana Plaza disaster in Bangladesh and those who were harmed in the disaster sought to hold the Canadian companies responsible in Canada. Leave to appeal was denied at the Supreme Court. The claimants were never given their day in court to have the matter heard on the facts as the focus was on whether they were to be given standing. Because the class action was never certified the corresponding legal issues were never decided including:

In this regard, did Loblaws have a duty of care to the Plaintiffs and the putative

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complexity: thoughts on *Chevron Corp v Yaiguaje*" (2016) Journal of Energy and Natural Resources Law, 34:2, 239-245.

[225] *Arati Das et al v George Weston Limited et al* 2018 ONCA 1053.

> Class Members because it adopted Corporate Social Responsibility Standards ("CSR standards") under which Loblaws would not purchase goods from suppliers who did not have and comply with appropriate workplace safety standards?
> In this regard, did Loblaws have a duty of care to the Plaintiffs and the putative Class Members who were working to manufacturer goods for Loblaws because Loblaws had control of their workplace through its substantial purchasing power and its CSR standards and because it knew that the workplace was hazardous and that Bangladesh's public authorities were incompetent in keeping it safe?
> In this regard, was Loblaws vicariously liable for the negligence of the employer because Loblaws knew that the employees were working in notoriously dangerous buildings and Loblaws had a non-delegable duty to protect the employees?[226]

The claimants in *Das* were never given their day in a Canadian court and the future for international human rights in the context of business law did seem bleak in that the wall might have been hit at *Chevron* and the court would not be willing to read in international customs further than what was established in that case. The Canadian connection for *Das* was obvious in that Joe Fresh is a wholly owned subsidiary of Loblaw Companies Limited which is itself Canadian. Joe Mirmar appearing on TV shortly after the Rana Plaza disaster claiming to be deeply impacted by the disaster gave a human face to perceived corporate accountability. Ultimately beyond signing up for the The Accord on Fire and Building Safety in Bangladesh which came into force on May 13, 2013 Loblaw has not had to pay damages as a result of Rana Plaza. It was never held to account as instead by signing up to the Accord it merely promised to never let another disaster like Rana Plaza happen again while avoiding liability for the original disaster happening at all. Global supply chains allow for liability and responsibility to be pushed down the line to another actor. In the case of Rana Plaza because those workers at the factory in Bangladesh were not employees of Joe Fresh or Loblaw then the obligation

[226] *Arati Das et al v George Weston Limited et al* 2017 ONSC 4129 at para 4.

that a corporation has towards its own employees does not apply. Who protects foreign workers within global supply chains that are controlled by Canadian companies? The current answer is muddy at best.

Ultimately the claim was unsuccessful but similar to *Chevron* the discussion about corporate accountability that was in the analysis of the decision allows for progress to be made and the setting for a future case to be successful. That case would be *Nevsun Resources*.

### 3.11 *Nevsun Resources Ltd. v Araya*[227]

*Nevsun Resources* involves a Canadian company Nevsun Resources Ltd. incorporated under British Columbia law which faced claims of forced labour, torture, and abuse in a mining operation due to being a majority owner of Bisha Mine operating in Eritrea.[228] The issue was whether the claim has to be brought in a court in Eritrea or if the claim can be started in a Canadian court.

This topic of corporate accountability is becoming more important every day as we expect business leaders and lawyers to not just act in a manner that is lawful and law-abiding, but perhaps to an elevated standard of what is moral and ethical. How to craft such a standard that exists outside of the law and beyond legal requirements and compliance? How do you treat someone who is injured by your actions if they suffer harm as a result? Does that change if the harm is done by an individual or a corporation? How are damages allocated when the harm is done on foreign soil versus domestic soil? This last question is becoming more the focus of the author's research as the author argues that Canadian corporations have obligations to act in an ethical and moral way towards stakeholders and not just Canadian stakeholders but those impacted by Canadian corporations who live in host nations. A recent decision by the SCC *Nevsun Resources*[229] discusses precisely this issue – whether Canadian corporations can held responsible for wrongdoing committed on foreign soil. The decision was yes, that Canadian corporations

[227] Some of this is based on my writing in Vanisha H. Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines* (Toronto: LexisNexis, 2020).
[228] *Nevsun Resources Ltd v Araya* 2020 SCC 5.
[229] *Nevsun Resources Ltd v Araya* 2020 SCC 5.

can held responsible. This follows from the rise of globalization and international law that transnational corporations cannot escape liability by harm done in other jurisdictions.

The governance gap is the term used to describe the movement from state-centered regulation to allowing corporations to self-regulate. The lack of movement from the nation state in regard to increased regulation of the business entity has allowed for a gap to appear in which businesses are not being adequately regulated. This may be because the law is forever catching up to new technology such as cryptocurrency and AI so that regulation is absent on those fronts, but the law also lags in regard to holding corporations and businesses accountable. Because there is no real accountability on the international stage for corporate and business misconduct, there is no real punishment or consequence for misdeeds. Because nation states enjoy sovereignty, there is no real ability of a Canadian corporation to try to seek justice on the soil of a host nation. The consequences should be faced on home soil so that conduct a Canadian business would not be able to get away with Canada must not be tolerated in a host nation. As noted earlier, the recent decision of *Nevsun Resources* may change the legal landscape.

Corporations are less likely to be able to cover up wrongdoing in current times versus in past times. "The effect of these developments has been to give multinational corporations remarkable freedom to choose the legal systems that will govern their operations. Corporations are now free to seek out those environments in which the laws in place provide the most favourable conditions for maximizing profits."[230] It may be true

[230] Wesley Cragg, ed., *Ethics Codes, Corporations, and the Challenge of Globalization*, (Northampton, Edward Elgar Publishing Limited, 2003), at 2.

that corporations were once able to engage in misbehaviour on foreign soil and not face consequences that would not be tolerated on domestic soil; that may soon be changed. With recent caselaw including *Nevsun Resources*, there is greater corporate accountability. With increased usage of codes of conduct, increased pressure to build on human rights, increased discussion about companies and human rights, those companies that choose to be stagnant may face the consequences as a result. "The real issue here is whether corporations are likely to honour commitments where risk reduction or enhanced profitability is unlikely to follow. The record in this respect is not encouraging. This, of course, is why many critics have argued that self-regulation is no substitute for legal regulation."[231] Self-regulation is a form of private regulation and while it might not be the ideal according to many scholars, it is worth pursuing as a basic level of governance. Once a basic level is implemented there is room for further progress to take place. Like the hardening of soft into hard law, so too can weak mechanisms be replaced by more rigorous ones in the future. "Codes are an element of governance that extends beyond simply those who the code targets but extends beyond. Whether this extension (arguably over-extension) of the code's scope is needed or desired is another issue. Whether those beyond the code are impacted by the code depends on the individual circumstances and how connected the specific individual or organization is to the proponents of the code. Does a particular supplier provide a lot of business to a certain company? Or is this particular company just one of many?"[232]

[231] Wesley Cragg, ed., *Ethics Codes, Corporations, and the Challenge of Globalization*, (Northampton, Edward Elgar Publishing Limited, 2003), at 46.
[232] Vanisha H. Sukdeo, *Regulation and Inequality at Work: Isolation and Inequality Beyond the Regulation of Labour* (New York: Routledge, 2018), at 110.

### 3.12 What comes after *Nevsun Resources*?

After *Peoples* and *BCE* there was much public debate about what the next decision would hold for CSR and business ethics. The case that followed *BCE* was *Choc* in 2014 but it was merely a trial decision out of Ontario so was not binding in any other jurisdiction. It could be held as persuasive in other jurisdictions however.

After *Choc* was the SCC case of *Chevron*[233] in 2015 which seemed to hold the promise of greater corporate accountability as the facts that brought rise to the claim were about Indigenous peoples who had their land polluted in Ecuador. This seemed to stretch Canadian liability beyond merely Canadian borders.

After the failure of *Chevron* to deliver more corporate accountability there were the trial decisions in *Das* both in 2017. Then the ONCA decision in 2018. These decisions seemed to be the end of the road and the SCC denied leave to appeal. So *Das* seemed like there was no room to expand corporate accountability after *Chevron*.

Then in 2020 the SCC ruled in *Nevsun Resources* that claimants against a corporation could bring the claim in a Canadian court as the court of first instance. This ruling bypassed years of international law and concerns about extraterritoriality. This SCC ruling increased access to justice by lowering the threshold to allow claimants into Canada rather than navigate the meandering journey from a court in Eritrea until the case could be heard in Canada. This simplified the process and allowed the claimants to go

[233] *Chevron Corp v Yaiguaje* 2015 SCC 42.

after the Canadian corporation in a Canadian court. Unfortunately, as the claimants settled out of court, we do not know the terms of the final settlement.

An important development by the Canadian government is the creation of the Canadian Ombudsperson for Responsible Enterprise (CORE) which allows for complaints to be brought about possible human rights violations against Canadian companies when they are working outside Canada in certain industries: garment, mining, and oil and gas.[234] The powers of the ombudsperson include looking into complaints that started after May 1, 2019 or before then if the claim is ongoing. The Order in Council was granted on April 8, 2019 which created the position and allows for a full-time position for a term of up to five years.[235] The Ombudsperson is appointed with a mandate to uphold the UN Guiding Principles. The UN Guiding Principles build on the UN Global Compact from 2000.

[234] Canadian Ombudsperson for Responsible Enterprise, online:<https://core-ombuds.canada.ca/core_ombuds_ocre_ombuds/index.aspx?lang=eng>.
[235] Canadian Ombudsperson for Responsible Enterprise, online:<https://core-ombuds.canada.ca/core_ombuds_ocre_ombuds/index.aspx?lang=eng>.

### 3.13 Possible new amendments to the *CBCA*

Possible new amendments to section 122 of the *CBCA*, amendments appear in bold:

> 122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
> (*a*) act honestly and in good faith with a view to the best interests of the corporation **including in order of priority: shareholders, employees, foreign workers of Canadian companies, suppliers, creditors, consumers, governments and the environment,** ; and
> (*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
> Duty to comply
> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
> No exculpation
> (3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.[236]

This amendment transplants the language from paragraph 42 of *Peoples* to make the words not just within the decision but also contained within the legislation. It is important to note that the second group after shareholders is employees. This author agrees that employees are the second most important group after shareholders and there are obligations to employees already codified in the legislation about being able to go after directors for unpaid wages. Employees do not occupy the essential position that shareholders do but they are a very important part of the corporation. See the work of Professor Richard Locke in Chapter Two and his conclusions about the two factories in Mexico one in which employees where given more input into the workplace and allowed to have a voice within the process and employees who did not have such an option. The

[236] Some language from *Canada Business Corporations Act,* RSC 1985, c C-44 at s 122. Amendments in bold.

workplace where workers were happier and engaged has a higher output level. Also, worth noting is that some employees also do wear two hats of being an employee and a shareholder because of employee stock option plans.

Not only would a ranking system allow for greater clarity about which stakeholder has priority over others but there is one important stakeholder group that is left out entirely. Beyond the ranking of priority among stakeholders which the author proposes here to help directors fulfill their legal obligations and make clearer to whom the duty is owed, the author also proposes that there are stakeholders who are currently left out and need to be included in Section 122: foreign workers of Canadian companies . In the ranking of priority the author borrowed from *Peoples* and *BCE* there is now the inclusion of a new stakeholder groups: foreign workers of Canadian companies. The author placed the foreign workers of Canadian companies directly after employees in the list of stakeholders. The need to expand the definition of "employee" to reflect the current times is beyond the scope of this dissertation but noteworthy that the rise of precarious work such as at Uber and Lyft has created a tiered system for workers and the term "employees" is not inclusive enough.

### 3.13.1 Foreign workers of Canadian companies

As discussed in detail elsewhere in the dissertation the term "employees" in section 122 is not inclusive enough as the word employees as defined in legislation may exclude workers in Canada such as part-time employees and gig workers. Thus it is not difficult to extend that exclusion to mean that workers for Canadian companies in foreign

jurisdictions are not included as a stakeholder group under the *CBCA*. As has already been stated, those corporations should not be allowed to escape liability simply because the wrongdoing did not occur in Canada.

The main issue in the Rana Plaza disaster is the workers who died, were injured, and otherwise impacted were not employees of Joe Fresh or Loblaw Companies Limited. While they are not workers it could be that the corporation owes a duty similar to an employer-employee relationship to the workers in Bangladesh. Why allow corporations to completely avoid that obligation? Who benefits from the corporation being able to avoid liability?

As discussed earlier, the inclusion of employees in the list of stakeholders does not mean that all workers will gain benefits as the definition of "employee" can be quite narrow rather than broad. The further exclusion of those who manufacture products for a corporation while not being labeled as employees of the corporation further complicates and distances the corporation from the worker. As noted in the author's research elsewhere[237] the category of "employee" and who belongs under that term needs to be amended. With the rise of the gig economy there needs to be recognition that not all workers are deemed as "employees" to gain the legal protection that goes along with that term.

[237] Vanisha H. Sukdeo, *Regulation and Inequality at Work: Isolation and Inequality Beyond the Regulation of Labour* (New York: Routledge, 2018).

This builds on the work of Peer Zumbansen and Larry Cata Backer who both write on the Rana Plaza disaster and possibilities for governance models to prevent future incidents. The author uses a case study on Rana Plaza to explore how best to advance the rights of workers who happen to work in jurisdictions outside of Canada but manufacture products for Canadian companies. What obligations, if any, are owed by the Canadian company towards these workers? Even absent a current legal obligation the argument can be made that there is an ethical or moral obligation to at least ensure building safety to prevent loss of life. Arguing for more advanced labour rights such as collective bargaining and freedom of association is not what is being stated here because the author is arguing that workers should at least expect that their workplaces will be safe and they will not be injured or killed on the job.

Another group left out are Aboriginal people, but analysis of their status is beyond the scope of this dissertation[238]. As discussed in the author's other research, there are many other stakeholder groups left out of the amendments to section 122 including not just Aboriginal groups but under the section on "the environment" there could have been inclusion of animal rights and youth as a group that has separate and distinct concerns

[238] Aboriginal, Indigenous, Metis and Inuit peoples

Indigenous, Metis and Inuit peoples have separate and distinct issues that are not covered by the other stakeholder groups listed in the amended Section 122. The issues about environmental protection is not necessarily tied to Aboriginal peoples as well as community members and issues about the long-term success of the corporation. All of these issues fall under the concerns of Aboriginal groups.

The author argues that this group has separate and distinct concerns that are not captured under the other stakeholder groups. Aboriginal persons' interests overlap with the environment as stakeholder but that is not sufficient to reflect the unique concerns that Aboriginal groups may have including when there are land disputes about ownership due to unceded territory.

beyond merely "the environment". The youth movement against climate change including Greta Thunberg and caselaw such as *Mathur v Ontario*[239] indicates that youth have different concerns and that they are fighting the government in the streets and in courtrooms to step up in their fight against climate change to protect the youth's future existence. Again, this is beyond the scope of this dissertation but useful to note that foreign workers are not the only stakeholder left out of the 2019 amendment to Section 122.[240]

[239] *Mathur, et al. v Her Majesty in Right of Ontario* 2020 ONSC 6918.

[240] For furher discussion about other stakeholders please see my forthcoming book entitled "Has Stakeholder Theory Been Actualized? From *Peoples* to *Nevsun Resources*" (2021).

### 3.14 New Corporate Forms of Organization - Benefit Corporations

I will explore the new corporate form of Benefit Corporations and how Benefit Corporations would fit into the Canadian legal landscape by examining the *CBCA*[241], *BCE*[242], and *Peoples*[243]. It will then turn to fiduciary duties at common law and the stakeholder debates will be explored to examine how much involvement and consideration is due to those beyond shareholders. It will look to British Columbia ('B.C.') in regards to its Bill 23 which would enact a new corporate form of the Community Contribution Company ('CCC') and the U.K briefly for its use of the Community Interest Company ('CIC') legislation. My conclusion will demonstrate that while BCs seem like a useful tool in the fight towards making corporations more socially responsible, they may prove ineffective if the Directors' duties are not clearly outlined and defined.

[241] *Canada Business Corporations Act*, RSC 1985, c C-44.
[242] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560.
[243] *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461.

### 3.15 Benefit Corporations

The organization B Lab certifies socially responsible corporations that they term 'B Corporations' or 'B Corps'. This voluntary certification scheme is distinct from legislatively defined BCs. The first state to pass BC legislation was Maryland in April 2010. Vermont was second in May 2010. There are a few states where legislation is under review including New York, North Carolina, Pennsylvania, California, and Michigan. The benefit corporation laws[244] that exist in Maryland[245], Vermont[246], New Jersey[247] and Virginia[248] are informed by the work of B Lab. There are commonalities among the legislation as all four deal with 'general public benefit', 'specific public benefit' and require a 'third party standard'. There are differences in the wording but the underlying premise is the same. According to the B Lab website, benefit corporations can be defined in the following manner: "A Benefit Corporation: 1) has a corporate purpose to create a material positive impact on society and the environment; 2) has an expanded fiduciary duty that requires consideration of non-financial interests when making decisions, and 3) reports on its overall social and environment performance as assessed against a third party standard."[249] The special legal format of a BC leads to greater accountability and transparency. "'B Corporations' legal structure expands corporate accountability so they are required to make decisions that are good for society, not just

[244] See B Corporation, online: <http://www.bcorporation.net/publicpolicy>.
[245] US, Bill S 690, *An Act Concerning Corporations – Benefit Corporation*, 2010, Reg Sess, Md, 2010 (enacted). Legislation came into force on October 1, 2010.
[246] US, Bill H 113, *An act relating to the Vermont Benefit Corporations Act*, 2010, Reg Sess, Vt, 2010 (enacted). Legislation came into force on July 1, 2011.
[247] US, Bill S 2170, *An Act concerning benefit corporations and supplementing Title 14A of the New Jersey Statutes*, 2010, Reg Sess, NJ, 2010 (enacted). Legislation came into force on July 1, 2010.
[248] US, Bill H 698, *An Act to Amend the Code of Virginia by adding in Chapter 9 of Title 13.1 an article numbered 22, consisting of sections numbered 13.1-782 through 13.1-791, relating to benefit corporations*, 2011, Reg Sess, Va, 2011 (enacted). Legislation came into force on March 26, 2011.
[249] See B Corporation, online: <http://www.bcorporation.net/publicpolicy>.

their shareholders."[250] The shareholder primacy model contrasted with stakeholder theory has enabled and encouraged a fruitful debate about how corporations are to be structured and whether shareholders occupy a very important position. This debate leads to the discussion of CSR as how the corporation functions, and whose interest(s) it serves, are important to the framing of fiduciary duties. If corporations are focused on shareholder wealth maximization to the detriment of other stakeholders shapes the debate on CSR and stakeholder theory. My research also explores this idea in regard to how corporations that brand themselves as socially responsible may actually increase their consumer base and profits as a result. Friedman states that, "there is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[251] Shareholders themselves sometimes engage in behavior to change the corporation – shareholder proposals[252], and shareholder activism. Possibly expanding the duties of directors to include employees and other stakeholders may lead to the inevitable conundrum of directors owing a duty to everyone, which has to be termed as essentially a duty to no one.

### 3.15.1 General Public Benefit

[250] See B Corporation, online: <http://www.bcorporation.net/publicpolicy>.

[251] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" in The New York Times Magazine, September 13 1970 at 6.

[252] By using an internal mechanism ('shareholder proposals,' also known as 'shareholder resolutions') as the channel rather than an external mechanism one is about to better understand how the corporation functions. The corporation essentially allows for its own reformation from within. Successful or effective shareholder proposals may help to build a more socially responsible corporation.

The language used in the 'General Public Benefit' provisions in the four Acts is virtually identical. "The 'general public benefit' purpose helps prevent abuse of this legislation by corporations interested in greenwashing[253]. Without the 'general public benefit' purpose, the corporation could name a single, narrow 'specific public benefit' purpose..."[254] The overarching purpose of the corporation is important as this legislation is really geared towards those corporations that are interested in branding themselves as socially responsible. In the Maryland Act the provision reads "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."[255] The other Acts have similar wording.[256] It is also meant to allow BCs to increase their importance in the ethical consumption marketplace as those corporations willing to be incorporated as a BC are making that distinction clear and unequivocal to consumers, the government, and other corporations alike.

### 3.15.2 Specific Public Benefit

[253] The term 'greenwashing' is used in the environmental realm to describe the incident of a corporation claiming to care about the environment and CSR while not actual doing anything to back up its claims

[254] See B Corporation, online: <http://www.bcorporation.net/>.

[255] *Supra* note 7. US, Bill S 690, *An Act Concerning Corporations – Benefit Corporation*, 2010, Reg Sess, Md, 2010 (enacted). Legislation came into force on October 1, 2010.

[256] In the Vermont Act the provision reads "a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits."

In the Virginia Act the provision reads "a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation."

In the New Jersey Act the provision reads "a material positive impact on society and the environment by the operations of a benefit corporation through activities that promote some combination of specific public benefits."

The language used in the 'Specific Public Benefit' provisions in the four Acts is quite similar including the fact that all four have seven subsections that qualify as specific benefit, which builds on the general public benefit. See below:

In the Maryland Act the provision reads "(1)Providing individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) preserving the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a public benefit purpose; or (7) the accomplishment of any other particular benefit for society or the environment."[257] The other Acts have similar wording.[258] The categories that BCs can fit into are quite wide. This allows for the legislation to stand on its own and face less chance of being amended in the future to allow for categories that were not

[257] *Supra* note 7. US, Bill S 690, *An Act Concerning Corporations – Benefit Corporation*, 2010, Reg Sess, Md, 2010 (enacted). Legislation came into force on October 1, 2010.

[258] In the Vermont Act the provision reads "(A) providing low income or underserved individuals or communities with beneficial products or services; (B) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (C) preserving or improving the environment; (D) improving human health; (E) promoting the arts or sciences or the advancement of knowledge; (F) increasing the flow of capital to entities with a public benefit purpose; and (G) the accomplishment of any other identifiable benefit for society or the environment."

In the Virginia Act the provision reads "a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation, including: (1) Providing low-income or underserved individuals or communities with beneficial products or services; (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) Preserving or improving the environment; (4) Improving human health; (5) Promoting the arts, sciences, or advancement of knowledge; (6) Increasing the flow of capital to entities with a public benefit purpose; and (7) Conferring any other particular benefit on society or the environment."

In the New Jersey Act the provision reads "(1) Providing low-income individuals or communities with beneficial products or services; (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) Preserving the environment; (4) Improving human health; (5) Promoting the arts, sciences, or advancement of knowledge; (6) Increasing the flow of capital to entities with a public benefit purpose; and (7) The accomplishment of any other particular benefit for society or the environment."

planned for. The concept of a specific public benefit creates focus in that the corporation has to declare its purpose and its impact on society will bring change.

### 3.15.3 Third party standard

The language used in the 'Third Party Standard' provisions in the four Acts is quite similar including the fact that all four Acts have two subsections which also have three subsections that qualify the standard. See below:

In the Maryland Act the provision reads "a standard for defining, reporting, and assessing best practices in corporate social and environmental performance that: (1) is developed by a person or entity that is independent of the benefit corporation; and (2) is transparent because the following information about the standard is publicly available or accessible: (I) the factors considered when measuring the performance of business; (II) the relative weightings of those factors; and (III) the identity of the persons who developed and control changes to the standard and the process by which those changes were made."[259] The other Acts are similar.[260] This is the most important part of the

[259] US, Bill S 690, *An Act Concerning Corporations – Benefit Corporation*, 2010, Reg Sess, Md, 2010 (enacted). Legislation came into force on October 1, 2010.

[260] In the Vermont Act the provisions reads "a recognized standard for defining, reporting, and assessing corporate social and environmental performance that: (A) is developed by a person that is independent of the benefit corporation; and (B) is transparent because the following information about the standard is publicly available: (i) the factors considered when measuring the performance of a business; (ii) the relative weightings of those factors; and (iii) the identity of the persons who developed and control changes to the standard and the process by which those changes are made."

In the Virginia Act the provisions reads: "a recognized standard for defining, reporting, and assessing corporate social and environmental performance that: (1) Is developed by a person that is independent of the benefit corporation; and (2) Is transparent because the following information about the standard is publicly available: (a) The factors considered when measuring the performance of a business; (b) The relative weightings of those factors; and (c) The identity of the persons that develop and control changes to the standard and the process by which those changes are made."

In the New Jersey Act the provision reads "a recognized standard for defining, reporting, and assessing corporate social and environmental performance that: (1) Developed by a person that is independent of the benefit corporation; and (2) Transparent because the following information about the standard is publicly available: (a) the factors considered when measuring the performance of a business; (b) the relative

legislation because creating a purpose is not sufficient unless that code of conduct or standard has a mechanism that allows for enforcement of the standard. If the standard is breached, then there must be a remedy for a breach. To not have an enforcement mechanism leads to weak legislation. An external monitoring agency is thought to be superior to an internal one as internal controls are thought to be 'the fox guarding the henhouse'. While the legislation is silent on the standardization of monitoring, it is noteworthy that a third-party standard is required. This may be similar to the code of conduct pairing with monitoring systems. Once codes of conduct are implemented the real force and effect comes from having external monitoring agencies that are paid to monitor compliance with the code. Depending on the code itself, the remedy for a breach of the code is usually to try to get the company to fix the problem rather than terminating the contract with the supplier automatically. If the attempt to try to rectify the wrong does not happen then the relationship may be terminated. This is often stipulated in the language of the code itself.

### 3.15.4 Fourth Sector and For-Benefit Corporations

It is worth noting that the organization 'Fourth Sector' advocated for a new corporate form called the 'For-Benefit Corporation'[261] which is akin to the BC. "For-Benefit corporations are a new class of organizations that are 'driven by a social purpose; they are economically self-sustaining, and they seek to be socially, ethically, and

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weightings of those factors; and (c) the identity of the persons that develop and control changes to the standard and the process by which those changes are made."

