

A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains

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There are few international and domestic legal obligations that require corporations to prevent, monitor or respond to human rights abuses in their global supply chains. Nonetheless, some Canadian companies now voluntarily represent to carry out supply chain human rights due diligence. The author investigates whether these voluntary undertakings to prevent, monitor or respond could give rise to a positive duty to protect under tort law—an issue yet to be addressed in Canada. The author argues that the relationship between these Canadian corporations and their suppliers' employees could give rise to a duty of care; however, only in limited circumstances. Through the use of a hypothetical claim, the author highlights the key issues a potential plaintiff would have to overcome: most importantly, establishing that he relied on the corporation's representations. The author further argues that the traditional negligence test should be modified to reflect the developments in parent/subsidiary liability and the circumstances of global production. Finally, after establishing the limited circumstances that could give rise to a prima facie claim, the author reviews the relevant policy concerns. Despite the lack of legislative remedies for foreign workers suffering human rights abuses, the author's arguments provide hope that meaningful remedies may be available through a claim in tort if represented undertakings are carried out negligently.

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Introduction

I. Human Rights Due Diligence in Global Supply Chains

A. *International Soft Law Initiatives and Canadian Regulations*

- (i) International Soft Law Initiatives
- (ii) Canadian Regulatory Mechanisms and Potential Developments

B. *Potential Reform*

C. *Supply Chain Human Rights Due Diligence by Canadian Corporations*

D. *The Benefits of Voluntary Human Rights Due Diligence in Supply Chains*

II. Prima Facie Duty of Care to Workers in Global Supply Chains

A. *Foreseeability*

B. *Proximity*

- (i) Liability for Failure to Protect from Harm Inflicted by a Third Party
 - a. Control
 - b. Autonomy
 - c. Reasonable Reliance

- (ii) Aggravation of Position as Reasonable Reliance

- (iii) Abandoning the Reliance Requirement

C. *Direct Liability of Parent Company for Harm Caused by Subsidiary's Operations*

- (i) Canadian Authority

- (ii) English Jurisprudence

- a. Decision of English Court of Appeal in *Chandler v Cape Plc*

- b. Application of *Chandler v Cape Plc* by Hague District Court in Shell Nigeria Litigation

D. *The Ninth Circuit's Decision in Doe I v Wal-Mart Stores*

E. *Conclusion on Prima Facie Duty of Care Inquiry*

III. Residual Policy Issues

A. *Floodgates*

B. *Deterring Voluntary Supply Chain Human Rights Due Diligence*

C. *Existence of Other Avenues for Redress*

D. *Economic Concerns*

E. *Intrusion on Sovereignty of States in Global Supply Chains*

F. *Policy Issues Supporting the Imposition of a Duty of Care*

Conclusion

Introduction

Global supply chains allow Canadian businesses to “buy globally that which others make more efficiently”.¹ However, the foreign

1. Danielle Goldfarb & Kip Beckman, “Canada’s Changing Role in Global Supply Chains” (March 2007) at ii, online: Conference Board of Canada <www.conferenceboard.ca/e-library/abstract.aspx?did=1932>. The Conference Board of Canada concluded that “Canada’s imported inputs from major developing countries play an increasingly important role in feeding Canadian supply chains”. *Ibid* at 23. See also The Canadian Chamber of Commerce, “Reevaluating Canada’s International Trade: The Impact of Global

workers employed in global supply chains pay the price of this efficiency—workers can be vulnerable to human rights abuses, such as involuntary labour, excessive working hours and unsafe working conditions.² While Canadian corporations that benefit from foreign labour may be subject to “the courts of public opinion” where serious human rights abuses are uncovered,³ they ultimately have no legal responsibility to protect the human rights of workers in their supply chains. Justine Nolan, Deputy Director of the Australian Human Rights Centre, aptly observed that “global supply chains stretch across multiple jurisdictions but are effectively regulated by none”.⁴

This regulatory void is (partially) plugged by voluntary corporate social responsibility initiatives.⁵ For example, corporations can require their suppliers to comply with minimum human rights conditions, and publicly state that they monitor compliance and respond to identified breaches by either requiring improvements or terminating the business relationship. Corporations that claim to carry out due diligence attract consumers and investors, reduce the risk of consumer, shareholder or investor claims, and discourage governments from imposing mandatory regulation.

Canadian corporations are currently not legally obligated to carry out supply chain human rights due diligence. However, I argue that in limited circumstances, a Canadian corporation that has undertaken

Supply Chains” (May 2013), *Chamber Blog* (blog), online: <www.chamber.ca/media/blog/130521-reevaluating-canadas-international-trade-the-impact-of-global-supply-chains> (observing that “[r]oughly one-fifth of the value of all the goods and services Canada exported in 2009 originated abroad” at 3).

2. See Justine Nolan, “The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?” in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge, UK: Cambridge University Press, 2013) 138 at 153.

3. See UNHCR, *Protect, Respect and Remedy: A Framework for Business and Human Rights—Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, 8th Sess, Agenda Item 3, UN Doc A/HRC/8/5, 7 April 2008 at para 54 [UNHCR, *Protect, Respect and Remedy*].

4. Nolan, *supra* note 2 at 153.

5. Voluntary initiatives are heavily criticized because of their non-binding nature. See generally Surya Deva, *Regulating Corporate Human Rights Violations* (New York: Routledge, 2012).

to carry out supply chain human rights due diligence could owe its suppliers' employees a duty to exercise reasonable care in carrying out such due diligence. While a claim of this nature was rejected in 2009 by the United States Court of Appeals for the Ninth Circuit decision in *Doe I v Wal-Mart Stores, Inc.*,⁶ it has neither been considered by Canadian courts nor been the subject of specific academic analysis.⁷ I further argue that the traditional negligence test should be modified to reflect the circumstances of global production and that such a modified approach is open on current tort authorities.

This article will highlight some of the key issues that would arise from a claim that a Canadian corporation owes a duty of care to its suppliers' workers, having undertaken to carry out supply chain human rights due diligence. Part I explains the rise of voluntary supply chain human rights due diligence and provides examples of Canadian corporations that claim to protect human rights in their supply chains. Part II considers the issues relevant to establishing a prima facie duty of care to suppliers' employees in light of Canadian and international jurisprudence. Finally, Part III considers a number of policy issues that either negate or support the imposition of a duty of care. This article concludes that it will be difficult for prospective plaintiffs to establish a duty of care, primarily because of the need to show that the plaintiff relied on the defendant to carry out supply chain human rights due diligence. However, a Canadian court could find a duty of care in limited circumstances, and there are compelling policy reasons for one to do so.

6. 572 F (3d) 677 (9th Cir 2009) [*Wal-Mart Stores* 9th Cir].

7. For the most comprehensive academic commentary on this issue, see Joe Phillips & Suk-Jun Lim, "Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees" (2009) 61:2 