[261] Fourth Sector's For-Benefit Corporation model, online: <http://www.fourthsector.net/learn/for-benefit-corporations>.

environmentally responsible.'"[262] They were ultimately unsuccessful as B Lab's version of the B Corporation is the new corporate form that has been enacted into legislation. The legislation enacted in the U.S. mirrors very closely B Lab's draft legislation. "A For-Benefit corporation seeks to benefit not only its shareholders, but also its stakeholders, creating a risk that directors could be held liable for breaching their fiduciary duty to maximize shareholder profit in favor of benefiting another corporate stakeholder."[263]

### 3.15.5 Do we need a new corporate form? If so, are BCs the right solution?

It may be argued whether a new corporate form is even needed as there are many versions in between a for-profit and a not-for-profit corporation such as co-ops, and other enterprises. The question may be more legalistic in that hard law such as legislation is often viewed as more strict or rigorous than soft law counterparts such as voluntary certification schemes. Even what role for-profit corporations really serve in Canadian society may need to be re-examined in light of *BCE*. If for-profit corporations truly do serve interests beyond shareholder wealth maximization, then what may appear to be a gulf between for-profit and not-for-profit may prove to be a small gap rather than a tremendous leap. It is important to conceptualize the for-profit corporation. If, however the gap between the two is not easy to close, then Benefit Corproations offer a suitable alternative. Not-for-profit corporations[264] differ from for-profit corporations in that in a not-for-profit there is no ownership. Instead, there are members of the not-for-profit who

[262] Alissa Mickels, "Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe" 32 Hastings Int'l & Comp. L. Rev. 271 2009 at 280-281.
[263] Alissa Mickels, "Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe" 32 Hastings Int'l & Comp. L. Rev. 271 2009 at 282.
[264] *Canada Not-for-profit Corporations Act*, SC 2009, c. 23.

pay dues (either annually or on a one-time basis).[265] In the for-profit realm, shareholders are held to be the true owners of the corporation. Another important distinction is that in for-profit corporations, surplus may be issued in the form of dividends to shareholders. In a not-for-profit surplus is not distributed among members.

A Cooperative ('coop') "is an enterprise, or business, owned by an association of persons seeking to satisfy common needs (access to products or services, sale of their products or services, employment, etc.)."[266] Contrasted with the for-profit and not-for-profit corporations, coops may pay their surplus to members in the form of patronage returns.[267] A coop can either be incorporated with or without membership shares[268].

### 3.16 B Lab

More research needs to be done on B Lab, which is the not-for-profit organization that successfully advocated for BCs. The Business Law Section of the State Bar of California wrote a memo to The Honorable Jared Huffman, Member of the State Assembly, in April 2011 about Benefit Corporations. The Business Law Section opposed the enactment of the Bill. Despite the pushback from the Business Law Section, the Bill

[265] Industry Canada, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs03954.html>. See also *Canada Cooperatives Act*, SC 1998, c. 1, s 7.
[266] Industry Canada, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs03954.html>.
[267] Industry Canada, online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs03954.html>.
[268] *Canada Cooperatives Act*, SC 1998, c. 1, s 9.

passed. One of the main concerns was B Lab's influence on the legislation. "The text of the Bill is based closely on model legislation drafted, adopted and promoted by a nonprofit corporation in Philadelphia called 'B Lab'. According to the promoters of the Bill, the Bill is part of a movement to give specific recognition to 'B Corporations,' a status that is bestowed by B Lab."[269] The challenge was also directed at B Lab for being one of the main organizations equipped to be a third-party standard required by the legislation. "AB 361 [Bill that enacted BCs in California] marginalizes shareholders, relies on a third-party standard largely beneficial to one organization, is not well integrated into the existing Code, and fails to make benefit corporations easily recognizable to the public."[270] This challenge about how difficult it may be for potential consumers and investors to differentiate BCs from other corporate forms is illogical as consumer and investors should be knowledgeable about where they invest or purchase their products and services. Also, those who fail to distinguish between various corporate forms may not care about those distinctions. "The Bill empowers and requires the directors of a benefit corporation to select a third-party standard by which its actions will be measured. We are troubled that the Bill apparently is designed to enact in statue a regime that will provide ready constituents for B Lab's certification service."[271] Again, the attack is aimed at B Lab as an organization that may have an indirect advantage by providing services that may be useful for BCs. This does not seem different from many other organizations and groups that benefit from new legislation.

[269] The State Bar of California, Business Law Section, Memo to Jared Huffman, online: <http://www.thecorporatecounsel.net/nonMember/docs/04_26_11_AB361.pdf> at 1 - 2.
[270] The State Bar of California, Business Law Section, Memo to Jared Huffman, online: <http://www.thecorporatecounsel.net/nonMember/docs/04_26_11_AB361.pdf> at 2.
[271] The State Bar of California, Business Law Section, Memo to Jared Huffman, online: <http://www.thecorporatecounsel.net/nonMember/docs/04_26_11_AB361.pdf> at 3.

### 3.17 CCCs and CICs

Both of these new corporate forms are related to Benefit Corporations as all of these new corporate forms allow for increased recognition of obligations beyond wealth maximization for shareholders and allow the corporation to align with community interests in a way that previous corporate forms did not allow. To understand how the corporation could possibly function in the future one must understand the various forms that were available through history and the current form as well as future options for the corporation.

#### 3.17.1 B.C. and Community Contribution Companies

Legislation was introduced in March 2012 in the provincial parliament of British Columbia to amend the *Business Corporations Act* to include 'community contribution company' as an alternate form of business corporation in the province.[272] The following outlines some of the proposed changes:

> Section 1 (1) of the Business Corporations Act, S.B.C., c. 57, is amended
> (a) by adding the following definitions: 'community contribution company' means a company that has, in its notice of articles, the statement referred to in section 51.911 (1); 'community contribution report' means a report produced under section 51.96 (2);,…[273]

The new corporate form is similar to Benefit Corporations in that it must have beneficial purposes to society:

> 51.911 (1) A company is a community contribution company if its notice of articles contains the following statement:

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[272] Bill 23, *Finance Statutes Amendment Act, 2012*, 4th Sess, 39th Leg, British Columbia, 2012 (first reading 5 March 2012). Online: <http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm>.

[273] Bill 23, *Finance Statutes Amendment Act, 2012*, 4th Sess, 39th Leg, British Columbia, 2012 (first reading 5 March 2012). Online: <http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm> at cl 1.

> This company is a community contribution company, and, as such, has purposes beneficial to society. This company is restricted, in accordance with Part 2.2. of the *Business Corporations Act*, in its ability to pay dividends and to distribute its assets on dissolution or otherwise. [274]

The definition of a CCC is detailed in the following:

> 51.92 One or more of the primary purposes of a community contribution company must be the community purposes and those community purposes must be set out in its articles.[275]

Community purpose is defined as:

> "a purpose beneficial to
> (a) society at large, or
> (b) a segment of society that is broader than the group of persons who are related to the community contribution company, and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose…"[276]

These clauses in the Bill outlining CCCs are just part of a bigger Bill to amend many statutes. Given this information by an organization in B.C. it may prove more effective to implement changes at the federal level in order for the regulatory model to be more consistent, such as to amend the *CBCA*. This will allow for uniformity across jurisdictions within Canada rather than the inconsistent system that currently exists. These changes to the standard corporate form allow for corporations to signal to stakeholders that they are separate and apart from other corporations regarding social issues.

> There is emerging evidence that these other structures (the L3C, Benefit Corporation, and the CIC) have succeeded in attracting investor capital to social economy businesses. It is also clear from ongoing amendments to these structures that they will continue to adapt to better clarify their purpose and ensure

[274] Bill 23, *Finance Statutes Amendment Act, 2012*, 4th Sess, 39th Leg, British Columbia, 2012 (first reading 5 March 2012). Online: <http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm> at cl 8.
[275] *Finance Statutes Amendment Act, 2012*, 4th Sess, 39th Leg, British Columbia, 2012 (first reading 5 March 2012). Online: <http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm> at cl 8.
[276] *Finance Statutes Amendment Act, 2012*, 4th Sess, 39th Leg, British Columbia, 2012 (first reading 5 March 2012). Online: <http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm> at cl 8.

> compatibility within the existing business system (in addition to limiting the potential to abuse the structure).[277]

The ongoing changes happening both within corporate governance and external to it in other areas of law will force corporations to respond to the challenges facing them be it racial inequality or climate change among others. The corporations that do not change and adapt may get left behind and suffer as a result.

### 3.17.2 The U.K. and CICs

In the U.K., there is a similar corporate form to Benefit Corporations called the Community Interest Company (CIC). "The CIC brand provides: reassurance to stakeholders, as the asset lock and community purpose are regulated, a higher profile for social enterprises and not-for-profit companies, and a growing network and voice within the social enterprise and third sector."[278] CICs assure investors that they will be operating with intent to make a profit whilst also benefiting society. "CICs are organizations pursuing social objectives, such as environmental improvement, community development, and inclusion, fair trade, support services etc."[279] The motivation seems similar to BCs even if the legislation is different. "CICs report annually to the independent regulator on how they are delivering for the community and how they are involving their stakeholders in their activities."[280] This component assures consumers and

[277] Sean Markey et al., "Social Enterprise in Legal Structure: Options and Prospects for a 'Made in Canada' Solution", online: <http://www.mtroyal.ca/wcm/groups/public/documents/pdf/selsreport.pdf> at 24.
[278] Department for Business Innovation & Skills, online: <http://www.bis.gov.uk/cicregulator>.
[279] Department for Business Innovation & Skills, online: <http://www.bis.gov.uk/cicregulator>.
[280] Department for Business Innovation & Skills, online: <http://www.bis.gov.uk/cicregulator>.

investors that the purpose is being adhered to. A Benefit Corporation can choose to focus on workers' interests and still be line with its legal obligations.

## 3.18 Business Ethics[281]

What is the difference between business ethics and CSR? As I note elsewhere:

> CSR is often interconnected with business ethics, notions of good corporate citizenship, and issues of morality and ethics more broadly. Activists are beginning to understand that the corporation may hold power that sometimes rivals the nation state's power. In order to effect change, it may be more lasting and effective to change corporate behaviour than state behaviour. Industry wide standards and codes of conduct may be alternatives to lobbying the corporation directly but rather impose a uniform standard across a variety of corporations.[282]

The source of power and wealth is becoming more and more the corporate form as some of the richest people in the world as people like Jeff Bezos who started a corporation, Amazon. Once they accumulate wealth from corporations, then they are able to use that power in other realms like owning media companies, etc. R. Edward Freeman notes that business ethics is distinct from CSR because business ethics focuses on doing the right thing simply because it is right versus CSR is about transferring the notion of doing good into a profitable business model. CSR is rather devoid of ethics. "In one sense then, business ethics can be said to begin where the law ends. Business ethics is primarily concerned with those issues not covered by the law, or where there is no definite consensus on whether something is right or wrong."[283]

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[281] Some of this is based on my writing in Vanisha H. Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines* (Toronto: LexisNexis, 2020).

[282] Vanisha H. Sukdeo, *Corporate Law, Codes of Conduct and Workers' Rights* (New York: Routledge, 2019), at 133.

[283] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 6.

Freeman's work on stakeholder theory is essential as for him it is very much tied to business ethics. "Of course, stakeholder theory's foundation on ethics, and morality offers a wide range of possibilities as well. The CSR literature has found stakeholder theory especially useful in defending its basic premise that firms should do well from a societal perspective."[284] CSR and business ethics are distinct but related fields. Business ethics focuses on how to do what is right over how to make money while appearing to do what is right. One is driven by ethics and the other is driven by profits.

### 3.19 Governance

The intersection between corporate law and labour law is not frequently discussed as labour law is often left out of corporate law textbooks and classrooms. Labour law may be left out of boardroom discussions too. Simon Deakin noted that "[w]hile labour law and corporate governance could once have been thought as discrete area for analysis, it is clear that this is no longer the case."[285] This should not be the case as the worlds are not so separate and distinct. The intersections and interconnections are becoming more apparent and noteworthy. Professor Peer Zumbansen notes that codes of conduct challenge "traditional understandings of law making, an analysis of voluntary codes of conduct further illuminates the complex nature of the regulated and self-regulating firm."[286] This makes explicit the need for the discussion to be regularly maintained and makes note that the corporation is multifaceted. The corporation is not just being

[284] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 866.
[285] Simon Deakin as quoted in Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law" 13 Ind J Glob Leg Stud 261-315 (2006) at 17.
[286] Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law" 13 Ind J Glob Leg Stud 261-315 (2006) at 8.

regulated but at the same time is self-regulating. These two somewhat separate issues can happen concurrently. The corporation as a site of power and for power is obvious: the corporation is both a site of power in that it wields great power and that it is a site where power can be obtained and controlled. Power as conceived in the Foucault construct can be thought of as "what makes the domination of a group, a caste, or a class, together with the resistance and revolts which that domination comes up against, a central phenomenon in the history of societies is that they manifest in a massive and universalizing form, at the level of the whole social body, the locking together of power relations with relations of strategy and the results proceeding from their interaction."[287] Foucault posits that power is legitimated by legal models. But in the world of transnational law the discussion becomes one of who is the state and what power does the state hold in comparison to the corporation.[288] If the power of the corporation overshadows that of the state then the issue becomes one of why that is the case and how it came to be. Perhaps the discussion can go further into how that power can be reclaimed by the state.[289]

This movement from nation state as the fundamental source of authority has given way to the corporation as a new form of governance. The rise of the corporation and the power and wealth contained therein allowed the corporate form to dominate on the world stage.

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[287] Michel Foucault, "The Subject and Power" Critical Inquiry, Volume 8, No. 4, (Summer 1982), pp. 777-795 at 795.

[288] Michel Foucault, "The Subject and Power" Critical Inquiry, Volume 8, No. 4, (Summer 1982), pp. 777-795 at 778: "We had recourse only to ways of thinking about power based on legal models, that is: What legitimates power? Or, we had recourse to ways of thinking about power based on institutional models, that is: What is the state?"

[289] It is beyond the scope of this dissertation to pursue answers to such questions but it is important to acknowledge that these concerns exist.

> For most of the last two centuries, 'governing' was viewed as an activity undertaken by 'the government' – that is, the formal apparatus of the state: legislatures, executive bodies, bureaucracies, courts, and the coercive agencies of the police and Armed Forces. Many believe that this way of looking at governance is now obsolete because the conventional institutions of the nation-state are ill-suited to deal with problems that transcend borders or those for which other actors such as business associations are better equipped to address.[290]

The rise of international law and transnational governance regimes has also led to the decrease in state power. The ability of goods and services to transcend borders has also allowed for exploitation to carry across borders more easily.

The authors then move their discussion to hard law and soft law distinctions.[291] However, there is often criticism directed at soft law that it is not effective enough because the penalties for breaches are often not as severe as hard law. "By contrast, hard law plays a much more limited role in social and environmental governance. Although some of the core arrangements of international social and environmental governance involve hard-law instruments such as human rights and environmental treaties, governance arrangements in social and environmental areas tend to be developed around soft-law instruments such as the Stockholm and Rio Declarations or the Millennium Development Goals."[292] This dissertation also discussed the UNGC in Chapter Four and how it has not yet lived up to the potential of creating an international code that corporations would be able to adhere to. The UNGC lacks an enforcement mechanism so it appears to be quite hollow.

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[290] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance*, (Vancouver: UBC Press, 2010), at 24.

[291] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance*, (Vancouver: UBC Press, 2010), at 158: "Soft-law instruments consist primarily of voluntary standards…"

[292] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance*, (Vancouver: UBC Press, 2010), at 159.

The stretch of laws beyond borders and into the borders of poorer nations may be thought of in a positive manner in that the laws being imported are holding the corporation to the same standards as when it operates on domestic soil. At the same time, it can be viewed as a new mode of invasion – conquering through law[293]. "Second, extraterritoriality occurs when the Canadian legal system purports to regulate people or their conduct outside its territorial borders. Canadian governments and courts consider this prospect often but with varying degrees of enthusiasm."[294] While this could be interpreted as a negative in that the reach of Canadian law should not be allowed to infiltrate other countries which seems imposing it could be the case that domestic laws in host nations are being as a result – through this notion of ratcheting labour standards. One way to ratchet is directly through codes of conduct, etc. but another way to lift standards is indirectly be it through the exportation of Canadian laws beyond Canadian borders.

### 3.19.1 R. Edward Freeman et al.

R. Edward Freeman coined the term "stakeholder theory" in 1984 to describe that directors and officers have obligations to those beyond shareholders and to include other groups of "stakeholders" like consumers and employees. Freeman has asserted that his theory about stakeholders having rights is more grounded in ethics than profit-making in that directors and officers should consider the interests of stakeholders for ethical reasons not just in order to "capitalize" on profit-making by catering to special interests.

[293] I created this term to describe a form of imperialism in which a nation is able to export their law to another country through a corporation. This could be a good thing – holding corporations to a standard that would be held to on domestic soil but is often a bad thing.

[294] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance*, (Vancouver: UBC Press, 2010), at 208.

> It is a practical theory because all firms have to manage stakeholders – whether they are good at managing them is another issue. It is efficient because stakeholders that are treated well tend to reciprocate with positive attitudes and behaviors towards the organization, such as sharing valuable information (all stakeholders), buying more products or services (customers), providing tax breaks or other incentives (communities), providing better financial terms (financiers), buying more stock (shareholders), or working hard and remaining loyal to the organization, even during difficult times (employees).[295]

Business ethics, in comparison to CSR, focuses on being ethical for the sake of being ethical. If being ethical results in greater profits then so be it. This is contrasted with CSR, which focuses on how to increase profits and realizes that being socially responsible might be the best way. Freeman et. al. go on to state that: "All management decisions contain an ethical component, and the ethical arguments in defense of managing for stakeholders are as important to the theory as are the practical considerations."[296] The two are intertwined and interconnected in that ethics, if one truly ascribes, influences all aspects. So too if a corporation is an ethical corporation, then all aspects must be ethical as a result rather than an as afterthought. This elevation of ethics to being paramount to all other concerns is also connected to the enlightened self-interest model in that if you do something kind for someone one day, they might do someone kind for you in the future. In order to reap rewards in the future it might be beneficial to be ethical in the current day.

The differences between stakeholder theory and CSR are useful to keep in mind. "[T]he distinction between stakeholder theory and CSR is important in the business

[295] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 859.

[296] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 859.

disciplines because a large number of business scholars and practitioners still reject stakeholder theory as a core management theory simply because they believe it is about CSR, and thus they see it as something firms might do if they can afford it or if they are compelled to do so…"[297] This is the difference between being ethical because you should be and being ethical because doing so will be profitable. The inherent act of being ethical of ulterior motives seems suspect and perhaps not really being ethical at all.

Differences in culture impact on how ethics play out in the business world. A more religious society may have different standards and customs compared to a secular society. "In short, stakeholder theory has not come to incorporate the kind of normative ethical theorizing that moral philosophers would want in order to ground claims about the specific rights of stakeholders or the obligations of corporate leaders."[298] As well, the difference between a collective mentality versus individual one will determine whether you decide what is best for you versus what is best for the group. "That is, because shareholder primacy grew out of the West, stakeholder theory was necessary to provide a more balanced perspective on the objective of the corporation and how to manage it."[299] Freeman et. al. seem to note that North America needs stakeholder theory because it lacks a sense of collective spirit that might be present in other societies and cultures.. "As we have traveled the world, we have noticed that a lot of the management techniques firms use within particular countries are a result of tradition in those countries.

[297] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 860.
[298] Wayne Norman, "Business Ethics", in *The International Encyclopedia of Ethics*, 2013 Blackwell Publishing pp 652-668, at 9.
[299] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 861.

Internationalization is changing this phenomenon to some extent, as multi-national companies apply management techniques developed in one country to their business units operating in different companies."[300]

The different understandings and formulations of capitalism and how it interacts with corporate law is noteworthy. "The stakeholder theory literature seems to represent an abrupt departure from the usual understanding of business as a vehicle to maximize returns to the owners of capital. This more mainstream view—call it 'shareholder capitalism,' or 'the standard account'—has recently come under much criticism, and the 'stakeholder view' is often put forward as an alternative."[301] This divergence from the mainstream theory about corporate law is the theory that is more aligned with modern day capitalism as the rise of consumer activism, and a kinder capitalism is emerging. This new version of capitalism might be the dominant form. "This approach is consistent with the main ways in which we understand capitalism. In particular we have argued that it is consistent with the market-based approach of Milton Friedman, the agency theory approach of Michael Jensen, the strategic management approach of Michael Porter, and the transactions cost theory of Oliver Williamson."[302] Freeman's new model of how corporate law should function is the progressive approach, which is pushing aside the antiquated notions of corporations existing solely for profit. Even new corporate forms

[300] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 861.
[301] R. Edward Freeman et al., *Stakeholder Theory: The State of the Art*, (Cambridge: Cambridge University Press, 2010), at xv.
[302] R. Edward Freeman et al., *Stakeholder Theory: The State of the Art*, (Cambridge: Cambridge University Press, 2010), at 29.

like the Benefit Corporation show that there is a need for new corporate frameworks and structures.

Freeman ends his discussion of stakeholder theory by linking back to a critique of capitalism itself: "If we envision capitalism as a system in which companies create value for stakeholders, how does this change our perspective on the history of capitalism and its usefulness in evoking positive changes in economies and their underlying societies?"[303]

### 3.19.2 Dirk Matten and Andrew Crane[304]

Professors Matten and Crane are world renowned scholars who have both written extensively on Corporate Social Responsibility as well as Business Ethics, often as co-authors. Their important text "Business Ethics" is in its fourth edition. Like CSR, Business Ethics is constantly changing and flexible. "To say that business ethics is an oxymoron suggests that there are not, or cannot be, ethics in business: that business is in some way unethical (i.e. that business is inherently bad), or that it is, at best, amoral (i.e. outside of our normal moral considerations)."[305] Their work really starts at the bedrock for determining what Business Ethics really means and how it can be used to help business thrive. The authors discuss how ethics is defined in the law versus in the business realm. "[T]here is considerable overlap between ethics and the law. In fact, the law is essentially an institutionalization or codification of ethics into specific social rules,

[303] Jeffrey S. Harrison, R. Edward Freeman and Monica Cavalcanti Sa de Abreu, "Stakeholder Theory As an Ethical Approach to Ethical Management: applying the theory to multiple contexts" Review of Business Management Vol. 17, No. 55, pp 858-869 2015, at 866.
[304] Some of this is based on my writing in Vanisha H. Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines* (Toronto: LexisNexis, 2020).
[305] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 4.

regulations, and proscriptions. Nevertheless, the two are not equivalent."[306] This is true to state that the law is not the same as morals. The law inherently contains moral underpinnings but is not overt in what the set of ethics upon which it is built actually is. In North America, the law is influenced by Judeo-Christian values.

Crane and Matten go on to discuss the importance and relevance of globalization in the study of business ethics. "In the context of business ethics, this controversy over globalization plays a crucial role. After all, corporations-most notably multinational corporations (MNCs)-are at the centre of the public's criticism on globalization. They are accused of exploiting workers in developing countries, destroying the environment, and, by abusing their economic power, engaging developing countries in a so-called 'race to the bottom'."[307] This need for capital to expand throughout the world leads to exploitation being spread along with the corporate expansion in that a corporation that is "bad" in one country is likely to be "bad" in all countries in which it operates. Perhaps except for its home nation and even then, there is no certainty. "The reason why there is a potential for such problems is that while globalization results in the 'deterritorialization' (Scholte 2005) of some processes and activities, in many cases there is still a close connection between the local culture, including moral values, and a certain geographical region."[308] As noted earlier, there are cultural differences across nation states and this plays a part in how business is conducted differently depending on the jurisdiction and social norms, customs, etc. What is deemed to be a gift in one country can be seen as a bribe in another country. "As soon as a company leaves its home territory and moves part

[306] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 5.
[307] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 18.
[308] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 21.

of its production chain to, for example, an emerging economy, the legal framework becomes very different. Consequently, managers can no longer simply rely on the legal framework when deciding on the right or wrong of certain business practices."[309] There is a need for managers, Directors, Officers to pay attention to differences in culture and adopt different strategies and practices as a result. "If there is an incident of industrial pollution or it is revealed that children are being used in an overseas factory, it is usually the company as a whole that we criticize rather than any specific manager(s)."[310] This is due to vicarious liability in corporate law that employers are vicariously liable for the torts committed by their employees so the misconduct of a manager may lead to liability for the corporation itself.

The movement of business law and specifically corporate law towards international law and human rights laws means that there is greater need for amendments to the legislation to keep in step with the caselaw momentum. This dissertation's suggestion that the *CBCA* be amended to include language from *Peoples* and *BCE* could help the SCC be more standardized and predictable in its approach to making decisions in the corporate realm. Outlining the actual stakeholders that should be satisfied by borrowing such language allows Directors and Officers to know who they will be held accountable to and there should be a ranking of priority absent from the current legislation. It is better to use exact language rather than vague terms that have to be complied with. This language would detail which groups or entities the corporation is held to have a duty towards.

[309] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 21.
[310] Andrew Crane and Dirk Matten, *Business Ethics, 4 ed.* (Oxford: Oxford University Press, 2016), at 30.

As Freeman argued, expanding the fiduciary duties of a corporation would allow those fighting for rights in regard to corporate behaviour to have a greater claim to such rights as they would be statutory mechanisms rather than unclear ideals. Having concrete terms to be able to argue before a court allows for greater access which is line with Ruggie's Report. Codifying such language gives greater strength and shows society that these are the principles or values that we expect corporations to comply with.

After *BCE* the questions surrounding the corporate governance decision-making process become centered on interests and which interests are of the utmost importance. So, the question changes to not only whose interests matter but to what extent those interests matter? This artificial balancing among competing interests has to be settled. Those who must settle it would be the legislature and the need for amending the *CBCA* is crucial to include a ranking of priority. These issues need to be clarified through the governmental decision-making process and through the drafting of legislation that clearly outlines the duties and the extent of the duty. By drafting new legislation or amending existing legislation the focus is allowed to be reflected by the ruling government rather than left to the SCC. The amendments to Section 122, while helpful, are not complete. There is still uncertainty about which stakeholder group gets priority.

If it is determined that all stakeholders' interests matter and are worthy of protection of the law by fiduciary duty or duty, then the question becomes to what extent that duty holds. Once a duty of care is established, there has to be a corresponding standard of care. What standard will be used to judge whether the standard is met? These

questions are crucial because the duty must have boundaries and those boundaries are not endless but rather need to be laid out and defined. This is similar to the situation in Tort law which forces one to determine if a duty exists and then the standard of care for that duty. Does the duty even exist? Then if the duty is found to exist what is the standard of care to be met to satisfy the execution of the duty? These are legal tests that have to be satisfied in order for the execution of the duty to be found to be sufficient. Having a duty on the books without explaining the extent of the duty and how it is to be fulfilled is not useful.

### 3.19.3 Wes Cragg and Benjamin J. Richardson[311]

Professors Wes Cragg and Benjamin J. Richardson write about the topic of Socially Responsible Investment (SRI). The authors note that "No longer were social investors satisfied with just avoiding profits from immoral activities; instead, they also sought to change the behavior of others. Business case SRI is a problematic benchmark for several reasons: often there is a countervailing business case for financing irresponsible activities, given the failure of markets to capture all social and environmental externalities…"[312] They trace the origins of SRI to the 1700s and the anti-slavery campaigns of Quakers during that time and onward to the financial sanctions against South Africa's apartheid regime during the 1970s and 1980s which focused on ethical concerns rather than focusing on financial reward.[313] The ethics behind the investment movement might not correlate with a return on investment. "But, if

[311] Some of this is based on my writing in Vanisha H. Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections Between the Two Disciplines* (Toronto: LexisNexis, 2020).
[312] Benjamin J. Richardson and Wes Cragg, "Being Virtuous and Prosperous: SRI's Conflicting Goals" Journal of Business Ethics 92 (201): 21-39, at 21.
[313] Benjamin J. Richardson and Wes Cragg, "Being Virtuous and Prosperous: SRI's Conflicting Goals" Journal of Business Ethics 92 (201): 21-39, at 22.

mainstream financial actors have long chosen to ignore or downplay *ethical* investment, why would they choose to do so now? How could they be persuaded to act differently? Lofty rhetoric calling for more enlightened behavior on its own will be unlikely to inspire change voluntarily. There are too many countervailing pressures in a competitive market to induce widespread ethical transformation."[314]

Cragg and Richardson offer a solution of drafting new policy instruments.

> What is needed is new policy instruments designed to encourage ethically responsible investment practices. Yet, law alone will also not be enough. Whether the law relies on carrots or sticks to induce compliance, the legal system has long been shown to suffer from significant limitations as a means of engineering social change (Teubner, 1987). Law must work in partnership with ethical arguments and moral suasion with a view to giving investors and other business actors convincing reasons to behave lawfully and in an ethically responsible manner.[315]

The law by itself will not be able to change behaviour in a manner that is consequential. The law can be used to command people, but getting people to obey is different. The importance of using the tool of boycott against a corporation allows for reformation as the corporation may change to bend to the pressure by no longer manufacturing in certain jurisdictions (such as South Africa during apartheid) or dealing with certain companies that use forced labour. This boycott from consumers and other stakeholders can drive corporate behaviour.

> Perhaps, the greatest obstacle to accomplishing ethical investment is the currently dominant management paradigm that views the primary purpose of the investor corporation as profit maximization (Bainbridge, 2002, pp. 419-420; Macey, 199). From the perspective of these theories, if profit maximization requires respect for human rights or pollution abatement, there is no problem. If it does not, as sometimes occurs, then corporations presumably have an obligation to their

[314] Benjamin J. Richardson and Wes Cragg, "Being Virtuous and Prosperous: SRI's Conflicting Goals" Journal of Business Ethics 92 (201): 21-39, at 24.
[315] Benjamin J. Richardson and Wes Cragg, "Being Virtuous and Prosperous: SRI's Conflicting Goals" Journal of Business Ethics 92 (201): 21-39, at 24.

> shareholders not to allow human rights or environmental concerns to impede their profit-maximizing *raison d'être*.[316]

As corporate law moves towards stakeholder theory, Cragg and Richardson`s work might become more useful as society keeps moving towards greater social responsibility.

SRI is about using investment as a mechanism for change in that certain consumers may choose ethical investments for their RRSPs and other may not care while SRI also includes divestment such as university students pushing for their schools to not invest in the oil and gas industry. As SRI grows the potential and scope broadens to encompass more actors. SRI is one potential tool in protecting workers as the ability to shape and change corporate behaviour means that the profit is the focus rather than some abstract notion of ethics. Cragg and Richardson note that "All investors, whether or not they identify themselves as 'social' ones, share a desire for financial returns, in contrast to philanthropists who donate money to charitable causes without expecting financial benefit."[317] So, even SRI investors still want to make money rather than simply donating that same money to a charity.

> Ethics, which is about how we ought to act and how we should live our lives, informs a range of philosophical approaches to RI. Deontological ethics places the moral status of our actions in specific features of the acts themselves, regardless of their consequences. One version of deontological ethics closely associated with faith-based investing is the divine command doctrine, which tends to cast itself in morally absolutist terms. Another deontological approach is Immanuel Kant's theory that morality rests not on divine authority but on inherent moral duties discoverable by rational people through reasoning.[318]

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[316] Benjamin J. Richardson and Wes Cragg, "Being Virtuous and Prosperous: SRI's Conflicting Goals" Journal of Business Ethics 92 (201): 21-39, at 26.

[317] Benjamin J. Richardson, *Fiduciary Law and Responsible Investing: In Nature's Trust*, (New York: Routledge, 2013), at 29.

[318] Benjamin J. Richardson, *Fiduciary Law and Responsible Investing: In Nature's Trust*, (New York: Routledge, 2013), at 29.

There is an important discussion to be had about business ethics in relation to CSR. To many scholars, business ethics is about businesspersons doing what is right whether it attached to profit or not while CSR is still very much attached to profit maximization. The terms "business ethics" and CSR are related but distinct.

### 3.20 Making the Corporation 'Moral'

CSR is often interconnected with business ethics, notions of good corporate citizenship, and issues of morality and ethics more broadly. Activists are beginning to understand that the corporation may hold power that sometimes rivals the nation state's power. In order to effect change, it may be more lasting and effective to change corporate behaviour than state behaviour. "Activists have long noted that 'lobbying the corporation' (Vogel 1978) directly is a viable alternative to targeting states. While classical social movements tried to achieve their aims through the state, transnational protest groups increasingly circumvent state politics by addressing their claims directly to transnational corporations (Spar and La Mure 2003)."[319] Industry wide standards and codes of conduct may be alternatives to lobbying the corporation directly by imposing a uniform standard across a variety of corporations.

[319] Brian Holzer, *Moralizing the Corporation: Transnational Activism and Corporate Accountability*, (Northampton: Edward Elgar Publishing Limited, 2010), at 3.

### 3.21 International regulation

In Jill Murray's book on the ILO Conventions, she posits that the Conventions are a form of governance. "The rules of the ILO and the Community can be compared as examples of transnational labour regulation. Each rule of these bodies is the product of consideration of two fundamental questions: why should a rule be made at the international level, and if one is to be made, what form should it take vis-à-vis national regulatory norms and procedures?"[320] However, she stipulates that the ILO Conventions are not readily transferable to the realm of corporate governance. Corporations do not have the same availability of enforcement that is available to the state. "It is argued here that it is both valid and useful to study the ILO Conventions in their own right, independently of their ratification and implementation at the national level. The Conventions can be studied as a body of rules which reflects the views of the tripartite delegates of the ILO Member States at the International Labour Conference in any given year."[321] Because of the malleability of the Conventions, she argues that they are not quite as useful as thought. "The character of transnational labour rules of the ILO and the Community is thus at times rather difficult to capture. For the most part, they are not instruments of direct 'governance', and they do not 'regulate' as national legislation does. The details in international rules are often templates for multiple outcomes within and

[320] Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared*, (Norwell, Kluwer Law International, 2001), at 4-5.
[321] Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared*, (Norwell, Kluwer Law International, 2001), at 5.

between national jurisdictions."[322] As stated earlier, different governance models require differing systems so the system that works to govern a nation state cannot simply be transplanted to govern a corporation. Those two entities function in different ways and have differing purposes.

Novitz and Mangan state that "[f]irst, it is evident that labour standards which secure access to material well-being, such as non-discrimination in access to jobs and provision of a living wage, can assist in addressing poverty, thereby raising levels of economic development. Second, regulation of working conditions, such as hours of work and health and safety, can enable workers not only to make economic provision for their families but to care for their dependents, thereby promoting social cohesion, well-being and stability."[323]

Murray notes that "…we need to critically assess the use of ILO standards *by firms*. ILO conventions are *addressed to states*."[324] It may not be easy to force companies to act like states and have the same obligations that citizens expect states to have. "As George Barnes-one of the group which negotiated the creation of the ILO-noted, it was feared that 'capital has no country' (Barnes, 1926, p36)."[325] Because of the ability of capital to cross borders irrespective of domestic laws, it may be easier to regulate the

[322] Jill Murray, Transnational *Labour Regulation: The ILO and EC Compared*, (Norwell, Kluwer Law International, 2001), at 7.
[323] Tonia Novitz and David Mangan, eds., *The Role of Labour Standards in Development: From theory to sustainable practice?*, (New York: Oxford University Press, 2011), at 4-5.
[324] Jill Murray, "Labour rights/corporate responsibilities: the role of ILO labour standards" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan Publications Limited, 2002), at 31.
[325] Jill Murray, "Labour rights/corporate responsibilities: the role of ILO labour standards" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan Publications Limited, 2002), at 33.

corporation than to bind it to national laws. The solution is having a rule/law that moves with the corporation such as a code. The code is in place no matter what jurisdiction the company is in.

As noted by Barrientos, "[t]racing the supply, or value chain allows us to situate employment within the context of global sourcing, and helps to understand the different factors affecting conditions of work (Barrientos, forthcoming)."[326] Work (a.k.a. human capital), like capital, is able to transcend borders. Workers themselves are less likely to move to another jurisdiction, but the nature of production has changed – now, a product can be sourced and then assembled in numerous jurisdictions and then shipped to another country to be purchased. "The ultimate sanction against non-compliance is the threat of being de-listed as a supplier. Codes are thus only 'voluntary' to the suppliers in that the alternative is to find new outlets."[327] This is an important point as the degree of voluntariness is subject to change and is different from company to company and supplier to supplier. "Yet there are others who are more optimistic, seeing codes as offering a potential tool in efforts to promote worker organization and education. However, this will only be possible if workers have a sense of ownership, if they feel that codes are actually there to support them."[328] If workers are able to be involved with the drafting of the code and implementation of the code, then they may feel more connected to it.

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[326] Stephanie Barrientos, "Mapping codes through the value chain: from researcher to detective" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan Publications Limited, 2002), at 64.

[327] Stephanie Barrientos, "Mapping codes through the value chain: from researcher to detective" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan Publications Limited, 2002), at 67.

[328] Linda Shaw and Angela Hale, "The emperor's new clothes: what codes mean for workers in the garment industry" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan Publications Limited, 2002), at 109.

The movement from state-centred regulation in the form of hard law, towards soft law mechanisms like codes of conduct exist at the intersection of a variety of laws – from contract law to corporate law to labour and employment law. Similar to the nexus of contracts theory of the corporation, codes of conduct exist at the nexus of areas of laws while simultaneously straddling the divide between hard law and soft law. As noted by Jakko Salminen, governance models such as codes of conduct are contract law[329], while the author of this dissertation would argue that codes also exist within the confines of corporate law and labour and employment law. These codes, which are based in the law of contracts, expand beyond simply a contract binding two parties to include new models of governance that are binding on the corporation no matter which jurisdiction the corporation operates within. This new form of governance which was also implemented after the Rana Plaza disaster will be examined in the next chapter.

[329] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 411.

# 4 Chapter Four - Case Study on the Rana Plaza disaster

## 4.1 Introduction

Workers in some countries in the Global South face horrendous working conditions, including being subjected to work in unsafe buildings, micromanagement about bathroom breaks, and constant drug testing. With the Covid-19 pandemic lasting through 2019, 2020 and ongoing into 2021, these same workers can also face job loss, reduced working hours and pay, and lack of access to sufficient personal protective equipment (PPE). Covid-19 led to precarious work becoming even more uncertain and unpredictable. While workers in the Global North also faced shifting work patterns as a result of Covid-19, the impact in the Global South was more extreme.

On April 24, 2013 1,134 workers died in the disaster at Rana Plaza in Dhaka, Bangladesh. Approximately 2,500 workers were also injured as a result of the building collapse. This incident brought to light the unsafe working conditions that many workers around the world face – the individual workplace may be hazardous in the form of dangerous machinery, but the building itself may be unsafe as well as Rana Plaza proved.[330] On Tuesday, April 23, 2013 it was reported that a number of cracks had appeared in the Rana Plaza building. The building had been evacuated but the workers

[330] For more information about Rana Plaza see Chikako Oka, "Improving Working Conditions in Garment Supply Chains: The Role of Unions in Cambodia" British Journal of Industrial Relations 2015 pp 1-26.

were then been ordered back to work.[331] It was reported that 3, 639 workers refused to enter the eight-story Rana Plaza factory building because there were large and dangerous cracks in the factory walls. The owners brought in paid gang members to beat the female and male workers to force them to go into the factory. At 8:45 a.m., workers felt the eight-story building begin to move, and heard a loud explosion as the building collapsed, pancaking downward, killing 1, 137 workers.[332] Mohamed Sohel Rana was eventually charged in two proceedings – violations of building codes and for loss of life[333] "The building collapse and its aftermath are neither random nor disconnected. They suggest the outlines of an emerging ordering of governance that is situated within, between and beyond states, but that is felt like law but may not be tied to the domestic orders of states."[334]

What is even more tragic about the terrible disaster that happened in 2013 was that it was preventable and avoidable. The very day before the disaster, workers complained about seeing cracks in the walls of the building and voiced their concerns about the stability of the structure. Those concerns were dismissed. If only the concerns were heeded, and workers were not allowed to enter the building on April 23, 2013 or April 24, 2013 to allow for inspection and potential repairs, the disaster could have been avoided.

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[331] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 13.
[332] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 14.
[333] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 15.
[334] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 41.

As the 10-year anniversary of the Rana Plaza disaster approaches in 2023, there is a lack of progress as workers in the Global South continue to work in unsafe and dangerous buildings and workplaces. As noted by Larry Cata Backer (Pennsylvania State University, Faculty of Law):

> Though the factories operating in the Rana Plaza building were local enterprises, and in the first instance subject to the laws of Bangladesh, and in addition, to their contractual and societal obligations under arrangements with their customers (principally multinational enterprises in the garment sector), their operation might also be tinged with legal and policy obligations under public international governance regimes.[335]

Cata Backer is noting that while this collapse occurred in Bangladesh in 2013, there is no reason to not expect that other jurisdictions face similar situations and workers around the world are subject to working under similar unsafe working conditions. While this case study centres on Rana Plaza, the incident is indicative and representative of workers from the Global South who face the impacts of neoliberalism and globalization from the Global North.

In this case study, the author will start by examining the background that led to the Rana Plaza disaster including such concepts as neoliberalism, globalization, transnational legal orders, and a new area of law termed "global supply chain law"[336]. The author will then detail what occurred in Bangladesh to explain the different factors at play that led to the disaster. Next, the author will compare the two governance models of The Accord on Fire and Building Safety in Bangladesh ("The Accord") and The Alliance

[335] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 13.

[336] See the work of Peer Zumbansen (McGill University, Faculty of Law) to be explained further in the case study.

for Bangladesh Worker Safety ("The Alliance") to determine if either led to actual change on the ground for workers in Bangladesh or if it was merely a public relations stunt to appease worried consumers and investors in the Global North. The author will conclude with best steps forward for foreign workers manufacturing goods for Canadian corporations, especially in light of the Covid-19 pandemic that has led to increased precarity for workers in the Global South.

The two governance models that were adopted in 2013 were: The Accord which came into force on May 13, 2013 and The Alliance enacted on July 10, 2013. The important distinctions between these two governance schemes will be examined and discussed. One important distinction is that the Alliance was intended to exist for five years and then end, and the website makes clear that it ended in 2018. The Accord was intended to last at least five years and had the option for renewal. There was a new version (the 2018 version) implemented in June 2017. The last date that the Accord was set to expire was May 31, 2021 and it was recently announced that the Accord would stay in place for three months longer. The ongoing nature of the Accord is separate and distinct from the Alliance. It is important to note that the Accord (2018 version) was the only remaining governance mechanism in place after the disaster up to August 31, 2021 when it was replaced by a new mechanism.

After the expiration date of August 31, 2021 the Accord was replaced with a new governance mechanism based on the 2018 version but now re-branded as "The International Accord for Health and Safety in the Textile and Garment Industry" ("The

International Accord") which went into effect on September 1, 2021.[337] "Like its predecessor agreement, this is a legally binding agreement between companies and trade unions to make Ready-Made Garment (RMG) and textile factories safe." The re-brand is intended to make the document international as it moves beyond just Bangladesh as the plan is to have more jurisdictions added although it currently only pertains to Bangladesh. The International Accord is a 26-month legally binding agreement[338] and as of September 12, 2021 has 113 signatories. "Bangladesh had been the world's second-largest garment exporter since 2010 after China, according to the World Trade Organization but last month lost that ranking to Vietnam amid pandemic lockdowns and rising coronavirus cases."[339] As discussed earlier, although only tangentially as it does not form the focus of this dissertation, the impact of Covid-19 on the world and the garment sector has been monumental. The conditions which workers endured in factories has now gotten worse since the pandemic started and the working conditions did not provide PPE or improve ventilation and other considerations to help stop the spread of Covid-19.[340] Increasing the jurisdiction of this new International Accord allows for broader coverage and now means that the Accord has the potential to become an industry-wide standard rather than simply staying within the confines of companies that manufacture in Bangladesh. This potential for expanded scope cannot be celebrated yet as it simply remains potential not yet actualized. This process is still ongoing and in flux.

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[337] "Agreement on new, expanded Accord" online at <www.bangladeshaccord.org>.

[338] International Accord for Health and Safety in the Textile and Garment Industry website: <www.internationalaccord.org>.

[339] Elizabeth Paton, "International brands sign a new accord to protect garment workers in Bangladesh" New York Times August 25, 2021.

[340] LeBaron et al., "The Unequal Impacts of Covid-19 on Global Garment Supply Chains" available online at the Worker Rights Consortium website: <www.workersrights.org>.

## 4.2 Background

Why did Rana Plaza happen in the first place? While the lack of listening to and addressing workers' concerns has already been alluded to, there are many factors at play that led to the disaster occurring, including issues surrounding supply chain management, neoliberal trade policies, globalization, and capitalism at large. This disaster is not a standalone event that could have only happened in Bangladesh – these are issues many workers in the Global South face and that commonality should not be dismissed. The author will be examining the disaster through the lens of corporate governance, transnational law, governance systems, and globalization as outlined by Peer Zumbansen and Larry Cata Backer, who have both written specifically on Rana Plaza.

According to Peer Zumbansen (McGill University, Faculty of Law) and co-author Benedikt Reinke, while there is not currently an area of law known as "global supply chain law", there may be in the future.[341] This new developing area of law encompasses aspects of contract law, corporate law, and tort law. Do the issues about supply chain management and the abuses attached to it fall under the umbrella of corporate law or labour law? Are these claims to be grounded in contract law or tort law? And in certain cases, the claims and allegations may actually be based in criminal law. When does negligent behaviour become in actuality criminal behaviour? The area of corporate crime is beyond the scope of this case study, but it is important to note that certain corporate behaviour can move beyond contract and tort issues into the area of criminal liability. And noteworthy that Mohamed Rana, the owner of Rana Plaza, also faced criminal

[341] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 4.

charges as a result of the building collapse. "…Rana Plaza is not the exception, but the manifestation of inacceptable (sic) working conditions in global supply chains."[342] This is the current discussion about Rana Plaza – that what happened in 2013 in Dhaka was not unique to Bangladesh but merely a representation of what is occurring throughout the Global South when it comes to manufacturing clothing for consumers in the Global North. I intentionally positioned the consumers as the main stakeholder as they can somewhat be blamed for their failure to be ethical consumers and may be the reason that corporations seek lower manufacturing costs for their products. Essentially without the market (consumers) for cheap, poorly made fast fashion, where would the industry be? Obviously, consumers alone are not the only blameworthy stakeholder, but it is important to situate them in this context. The other stakeholders include the employees, community members, the environment, investors, and shareholders. The role of these stakeholders cannot be discounted but the importance of the consumer driving down prices is significant. The environmental devastation created by the collapse of a building and the potential contamination of the surrounding environment and community as a result is noteworthy.

The separation of the corporation from those who own the corporation, known as the Salomon principle, is relevant in this disaster too. The law does not hold Galen Weston or Joe Mimran personally liable nor does it hold the shareholders of Loblaw responsible due to the notion of corporate separateness. But when will the courts look beyond corporate personhood to hold the corporation accountable for the actions

[342] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 1.

committed on foreign soil? "Today, the genius of the separate legal person lives on in numerous decisions around corporate liability, and with the breath-taking proliferation of supply chain regimes the principle has acquired a somewhat novel, awe-inspiring significance."[343] Zumbansen and Reinke speaks to the issue of corporate separateness and how corporations are able to avoid liability by contracting out so that workers in Bangladesh who sew and stitch garments are not able to successfully bring forward claims in a Canadian court due to the wrongs committed by a Canadian corporation outside of Canada. "All of these cases raise the question of whether an MNC is liable for damages to the workforce of one of its supplier companies or subsidiaries."[344] The argument can be extended that the harm was not done to Canadians or those who look "Canadian", so it is easier to dismiss the loss of life on foreign soil. "The crux of the supply-chain liability rests upon a central dichotomy in the relationship between MNCs and theirs suppliers, commonly based in the Global North and South respectively: while suppliers are generally kept independent in a legal sense, they are often economically and procedurally dependent on the corporations in a factual sense."[345] There is a difference between parent and subsidiary versus corporations with supply agreements with independent suppliers in foreign jurisdictions.[346]

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[343] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 5.

[344] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 11.

[345] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 11.

[346] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London

In Kik, which is a German case with similar facts to the Rana Plaza disaster in that both involve companies that are operating in Bangladesh manufacturing goods for the Global North, there is mention of a code of conduct. In Kik, the accident occurred in 2012 and 117 workers died in a factory fire and 200 were injured. "As, at the international level, recommendations for codes of conduct are often referred to as a voluntary form of self-government, their legal nature may change when they become part of or connected to a contractual agreement. In that regard, their binding effect *as part of a legal contract* has been recognized by German courts and is becoming a potentially important avenue for the establishment of third-party related contractual duties on the part of a major buyer."[347] Codes of conduct can become akin to hard law once enacted. So, where is the line drawn between voluntary and mandatory governance mechanisms?

It is important to distinguish between a parent corporation's relation to a subsidiary versus a corporation's relation with a supplier: "Only in exceptional cases may this principle be circumvented, commonly referred to as 'piercing the corporate veil'. It is against this background of this important legal principle that we have to assess if, and if so under what circumstances, an MNC should be liable for tort actions of its suppliers or subsidiaries."[348]

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Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 12.

[347] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 15.

[348] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London

### 4.3 Who is Bound by the Code?

Only ten of the fourteen Canadian companies that used suppliers that operated factories in Bangladesh with links to the Rana Plaza disaster had a code of conduct. The Canadian companies that were involved were as follows: 1) Abercrombie and Fitch, 2) Gap, 3) H & M, 4) Hudson's Bay, 5) Jacob, 6) Loblaw, 7) Lululemon, 8) Mark's, 9) Reitmans, 10) Roots, 11) Sears Canada, 12) Tristan, 13) Walmart, and 14) YM Inc. The ten with a code of conduct are as follows: 1) Abercrombie and Fitch, 2) Gap, 3) H & M, 4) Hudson's Bay, 5) Loblaw, 6) Lululemon, 7) Mark's, 8) Reitmans, 9) Roots, 10) Walmart. This dissertation examines the current codes in existence, which works with the case study on Rana Plaza, as well as the two governance mechanisms that were created after the disaster. Comparing the current codes of these companies allows for a direct comparison to be made with the Alliance (now expired) and the Accord (currently in place). This discussion allows for the examination of what changes, if any, companies made as a result of the Rana Plaza disaster as it allows the companies time to have updated their codes in light of the disaster.

Moreover, even if Walmart intends to cover third party beneficiaries, as outlined by Zumbansen, then from which party does the obligation flow from and to whom does the obligation flow to?

Walmart ⇨ Rana Plaza ⇨ Workers

Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 17.

And in the case of Joe Fresh, which is owned by Loblaw Corporation, then there is an additional step:

Loblaw ⇨ Joe Fresh ⇨ Rana Plaza ⇨ Workers

"In the context of ascertaining the existence and, in the affirmative, the scope of a duty of care of the major buyer for the employees of its local supplier, the buyer's code of conduct is key."[349] This speaks to a commitment to monitor safety, human rights, and the environment. A code of conduct can be broader than the mechanisms in place after the disaster, in this case the Accord and the Alliance. "The crucial question of such a proposal for a contractual liability becomes whether the MNC intended to make a legally enforceable promise to the workforce of its supplier."[350] To satisfy the question posed by Reinke and Zumbansen, the answer must look to the intent of the parties as to whether it was the intention to form a legally binding contract or merely a soft law tool to appease consumers in the Global North that conditions in the Global South are getting better. "Namely, where an MNC engages in either or both activities of a) issuing a code of conduct and b) making public statements – each of which arguably containing elements that detail the level of responsibility the company recognizes towards its contractual

[349] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 20.

[350] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 28.

parties and its stakeholders – the crucial question is whether the company has bindingly assumed responsibility for the welfare of those stakeholders."[351]

When can an employer-employee relationship be deemed to exist? It is obvious that a foreign worker for a factory in the Global South is not an employee of a Canadian corporation, but that does not mean that the relationship does not contain legal protections beyond that. In corporate law, there is the concept of vicarious liability that deems a corporation liable for the negligent acts or omissions of an employee but if a foreign worker is not an "employee" then this relationship is not covered. Reinke and Zumbansen noted that "both MNCs required their suppliers to display the codes of conduct, a contractual document between corporation and supplier, to their workforce and one may justifiably ask why they would have done so, if not to establish some kind of legal implication."[352] When is a legal obligation created and what are the requirements to satisfy such legal obligations?

> Even if we assume that the codes of conduct between KiK and their supplier become contractually enforceable one might justifiably ask who, in fact, the promising party is. If we, for example, consult the current version of KiK's code of conduct we can identify several provisions that contain specific standards to be upheld for the employees of the suppliers. However, they do not, at least explicitly, state that KiK promises these rights to the workforce of its suppliers.

[351] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 23-24.

[352] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 28.

> One could also make the opposing argument that it is supplier who promises compliance with these standards to its workforce rather than the MNC.[353]

Do we expect corporations to know what is happening along all aspects of the supply chain? If so, to what extent? How much, if any, knowledge should they have? Does this create a new duty of care? Zumbansen focuses on subsidiaries and their relation to a parent company: this can be differentiated from this dissertation, which focuses on foreign workers of a supplier to Canadian corporations. In this case study, the supplier is Rana Plaza, which housed different companies that manufactured and supplied the fourteen Canadian corporations. "Subsidiarity, however, the idea that the most adequate and efficient level of governance might be the lowest, where those allegedly most affected by the norms should be their authors, comes with considerable baggage."[354] The work done by Cata Backer on Transnational Legal Orders (TLOs) shows how this layering of governance[355] creates new legal orders that are akin to legal pluralism. "By reflecting on the architectures of variably conceived global legal orders, we regularly find deep-running concerns as to whether it is possible to rely on lessons from domestic law in our aspirations for law 'beyond', rather than 'without,' the state."[356] In the case of transnational law, and TLOs, it is important to note the role of the state in relation to the corporation. "Transnational Legal Orders (TLOs) are constellations of legal norms,

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[353] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 28-29.

[354] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at abstract.

[355] Which I also write about in my second book.

[356] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at 216.

organizations, and international actors, who seek to organize or regulate transnational action in a highly globalized world, in which the regular nation-state based center of law we have been accustomed to for the past couple of centuries is basically nonexistent or amorphous."[357] The governance gap created space for corporations to engage in private regulation including self-regulation, leaving the state with a reduction in responsibility. This decentering of the nation-state in regulation has created the room for there to be a regulation void which can be filled by the corporation or remain empty allowing workers to fall through the cracks. "…decentering of a formerly state-based regulatory response regime, resulting in the combination of hard and soft, formal and informal regulatory elements."[358]

As noted by Jakko Salminen, "the Accord represents a break from earlier nonbinding and worker-exclusive CSR by providing a new paradigm stressing enforceability and inclusivity."[359] CSR has changed from its creation to now have differing governance mechanisms that run parallel to each other. Now the question arises as to whether these new tools are CSR or something new and different? If CSR is about being voluntary and nonbinding then the Accord cannot fit into such a categorization. This dissertation states that what was once branded as CSR as being voluntary and rather weak has now been replaced by a governance model between soft law and hard law that be termed hybrid law. As noted by Cata Backer elsewhere in this dissertation, hard law

[357] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 44.
[358] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at 221.
[359] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 411.

has flaws as well, sometimes as significant as those relating to soft law. It cannot be stated that hard law is always superior to soft law mechanisms. So this new hybrid model may be able to take the best and avoid the worst aspects of both soft law and hard law by embracing both and shunning neither. Perhaps this new mode of governance can be termed "medium law" somewhere along the spectrum from soft to hard law. This categorization is where the Accord and other similar mechanisms truly belong. As they are neither soft nor hard, as they exist between voluntary and mandatory and between jurisdictions as these mechanisms often transcend borders into international law realms. Or this could be termed "alt-law" as it exists as an alternative to hard law in its original sense. Somewhere along the spectrum from soft to hard law while recognizing that hard law is not the ultimate goal and this "medium law" or "alt-law" can prove to be sufficient on its own. The malleability of soft law leaves it open for adaptation to differing workplaces and spaces so that no one single workplace is curtailed by the limits of hard law.

Salminen[360] also raises interesting discussions regarding the Accord about issues like privity of contract and who is actually privy to the supplier contract and whether a single company can adopt such a governance mechanism like the Accord that binds all parties along the supply chain. But I ask: if not the company, then who could ever control the supply chain? If a duty of care exists then would not the duty attach to the company? If not, who else? Does not the ultimate responsibility rest with the company in the Global North to ensure that all parties along the supply chain are protected? A Canadian

[360] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 411.

corporation cannot contract out of responsibility by simply moving production off domestic soil to foreign soil. Salminen also discusses how "private ordering of transnational contracts, such as the Accord, over locally embedded legal safeguards"[361] might prioritize the Accord over local laws such as the law in Bangladesh which is a nuanced approach. Salminen compares the Alliance to the Accord and reaches the conclusion that the Accord is superior because it is legally binding and enforceable in a way that the Alliance is not. He states that Alliance is the type of governance mechanisms from antiquated days of CSR being mere windowdressing and containing hollow words to satisfy consumers in the Global North.[362] Also, noteworthy is the inclusion of employees via representation of their unions as the unions are signatory to the agreement as well – not just companies which si lacking in the Alliance and many other typical CSR governance mechanisms.[363] One of the critiques that can be leveled at the Accord is that it is quite narrow in scope as the focus is on worker safety and does not speak to common labour issues like wages and overtime. But this basic protection like healthy and safety was missing in Bangladesh so to protect workers in this manner is a good start and more advanced rights may follow in the future.

This first step for workers to gain protection helps to increase worker voice in the governance of their workplaces which is a common thread in this dissertation – that soft

[361] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 412.
[362] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 412.
[363] Jakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" American Journal of Comparative Law, vol 66, 2018, pp- 411 – 451 at 416.

law mechanisms allow for greater worker voice which the legislative process does not. The ongoing nature of codes and soft law allow for increased protection along the feedback loop while legislation remains stagnant. "The case here, of rather, legal field in point, is labor law-an area of law that has forever been at the frontlines of conflict between a libertarian private law ideology ('you get what you contract for') and a public and social law architecture committed to redistribution."[364] Zumbansen is one of the few scholars to write on the connection between corporate law and labour & employment law seeing the connections and disconnections between the corporate form and the role of workers be they employees or merely workers along a supply chain. "Labor law's woes started early on and have become dramatically amplified and accentuated in the current globalization context. Labor law poignantly illustrates the dark side of entrusting conflict resolution and redistributive mechanisms to private ordering."[365] Here we see Zumbansen building on this notion of private law and what is left to individual contracting parties versus what the state is in charge of and what society expect the state to regulate. "From a private law perspective, it becomes more evident how invocations of subsidiarity, empowerment, and self-government are likely to result in increasing the precarious state of already vulnerable stakeholders, and in continuing to immunize powerful private actors from public accountability."[366]

[364] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at 217.
[365] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at 218.
[366] Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity" King's College London Dickson Poon School of Law, Research Paper Series: Paper 31/2016, available online at SSRN: <https://ssrn.com/abstract=2628254>, at 234.

According to Cata Backer, "[t]he collapse, and its consequences, then, might be understood as uncovering the complex interweaving of national law, international standards and private governance standards that together might be understood as a transnational legal order that affects on business behavior, and state regulatory activity both within and beyond its borders."[367] Rana Plaza`s workers were mainly women who worked 13 to 14.5 hours starting around 8 a.m. The building had additional floors built on top which may not have been authorized. Akin to Zumbansen`s arguments about decentering, we see Cata Backer speak to the complexity of supply chains due to the sheer number of parties involved:

> That sharing, however, did not merely involve the state that represented the largest enterprises which sources garments from much smaller enterprises within Bangladesh. It also involved a host of other actors – enterprises, NGOs, labor organizations, and international public and private actors, in distinct and complex ways.[368]

Rana Plaza serves as an example of the devastation that can be done by the simple lack of regulation. The lack of fire and safety training and the lack of enforcement of building codes allowed for the disaster to occur. "The Rana Plaza factory building collapse may nicely illustrate the complex and perhaps disordered nature of law and governance making within and beyond any single class of individual or institutional actor to manage or order."[369]

Some of the scenes are straight out of 1800s England: "Its construction materials were of extremely poor quality, and giant vibrating generators had been placed on several

[367] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 3.
[368] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 3.
[369] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 5.

floors to keep the power on and the sewing machines running during the city's regular power cuts."[370] These situations are dire and leave no real chance for workers to have autonomy or power in such a setting. "Alternatively, and especially where suppliers are themselves large multinational enterprises, it is sometimes the case that companies at the middle level of supply chains may also produce their own supply chains effective against the entities from which they contract."[371] See also the example of Foxconn which has obligations under the Apple code but also has its own supplier code. "Suppliers who fail to conform to the supplier conduct codes may be disciplined, up to and including loss of the supplier relationship. These are matters handled internally for the most part. While it is possible that such supplier codes might be enforced in courts among the parties to them, U.S. courts have so far refused to extend their protections to third parties, especially workers."[372] Other examples of conduct standards such as the Ethical Trading Initiative and FLA and UN Global Compact as well as the UN Guiding Principles for Business and Human Rights which helped create the human rights due diligence.[373]

[370] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 9. Quoting from The Guardian Tansy Hiskins. April 23, 2015.
[371] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 11.
[372] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 12.
[373] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 12.

### 4.4 The Accord on Fire and Building Safety in Bangladesh (2013)

The Accord on Fire and Building Safety in Bangladesh came into force on May 13, 2013, only a few weeks after the disaster. The seven-page document was intended to protect workers from fires, building collapses and other preventable accidents and was scheduled to last five years.[374] It stated that "The signatories also welcome a strong role for the International Labour Organization (ILO, through the Bangladesh office…"[375] The document is signed by the General Secretary of the IndustriAll Global Union and the General Secretary of the UNI Global Union. On the website one is able to see all the signatories. This dissertation focuses on the Canadian corporations: Loblaw Companies Limited, Nelson Education Limited, and Bruzer Sportsgear Limited.[376] Bruzer seems to have ceased operations in March 2019.[377] Nelson Education, based in Toronto, publishes educational products and is not in the garment industry.[378] So, of the three Canadian companies signed on to the Accord only Loblaw Companies Limited is still in business in the garment industry.

For "Global" signatories there are four organizations: Clean Clothes Campaign, Maquila Solidarity Network, International Labor Rights Forum, and Worker Rights

[374] The Accord on Fire and Building Safety in Bangladesh (2013) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[375] The Accord on Fire and Building Safety in Bangladesh (2013) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[376] The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[377] Conducting a simple Google search informed the author that Bruzer is no longer in existence and is permanently closed. And the LinkedIn for one of the founders, Jim Gardner, listed him as the President of Bruzer until March 2019. Another employee of Bruzer listed that he worked there until March 2019 (Jason Kendall). And Ron Pineo worked at Bruzer until September 2019.
[378] Nelson Education website <www.nelson.com>.

Consortium.[379] The fact that the Accord is working in coordination with two international unions and four international organizations seems to indicate that it is rigorous and enjoys the support of the international community and the unions.

The following headings were used in the Accord:

### 4.5 Table - Accord 2013 version

| **Heading** | **Article number(s)** |
|---|---|
| Scope | 1, 2, 3 |
| Governance | 4, 5, 6, 7 |
| Credible Inspections | 8, 9, 10, 11 |
| Remediation | 12, 13, 14, 15 |
| Training | 16, 17 |
| Complaints Process | 18 |
| Transparency and Reporting | 19, 20 |
| Supplier Incentives | 21, 22, 23 |
| Financial Support | 24, 25 |

Under the heading of Scope, it states that "The agreement covers all suppliers producing products for the signatory companies."[380] This provides for liability and responsibility to flow further down the supply chain so that every aspect of a garment is in compliance with the Accord (think of buttons, zippers, and other such items). Under Scope, it also outlines that factory inspections must be accepted and includes details about the

[379] The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

[380] The Accord on Fire and Building Safety in Bangladesh (2013) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

requirements (see page 1 of the Accord 2013 version).[381] The Accord covers safety inspections, as well as fire safety training.[382] The agreement references trade union signatories and company signatories as well as a representative from the ILO as a neutral chair.[383] Dispute Resolution is section 5 under the Governance heading. This outlines the process which is decided by the Steering Committee set up in Article 4. Arbitration awards are deemed enforceable in a court of law. Separate from the Steering Committee established in Article 4, there is an Advisory Board appointed under Article 6. The Advisory Board is comprised of brands, retailers, suppliers, government institutions, trade unions, and NGOs.[384] This approach seems inclusive and ensures that different stakeholders will be consulted. Under Credible Inspections, the sections outline that a qualified Safety Inspector with expertise in fire and building safety and who is independent of the companies, trade unions, or factories will be appointed by the Steering Committee.[385] Under Remediation, there is a process outlined for what will happen if the Safety Inspector finds violations. This heading also includes provisions that workers shall be compensated during work loss due to renovations to fix safety problems.[386] This heading also includes workers having the right to refuse unsafe work without

[381] The Accord on Fire and Building Safety in Bangladesh (2013) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[382] The Accord on Fire and Building Safety in Bangladesh (2013) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[383] The Accord on Fire and Building Safety in Bangladesh (2013) at 2, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[384] The Accord on Fire and Building Safety in Bangladesh (2013) at 2, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[385] The Accord on Fire and Building Safety in Bangladesh (2013) at 3, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[386] The Accord on Fire and Building Safety in Bangladesh (2013) at 4, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

discrimination of loss of pay.[387] Such a provision prior to the disaster would have protected those workers who complained about the cracks in the walls of Rana Plaza and refused to enter the building. It may seem tangential, but it is important to keep in mind that all the progress made is on the backs of those who were killed or injured during the disaster. Companies did not choose to make these changes until after the disaster.

Under Training, there is a requirement to establish a training program to be delivered by skilled personnel. The training programs also create space for workers to voice their concerns and actively participate in the process to ensure their own safety.[388] This heading also requires the establishment of health and safety committees. Under the Complaints Process heading, there is only one section which sets out the establishment of a worker complaint process mechanism.[389] While this seems advantageous to workers, it is akin to the process under *Dunmore v Ontario (AG)*[390] where agricultural workers, mostly migrant workers, had a process to voice concerns to management without a corresponding requirement put on management to take any steps to fix the issues being complained about.

Under Transparency and Reporting, there are obligations about compiling a list of all suppliers in Bangladesh including sub-contractors.[391] This heading also sets up the

[387] The Accord on Fire and Building Safety in Bangladesh (2013) at 4, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[388] The Accord on Fire and Building Safety in Bangladesh (2013) at 4, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[389] The Accord on Fire and Building Safety in Bangladesh (2013) at 5, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[390] *Dunmore v Ontario (AG)* 2001 SCC 94.
[391] The Accord on Fire and Building Safety in Bangladesh (2013) at 5, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

requirement for quarterly aggregate reports that provide a detailed review of findings and progress on remediation for all factories at which inspections have been completed.[392] Supplier Incentives includes that suppliers are required to participate fully in the inspections, remediation, health and safety, and training activities.[393] Ultimately, if a supplier is to have been found in breach of the Accord there is the potential for termination of the business relationship.[394] Financial Support outlines that signatory companies will assume responsibility for funding the activities of the Steering Committee, and Safety Inspector – the maximum contribution per company is $500, 000 per year for each term of the Agreement.[395]

[392] The Accord on Fire and Building Safety in Bangladesh (2013) at 5, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[393] The Accord on Fire and Building Safety in Bangladesh (2013) at 6, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[394] The Accord on Fire and Building Safety in Bangladesh (2013) at 6, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[395] The Accord on Fire and Building Safety in Bangladesh (2013) at 6, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

### 4.6 Accord 2018 version

The May 2018 version was also seven pages in length. It is stated that the Agreement is set to expire on May 31, 2021.[396] At that time, the work was to be assigned to a national regulatory body supported by the ILO.[397]

#### 4.6.1 Table - Accord 2018 version

| **Heading** | **Article number(s)** |
|---|---|
| Scope | None |
| Governance | 1, 2 |
| **NEW**: Dispute Resolution | 3 |
| Credible Inspections | 4, 5, 6 |
| Remediation | 7, 8, 9, 10 |
| Training | 11, 12 |
| Complaints Process | 13 |
| Transparency and Reporting | 14, 15 |
| Supplier Incentives | 16, 17, 18 |
| Financial Support | 19, 20 |
| **NEW**: Support for the NTPA | 21 |
| **NEW**: Release of Responsibility | 22 |
| **NEW:** Termination of the Agreement | 23 |
| **NEW:** Choice of Law | 24 |

[396] The Accord on Fire and Building Safety in Bangladesh (2018) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[397] The Accord on Fire and Building Safety in Bangladesh (2018) at 1, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

The new Articles highlight the importance of making the document more legalistic. The original document (2013 version) read as similar to a voluntary mechanism and the current version is more contractual in language. Doing a compare and merge of the two documents shows how small the changes are with the enactment of a few new Articles at the end of the Accord. Scope is similar to the 2013 version. Governance as well was similar to the 2013 version. Dispute Resolution in the 2018 is standalone while in the 2013 version it was Article 5 under the Governance heading. Credible Inspections is similar to the 2013 version – there is a new concept of the Chief Safety Inspector (CSI) used throughout the document. Remediation is similar to the 2013 version. Training has been "revised and further implemented"[398] yet there is no indication to how this is to be implemented. It seems to suggest that there may be further developments than currently in place but there is no mention of what form or function those would serve nor how they would be implemented. Complaints Process is similar to the 2013 version except now those concerns are to be heard by the CSI (the newly created position). Like the 2013 version, there is no obligation on management (the companies) to address or fix the issues raised by workers. It is simply a voicing process with no corresponding obligation of addressing or resolving concerns. Transparency and Reporting is similar to the 2013 version, with some new mention of the CSI. Likewise, Supplier Incentives is similar to the 2013 version, with some new mention of the CSI. Financial Support is similar to the 2013 version, with a change in the monetary sum – from $500, 000 (no currency specified in the 2013 version) to $300, 000 Euros in the 2018 version.

[398] The Accord on Fire and Building Safety in Bangladesh (2018) at 5, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

Support for the NTPA is a new section that indicates that the Accord will support the NTPA [National Tripartite Plan of Action on Fire Safety and Structural Integrity in the garment Sector of Bangladesh] and the RCC [Remediation Coordination Cell – ILO].[399] Release of Responsibility is a new section that allows for a signatory company to be released from responsibility if it severs ties with a factory once the violation becomes known to the signatory.[400] Termination of the Agreement is a new section that allows for signatories who stop sourcing from Bangladesh to be able to terminate the agreement by giving three months' notice. Choice of Law is a new section that mandates that the Accord will be governed by the law of the Netherlands.[401]

### 4.7 Quarterly Aggregate Report (January 1, 2021)

The Accord mandates that there will be quarterly reports released and available on the website. The author read and studied the January 1, 2021 Quarterly Aggregate Report which was 36-pages in length and available on the website. 1, 653 factories are covered by the Accord.[402] The report also indicated that more than 1.8 million workers have been informed about workplace safety through the training programs mandated by the Accord.[403] Page 6 outlines the impact Covid-19 has had on the Accord, which includes

[399] The Accord on Fire and Building Safety in Bangladesh (2018) at 7, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[400] The Accord on Fire and Building Safety in Bangladesh (2018) at 7, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[401] The Accord on Fire and Building Safety in Bangladesh (2018) at 7, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[402] Quarterly Aggregate Report (January 1, 2021) at 2, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.
[403] Quarterly Aggregate Report (January 1, 2021) at 3, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

consideration about disinfection of hands and shows at entry, maintaining social distance, airflow and ventilation, and providing nose and mouth face masks.[404] Approximately 249 complaints filed have been related to Covid-19, which focused on non-payment of severance entitlements, non-payment of wages, lack of adequate PPE and termination of pregnant workers.[405]

[404] Quarterly Aggregate Report (January 1, 2021) at 6, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

[405] Quarterly Aggregate Report (January 1, 2021) at 6, available online at: The Accord on Fire and Building Safety in Bangladesh website: <www.bangladeshaccord.org>.

## 4.8 The Alliance for Bangladesh Worker Safety (2013)

The Alliance for Bangladesh Worker Safety came into force on July 20, 2013. Even though it was not produced as quickly as the Accord, at three months after the disaster, the implementation time is quite quick as well. It was planned that Alliance members would work to create Worker Participation Committees in all Alliance member factories to encourage worker reporting of fire and safety violations which seems akin to works councils. "The Alliance for Bangladesh Worker Safety has ceased operation as planned on December 31, 2018."[406] When it was in existence, it included 29 companies of which the following are Canadian: Canadian Tire Corporation Limited, Gap Inc., Hudson's Bay Company, Wal-Mart Stores Inc. and YM Inc.

## 4.9 Table - Alliance 2013 Version

| **Heading** | **Article number(s)** |
|---|---|
| Purpose | 1 |
| Funding | 2 |
| Needs | 2.1 |
| Worker Safety Fund | 2.2 |
| Alliance Member In-Kind Contributions | 2.3 |
| Empower Factory Workers | 3 |
| Principles | 3.1 |
| Program | 3.2 |
| Train and Educate Factory Workers, Supervisors, and Management on Fire and Building Safety | 4 |

[406] The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.

| | |
|---|---|
| Choice of Law | 10.3 |
| No Third Party Beneficiaries Created | 10.4 |
| Force Majeure | 10.5 |
| Binding Provisions | 10.6 |
| Counterparts | 10.7 |
| Severability of Provisions | 10.8 |
| Paragraph Titles | 10.9 |
| Entire Understanding | 10.10 |

The Alliance was enacted in 2013 and expired in 2018.There was no plan created for a document or organization to fill the void left by the expiration of the Alliance. Article 1 outlines the purpose including to "empower workers to take an active role in their own safety, and to be able to speak out about unsafe conditions without any risk of retaliation…"[407] This seems to download all responsibility to workers to fight for their own rights. Still, in the purpose section at page 2 there is mention of the Accord and that the Alliance seeks to work together with the Accord to ensure safe working conditions.[408] Article 2, which focuses on Funding, includes setting up a Worker Safety Fund with the aim to attract membership which will "approach or exceed total contributions of fifty million dollars…"[409] The fund will include 10% reserved for workers who face displacement due to renovations or other such activities.[410] There is a mention of the ILO

[407] The Alliance for Bangladesh Worker Safety at 1, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[408] The Alliance for Bangladesh Worker Safety at 2, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[409] The Alliance for Bangladesh Worker Safety at 3, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[410] The Alliance for Bangladesh Worker Safety at 3, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.

but no specific details about how it can or will be involved.[411] "These goals will be clearly stated and recognize that responsibility for conditions in Bangladesh ultimately resides with the local Factory owners and people and government of Bangladesh."[412] On the other hand, this could be viewed as recognizing the autonomy of both workers and the government of Bangladesh to be able to govern themselves: but on the other hand, this seems to absolve multinational corporations from responsibility and legal liability. Article 3 Empower Factory Workers outlines that workers should be able to voice their concerns, but the effectiveness of this is minimal without actual protection such as whistleblower protection or the corresponding obligation on management to try to resolve concerns. Article 4 Train and Educate Factory Workers, Supervisors, and Management on Fire and Building Safety states that by July 10, 2014, one hundred factories in Bangladesh that manufacture for Members will have their workers and management be trained on fire and building safety.[413] On page 7 there is again reference to the Accord.[414] Much of the document reads as information about governance and seems heavy on form and light on function. Article 5 Develop and Implement a Common Standard for Assessing Fire and Building Safety sets a deadline of September 10, 2013 to recommend a standard.[415] Article 6 Expand Industry Fire and Building Safety Inspections and Remediation Programs simply outlines that some Members have already started to conduct evaluations of their existing safety programs and that they should continue to do

[411] The Alliance for Bangladesh Worker Safety at 3, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[412] The Alliance for Bangladesh Worker Safety at 4, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[413] The Alliance for Bangladesh Worker Safety at 6, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[414] The Alliance for Bangladesh Worker Safety at 7, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[415] The Alliance for Bangladesh Worker Safety at 9, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.

the same.[416] This Article also seeks to strike a Committee of Experts in fire and building safety approved by the Board.[417] Article 7 Share Information on Training, Current and Future Fire and Building Safety Inspections and Remediation Actions include another reference to the Accord on page 13.[418] Article 8 Commitment to the Prohibition of Unauthorized Subcontracting and Shared Best Practices emphasizes that unauthorized subcontracting means that there is no ability to trace that the subcontracted with factory is in compliance. Article 9 Termination Fees states that the agreement has a term of five years with a minimum commitment of two years by Members.[419] Article 10 Miscellaneous includes Compliance with Laws and Choice of Law being New York law. To draw a comparison to monitoring agencies the Alliance is like the FLA and the Accord is like the WRC. The level of strictness and rigour to which factories are held under the Accord and enforced and monitored by the WRC is higher than factories under the Alliance and monitoring of the FLA. This is concluded by the research done by the author of this dissertation and others.

[416] The Alliance for Bangladesh Worker Safety at 9, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[417] The Alliance for Bangladesh Worker Safety at 9, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[418] The Alliance for Bangladesh Worker Safety at 13, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[419] The Alliance for Bangladesh Worker Safety at 14, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.

### 4.10 Alliance for Bangladesh Worker Safety Fifth Annual Report (November 2018)

The 48-page document available on the website is the final report from the Alliance as it was only set to last from 2013 to 2018. The overall layout is quite different from the reports from the Accord. Twenty-one pages of the 48-page document are full-page photos, leaving only 27 pages to contain actual text. In the message from the Executive Director, Ambassador James R. Moriarty states that "1.6 million workers, security guards and factory managers have been trained-and retrained-in fire safety."[420] There are also photos to document the change to certain areas of the factories to make them safer including separating and enclosing areas with combustible items. The document outlines that Worker Safety Committees gave workers an opportunity to have a seat at the table and be actively involved with factory management.[421] There was also a 24-hour worker helpline set up called "Our Voice" which allows workers to bring to the attention of management issues such as safety concerns and abuse.[422] Overall, this document read as a public relations document with many photographs and not much substance. It showed how the Alliance was meant to be temporary to set up a sense of protection for workers and then leave those same workers on their own to try to enforce these weak protections. It read as a weak system that left nothing in place to stop the pre-2013 system from returning once the Alliance expired. It was a disappointing document which resulted from a weak scheme intended to last for five years.

[420] Alliance for Bangladesh Worker Safety Fifth Annual Report (November 2018) at 3, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[421] Alliance for Bangladesh Worker Safety Fifth Annual Report (November 2018) at 33, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.
[422] Alliance for Bangladesh Worker Safety Fifth Annual Report (November 2018) at 35, available online at The Alliance for Bangladesh Worker Safety website: <bangladeshworkersafety.org>.

### 4.11 Comparison of the Accord and the Alliance

| | Accord | Alliance |
|---|---|---|
| **When was the document enacted?** | May 13, 2013 | July 10, 2013 |
| **Is the document currently in effect?** | Yes, it was set to expire on May 31, 2021 but was given a three month extension | No, the agreement expired in 2018 after a five-year timeline |
| **Is there a report available?** | Yes, there is a quarterly report | Yes, there is an annual report |
| **If so, how often is a report given?** | available on the website. | available on the website. |

Source for data: Accord and Alliance documents and websites.

The Alliance is now defunct and even when it was active it did not provide the level of protection that the Accord did. The Accord is still in place and was renewed after the May 2021 expiry date. The Accord is overall a stronger document involving more stakeholders including the WRC, which enjoys a reputation for being a rigorous agency.

## 4.12 The International Accord for Health and Safety in the Textile and Garment Industry

The new International Accord went into effect on September 1, 2021 immediately after the expiration of the Accord on August 31, 2021. The new expiration date is October 31, 2023.[423]

## 4.13 Table – International Accord (2021)

| **Heading** | **Article number(s)** |
|---|---|
| Preamble | None |
| Governance | 1, 2, 3, 4, 5 |
| Bangladesh | 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 |
| Remediation | 17, 18, 19, 20, 21, 22, 23 |
| Training | 24, 24, 26 |
| Complaints Process | 27 |
| Transparency and Reporting | 28, 29 |
| Supplier Incentive | 30, 31, 32, 33 |
| Release of Responsibility | 34 |
| Expansion of the Program | 35, 36, 37, 38, 39, 40 |
| Financial Support | 41, 42, 43, 44, 45, 46, 47 |
| Dispute Resolution | 48, 49, 50, 51, 52 |
| Termination of the Agreement | 53 |
| Duration of the Agreement | 54 |

[423] The International Accord for Health and Safety in the Textile and Garment Industry website: <www.bangladeshaccord.org>.

### 4.14 Comparison of the Accord (2018) and the new International Accord

| **Heading** | **Accord (2018)** | **International Accord** |
|---|---|---|
| | **Article number(s)** | **Article number(s)** |
| Scope | None | Termed "preamble" |
| Governance | 1, 2 | 1, 2, 3, 4, 5 |
| Dispute Resolution | 3 | 48, 49, 50, 51, 52 |
| Credible Inspections | 4, 5, 6 | Not applicable |
| Remediation | 7, 8, 9, 10 | 17, 18, 19, 20, 21, 22, 23 |
| Training | 11, 12 | 24, 24, 26 |
| Complaints Process | 13 | 27 |
| Transparency and Reporting | 14, 15 | 28, 29 |
| Supplier Incentives | 16, 17, 18 | 30, 31, 32, 33 |
| Financial Support | 19, 20 | 41, 42, 43, 44, 45, 46, 47 |
| Support for the NTPA | 21 | Not applicable |
| Release of Responsibility | 22 | 34 |
| Termination of the Agreement | 23 | 53 |
| Choice of Law | 24 | Not applicable |
| **NEW:** Bangladesh | Not applicable | 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 |
| **NEW:** Expansion of the Program | Not applicable | 35, 36, 37, 38, 39, 40 |
| **NEW:** Duration of the Agreement | Not applicable | 54 |

The Accord (2018) was seven pages and the new International Accord is eight pages. Certainly, page length does not determine how strong a document is.The International Accord contains 54 sections and the Accord (2018) only 24 sections. Again, these differences do not indicate that one version is more rigorous than the other. Comparing the two documents, overall they are quite similar. The only significant changes are the "Bangladesh", "expansion of the program" and "duration of the agreement" sections. When the headings are the same the wording underneath the heading remains similar as in some cases the numbering simply changed to reflect the overall changes in the documents. This new International Accord is intended to include more jurisdictions beyond just Bangladesh so it has re-branded from being focused on Bangladesh to now being "International" in its approach. As of September 14, 2021 Bangladesh is still the only country that the International Accord applies to. That does not mean that it will not, in the future, be extended to include other nation states. The International Accord can also grow to include more signatories as well so not just greater jurisdictional applicability but also more companies signing on the International Accord as well. Because the International Accord is so new, there are no reports to use to compare the reporting system in the Accord (2018) and the Alliance. Because the International Accord is so similar to the Accord (2018) it can be predicted that reporting system might also be similar. Future versions of the International Accord might also be drafted in the future similar to the Accord (2013) giving way to the Accord (2018).

## 4.15 The Future for Bangladeshi Workers of Suppliers Who Contract With Canadian Companies

The future for workers in Bangladesh who manufacture clothing for Canadian companies is more solidified with the introduction of the new International Accord being implemented the day after the expiration of the Accord (2018). This is a similar governance mechanism as the one it is replacing so this provides stability and consistency to the workers protected by the document. While continuing a commitment might not necessarily be worthy of celebration, it does help workers and during a pandemic too, so the likely rollback of workers' interests did not occur so there should be contentment.

## 4.16 Case Study Conclusion

After the Rana Plaza disaster, the corporations that used that building in Dhaka, Bangladesh as a place to manufacture their products all decided to take some form of action to ensure that another disaster did not occur in the future. "The Accord and Alliance represent the self-constitution of private and public governance orders to the ends of developing and implementing legal regimes within a state that incorporate and legalize international normative rules. It is not just that the Accord and Alliance are legal persons, but that their object is the construction of a legal order that is inherently transnational."[424] While some of the corporations took a rigorous approach and accepted a governance mechanism akin to hard law in the form of the Accord, which is still in effect and binding, other corporations took a less strict approach and joined the Alliance. The Alliance was disbanded in 2018, which was five years after the disaster. While at its creation the five years needed for the Alliance to work may have seemed appropriate, the spectre of Covid-19 has led to further devastation for workers who had already faced dire working conditions. Now the potential exposure to the deadly Covid-19 virus has created an even more dangerous working environment.

The implementation of a governance mechanism in the form of the International Accord has created minor change from the Accord (2018) as the wording from the 2018 version of the Accord to the International Accord is negligible – the main new changes being the Article on Bangladesh, the Expansion of the Program, and Duration of the

[424] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 52.

Agreement which is set to expire in 2023. This continuation of the Accord from its original implementation in 2013 to stretch to 2023 is very ambitious and allows for workers in Bangladesh, and potentially beyond those borders, to receive protection to help prevent future disasters. While not all accidents can be avoided in the workplace and beyond the number of injuries and deaths should be reduced. Risk cannot be eliminated but it can be managed. Increasing safety protection for workers will reduce the number of injuries and will increase health and safety.

# 5 Chapter Five - Case Study on the Hudson's Bay Company

## 5.1 Introduction

In this case study, the author will build on the discussion that was started in the previous case study on Rana Plaza. This case study focuses on The Hudson's Bay Company (HBC) and examines how its deep rooted history and relation to the formation of Canada as a nation state was shaped and how the HBC currently responds to issues such as worker health and safety. The three versions of the HBC codes of conduct will be examined to ascertain whether the 2012 version was changed in the 2015 version to acknowledge the Rana Plaza disaster and the current version in place today which was enacted in 2017.

## 5.2 Background

The HBC was created on May 2, 1670 and is the oldest company in Canada that is still in existence. At its inception the purpose of the HBC was to serve at the pleasure of the monarchy. HBC was created by Royal Charter, which was given by the monarchy in England. The nation state and the business enterprises that originated in the nation state were very much interconnected. Only in current day do we see a distinct divide between the interests of the corporation and the interests of the government. The HBC reflects the older model of the chartered company, where a business operated as a privilege granted by the state to pursue defined ends. This differs from the current day model of a company.

HBC became a private U.S. owned company in 2006.[425] In 2008 National Realty and Development Corporation (NRDC) Equity Partners, which is American based, bought HBC.[426] The deal valued the retailer at $1.9 billion.[427] In 2012 HBC went public again with another IPO.[428] In 2013 HBC acquired Saks Fifth Avenue.[429] That is the modern history of HBC.

The old history, that dating back to the 1600 and 1700s, is so intrinsic to the Canadian story and the formation of Canada itself. Not many corporations play such a vital role in the identity of a nation state. From the fur trade and the importance and interconnections with Indigenous peoples who knew more about the fur trade than the new Europeans there existed a symbiotic relationship. The Europeans were new to the vast and cold land and depended on the Iroquois and Cree to show them around the territory and which animals had the best pelts – with the focus being on beaver pelts. The history of the fur trade, so vital to Canadian history, is connected with the history of HBC. The placement of Indigenous persons in the history of HBC is becoming more apparent, and even perhaps celebrated, in 2022 with the symbolic and beyond symbolic gifting of the HBC store in Winnipeg, Manitoba, to Indigenous groups to use for housing purposes within the Indigenous community. What is the relationship between the HBC

[425] HBC Heritage website: <www.hbcheritage.ca>.
[426] "Hudson's Bay Company agrees to be taken private after Richard Baker sweetens deal" Financial Post October 21, 2019 www.financialpost.com
[427] "Hudson's Bay Company agrees to be taken private after Richard Baker sweetens deal" Financial Post October 21, 2019 www.financialpost.com
[428] HBC Heritage website: <www.hbcheritage.ca>.
[429]HBC Heritage website: <www.hbcheritage.ca>.

founded in 1670 with Canada? What about the modern version of Canada? What is the influence of the HBC on Canadian corporate law?

I chose to focus on the HBC as one of the corporations which produced products in the Rana Plaza building when it collapsed in 2013. Out of the fourteen Canadian corporations[430] doing business there when the Rana Plaza collapse occurred, the HBC is the oldest and most iconic. To trace the history of the HBC is to explore the very history of Canada as a country and, as is obvious, it predates the formation of Canada as a nation state. From the fur trade and the rugged Canadian landscape as a place of rugged wilderness (which is still true today, in some places) to the complicated relationship with Indigenous persons within Canada today the history of the HBC is so intrinsically tied to Canada despite no longer being Canadian owned. Much like other "Canadian" icons such as Tim Horton's coffee chain, the HBC is no longer Canadian owned but the symbolic Canadian connection remains. Relevantly, the HBC once was chosen to design the Canadian Olympic team outfits, a task now done by Lululemon (some would argue, a true Canadian company).

The connection between Rana Plaza and HBC seems rather remote as HBC was only one corporation among others to use Rana Plaza for manufacturing. But the importance of HBC to Canada and Canadian identity remains and lingers. To have such a quintessentially Canadian company involved with such a tragedy tarnishes the Canadian image of being multicultural, and respect for human rights. This new image of Canadian

[430] The Canadian companies that were involved were as follows: 1) Abercrombie and Fitch, 2) Gap, 3) H & M, 4) Hudson's Bay, 5) Jacob, 6) Loblaw, 7) Lululemon, 8) Mark's, 9) Reitmans, 10) Roots, 11) Sears Canada, 12) Tristan, 13) Walmart, and 14) YM Inc.

companies being "CSR laggards" aligns with the terrible environmental devastation done throughout the world by Canadian mining companies. The (perhaps) former image of Canadians as polite and friendly is giving way to the Canadian as willing to damage the environment of others rather than its own, to use sweatshops beyond its national borders and so on to avoid direct guilt and blame - which in turn makes the proximity seem too remote and unmerited to link to Canadian companies. Canada's image on the world stage is changing from 'Canada the good' to 'Canada the complicated' where Canada is re-cast from hero towards villain. The country stopping bad acts to the country responsible for and avoiding liability for bad acts.

### 5.3 History of the HBC

The HBC started as a simple expedition to bring much needed furs to England. Canada was a land where beavers grew large and fat so the best pelts were to be found there. As noted by Stephen R. Brown,

> In 1670, the Hudson's Bay Company was a small English business with a handful of primitive outposts along the Western shore of Hudson Bay, trading practical manufactured goods for furs with the Cree of inland Subarctic Canada. One hundred and fifty years later, its trading posts populated the subarctic lowlands south and west of Hudson Bay, the tundra, the Great Plains, the Rocky Mountains and the misty forests of the Pacific Northwest.[431]

The argument can be made the HBC was not set up as an instrument of settlement and creation of a colony, but rather it focused on stripping Canada of its natural resources and animal products. The HBC contained nothing in its charter about conquest but it was

[431] Stephen R. Brown, *The Company: The Rise and Fall of the Hudson's Bay Empire* (Toronto: Anchor Canada, 2020), at 1.

also not simply a business enterprise.[432] The focus of the HBC at its creation was to focus on the fur trade with Indigenous peoples and also to try to find a route to what was then called Cathay.[433] This fabled route never did come to fruition but the voyage through the St. Lawrence proved useful for other reasons such as the lucrative fur trade.

### 5.4 The company as parent and the company as subsidiary

Similar to my discussion in the Rana Plaza case study, it is important to discuss as two separate topics the relationship between a parent corporation and its subsidiary versus a corporation's relation with a supplier - which Zumbansen discusses as "piercing the corporate veil"[434] and removing one of the foundational principles inherent within corporate law that a corporation is separate and distinct from its shareholders, employees, and so on. This shielding of liability is what sets the corporation apart from other business associations likes the sole proprietorship or the partnership where liability is not shielded in the same manner. When HBC is manufacturing in places remote from Canada such as Bangladesh then there has to be a discussion about the underlying reasons why. Is it the best quality product? Is it closer to its consumer base? Or is it simply the cheapest labour available worldwide?

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[432] Stephen R. Brown, *The Company: The Rise and Fall of the Hudson's Bay Empire* (Toronto: Anchor Canada, 2020), at 2.

[433] Stephen R. Brown, *The Company: The Rise and Fall of the Hudson's Bay Empire* (Toronto: Anchor Canada, 2020), at 2.

[434] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 17.

As already discussed in the Rana Plaza case study, workers in the Global South often face terrible working conditions compared to workers in the Global North, and with the protracted Covid-19 pandemic these same workers now face new issues related to their physical and mental health. These issues include loss of employment, reduction in working hours and pay, and lack of access to Covid-related personal protection such as masks, gloves, improved ventilation and so on. Of course, workers in the Global North sometimes also face similar issues but they are likely less severe than the impact felt in the Global South (which also lacked access to vaccines, among other embedded inequalities in dealing with the pandemic).

As noted by Larry Cata Backer (Pennsylvania State University, Faculty of Law), the collapse of the Rana Plaza building represented so much beyond that singular event.[435] It unraveled the complexity of global supply chains[436], distilled rhetoric surrounding labour costs, and brought into clear view the direct impact of related issues to make obvious the unseen: cutting labour costs and disregarding health & safety could and does result in the loss of lives and injuries. By allowing companies headquartered in the Global North to thrive by cutting costs in the Global South and draw upon a never-ending pool of cheap labour there is complicity and acceptance of that behaviour. By avoiding the regulation and governance mechanisms in place in their home nations companies are able to traverse the world in search of readily available cheap labour to lower their costs to consumers. As noted by Peer Zumbansen (McGill University, Faculty

[435] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 41.
[436] Larry Cata Backer, "Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse" available from Google Scholar at 41.

of Law) and co-author Benedikt Reinke this creation of "global supply chain law"[437] heralds the possible emergence of a "*new* new governance". [438] "New governance" refers to the rise of globalization as seen in the 1980s and 1990s. This new new model moves beyond globalization, and what was sold as a "global village and global marketplace" to this new darker model of trying to manage global supply chains so that workers are not exploited along that pipeline from the Global North to the Global South.

Rana Plaza was almost ten years ago (April 2013) at the time of writing, and what impact has been made by the loss of so many lives? Are workers in Bangladesh better off today than in 2013?

[437] See the work of Peer Zumbansen (McGill University, Faculty of Law) to be explained further in the case study.

[438] Benedikt Reinke and Peer Zumbansen, "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2019-18, available online at SSRN: <https://ssrn.com/abstract=3312916>, at 4.

## 5.5 Codes of Conduct

Codes can cover off many topics, but that also may be done in a shallow manner rather than having details that allow for greater uniformity. When the code lacks specificity, then it may be more open to being misinterpreted. When the code is very detailed, then there is likely less room for misinterpretation and will allow for increased standardization.

The Model Code of Conduct employs the most rigorous aspects of the codes examined and if implemented will help workers to gain protection. This dissertation also suggests further amendments to the *CBCA* that will help embrace greater protection for different stakeholder groups such as the expansion of employees to include foreign workers along supply chains. By clarifying the directors' duties enunciated in *Peoples* and *BCE* by using a ranking of priority for stakeholder groups, there will be increased accountability and transparency. This will contribute to the existing literature as there is a need for further research to be done in the area of corporate governance and labour and employment law. Much of the research in CSR relates to sustainability and the focus is on environmental protection rather than protecting humans against suffering and abuse. More recent decisions from the SCC have raised awareness not just about sweatshops in the Global South but about forced labour as well.[439] So while cases involving climate change have been increasing as well as SRI, there has been increased attention to workers' interests with a particular focus on forced labour.

[439] *Nevsun Resources Ltd v Araya* 2020 SCC 5.

Many scholars focus on American multinationals in the apparel industry without much attention given to Canadian apparel companies. That way there can be a comparison done between the existing Loblaw code and the Bangladesh Accord that was created after the Rana Plaza disaster. This adds another dimension to this research as beyond simply comparing corporation-specific codes to other corporation-specific codes: now the comparison is between a code of conduct to an industry-standard. The different audiences allow for greater in-depth analysis. The differences between a corporation-specific code of conduct to an industry-wide standard will allow for a wider exploration. Similar to the critique of the ILO Conventions being transplanted to individual corporations - the analysis is similar in that different governance models apply differently to differing governance systems because some operate at the high level of nation state and other system operate only within a single corporation. Depending on the rule-maker (be it the individual corporation or the industry-wide standard) versus the rule taker (the corporation versus a group of corporations), there needs to be a different alignment of interests for workers.

To compare the codes of conduct the author used a keyword search for the following terms:

Child Labour
Forced Labour
Wages and Benefits
Overtime
Working Hours
Working Conditions
Health and Safety
Harassment
Discrimination
Environment

Freedom of Association

Monitoring
Access to facilities

The author of this dissertation scored each code out of 13, assigned 1 point for each different article. The more items included in a code of conduct determined that the code was more rigorous according to the system that was devised. This system can be deemed "self-referential" but it is important to note that the set of codes were evaluated using two different systems not simply the one devised by the author. The author of the dissertation uses two sets of assessment criteria to determine the relative strength and weakness of each code. This allows for each code to be assessed on its own and that assessment can be compared to other codes. This combination allows for greater insight into the strength of the codes as they are evaluated by two different systems. It can be determined that if a code scores well on two different systems then the code is deemed stronger than a code that scores well on only one system. Other issues could be used to score a company, but these items are quite basic and common. The more "advanced" items were freedom of association, monitoring, and access to facilities. The author also read each code thoroughly to see which terms were included as the author did not rely solely on a keyword search. After thoroughly reviewing all documents, the codes were assessed on two different schemes: 1) the one devised by the author to quantify the number of items included in each code, as determined by the author; and 2) the assessment scheme devised by the ILO's Framework of Decent Work Indicators. While the Model Code of Conduct is not perfect it can be adapted to suit different workplaces as developed through a feedback loop – that an original code, once in place, can be amended in the future to

adapt to changes. The ILO system is discussed more in-depth in sections 2.13, 2.14, 2.15, and 2.16 of this dissertation.

## 5.6 The 13 Different Articles Within the Model Code

Prohibitive clauses are intended to prohibit behaviour as opposed to regulating such behaviour. Such articles like child labour and forced labour are to be prohibited in codes of conduct rather than try to regulate this behaviour.

### Regulation versus prohibition

It is useful to distinguish between corporate behaviour that is simply regulated within certain parameters and conduct that which is prohibited outright. The distinction is sometimes hard to make. It is important to remember that certain aspects of corporate behaviour are being regulated such as what constitutes a conflict of interest, what the steps are for disclosing a potential conflict of interest and so on, and yet other behaviours are trying to be prohibited such as forced labour and child labour. Some behaviours are tolerated but regulated and other behaviour is seen to be so abhorrent that there is a need for the behaviour to be eliminated entirely not simply regulated. Even within the concept of child labour there is some debate about what age is deemed permissible for a child to work and when is a child too young. The ethics and morality underpinning child labour are different from forced labour where there is no autonomy.[440]

[440] Consent and capacity issues surround child labour as a child cannot consent so there are aspects of duress and parental pressure. Still different from slavery and forced labour where there is never consent.

In the corporate crime context there is discussion by Professor Poonam Puri about when society deems behaviour as criminal[441] versus as simply a regulatory offence which implies faulty but not necessarily unethical behaviour with lesser sanctions. When is behaviour deemed so terrible that society decides the behaviour is criminal including being worthy imprisonment of relevant corporate personnel? When should corporate behaviour be deemed criminal? Who is held accountable: the CEO, the Board, an individual director or all?

When society chooses merely to regulate behaviour rather than make it criminal[442] then society is signalling which behaviour is tolerated[443] versus which behaviour is egregious and needs to be eliminated. This is a bigger than this dissertation allows as what constitutes criminality and why individuals (and corporations) choose to obey the law are large topics but it is important to understand and appreciate that corporate behaviour can be criminal in nature if the conduct is terrible enough to be designated as such. The instant example is the Vale dam collapse in Brazil where the ex-CEO was eventually brought up on criminal charges.[444]

What behaviour does society deem so terrible that it should be abolished? Slavery is near the top, as it is denies basic human autonomy, liberty, and to be compensated for work and it is usually based on racism as well. Modern slavery allegations in China are

[441] Poonam Puri, "Mandatory Minimum Sentences: Law and Policy" (2001) 39 Osgoode Hall L.J. 611 – 653.
[442] Even with crimes, the law sometimes makes an exception, such as the common law defence of "necessity".
[443] The business sector has been very successful in minimizing its exposure to criminal law (see eg the work of Gary Slapper and Steve Tombs, *Corporate Crime* (Harlow: Longman, 1999).
[444] Reuters, "Brazil charges ex-Vale CEO with homicide for dam disaster" January 21, 2020, online: <reuters.com>.

impacting a Muslim minority group, the Uyghurs, which seems to be discriminatory.[445] This undermines personhood and self-worth. Child labour is almost universally condemned as it exploits vulnerable members of society who lack the power and ability to competently represent themselves. But it is not universally condemned altogether as some people argue that children sometimes need to work to survive[446]. Some argue that there should be regulation of child labour rather than an abolition of it.[447]

Modern slavery in supply chains is becoming increasingly important in both legislation and caselaw. In the UK there is new legislation about modern slavery. In Canada there is the *Nevsun Resources*[448] case where the Supreme Court of Canada ruled that Canadian corporations can be held liable for the use of slavery in their supply chains. Corporations cannot plead ignorance and expect for that to allow them to avoid liability. Also, in Canada there are potential future developments regarding slavery in supply chains through Bill S-216 *An Act to enact the Modern Slavery Act and amend the Customs Tariff* that passed Second Reading on March 31, 2021.[449] This Bill is based on two prior bills that were never enacted. It is important to note the Bill's proposed new

[445] The Guardian, "There is a good chance your cotton T-short was made with Uyghur slave labor" April 9, 2021, online: <www.theguardian,com>.
[446] Human Rights Watch, "When is it okay for children to work?" April 2, 2016, online: <www.hrw.org>.
[447] See the work of the ILO studying the causes of Child Labor, ILO "Causes of Child Labour", online: <www.ilo.org/moscow/areas-of-work/childlabour/WCMS-248984/lang-en/index.htm>.
[448] *Nevsun Resources Ltd v Araya* 2020 SCC 5.
[449] *An Act to enact the Modern Slavery Act and amend the Customs Tariff*, available online: < https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=10922230&Language=E>.

obligations of directors and officers to provide an attestation that the information in the report is true, accurate, and complete which opens them up to personal liability.[450]

**Child Labour**

The article[451] within the Code on child labour is a prohibition on child labour, not a way to regulate child labour. Child labour and forced labour both move from unlawful behaviour into criminality. There should be a definition provided for what age constitutes a child versus an adult as labour and employment laws vary from jurisdiction to jurisdiction both on what the age of majority is and what age a child can start working. Depending on the jurisdiction, the age at which a child is legally able to work is often irrelevant as children who are not legally allowed to work still gain employment at some of these factories. The recent work on child labour in cocoa supply chains and the involvement of Nestle is raising more awareness to the use of child labour in supply chains. However the progress for child labourers may not be coming soon as the Supreme Court of the United States recently released a decision where it will not allow for claimants to go forward with their lawsuit against Nestle for allegations of child labour in their supply chains.[452]

**Forced Labour**

[450] Stikeman Elliott, "Canadian Modern Slavery Bill Would Cast a Wide Net on Supply Chain Transparency Practices", June 9, 2021, online: < https://www.stikeman.com/en-ca/kh/canadian-employment-labour-pension-law/canadian-modern-slavery-bill-would-cast-a-wide-net-on-supply-chain-transparency-practices>.

[451] I chose to use the language of "article" similar to a collective agreement rather than "section" as in legislation.

[452] *Nestle USA Inc v Doe* 593 U.S. (2021)

Similar in some ways to the prohibition articles on child labour, the article on forced labour is a prohibition on the use of forced labour, not a means by which to regulate it. Like child labour, the importance is on the definition and what constitutes forced labour. In some instances, that may include the use of prison labour and others not so specificity is required to outline what constitutes "forced labour".

The recent Supreme Court of Canada decision in *Nevsun Resources* granted those who made claims of the use of slavery in Eritrea by a Canadian company the ability to commence the action in a Canadian court. This decision allowed the claimants to bypass launching the claim in the jurisdiction in which the abuses took place, Eritrea, and broadens the scope of international law and corporate law to allow the action to be commenced in Canada. Ultimately, while the claimants won the right to be able to launch the claim in Canada, the matter was settled and due to confidentiality of the settlement, its terms are unknown.

**Wages and Benefits**

Now we arrive at articles that are similar to ones that can be found in a collective agreement when there needs to be information provided to those governed by the code as to what wages and benefits they are entitled to. The need for the standard collective agreement to contain terms about child labour and forced labour are not needed. Similar to a collective agreement my Model code of conduct allows for workers to have an article by which they can ground their claim. In labour and employment law, at arbitration the arbitrator may state that they will not give employees greater benefits than they

negotiated which means that if the information is not contained in the governing document, then it will not be read in to grant better rights than were negotiated for.

**Overtime**

Similar to wages and benefits, overtime is often included in a collective agreement. This mirrors the language used in collective agreements so that the code of conduct can mimic hard law standards. This article allows workers to bring claims if they are not properly paid for overtime or made to work overtime involuntarily.

**Working Hours**

Similar to both wages and benefits and overtime these are sections found in a typical collective agreement. The Model code of conduct acts as comparable to a collective agreement by outlining similar articles that can be found in a collective agreement. Codes can operate alongside collective agreements and do not have to be viewed as a substitute or replacement. See my notion of layering governance further in the dissertation.[453]

**Working Conditions**

Similar to other sections already mentioned, this section could be found in a typical collective agreement. Working conditions can be more detailed to include precise measurements for working tables and space allocated to each worker. Especially in light of covid-19, there may be social distance requirements and provision of PPE by the management to protect workers against the virus. This section could also include

[453] Found at chapter four of the dissertation.

ventilation requirements, safety equipment, fire equipment like fire extinguishers and so on.

**Health and Safety**

This section is also typical to a collective agreement and could make training mandatory so that all workers are knowledgeable about fire prevention and how to safely exit in case of fire. There could also be training requirements about the legal obligations of management to enable workers to know when to refer to the code of conduct for protection versus when to call law enforcement or the local labour board.

**Harassment**

Harassment and discrimination are both prohibitive clauses in that the behaviour is intended to be eradicated not regulated. The earlier discussion about prohibition clauses is applicable in that definitions as to what constitutes harassment such as unwanted attention could be included in the code.

**Discrimination**

Harassment and discrimination are both prohibitive clauses in that the behaviour is intended to be eradicated not regulated. My earlier discussion about prohibition clauses is applicable in that definitions as to what constitutes discrimination and the listing of prohibited grounds could be included in the code. This is moving from language typically found in a collective agreement towards language that may be found in a Human Rights Code which is the nature of harassment and discrimination.

**Environment**

Environmental protections and consideration of environmental impacts of the apparel industry is a growing movement. There is much research on "fast fashion" and consumer culture that dictates that consumers buy cheap, poorly manufactured trendy clothing that is quickly discarded when it falls out of fashion (companies like H&M, Urban Behaviour and others are in that category). The need for articles in the code of conduct to speak to environmental impact and the need to reduce the same is becoming more popular.

In some instances the inclusion of environmental impact can include "animal welfare" and other issues that are tangential to environmental concerns.

**Freedom of Association**

Freedom of association is one of the more advanced rights in that it is still contested throughout the world as to whether freedom of association and the right to collective bargaining constitutes a constitutionally protected set of rights for workers. Advanced rights are the right to bargain collectively and right to join a union as opposed to basic rights outlining wages and working hours. To see it included in so many codes is promising and is an indication that codes can work alongside the work of unions and negotiation of collective agreements. This is discussed later in the dissertation.

**Monitoring**

Monitoring of the code to ensure compliance is crucial. Monitoring agencies serve the function of ensuring that an existing code is being complied with and usually provide

a report back to the company about the results of factory audits and other monitoring activities like speaking to workers at the individual factories. Monitoring agencies are discussed further elsewhere in the dissertation.

**Access to Facilities**

Access to facilities is usually attached to monitoring as it speaks to companies granting access to their factories to allow in monitoring agencies to ensure compliance with the code.

## 5.7 ILO Decent Work Framework

The author consulted the ILO's Framework of Decent Work Indicators to also use an alternative way of scoring the ten codes beside the simple scoring that the author devised.

The following eleven factors are outlined in the ILO Framework of Decent Work Indicators:

## 5.8 Table – ILO Framework of Decent Work Indicators – eleven factors

| |
|---|
| 1. Employment opportunities |
| 2. Adequate earnings and productive work |
| 3. Decent working time |
| 4. Combining work, family and personal life |
| 5. Work that should be abolished |
| 6. Stability and security of work |

| |
|---|
| 7. Equal opportunity and treatment in employment |
| 8. Safe work environment |
| 9. Social security |
| 10. Social dialogue, workers' and employers' representation |
| 11. Economic and social context for decent work |

1**. Employment opportunities** For the first indicator in the Framework of Decent Work Indicators "employment opportunities" the codes are not able to be scored on this indicator because they are indicators of broader societal patterns about unemployment which is outside the scope of this dissertation. **2. Adequate earnings and productive work** The second indicator outlines earnings and productive work. This is akin to wages and benefits used to compare the codes elsewhere in the dissertation. This states that there should not be working poor who make $1 or $2 per day. **3. Decent working time** The third indicator outlines that workers should not be made to work more than 48 hours per week. It is also indicates that there should be standardized hours and paid annual leave. **4. Combining work, family and personal life** The fourth indicator states that there should be maternity and paternity leave.

5. **Work that should be abolished** The fifth indicator states that both child labour and forced labour should be abolished. **6. Stability and security of work** The sixth indicator states that there should not be precarious work such as casual or daily workers. This is also outside the scope of the dissertation and will not be applied to the dataset. 7. **Equal opportunity and treatment in employment** The seventh indicator states that

there should not be discrimination on the basis of sex, race, ethnicity or religion. **8**. **Safe work environment** The eighth indicator outlines that there should be a reduction or elimination of injuries in the workplace. **9**. **Social security** The ninth indicator states that there should be pensions available to all workers and sick leave. **10**. **Social dialogue, workers' and employers' representation** The tenth indicator states that workers should be given rights of freedom of association and collective bargaining. **11. Economic and social context for decent work** The addition of an eleventh indicator outlines that children should attend school as well as rates of HIV positivity. This is also outside the scope of the dissertation and will not be applied to the dataset.

The comparison between the HBC Code and the FDWI is set out below. Of the eleven indicators outlined, the author finds that three are beyond the scope of the dissertation so the codes will assessed based on the remaining eight factors. The dissertation cannot speak to the economic situation of each individual nation state in which Canadian corporations manufacture apparel.

## 5.9 Application of the Framework of Decent Work Indicators to the HBC Code (2017)

Indicators 1, 6, and 11 (1. Employment opportunities, 6. Stability and security of work, and 11. Economic and social context for decent work ) are too multifaceted and related to societal structures in each different jurisdiction, so they are not applicable to the HBC Code. The Framework of Decent Work Indicators seems more suited to individual nation states or even individual provinces and territories within a nation state.

The HBC Code is more focused on governing a supply chain for a multinational corporation so the articles contained in the HBC Code are more general and international in focus as opposed to the Framework of Decent Work Indicators. Using the Framework of Decent Work Indicators allows for the incorporation of a standardized approach that is already in existence, but the author of the dissertation is cautious about how applicable the Framework is to multinational corporations and the suppliers within their supply chains.

Indicator 2 is quite similar to Wages and Benefits in the dissertation's scoring, so the author determined that the HBC Code satisfied the requirement under the scoring system also scored the same under the Framework.

For Indicator 3 Decent Working Time, the HBC Code includes overtime provisions but do not include paid annual leave so this indicator is not very applicable. Because each individual Framework of Decent Work Indicator is so multifaceted, it is difficult to ascertain whether a code has satisfied the indicator.

Indicator 4 focuses on maternity and paternity rights and protections.

Indicator 5 is about the inclusion of prohibitive terms such as child labour and forced labour. The HBC Code will be determined to be in compliance with this Indicator if it includes both.

Indicator 6 is not being applied.

Indicator 7 is about whether the workplace has protection against discrimination.

Indicator 8 is similar to health and safety.

Indicator 9 of whether workers have a pension.

Indictor 10 is focused on workers have the right to freedom of association and collective bargaining.

Indicator 11 is not being applied.

### 5.10 The HBC Codes

Three versions of the HBC codes will be examined: 2012, 2015, and the 2017 which is the current version in place.

The HBC's code in 2012 was quite extensive and included a 'Whistle Blowing' hotline where complaints about violations of the Code could be made Monday to Friday 9 a.m. to 4 p.m.. The HBC Code mentioned that "suppliers must participate in the Company's social compliance program, which may include but is not limited to disclosure of factories, participation in factory audits…".[454] In the 2015 HBC Code, some

[454] HBC Ethical Sourcing – Supplier Code of Conduct 2015.

sections were removed from the 2012 version, but the Code remains much the same. The current code with a copyright of 2017 is less strict than the 2015 version. It is less lengthy too. A less strict code contains less guidance about such items like ventilation requirements in a factory compared to a code that outlines mandatory minimum standards.

There was no mention of external monitoring. The HBC Code does mention that 'suppliers must participate in the Company's social compliance program, which may include but is not limited to disclosure of factories, participation in factory audits…'.[455] In the 2015 HBC Code some sections from been moved from the 2012 version but the Code remains much the same. It is important to note that the 2015 Code would be after the 2013 Rana Plaza disaster yet makes no mention of the disaster itself.

[455] HBC Ethical Sourcing – Supplier Code of Conduct 2015.

## 5.11 HBC Code (2012)

The 2012 version was entitled "The Hudson's Bay Company and Lord & Taylor Supplier Code of Conduct". The document was five pages long.

## 5.12 HBC Code 2012

| | **Hudson's Bay Company 2012** | |
|---|---|---|
| Child Labour | Yes | Page 3 |
| Forced Labour | Yes | Page 3 |
| Wages and Benefits | Yes | Page 4 |
| Overtime | Yes | Page 4 |
| Working Hours | Yes | Page 4 |
| Working Conditions | | |
| Health and Safety | Yes | Page 4 |
| Harassment | Yes | Page 3 |
| Discrimination | Yes | Page 3 |
| Environment | Yes | Page 4 |
| Freedom of Association | Yes | Page 3 |
| Monitoring | | |
| Access to facilities | Yes | Page 2 |

## 5.13 Table – Comparison of score on strength of the 2012 code as given in percentages

| | Score out of 13 | Percentage score |
|---|---|---|
| Hudson's Bay Company | 11 | 85% |

The 2012 version contained 11 of the 13 Articles. Codes can cover off many topics but that also may be done in a shallow manner rather than having details that allow for greater uniformity. When the code lacks specificity then the code may be more open to being misinterpreted. When the code is very detailed then there is less room for

misinterpretation and will allow for increased standardization. All three Codes are similar in length so it is not as though one version suddenly added many pages with extensive details.

### 5.14 HBC Code (2015)

The 2015 version was entitled "Ethical Sourcing – Supplier Code of Conduct 2015". The document was four pages long so it was shorter than the 2012 version but still similar in length. As noted above, the codes are similar in length an content.

### 5.15 HBC Code 2015

| | **Hudson's Bay Company 2015** | |
|---|---|---|
| Child Labour | Yes | Page 2 |
| Forced Labour | Yes | Page 2 |
| Wages and Benefits | Yes | Page 3 |
| Overtime | Yes | Page 3 |
| Working Hours | Yes | Page 3 |
| Working Conditions | | |
| Health and Safety | Yes | Page 2 |
| Harassment | Yes | Page 2 |
| Discrimination | Yes | Page 2 |
| Environment | Yes | Page 4 |
| Freedom of Association | Yes | Page 2 |
| Monitoring | Social compliance program | Separate document |
| Access to facilities | Yes | Page 2 |

### 5.16 Table – Comparison of score on strength of the 2015 code as given in percentages

| | Score out of 13 | Percentage score |
|---|---|---|
| Hudson's Bay Company | 12 | 92% |

The 2015 version contained 12 of the 13 Articles. This version was stronger than the 2012 version as it included a mechanism that is akin to monitoring in its social

compliance program but this is still very much an internal system which is different, and arguably not as rigorous, as an external monitoring agency.

## 5.17 Current HBC Code (2017)

The 2017 version was entitled "HBC Supplier Code of Conduct". The document was four pages long which is the same length as the previous 2015 version.

## 5.18 Table – HBC Code (2017)

## 5.19 HBC Code 2017

| | **Hudson's Bay Company 2017** | |
|---|---|---|
| Child Labour | Yes | Page 2 |
| Forced Labour | Yes | Page 2 |
| Wages and Benefits | Yes | Page 3 |
| Overtime | Yes | Page 3 |
| Working Hours | Yes | Page 3 |
| Working Conditions | | |
| Health and Safety | Yes | Page 3 |
| Harassment | Yes | Page 2 |
| Discrimination | Yes | Page 3 |
| Environment | Yes | Page 4 |
| Freedom of Association | Yes | Page 2 |
| Monitoring | Social compliance program | Separate document |
| Access to facilities | Yes | Page 1 |

## 5.20 Table – Comparison of score on strength of the 2017 code as given in percentages

| | Score out of 13 | Percentage score |
|---|---|---|
| Hudson's Bay Company | 12 | 92% |

The 2017 version contained 11 of the 13 Articles. This indicates a continuation of the 2015 score and similar Articles.

## 5.21 Comparison of the 2012, 2015, and 2017 Codes

| Heading | HBC 2012 | HBC 2015 | HBC 2017 |
|---|---|---|---|
| Child Labour | Yes | Yes | Yes |
| Forced Labour | Yes | Yes | Yes |
| Wages and Benefits | Yes | Yes | Yes |
| Overtime | Yes | Yes | Yes |
| Working Hours | Yes | Yes | Yes |
| Working Conditions | | | |
| Health and Safety | Yes | Yes | Yes |
| Harassment | Yes | Yes | Yes |
| Discrimination | Yes | Yes | Yes |
| Environment | Yes | Yes | Yes |
| | | | |
| Freedom of Association | Yes | Yes | Yes |
| | | | |
| Monitoring | | Social compliance program | Social compliance program |
| Access to facilities | Yes | Yes | Yes |
| | 11 | 12 | 12 |

As discussed above, the 2012 version was quite strong, the 2015 version was stronger as there was a mechanism in place that was similar to a monitoring system which was still in place in 2017.

### 5.21.1 Discussion of the actual text in the three Codes

Child Labour

| Version | Child Labour |
|---|---|
| HBC 2012 | Child labor is not permissible. Workers must be at least 15 (or 14 where the law of the country of manufacture allows), or the age at which compulsory schooling has ended, whichever is greater. In jobs with hazardous working conditions, workers must be at least 18. |
| HBC 2015 | Child labor is not permissible. Workers must be at least 15 (or 14 where the |

| | |
|---|---|
| | law of the country of manufacture allows), or the age at which compulsory schooling has ended, whichever is greater. Children may not be employed during school hours; and the combined time at school and work (including transportation) cannot exceed 10 hours a day. In jobs with hazardous working conditions, where by its nature or the circumstances in which it is carried out is likely to harm the health or safety of the worker, workers must be at least 18. |
| HBC 2017 | Child labor is not permissible. Workers must be at least 15 (or 14 where the law of the country of manufacture allows), or the age at which compulsory schooling has ended, whichever is greater. |

Examining the language used in the three Codes one can see that the 2015 version included a discussion about children being expected to attend school and restrict the working hours accordingly. As can be seen in the text the 2012 version is replicated in the 2017 version. As mentioned earlier, the language in the 2015 indicated a quick instant reaction to include stronger language which was later reversed in the 2017 version.

Forced Labour

| **Version** | **Forced Labour** |
|---|---|
| HBC 2012 | Employment must be voluntary, and respect the right of employees to decide to work or not. Suppliers must not use forced labor, whether in the form of prison labor, indentured labor, bonded labor or otherwise. |
| HBC 2015 | Employment must be voluntary, and respect the right of workers to decide to work or not. Suppliers must not use forced labor, whether in the form of prison labor, indentured labor, bonded labor or otherwise. Slavery and human trafficking are prohibited. |
| HBC 2017 | Employment must be voluntary and respect the right of workers to decide to work or not. Suppliers must not use forced labor, whether in the form of prison labor, indentured labor, bonded labor or otherwise. Slavery and human trafficking are prohibited. Suppliers will allow their workers the right to leave work and freely terminate their employment provided that workers give reasonable notice to the employer. |

Examining the language used in the three Codes one can see that the 2015 version added language not included in the 2012 version so it was stronger and more precise. The 2017 version also improved upon the 2015 version. This section keeps getting stronger, unlike the section on Child Labour.

Wages and Benefits

| Version | Wages and Benefits |
|---|---|
| HBC 2012 | We are committed to the betterment of wage and benefit levels that address the basic needs of workers and their families so far as possible and appropriate in light of national economic conditions. Suppliers must pay the higher of, the prevailing industry wage, the minimum wage, or a wage that results in a decent living. Suppliers must provide all legally mandated benefits. |
| HBC 2015 | We are committed to the betterment of wage and benefit levels that address the basic needs of workers and their families so far as possible and appropriate in light of national economic conditions. We encourage suppliers to pay the higher of the prevailing industry wage, the minimum wage, or a wage that results in a decent living. Suppliers must provide all legally mandated benefits |
| HBC 2017 | We are committed to the betterment of wage and benefit levels that address the basic needs of workers and their families so far as possible and appropriate in light of national economic conditions.<br>Suppliers are expected to comply, as a minimum, with wages mandated by governments' minimum wage legislation, or industry standards approved on the basis of collective bargaining, whichever is higher. Wages are to be paid in a timely manner, regularly, and fully in legal tender. Partial payment in the form of allowance "in kind" is accepted in line with ILO specifications. The level of wages is to reflect the skills and education of workers and shall refer to regular working hours. Deductions will be permitted only under the conditions, and to the extent, prescribed by law or fixed by collective agreement. |

Examining the language used in the three Codes one can see that the 2015 version used weaker language in "we *encourage* suppliers" when contrasted with the language in the 2012 version, "suppliers *must* pay". This change seems unnecessary and does in fact weaken the Article from its previous version. The 2017 version the language of "suppliers are *expected* to comply" is needlessly vague. The original language in the 2012 version was the strongest. The added words in the 2017 version about ILO specifications do not seem to strengthen the section.

Overtime and Working Hours

| Version | Overtime and Working Hours |
|---|---|

| | |
|---|---|
| HBC 2012 | Suppliers must maintain reasonable work hours. HBC/L&T define a standard work week to be not more than 48 hours (unless the local law provides for a shorter period), and considers all additional hours to be overtime. Suppliers must compensate for overtime at the greater of the regular hourly rate and such higher rate as required by law, regardless of whether workers are compensated hourly or by piece rate. In the absence of exceptional circumstances, HBC/L&T will favor Suppliers who utilize less than a sixty‐hour work‐week. Unless exceptional circumstances exist, employees must be permitted at least one day off in every seven‐day period, and also leave privileges. |
| HBC 2015 | Suppliers must maintain reasonable work hours. The Company defines a standard work week to be not more than 48 hours (unless the local law provides for a shorter period), and considers all additional hours to be overtime. Overtime must be voluntary, and suppliers must compensate for overtime at the greater of the regular hourly rate and such higher rate as required by law, regardless of whether workers are compensated hourly or by piece rate. In the absence of exceptional circumstances, the Company supports suppliers who utilize less than a sixty-hour work-week. Unless exceptional circumstances exist, workers must be permitted at least one day off in every seven-day period, and also leave privileges. |
| HBC 2017 | Suppliers must maintain reasonable work hours. The Company defines a standard work week to be not more than 48 hours (unless the local law provides for a shorter period), and considers all additional hours to be overtime. Applicable national laws, industry benchmark standards or collective agreements are to be interpreted within the international framework set out by the ILO. In exceptional cases defined by the ILO, the limit of hours of work prescribed above may be exceeded, in which case overtime is permitted.<br>Overtime is meant to be exceptional, voluntary, paid at a premium rate of not less than one and one-quarter times the regular rate regardless of whether workers are compensated hourly or by piece rate, and shall not represent a significantly higher likelihood of occupational hazards. In the absence of exceptional circumstances, the Company supports suppliers who utilize less than a sixty-hour work-week. Unless exceptional circumstances exist, workers must be permitted at least one day off in every seven-day period, and also leave privileges, and workers must be granted the right to resting breaks in every working day. |

Examining the language used in the three Codes it can be noted that the 2015 version included that overtime should be “voluntary” and did make the Article stronger than the previous version. The 2017 version built upon that and noted that overtime should be “exceptional”. This indicates that the 2017 version is strongest and most detailed of the three versions.

Health & Safety

| Version | Health & Safety |
|---|---|
| HBC 2012 | Suppliers must provide a safe and healthy work environment. Factories producing HBC/L&T merchandise must provide adequate ventilation, first aid supplies, fire exits and safety equipment, well‐lit workstations, clean washing facilities and an adequate number of toilets for both men and women, access to clean drinking water; and Supplier must ensure that all are well maintained and in good working order. Worker housing and dining facilities, where provided by the supplier, must meet a reasonable standard of health and safety. |
| HBC 2015 | Suppliers must provide a safe and healthy work environment in a building that is structurally sound. Suppliers must have a valid building, and where applicable, construction license/certificate for the premises as required by local laws. Factories must provide adequate ventilation, first aid supplies, fire exits and safety equipment, well-lit workstations, clean washing facilities and an adequate number of toilets for both men and women, and access to clean drinking water; and suppliers must ensure that all are well maintained and in good working order as required by local laws. Factories must also have an adequate number of clearly marked, unlocked exits that are kept clear of any obstructions, and conduct a minimum of one emergency evacuation drill per year. Worker housing and dining facilities, where provided by supplier, must meet a reasonable standard of health and safety, and be separated from warehouse and production areas. |
| HBC 2017 | Suppliers must provide a safe and healthy work environment in a building that is structurally sound. Suppliers must have a valid building, and where applicable, construction license/certificate for the premises as required by local laws. Factories must provide adequate ventilation, first aid supplies, effective Personal Protective Equipment (PPE – to all workers free of charge), fire exits and safety equipment, well-lit workstations, clean washing facilities, an adequate number of toilets for both men and women, and access to clean drinking water; suppliers must ensure that all are well maintained and in good working order as required by local laws. Factories must also have an adequate number of clearly marked, unlocked exits that are kept clear of any obstructions, and conduct a minimum of one emergency evacuation drill per year. Worker housing and dining facilities, where provided by the supplier, must meet a reasonable standard of health and safety, and be separated from warehouse and production areas.<br><br>Suppliers must ensure that there are systems in place to detect, assess, avoid and respond to potential threats to the health and safety of workers. They shall take effective measures to prevent workers from having accidents, injuries or illnesses, arising from, associated with, or occurring during work. These measures should aim at minimizing so far as is reasonable the causes of hazards inherent within the workplace. Suppliers must ensure adequate occupational medical assistance and related facilities. |

Examining the language used in the three Codes it can be noted that the 2015 version included was more detailed and stronger than the previous version. The 2017 version built upon that and included PPE which would become even more important during the

Covid-19 pandemic. This indicates that the 2017 version is strongest and most detailed of the three versions.

Harassment

| **Version** | **Harassment** |
|---|---|
| HBC 2012 | Every employee must be treated with respect and dignity. No employee may be subject to any physical, sexual, psychological or verbal harassment or abuse including the use of physical punishment. |
| HBC 2015 | Every worker must be treated with respect and dignity. No worker may be subject to any physical, sexual, psychological or verbal harassment or abuse including the use of physical punishment. |
| HBC 2017 | Every worker must be treated with respect and dignity. No worker may be subject to any inhumane or degrading treatment, or to physical, sexual, psychological or verbal harassment or abuse including the use of physical punishment. All disciplinary procedures must be established in writing, and are to be explained verbally to workers in clear and understandable terms. |

Examining the language used in the three Codes it can be noted that the 2012 and 2015 are virtually identical with the difference being the use of "employee" in 2012 and "worker" in 2015. The 2017 version includes a sentence about disciplinary procedures absent from the previous versions. This is beneficial to both the complainant and the perpetrator.

Discrimination

| **Version** | **Discrimination** |
|---|---|
| HBC 2012 | Employees must not be subject to discrimination in employment, including with respect to hiring,<br>salary, benefits, advancement, discipline, termination or retirement, on the basis of gender, race, religious or personal beliefs, age (other than normal and legally allowed hiring or retirement limitations), disability, sexual orientation, maternity or marital status, nationality, political opinion, union participation, social or ethnic origin or membership in any legal organization.<br>Employment decisions must be made solely on the basis of knowledge, skill, efficiency and ability to do the job and meet its requirements. |
| HBC 2015 | Workers must not be subject to discrimination in employment, including with respect to hiring, salary, benefits, advancement, discipline, termination or |

| | |
|---|---|
| | retirement, on the basis of gender, race, religious or personal beliefs, age (other than normal and legally allowed hiring or retirement limitations), disability, sexual orientation, maternity or marital status, nationality, political opinion, union participation, social or ethnic origin or membership in any legal organization. Employment decisions must be made solely on the basis of knowledge, skill, efficiency and ability to do the job and meet its requirements. |
| HBC 2017 | Workers must not be subject to discrimination in employment, including with respect to hiring, salary, benefits, advancement, discipline, termination or retirement, on the basis of gender, race, caste, birth, religious or personal beliefs, age (other than normal and legally allowed hiring or retirement limitations), disability, diseases, sexual orientation, family responsibilities, maternity or marital status, nationality, political opinion, union participation, social or ethnic origin, or membership in any legal organization or any other condition that could give rise to discrimination. Employment decisions must be made solely on the basis of knowledge, skill, efficiency and ability to do the job and meet its requirements. |

Examining the language used in the three Codes it can be noted that the 2012 and 2015 are virtually identical with the difference being the use of "employee" in 2012 and "worker" in 2015 - similar to the Article on harassment. The use of "worker" is more broad than "employee" as the debate about who is covered by a code along the supply chain is complicated, in particular in relation to who is deemed an "employee" and the legal consequences that flow from that determination. The 2017 version is amended to include "caste", "birth" and "family responsibilities" which were absent in the 2012 and 2015 versions. This follows from a rise in discussion about caste discrimination which while originating in South Asia is also apparent in Silicon Valley as well.

Environment

| **Version** | **Environment** |
|---|---|
| HBC 2012 | HBC/L&T will favor suppliers who conduct their business using progressive environmental practices and take active steps to preserve and protect the well‐being of the environment, including complying with all applicable laws and regulations in respect of protecting the environment and maintaining procedures for notifying local authorities in the event of an environmental accident resulting from Supplier's operations. In jurisdictions in which a supplier is required to participate in an environmental stewardship program, it will provide HBC/L&T with written proof of participation, and its registration number(s); in other jurisdictions it will provide HBC/L&T with detailed |

| | |
|---|---|
| | packaging information formatted as requested, and promptly inform HBC/L&T of any changes to such packaging. HBC/L&T will calculate environmental stewardship fee(s) and where such fee(s) are not collected at "point of sale" and supplier is not a participant of the applicable environmental stewardship program(s), these fees will be payable forthwith by supplier to HBC/L&T. |
| HBC 2015 | The Company will support suppliers who conduct their business using progressive environmental practices and take active steps to preserve and protect the well-being of the environment, including complying with all applicable laws and regulations in respect to protecting the environment and maintaining procedures for notifying local authorities in the event of an environmental accident resulting from supplier's operations. |
| HBC 2017 | The Company will support suppliers who conduct their business using progressive environmental practices and take active steps to preserve and protect the well-being of the environment, including complying with all applicable laws and regulations in respect to protecting the environment and maintaining procedures for notifying local authorities in the event of an environmental accident resulting from supplier's operations. Suppliers should assess significant environmental impact of operations, and establish effective policies and procedures that reflect their environmental responsibility. They will see to implement adequate measures to prevent or minimize adverse effects on the community, natural resources and the overall environment. |

Examining the language used in the three Codes it can be noted that the 2012 version mentioned that HBC will "favour" suppliers who use progressive environmental practices while the 2015 and 2017 versions merely state that HBC will "support" suppliers who use progressive environmental practices. This seems to indicate a decrease in HBC seeking out such suppliers. "Favour" indicates preference.

Freedom of Association

| **Version** | **Freedom of Association** |
|---|---|
| HBC 2012 | Management practices must respect the right of employees to free association and collective bargaining where allowed by law. |
| HBC 2015 | Management practices must respect the right of workers to free association and collective bargaining where allowed by law. |
| HBC 2017 | Suppliers shall: (a) respect the right of workers to form unions in a free and democratic way; (b) not discriminate against workers because of trade union membership; and (c) respect workers' right to bargain collectively. Suppliers should not prevent workers' representatives from having access to workers in the workplace or from interacting with them. When operating in countries |

| | |
|---|---|
| | where trade union activity is unlawful or where free and democratic trade union activity is not allowed, supplies should respect this principle by allowing workers to freely elect their own |

Examining the language used in the three Codes it can be noted that the 2012 and 2015 are virtually identical with the difference being the use of "employee" in 2012 and "worker" in 2015 – similar to other sections that used "employees" in 2012 and changed in the 2015 version. The 2017 version is more robust and detailed.

Access to Facilities

| **Version** | **Access to Facilities** |
|---|---|
| HBC 2012 | Suppliers authorize HBC/L&T or its designated agent to conduct unannounced inspections of Suppliers' facilities, during which all premises may be inspected, workers interviewed, and books and records reviewed. If HBC/L&T determine that a supplier has violated the code, the supplier will be required to implement a corrective action plan and to achieve compliance within a specified time. Alternatively, HBC/L&T reserve the right to cancel orders and/or terminate the relationship. |
| HBC 2015 | Where applicable, suppliers must participate in the Company's social compliance program, which may include but is not limited to disclosure of factories, participation in factory audits, and inspection of books and records. If a supplier manages and enforces its own social compliance program, it must meet or exceed the compliance standards set forth in the Company's program, and may be required to submit supporting documents to demonstrate same. |
| HBC 2017 | Where applicable, suppliers must participate in the Company's social compliance program, which may include but is not limited to disclosure of factories, participation in factory audits, and inspection of books and records. If a supplier manages and enforces its own social compliance program, it must meet or exceed the compliance standards set forth in the Company's program, and may be required to submit supporting documents to demonstrate same. |

Examining the language used in the three Codes it can be noted that the 2015 and 2017 include mention of the social compliance program which is obviously absent in the 2012 version as it was not yet created. The 2017 code which is still in place is a stronger code than previous versions. One can be hopeful that future versions (if the 2017 version is replaced) will be stronger still.

**5.22 Table – Application of the Framework of Decent Work Indicators to the HBC Code (2017)**

| | Hudson's Bay Company |
|---|---|
| 1. Employment opportunities | X |
| 2. Adequate earnings and productive work | Yes |
| 3. Decent working time | |
| 4. Combining work, family and personal life | |
| 5. Work that should be abolished | Yes |
| 6. Stability and security of work | X |
| 7. Equal opportunity and treatment in employment | Yes |
| 8. Safe work environment | Yes |
| 9. Social security | |
| 10. Social dialogue, workers' and employers' representation | Yes |
| 11. Economic and social context for decent work | X |
| **TOTAL out of 8** | **5** |

**5.23 Table - Comparison of score on strength of the code versus score on the Framework of Decent Work Indicators**

| | Score out of 13 (my system) | Score out of 8 on the Framework of Decent Work Indicator (FDWI) | Average score | Difference in score |
|---|---|---|---|---|
| Hudson's Bay Company | 12 = 92% | 5 = 63% | 77.5% | Under the FDWI the score dropped by 29% |

From the results in the above chart, it can be determined that the FDWI seems more rigorous as a scoring system.

While the FDWI is stricter than the system the author devised, it is useful to put the dataset through two different systems to examine the relative strength of each code rather than simply rely on one system as the only and final deciding factor. Examining the dataset through the lens of two different systems allows for greater comparison of the relative rigor of the respective codes under each system. This indicates that codes are not able to be deceptive and appear strong under one system and be seen as robust under another system. Both systems scored the codes relatively similar.

## 5.24 Monitoring Agencies

The assessment of the strengths and weaknesses of various monitoring agencies including: 1) the WRC and 2) FLA will be conducted[456]. Examining the Code of Conduct that was implemented at Queen's University in 2004[457] and then signing on with the monitoring agency WRC, allows for an examination that is outside of the corporate realm as the university is not a corporation. The code is the first step. The implementation of the code is the most important piece. Having it be properly enforced is obviously the next most important step. A rule without a remedy is ineffective. There must be a remedy once that rule is breached. Some institutions decide to have two monitoring agencies as York University uses both the WRC[458] and FLA[459]. Looking at the Queen's University example section 3 of its code reads:

> The University reserves the right to terminate its relationship with any licensee which continues to conduct its business in violation of the corrective action plan, in accordance with the terms set forth in the licensee agreement. This decision will be rendered by the ad hoc oversight committee responsible for implementation of the Code.[460]

This outlines the various bodies responsible for ensuring compliance with the code. On the internal side, Queen's has an oversight committee to monitor compliance with the code and has an external third-party monitoring agency, the WRC. There may be contention if these two entities have a disagreement over the enforcement of the code.

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[456] Please see Appendix 1 for direct comparisons.
[457] Queen's Code of Conduct, available at: <http://www.queensu.ca/studentaffairs/trademarklicensing/codeofconduct.html>.
[458] WRC, Affiliate schools, available at: <http://www.workersrights.org/about/as.asp>.
[459] FLA, Affiliate schools, available at: <http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=CollegesUniversities>.
[460] Queen's Code of Conduct, available at: <http://www.queensu.ca/studentaffairs/trademarklicensing/codeofconduct.html>.

The fact that the code is still in force after more than a decade shows how lasting the impact of activists can be on the campus culture. The institutionalization of the anti-sweatshop activism has enduring impacts on the University.

Codes are varied as some are rigorous than others. The more rigorous a code the more difficult it may be to get it implemented. The author's experience at Queen's getting the University to implement a code was informative. They started Queen's Students Against Sweatshops ('QSAS') with the intention of having the WRC be the monitoring agency and were successful in that, but had to sacrifice certain provisions in order to get the code drafted. The pressures on advocacy groups (QSAS could fall under this umbrella) to conform or accept concessions is strong. What is better - having a weaker code that gets implemented or holding out for a stronger one to possibly be implemented in the future? Concessions have to be accepted and the push for a stronger code in the future must be brought about later. A starting out point is an important one. None of them viewed their code as one that was compromised compared to other Universities. They were proud to get one implemented and were happy that it did not take very long for this progress to be made. There is not much research on the use of self-monitoring, such as Nike does. [461] The Queen's code references ILO Conventions 138, 182, 155 and Recommendation 164. ILO Conventions 87, 98 and 135 are also mentioned. As Sethi states an independent external monitoring system builds public trust.[462] Thus, a code

[461] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 22.

[462] S. Prakash Sethi ed., *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, (New York: Palgrave Macmillan, 2011) at 13: "There must be an independent external monitoring and compliance verification system to engender public trust and credibility in the industry's claims of performance. Performance with code compliance on the part of

without a monitoring agency is rather purposeless. A code of conduct without a monitoring scheme limits the ability for enforcement as agencies such as WRC report on their website.

The work of Professor Benjamin Cashore of Yale University builds on the work of Sabel, O'Rourke and Fung who came out with their RLS model in 2000. Cashore notes that governance can start with a limited approach and move to a more comprehensive approach as time goes on (see Figure[463] below). He outlines 'the California effect' which he explains as the notion that businesses in regulated markets act out of self-interest to impose regulations on other companies in less regulated markets. He notes that this can lead to strategic coalitions between businesses and NGOs. This means that slowly the floor level of regulation gets imposed on competitors in the same way that Sabel, O'Rourke and Fung note in RLS. This increases standards throughout the industry as there is slowly buy-in from other companies.

member companies or groups must be subjected to independent external monitoring and compliance verification. It is in this area that companies and industries offer the most resistance. It is argued that external monitoring would create an environment of distrust and policing."

[463] Benjamin Cashore, et al., "Can Non-state Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector" Reciel 16 (2) 2007 158-172 at 170.

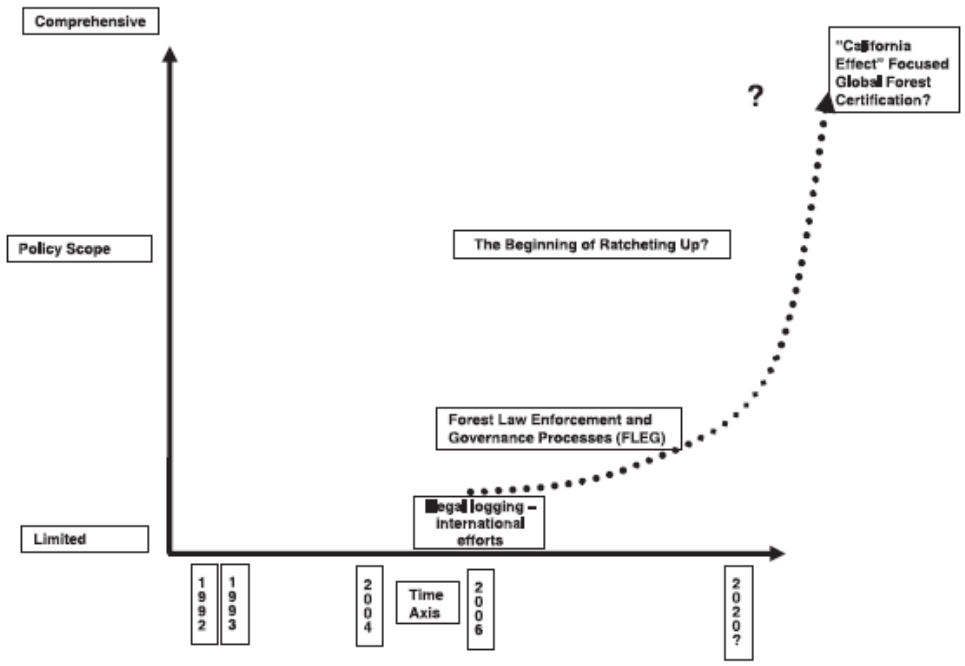


**FIGURE 4** FUTURE GLOBAL ENVIRONMENTAL FORESTRY STANDARDS?

### 5.24.1 Worker Rights Consortium

The Worker Rights Consortium is an independent labor rights monitoring agency. The WRC has over 175 college and university affiliates and its primary focus is on factories that make university-related apparel. It was started in April 2000 by university administrators, students and labor experts. As noted on their website their "purpose is to combat sweatshops and protect the rights of workers who make apparel and other products."[464] Monitoring agencies are external organizations that are paid a fee to monitor compliance with a code. "USAS [United Students Against Sweatshops] and the CCC [Clean Clothes Campaign] have sought to establish a 'foundation' model that centralizes oversight and controls all payments for monitoring. The FLA and SA8000 employ a 'consulting firm' model which allows companies to choose and pay for their

[464] WRC, 'Mission', available at: < http://www.workersrights.org/about/>.

own monitors."[465] The various agencies have different standards, and some are stricter than others. WRC will cancel its contract if there is non-compliance versus FLA, which will work towards encouraging compliance if there is a breach. "[T]he Worker Rights Consortium (WRC), developed by the United Students Against Sweatshops (USAS) in 1999, employs a different strategy focusing on information forcing, verification systems, and pro-active inspections."[466] What do they do that is different from FLA? They go into warehouses and investigate. FLA is viewed as the less rigorous monitoring agency compared to the WRC.

> It [WRC] puts particular emphasis on developing links with labour organizations and workers in the countries where licensed production is being undertaken. It will develop mechanisms for receiving and verifying workers' complaints regarding violations of the code of conduct. The WRC places considerable emphasis on transparency, requiring full disclosure of plant locations and labour conditions.[467]

The WRC is careful to not be seen as trying to usurp the power and control of unions. The role of monitoring agencies to provide a variation on the auditing system in that the agency will ensure that proper mechanisms are in place in conformity with the code. "When codes are the result of negotiations involving a number of different stakeholders, they are likely to be more comprehensive and to have stricter monitoring than those which are unilaterally adopted by companies…Thus the WRC code which

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[465] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 24.

[466] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 23.

[467] Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 27.

does not involve any direct corporate participation is more stringent than the FLA code which was rejected by the trade unions."[468]

### 5.24.2 Fair Labor Association

The FLA was started in 1999 with the involvement of companies, which is in contrast to the WRC which does not include corporate involvement. It may be said that having corporations involved with the founding of the FLA may result in it being viewed as less rigorous as the WRC. Corporate involvement in the FLA has made it appear as less rigorous than competitors due to the appearance of undue influence. When comparing the WRC and the FLA it does appear that the FLA is weaker so the involvement of corporations may actually result in a weaker monitoring system compared to a system that exists free from corporate involvement. According to the FLA website, "the FLA is a brand accountability system that places the onus on companies to voluntarily achieve the FLA's labor standards in the factories manufacturing their products."[469] This task seems less onerous than the WRC's mandate. Sabel and others contend, "the Fair Labor Association (FLA), convened by the Clinton administration in 1996, is the most advanced and most controversial of current initiatives to establish monitoring and verification systems."[470] The FLA is criticized for being too aligned with both government and corporate interests. A monitoring agency that appears to demonstrate such biases may be less successful than one where the clear independence has been established since its creation. Jenkins explains, "The fact that a company can be

[468] Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 28.
[469] FLA, 'About Us', available at: < http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=About_Menu>.
[470] Charles Sabel, Dara O'Rourke & Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace", available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833> at 23.

certified when only 30 per cent of its facilities have been independently monitored, and that it has plenty of time to warn those which are to be inspected, limits the effectiveness of monitoring."[471] The FLA may also face criticism as not being independent enough from corporate interest because it lacks a real 'arm's length' distance from its founders. "Another perverse outcome of this approach", explains Sethi, "is that it may lead the code effort to be captured by the companies with the least amount of commitment to code compliance. This situation is akin to the capture theory of regulation, where the regulators are co-opted by the regulated and thus lose their legitimacy as regulators."[472] In this instance the monitoring agencies may be said to be occupying the role of regulators by offering services akin to auditing and sometimes drawing attention to delinquent suppliers.

[471] Rhys Jenkins, "The political economy of codes of conduct" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, (London: Earthscan Publications Ltd., 2002) at 26.

[472] S. Prakash Sethi ed., *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, (New York: Palgrave Macmillan, 2011) at 11.

## 5.25 Background to my Model Code of Conduct

This dissertation is suggesting a model code of conduct. I concur with Professor Jill Murray's argument that the ILO Conventions are aimed at nation states and may be better suited to remain that way because states have enforcement mechanisms that other corporations and other non-state entities lack. Reference to the ILO Conventions can help situate a code of conduct in a broader discussion about workers' interests and can be useful in that regard – to demonstrate that this one particular code of conduct is part of a larger set of internationally-backed norms. Professor John Ruggie's work on how states and corporations have a responsibility to protect human rights can likewise demonstrate this effect in other CSR codes. I have modified my Model Code of Conduct that appears in my earlier research[473] to make sure that my current dataset is more reflected in the Model Code.

What are the basic provisions which should be included in all codes? As indicated in the chart detailing the comparison of the ten codes of conduct there are some areas that should be covered in all codes. Number 11 is an advanced right of freedom of association and collective bargaining. Number 12 and 13 are more about enforcement and compliance. There should be a preamble outlining the purpose of the Code. The following headings and topics should be included:

[473] Vanisha H. Sukdeo, *Corporate Law, Codes of Conduct and Workers' Rights*. (New York: Routledge, 2019).

1. Child Labour

2. Forced Labour

3. Wages and Benefits

4. Overtime

5. Working Hours

6. Working Conditions

7. Health and Safety

8. Harassment

9. Discrimination

10. Environment

11. Freedom of Association, Collective Bargaining

12. Monitoring

13. Access to Facilities

### 5.26 Actual Text of This Dissertation's Model Code of Conduct

Corporation X is committed to ensuring that all of its products are produced in an ethical manner, consistent with international labour standards, and all applicable laws and regulations. This Code provides the basic standard for Corporation X and all suppliers, sub-suppliers and their contractors must comply with the provisions outlined in this Code. Violations of this Code may result in the termination of the contract between Corporation X and the supplier/subsupplier found to be in violation.

2.20.1 1. Child Labour

No person shall be employed at an age younger than 15 (or 14 where, consistent with International Labor Organization practices for developing countries under ILO Convention 138, the law of the country of manufacture allows such exception). Where the age for completing compulsory education is higher than the standard for the minimum age of employment stated above, the higher age for completing compulsory education shall apply to this section. Suppliers and sub-suppliers agree to work with governmental, human rights, and non-governmental organizations, as determined by the Corporation and supplier, to minimize the negative impact on any child released from employment as a result of the enforcement of this Code.

Consistent with ILO Conventions 138 and 182, the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety, or morals of young persons shall not be less than 18 years of age.

While not a requirement, it would be beneficial if employers encouraged children to attend school/classes.

2.20.2 2. Forced Labour

Employment must be voluntary, and respect the right of workers to decide to work or not. Suppliers, sub-suppliers and their contractors must not use forced labour, whether in the

form of prison labour, indentured labour, bonded labour, or otherwise. Slavery and human trafficking are prohibited. Workers have the right to refuse unsafe work practices.

2.20.3 3. Wages and Benefits

Suppliers, sub-suppliers and their contractors must provide wages and benefits in the relevant industry which constitutes a dignified living wage which is capable of providing for the essential needs of workers and their families.

A living wage means a wage which provides for the basic needs (housing, energy, nutrition, clothing, health care, education, potable water, child care, transportation, and savings) of an average family unit of employees in the relevant sector of the country divided by the average number of adult wage earners in the family unit of employees, in the relevant employment sector of the country.

2.20.4 4. Overtime

In addition to their compensation for regular hours of work, employees shall be compensated for overtime hours at such a premium rate as is legally required in that country, or as negotiated in a collective agreement, but not less than at a rate equal to their regular hourly compensation rate. Typical overtime rates are 1.5 times regular hourly rates. Also common is twice the hourly rate for workers working on statutory holidays.

2.20.5 5. Working Hours

Except in extraordinary circumstances, employees shall (i) not be required to work more than the lesser of (a) 48 hours per week and 12 hours overtime per week, or (b) the limits on regular and overtime hours allowed by the law of the country of manufacture; and (ii) be entitled to at least one day off in every 7-day period, as well as official holidays and at least 3 weeks paid holiday leave per year.

2.20.6 6. Working Conditions

Suppliers, sub-suppliers and their contractors are expected to treat all workers with respect and dignity and provide them with a safe and healthy work environment. Workers must not be subjected to corporal punishment or any other form of physical, psychological, sexual or verbal harassment, or abuse.

- Suppliers, sub-suppliers and their contractors' factories must comply with all applicable laws and regulations relating to working conditions, including workers' health and safety. Factories must:
- have adequate lighting in all areas;
- be well ventilated. Windows, fans, air conditioners or heaters must be present where required in all work areas;
- have sufficient, clearly marked, accessible exits allowing for orderly worker evacuation in case of any emergency;
- have adequate fire alarm systems. Fire extinguishers must be appropriate to the types of possible fires in the various areas of the factory, be regularly maintained and

charged, the date of last inspection must be displayed, and they must be mounted so they are visible and accessible in all areas;

- conduct evacuation drills at least once per annum;
- ensure that machinery is properly equipped with operational safety devices and inspected and serviced on a regular basis;
- provide and allow workers reasonable access to drinkable water throughout the working day;
- have a minimum of one well-stocked first aid kit and one or more employees trained in basic first aid. A procedure must be in place for handling injuries that require further medical evaluation and/or hospitalization; While not required, it would be useful to have one staff member who is trained in CPR.
- maintain clean and sanitary toilet areas that are available to employees throughout their entire work day. There must be no unreasonable restrictions on their use;
- store any hazardous and combustible materials which may be located on its premises in secure, ventilated areas. All safety and legal requirements must be met when disposing of such materials; and
- in the event that dormitory facilities are provided for workers, ensure that those facilities meet all applicable laws and regulations related to wage deductions, health, safety and protection of employees, including fire, electrical, mechanical and structural safety and sanitation.

2.20.7 7. Health and Safety

Suppliers, sub-suppliers and their contractors must provide a safe and healthy work environment in a building that is structurally sound. Suppliers must have a valid building, and where applicable, construction license/certificate for the premises as required by local laws. Factories must provide adequate ventilation, first aid supplies, fire exits and safety equipment, well-lit workstations, clean washing facilities and an adequate number of toilets for both men and women, and access to clean drinking water; and suppliers must ensure that all are well maintained and in good working order as required by local laws. Factories must also have an adequate number of clearly marked, unlocked exits that are kept clear of any obstructions, and conduct a minimum of one emergency evacuation drill per year. Worker housing and dining facilities, where provided by supplier, must meet a reasonable standard of health and safety, and be separated from warehouse and production areas.

2.20.8 8. Harassment

Every worker must be treated with respect and dignity. No worker may be subject to any physical, sexual, psychological or verbal harassment or abuse including the use of physical punishment. Employers are encouraged to create a collegial working environment.

2.20.9 9. Discrimination

Workers must not be subject to discrimination in employment, including with respect to hiring, salary, benefits, advancement, discipline, termination or retirement, on the basis of gender, race, religious or personal beliefs, age (other than normal and legally allowed hiring or retirement limitations), disability, sexual orientation, maternity or marital status, nationality, political opinion, union participation, social or ethnic origin or membership in any legal organization. Employment decisions must be made solely on the basis of knowledge, skill, efficiency and ability to do the job and meet its requirements.

2.20.10 10. Environment

The Company will support suppliers who conduct their business using progressive environmental practices and take active steps to preserve and protect the well-being of the environment, including complying with all applicable laws and regulations in respect to protecting the environment and maintaining procedures for notifying local authorities in the event of an environmental accident resulting from supplier's operations. Employers are encouraged to become knowledgeable about eco-friendly practices.

2.20.11 11. Freedom of Association

Suppliers, sub-suppliers and their contractors shall recognize and respect the right of employees to freedom of association and collective bargaining with bargaining representatives of their own choice. No employee shall be subject to harassment, intimidation or retaliation as a result of his or her efforts to freely associate or bargain collectively. Where not explicitly prohibited by national laws, suppliers, sub-suppliers and their contractors shall ensure compliance with ILO Conventions 87, 98, and 135.

2.20.12 12. Monitoring

Where applicable, suppliers must participate in the Company's social compliance program, which may include but is not limited to disclosure of factories, participation in factory audits, and inspection of books and records. If a supplier manages and enforces its own social compliance program, it must meet or exceed the compliance standards set forth in the Company's program, and may be required to submit supporting documents to demonstrate same.

2.20.13 13. Access to Facilities

Suppliers must allow authorized representatives of Corporation X unrestricted access to their facilities and to all relevant records at all times, whether or not notified in advance, to ensure compliance with this Code.

### 5.26.1 Analysis of this Dissertation's Model Code of Conduct

The purpose this new Model Code of Conduct is to present a composite that contains the best portions of the codes the author has studied. By analyzing the various codes over the course of years, the author is better positioned to make recommendations about the most appropriate code that fits the apparel industry and its distinctive context and needs.

The Model Code will also contain a provision that it should be subject to a 3 year review and be updated as need be to reflect changes as seen in codes that have adapted to include clauses about the environment and to better suit the workplace's needs. A review process set in place reflects Mamic's feedback look that allows for internal review and improvement.

This Code would score thirteen out of thirteen based on the scoring system devised above, which is not surprising as the person determining the measurement will ensure that the code meets the standard. But it does show that a Model Code can be drafted that is not onerous or difficult for suppliers and sub suppliers to follow and comply with. When drafting the Queen's Code, the author recalls a discussion about how the document should not be longer than two pages as otherwise the suppliers would find it cumbersome and hard to follow. A shorter document was viewed as more straightforward. As showcased above, a short document does not have to lack strength as sometimes a longer document like the Gap code can be convoluted and lacking in precise details when compared to other codes that are stronger like the two-page Reitmans code.

Applying the FDWI factors to the Model Code of Conduct shows the results below in Table 2.21 as the score for the Model Code is 7/8. The element missing from the Model Code is Social Security as items such as pension plans for workers was not included. This demonstrates room for improvement and similar to collective bargaining where there is a collective agreement in place that is malleable, the Model Code is also malleable and in the future workers could fight for the inclusion of Social Security.

**5.27 Table – Application of the Framework of Decent Work Indicators to the Model Code of Conduct**

| | Model Code |
|---|---|
| 1. Employment opportunities | X |
| 2. Adequate earnings and productive work | Yes |
| 3. Decent working time | Yes |
| 4. Combining work, family and personal life | Yes |
| 5. Work that should be abolished | Yes |
| 6. Stability and security of work | X |
| 7. Equal opportunity and treatment in employment | Yes |
| 8. Safe work environment | Yes |
| 9. Social security | |
| 10. Social dialogue, workers' and employers' representation | Yes |
| 11. Economic and social context for decent work | X |
| **TOTAL out of 8** | **7** |

### 5.28 Comparing the strengths of the WRC, and FLA

| | WRC | FLA |
|---|---|---|
| **Does the agency conduct independent factory investigations?** | Yes | No |
| **Does the agency have a model code of conduct?** | Yes | Yes |
| **What is the fee for an affiliate?** | "Schools with licensing programs pay annual fees in the amount of 1% of their previous year's gross licensing revenues, with a minimum of $1,500 and a maximum of $50,000. Schools that do not have licensing programs pay a flat annual fee of $1,500."[474] | "For schools with licensing programs, dues are 1% of the previous year's gross licensing revenue, but in no case less than $1,000 and with each year's dues payment capped at $50,000. For schools with no licensing programs, the dues are currently $250 per year."[475] |

Source for data: FLA and WRC websites.

[474] WRC, 'FAQs', available at: < http://www.workersrights.org/faq.asp>.
[475] FLA, 'Join the FLA – College and Universities', available at: <http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=JoinFLA>.

## 5.29 Case Study Conclusion

HBC was one of the companies doing business at Rana Plaza when the disaster occurred. Of the fourteen Canadian companies doing business there after the disaster ten of those fourteen enacted codes (some have previous codes in place). HBC already had a code in place prior to Rana Plaza but introduced a new code in 2015 which was after the disaster. The Accord and Alliance that were put in place after the collapse were industry-wide standards which are separate and distinct from the actions of individual companies deciding to enact a code or to amend an existing code in response to the collapse. As stated earlier in the dissertation, the Alliance was disbanded in 2018 which was the plan to stay in place for five years after the disaster. The Accord has been through two overhauls and the most recent version is planned to stretch beyond Bangladesh to be international. The International Accord is set to expire in 2023. The HBC Code does not have an expiration date but if we look to the past we can anticipate that the current code will be replaced with another version, likely in three or six years.

# 6 Chapter Six - Conclusion

This chapter will provide analysis and conclusions. The decline of state-centered governance has created a governance gap in how corporations are being governed. This has allowed corporations to self-regulate as a way to stave off regulation from the state or another entity. While self-regulation is often critiqued as less rigorous than state regulation, it may not be the case that is less effective and/or efficient. Notions like the 'social license to operate' have created a more nuanced approach to regulation as regulation becomes more about appeasing those who are being impacted by the work of the corporation and less so about those in control (be it government officials, etc.). The author examined codes of conduct, expanding fiduciary duties in the corporate realm, how union contracts have been changed, as well as shareholder proposals. With this work, it can be concluded that codes of conduct, with a strong monitoring agency to ensure compliance, are the best device to use in order to strengthen the rights of workers.

Workers' interests are often included in corporate codes of conduct, so this new way of regulating the corporation internally through its own code allows for increased protection for workers. There are many ways to change a corporation for the better and to make it function in line with CSR principles. The author chose to ground my research in corporate governance as there are various routes to increasing the rights or workers and the one chosen to study is the internal mechanism of a corporation, codes of conduct, rather than external governance mechanisms (the work of NGOs, unions, etc.). Codes of conduct serve a similar purpose of increasing or strengthening the rights of workers in

that they govern corporate behaviour in regard to labour-related issues. Although codes of conduct do not offer the force that hard law mechanisms do, they can be drafted and enforced in such a manner that reflects hard law's command. By acting outside of hard law, workers along with management can craft workplace environment regulations that fit their individual workplace. This also allows there to be increased workers' interests in jurisdictions where it is difficult to unionize or workers choose/would rather have a code of conduct rather than belong to a union.

## 6.1 The Model Code of Conduct

The proposed Model Code of Conduct would hold corporations to a high standard and includes references to ILO Conventions, which allows the code to be part of a bigger blueprint for socially responsible corporations. To ensure compliance and enforcement of the code of conduct requires a mechanism that monitors the corporation. This is best done by an external monitoring agency such as WRC. Perhaps the ideal situation might be to have one code of conduct that is monitored by two monitoring agencies in that they act as check and balance; a rigorous code that is well-enforced by an external monitoring agency or two monitoring agencies provides the best level of assurance to workers. When a corporation adopts a code of conduct, this demonstrates an aspiration to be more socially responsible, but only when there is a monitoring scheme will there be true dedication to the code itself. Without a mechanism in place to ensure compliance, the code itself is rather futile.

Codes of conduct allow for greater flexibility as workers could be involved at the initial negotiation stage and on to drafting. Contrasted with a collective agreement, the process might be similar in that union members are involved with the negotiation and the drafting of the collective agreement. The difference may be that in the unionized settings, where there are collective agreements, there is often a template from which a new collective agreement is based upon like when lawyers draft a contract from a precedent document. However, in the environment this dissertation envisions it might be that the corporation, with its own group of workers, is starting from first principles in regards to

drafting its code of conduct. In the unionized setting, the staff from the union in the form of stewards, have expertise that they bring to the table when working with the employer. In the corporate setting, when a code is being implemented, this freedom from routine behaviour allows for greater flexibility regarding what can be included in the code or what can be left out. Union contracts can be formulaic when, in contrast, codes can be tailor made to fit each individual workplace.

The proposed Model Code of Conduct outlines such basic rights as the information about maximum working hours, ventilation systems in factories, and remuneration, which are all typical items to be found in a collective agreement: however, the Model Code of Conduct goes beyond a collective agreement by encouraging employers to create an environment in which workers feel appreciated and their voice is acknowledged. This goes beyond legal structures and touches on psychological studies about inclusion in the workplace versus exclusion.[476] Professor Jane O'Reilly notes that ostracism removes interactional dynamic and potential for exchange[477]. By not allowing workers to voice their concerns, management is not able to fully engage with the workers about potential ways to improve the workplace for *everyone*. Workers may see ways to improve productivity, etc. that management may not be able to witness without being on the shop floor. To be able to control the process without having the process control you can be rewarding for workers in a way that simple wage increases would not. The same way that employee stock options can help get employees to become more invested in the

[476] Jane O'Reilly, "Is Negative Attention Better Than No Attention? The Comparative Effects of Ostracism and Harassment at Work" online: <http://pubsonline.informs.org/doi/abs/10.1287/orsc.2014.0900>.
[477] Jane O'Reilly, "Is Negative Attention Better Than No Attention? The Comparative Effects of Ostracism and Harassment at Work" online: <http://pubsonline.informs.org/doi/abs/10.1287/orsc.2014.0900>.

company, so too can workers who simply feel more appreciated at work help the company to become more productive. It may be argued that an invested worker is a more loyal and devoted worker. This drive could help the worker become more valuable to the organization. In the absence of these improvements, the workers may become unproductive and less willing to devote their time and energy to the organization in a way that a respected worker might.

The Model of Code of Conduct allows for a company to take a basic outline and build on it to make it work for their particular workplace. I chose the strictest aspects of the codes examined to come up with the most rigorous code. This code allows for workers to have their rights protected in an environment that respects their rights and freedoms. While there are other codes or models proposed by various authors The Model Code is detailed and exacting. Other codes may outline what should be included but do not actually detail the language (see Sabel, O'Rouke and Fung). Using the Model Code proposed coupled with the model outlined by Kaptein about constant feedback allows for a code that can change and respond to the needs of the workers. Once a code is in place, it should not be stagnant. Instead it should become stronger and more robust as times goes on – it is malleable. The principles created by Janda, et al and the one devised by Sethi set out a framework to show what underlying rules should be included in codes. This leads to a discussion about rules-based versus principles-based regulation. In this example it is a rules-based code but there should be acknowledgement that the rules are based on far-reaching principles about respect, dignity, and safety for workers. Also, related to constant improvement is the model created by Locke about workers being able to voice their concerns and have the code respond accordingly.

There could be the possibility of creating a new monitoring agency that is superior to both the FLA and the WRC. Such a monitoring agency may conduct more unplanned factory visits, may examine factories in areas that others do not, may speak to more workers individually about their work experience, etc. Being able to speak with individual workers in a setting off site may allow for workers to speak more openly about their workplace environment than a short chat on site. This new theorized agency could also improve by being cheaper to sign on with than the competing agencies. By making the fees lower, this may encourage companies with merely a code of conduct in place to sign on with a monitoring agency as well. It is still important to continue to monitor the monitors to make sure that their reports, findings are accurate and reliable. Without a strong monitoring agency whose reports are dependable, the system as a whole will be lacking a crucial element. Without a strong monitoring agency, the code of conduct is left to stand separately and not be examined – this allows for the code to possibly not be complied with or even ignored altogether. For workers to be protected, there must be a safeguard put in place to guarantee that their rights are being protected according to the code and breaches of the code or noncompliance should be detected and allowed to be remedied before any other action is taken.

## 6.2 Fiduciary Duties

This dissertation's suggestion that the *CBCA* be amended to include language from *Peoples* could help the Court be more standardized in its approach to making decisions in the corporate realm. Outlining the actual stakeholders that should be satisfied allows directors and officers to know who they will be held accountable to. It is better to use exact language rather than vague terms that have to be complied with. This language would detail which groups or entities the corporation is held to have a duty towards.

Expanding the fiduciary duties of a corporation would allow those fighting for rights in regard to corporate behaviour to have a greater claim to such rights as they would be statutory mechanisms rather than unclear ideals. Codifying such language gives greater strength and shows society that these are the principles or values that society expect corporations to comply with. Codification signals to the corporation, those who commit wrongs, and society at large that there is certain importance to be given to all stakeholders and not just shareholders.

Benefit Corporations have an increased fiduciary duty attached to the corporation itself from its very formation. This suits the Benefit Corporation as it has many other processes in place that work in conjunction to increase or elevate the duties to stakeholders. By increasing fiduciary duties in the typical for-profit corporation that increase may not be as successful without the same support system.

The expansion of fiduciary duties, while useful, is not the best way forward because corporations would still be able to say that importance was given to all stakeholders, but the proof of such statement would be near impossible to verify. How such compliance would be measured or ascertained would be difficult.

## 6.3 Transnational Governance as Another Aspect for Workers' Interests

This dissertation's work on transnational governance models looks at codes of conduct and monitoring agencies as tools to be used to increase the rights of workers.

> Codes are a soft law mechanism that may be used to create a voluntary standard or set of rules to which corporations are bound. While this may be viewed as rather insubstantial compared to legislation, codes have value in terms of allowing the two (or more) parties that are bound by the code to have direct input in drafting the code. While the inherent imbalance of power involved in the dynamics of the employment relationship between management and workers must be acknowledged and must have an impact on the creation of the code, it does allow for involvement at a level which legislation does not.[478]

The purpose is to strengthen workers' interests through codes and this can be accomplished by either internal or external sources - legislation being external and a code of conduct being internal. Strengthening voluntary codes of conduct is the hardening of soft law which means the move from soft law to hard law. "Once codes are implemented their force and effect comes from having external monitoring agencies that are paid to monitor compliance."[479] The competing monitoring agencies examined in the dissertation are the FLA and the WRC.

I argue that the step in between state control and private regulation is consumer regulation. "In the model I term 'consumer regulation' the regulation of consumer goods is left to consumers themselves. While codes and certification agencies allow for compliance with a certain level of standards, they also create a corresponding obligation

[478] Vanisha H. Sukdeo, "Transnational Governance Models: Codes of Conduct and Monitoring Agencies as Tools to Increase Workers' Rights" (2012) 13: 12 *German Law Journal* 1559-1570 at 1559.
[479] Vanisha H. Sukdeo, "Transnational Governance Models: Codes of Conduct and Monitoring Agencies as Tools to Increase Workers' Rights" (2012) 13: 12 *German Law Journal* 1559-1570 at 1561.

on consumers. If these codes and certifications exist in the world where consumers purchases goods and services, is the obligation not placed on consumers to be knowledgeable about these codes and certifications?"[480] This dissertation concludes that codes of conduct are rather malleable as they can be altered by future amendments to the code itself. This can be viewed as a positive aspect, as codes can be improved in later years to become more competitive especially if competitors adopt similar codes. This may create competition between companies for the 'most rigorous code' when trying to attract ethical consumers. Codes can be altered in a way that static certifications may not. This forces corporations to become CSR leaders rather than mere laggards.

As noted by Professor Larry Cata Backer, codes of conduct do not share the special characteristics of hard law (perhaps a more comprehensive enforcement structure) but they also do not suffer the weakness of law: "They reflect a potentially enforceable private law among the parties consenting thereto, provide a more robust basis in consent legitimacy than that offered by the more remote process of law making."[481] He goes on to state that:

> Corporate Codes and soft law generally are criticized as undemocratic, as dangerous because of asymmetries in bargaining power and in the difficulty of using the mechanics of state power to enforce. More importantly, soft law is viewed, like contract, as party specific and thus of little help when attempting to harmonize conduct norms over large groups of enterprises and individuals.[482]

Many different codes acting in isolation can one day become industry-wide standards and then true change can be actualized on a large scale. The idea of creating

[480] Vanisha H. Sukdeo, "Transnational Governance Models: Codes of Conduct and Monitoring Agencies as Tools to Increase Workers' Rights" (2012) 13: 12 *German Law Journal* 1559-1570 at 1564.
[481] Larry Cata Backer blog post on September 21, 2013, online: <http://lcbackerblog.blogspot.ca/2013/09/changing-corporate-behavior-through.html>.
[482] Larry Cata Backer blog post on September 21, 2013, online: <http://lcbackerblog.blogspot.ca/2013/09/changing-corporate-behavior-through.html>.

uniformity across industries in a global sense may be more productive than changing domestic laws in separation from others. Attaching the governance at the site of the corporation will force that corporation to comply with the code in any jurisdiction as opposed to getting various laws to become standardized simultaneously.

Professor Larry Cata Backer states that "consent based governance regime among the parties may be more democratic than law as the product of interest group bargaining and strategic consideration that may or may not permit sufficient engagement by those objects of legislation who will have to bear most of its costs."[483] As I note in the article "the divide between which monitoring agencies unions and other advocacy groups choose to align with speaks volumes as to which entities are more corporate driven (and perhaps controlled) than others. A lenient monitoring agency will not provide effective services in that its role is to ensure compliance with the code not merely act as a façade."[484] The monitoring agencies that are used to enforce the codes visit factories in the case of WRC to check that companies are complying with the code. There is a mechanism in place to make sure that companies adhere to the code of conduct. Similar to any enforcement tool, there must be a penalty when there is a breach, and this penalty will vary from code to code depending on the language contained therein.

The study of Benefit Corporations shows yet another example of the hardening of soft law and how to use codes as a tool in corporate governance. Beyond merely abiding

[483] Larry Cata Backer blog post on September 21, 2013, online: <http://lcbackerblog.blogspot.ca/2013/09/changing-corporate-behavior-through.html>.
[484] Vanisha H. Sukdeo, "Transnational Governance Models: Codes of Conduct and Monitoring Agencies as Tools to Increase Workers' Rights" (2012) 13: 12 *German Law Journal* 1559-1570 at 1569.

by the law, the need for corporations to give true weight to being socially responsible can be demonstrated through various ways. Balancing competing interests may be achieved in the non-fiduciary realm, but when discussing dual fiduciary duties, an apparent conflict arises. How is a director to decide which stakeholders' interest will trump other stakeholders? Do profits win over the environment? Do profits win over workers? This balancing could lead to problems. It is trite to say that legislation on the books needs to be tested in the courts, but it is true that caselaw will help to interpret and understand the true limits of fiduciary duties in corporations' legislation. "It is poignantly clear that a duty premised upon fidelity, serving two or more parties may be a breach of duty."[485] How is a director able to balance what seems to be dual fiduciary duties? It seems to be a paradox to ask someone to serve with the utmost fidelity while balancing seemingly contradicting interests. It can be expected that future caselaw will help to set parameters on the duties of Directors of corporations and will make *BCE*[486] clearer.

Benefit Corporations are a new corporate form, but do not change the overall nature of the firm. The corporate form does not change but this new form allows for yet another alternative to exist in law. The corporation can be a Benefit Corporation from its beginnings or choose to become a Benefit Corporation after being incorporated.

CSR is very much linked with the stakeholder model as greater corporate accountability will be able to satisfy stakeholders to a greater degree. Rather than pitting shareholder primacy against the stakeholder model, it may be the case that the

[485] Mark Ellis, *Fiduciary Duties in Canada,* looseleaf, (Toronto: Carswell, 2011), at para. 1-8.01.
[486] *BCE* is discussed more in depth throughout the dissertation.

shareholder primacy model is being changed or amended to be more in line with the stakeholder model. Even the example of *BCE* shows how Canadian corporate law is becoming more aligned with stakeholder theory. Rather than the two models being separate and distinct, it may be that a new model which is in fact an amalgamation of the two models may emerge. Two competing models may be better served by the addition of another model that encapsulates the best parts of both and offers a viable one for moving forward. The awareness of citizens about issues in the area of CSR is one way that change is being made – from the grassroots rather than from top down. Mainstream media coverage about such issues as workers' interests in Bangladesh to conflict minerals in the Congo is raising awareness among citizens.

This dissertation also takes note of 'Arm's Length Exploitation' which describes the phenomenon of companies that, while not directly exploiting workers, hire/ contract with/ outsource, etc. with others who do exploit workers (the direct exploiters). This allows company A to escape liability because they are the not the actual wrongdoers but they hire/ contract with/ outsource, etc. with company B who are the direct exploiters.

CSR is often interconnected with business ethics, notions of good corporate citizenship, and issues of morality and ethics more broadly. Activists are beginning to understand that the corporation may hold power that sometimes rivals the nation state's power. In order to effect change, it may be more lasting and effective to change corporate behaviour than state behaviour. Industry wide standards and codes of conduct may be alternatives to lobbying the corporation directly but rather impose a uniform standard across a variety of corporations. This would allow for consistency across the corporations

that adopt a similar code. This may increase the strength of the workers with the ability to align their interests with those of other workers. Union negotiators employ the tactic of getting certain items included in one collective agreement so that they can use that as a bargaining chip in a separate round of negotiations with another employer – to drive the second employer into adopting the items agreed on by the first employer.

The original hypothesis was that while codes of conduct may be effective tools in strengthening the rights of workers, they are but a few tools among many available, and that many tools being used at the same time for the same purpose will prove more effective than a single tool. It has been demonstrated that codes of conduct are an effective tool in increasing the rights of workers. When paired with a monitoring agency that is rigorous and conducts spot audits in factories then they create a scheme that very much models hard law with the code being akin to legislation and the monitoring agency being like the government to enforce the code. This is particularly helpful in jurisdictions where it is difficult to unionize.

## 6.4 The Corporation and Developing Countries

The corporation does not act alone as the case in sweatshops, where governments are complacent and do not do anything to stop the corporations from operating on their soil. The impact of the corporation versus the government in developing countries needs to be explored further. What are the conditions that give rise to the sweatshop? Why are individuals so desperate for work that they accept jobs in sweatshops? "The 'moralized' corporation is not necessarily an ethical business resulting from value-driven entrepreneurial spirit or ethical conviction. It is to a large degree due to others applying moral standards to corporate behaviour and forcing corporations to anticipate that."[487] The need to impose morality unto the corporation is hard to resist. However, perhaps the corporation is intended to be void of morals - more a place of neutrality rather than having 'bad' morals. While corporations are sometimes expected to 'show emotion' after such instances as Rana Plaza the corporation itself does not necessarily need morals to show emotion.[488] Distancing and the ability to curtail it will help to create a better sense of duty or at least greater respect to those who inhabit host nations when compared with home nations. Perhaps only then will corporations act accordingly when abroad.

Because labour issues are very politically isolating, the government in power may choose to curtail workers' interests in their administration and the next party in power may change these policies. In the case of codes of conduct, there is less chance of codes

[487] Brian Holzer, *Moralizing the Corporation: Transnational Activism and Corporate Accountability*, (Northampton: Edward Elgar Publishing Limited, 2010), at 76.

[488] Just because Joe Fresh executives show emotion on TV does not mean that the corporation has morals. These two do not have to be connected.

being changed as key officials may remain in those positions of power. Also, the potential consumer backlash against changing the codes may be anticipated and fought against. Codes do not have the same strength that hard law offers, but are a good alternative for those who are often left out of the political decision-making process. As stated above, codes of conduct allow for workers' voices to be included in a way that legislation does not. Workers are often excluded from the governmental realm in that the governing party has never been one focused on labour (the New Democratic Party) and the less powerful members of society (such as workers) do not have the money to be overly involved with the democratic process.[489] While the NDP have sometimes been successful at the Provincial level their inability to win at the Federal level can be indicative of the lack of collective will of the working class perhaps due to feeling excluded from the political process[490].

Codes do not offer the protection that hard law does but may allow coverage for areas that legislation does not – while legislation may govern hours of work there is room within a code to allow for formation of advantages akin to those gained in a collective agreement. In jurisdictions where union organizing is difficult, there may be ground covered in a code that may not be able to be achieved through hard law. While the future outcome of numerous codes is yet to be realized the potential of codes is compelling.

[489] This may be a rather sweeping statement but one that is truthful. The poor and overworked are often left out of the political sphere.

[490] Workers are often left out of the political process as they may feel their wants not reflected in issues such as home ownership and other aspects that are aimed at upper and middle class voters.

Once codes are implemented, the real force and effect comes from having external monitoring agencies that are paid to monitor compliance with the code. Depending on the code itself, the remedy for a breach of the code is usually to try to get the company to fix the problem rather than terminating the contract with the supplier automatically.[491] The nature of the code varies from corporation to corporation, but most identify that suppliers and sub-suppliers must be governed by the code, otherwise the efficacy is reduced. If the attempt to try to rectify the wrong does not happen, then the relationship may be terminated. "The ultimate sanction against non-compliance is the threat of being de-listed as a supplier. Codes are thus only 'voluntary' to the suppliers in that the alternative is to find new outlets."[492] This is often stipulated in the language of the code itself.

Codes are essential in current society, as the reach of transnational corporations is vast and domestic laws are not able to fully provide a regulatory system that is needed for policing such an organization. Critics may argue that codes allow corporations to get away with behaviour that hard law mechanisms would punish (possibly severely so). The question becomes more akin to what corporations should do when the state fails to act, rather than corporations vying to usurp the power of the state. As articulated by Harry Arthurs, corporate codes may be used to fend off state law because corporations are able to "deflect state law, to create the illusion of law while fending off the reality of

[491] This depends on the terms of the contract itself. The Queen's code outlines the process by which a supplier can be terminated.

[492] Stephanie Barrientos, "Mapping codes through the value chain: from researcher to detective" in Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., *Corporate Responsibility and Labour Rights; Codes of Conduct in the Global Economy*, 67 (London: Earthscan Publications Ltd., 2002) at 67.

regulation."[493] While it may be true that corporations turn to self-regulation as opposed to calling for state regulation it is not necessarily true that self-regulation is futile. Self-regulation may also be a first step towards increased regulation. As noted by Ed Waitzer and Douglas Sarro, self-regulation includes standard setting, monitoring and enforcement.[494] Waitzer and Sarro also talk about how managers must be trained about existing codes of conduct so that they understand and are able to keep track of the terms and ensure that the terms of the codes get enforced.

The connection between the Rana Plaza case study and the examination of the ten companies with codes of conduct which manufactured at the building before the collapse, allow for a greater understanding of the complexity of both transnational governance of multinational corporations as well as supply chain management which is moving into the newly minted phrase "mandatory human rights due diligence". This demonstrates the ability of what was once soft law becoming incorporated into hard law. The creation of the Accord allows for a legally binding governance model that protects workers interests in the form of outlining wages and benefits as well as the previously overlooked aspects of building and fire safety. The increased training of staff and workers covered by the Accord allows for protections that were not previously considered. The proposed further amendments to the *CBCA* together with new Canadian caselaw show the potential for the common law to create new protections for workers particularly those in foreign

[493] Harry Arthurs, "Profit, Power and Law in the Global Economy" in Wesley Cragg, ed., *Ethics Codes, Corporations, and the Challenge of Globalization*, (Northampton, Edward Elgar Publishing Limited, 2003). at 58.

[494] See Ed Waitzer and Douglas Sarro, "Fiduciary Society Unleashed: The Road Ahead for the Financial Sector" at 23, available online: <http://digitalcommons.osgoode.yorku.ca/olsrps/10/>.

jurisdictions who work for Canadian companies. By using both soft law and hard law mechanisms concurrently workers are able to gain protections in a multilayered fashion.

## 6.5 Future Work

Future research that was not able to be covered in the dissertation includes three main areas: mHRDD which is the focus of my future research agenda, modern slavery in supply chains, and examining how climate change will impact the lives of workers – in particular outside workers such as delivery drivers.

### Modern slavery

In the U.K. Modern Slavery Act (2015) was implemented to deal with modern slavery and human trafficking in the UK and how to eliminate both. In relation to corporate law and supply chains corporations are often negligent about determining whether their own supply chains make use of slavery. One can look at the Supreme Court of Canada case of *Nevsun Resources* (2020) to see how such legislation would be useful in the Canadian context as well. It seems absurd that in current times there is still slavery in many parts of the world and that corporations can be so wilfully blind to the use of slavery along their supply chains. Canada should implement a piece of legislation similar to the U.K. Modern Slavery Act to indicate that Canada and Canadians will not tolerate slave labour being used to manufacture products available in the Canadian marketplace. The failure of Canada to implement legislation similar to Sarbanes-Oxley or Dodd-Frank in the wake of the 2007-2008 Financial Crisis seems to indicate that Canada is not keeping pace with other nation states in protecting economic interests while holding corporations accountable. The failure of Bills protecting Canadians against conflict minerals to become law in Canada is serious and indicates that Canada is not a leader

when it comes to CSR, or corporate accountability. It also is not in step with Canada's image of being a beacon for human rights and the role of peacekeeper as instead it shows Canada as a nation that does not human rights abuses a priority.

**Transition to weather and work**

A major issue for workers in the present day (and near future) is how their work will be impacted by climate change. In particular those workers in the Global South who face increased monsoons, hurricanes, flooding, heat domes and other extreme weather conditions their working conditions will be degraded as well. This is even more detrimental to many workers in the garment industry who work in factories without air conditioning as temperatures continue to rise. This will make difficult working conditions become even worse.

The fight against climate change is multifaceted as it involves transcending borders and involves many different stakeholders. Workers who complete their work obligations in the outdoors will be impacted by climate change in a more severe manner as the increase in extreme weather will make dangerous work even more so. The tragic death of a 24-year-old UPS driver from suspected heat stroke[495] makes this issue more urgent and dire. Workers are not just facing the usual threats and dangers of outside work but now also face an increased chance of death on the job due to heat and heat-related issues. Workers who work outdoors are not the only ones impacted, as office workers will face the consequences of climate change as well but likely less so. As weather will

[495] Esteban Chavez Jr., California, June 25, 2022. <https://abc7news.com/california-ups-driver-dies-signs-of-heatstroke-esteban-chavez-heat-related-deaths/12023790/>.

bring more heat domes, flooding, and wildfires to Canada there must be government action taken that recognizes the unique position workers face in relation to climate change. These issues are not limited by national borders as climate change is an international issue. Women are particularly impacted by these issues and climate refugees tend to be along gender and racial lines. Poverty is another factor in the creation and continuation of climate migration while recognizing that those least able to afford to move are likely the very ones who *need* to move. New worker protections must be codified into law and extralegal mechanisms before climate change makes work life even more hazardous.

Building on my previous work on codes of conduct as soft law mechanisms I then turn to mHRDD as new form of shifting what was previously soft law, voluntary tools into hard law, mandatory instruments of governance. This movement in CSR towards the creation of quantifiable measurements such as ESG instruments allows for corporations to take more seriously their obligations to society more broadly. What is measured gets priority so by forcing what was previously voluntary into the realm of mandatory shifts the importance. These new trends and future trends seem promising in making previously voluntary standards become permanent and mandatory. By forcing corporations to adapt there is greater onus on them to take seriously their obligations. The relationship between weather and work is growing and needs to be addressed through both codified laws and extralegal tools like codes to help protect workers from the devastating impacts of climate change.

## 6.6 The Future for Workers' Interests

While this dissertation argues that codes of conduct are the best way forward for workers critics of CSR may argue that codes may not be the best way to secure or increase the rights of workers. With the rise of capitalism and what may be termed 'corporatism', workers must be willing to acknowledge that power and the ability to gain strength in their collective ability allows for speaking truth to power. Only through engaging with corporations will workers be able to forge ahead. The labour movement in many forms has accepted this new mode and has adapted as a result.[496] For workers to have a seat at the table, like in the German model may be just one option, and other options may prove useful to other workplaces; no one solution will work in every single workplace. If workers are given increased autonomy and voice about their workplaces, then they would be able to choose which model works for their individual workplace.

What amplifies the wrongs committed along the supply chain would be the cruel conditions and dehumanizing conditions that workers face. It is an indignity to be subjected to cruel workplaces where one is controlled minutely and without input in the working process. It is the difference between being acted upon and acting within. This is the author's take on Foucault's model of power and how one can be active in the power-making process. This is the move from the worker as automaton to an autonomous worker with some input about the work. This is a move from dehumanizing towards a more humane workplace. 'Acting within' the system means that one is part of the system

[496] See the Framework of Fairness.

but the system is not controlling one instead. This difference is important for workers who feel silenced in the workplace as though their voices do not matter and only the voice of the employer gets heard. Workers' interests are about better working conditions, hourly wages, and benefits, but they are also about being treated in a more civilized manner where humanity is recognized. Only through all of these parts working together will a true version of workers' interests emerge - one where workers are not viewed as mere tools but within and of the system itself.

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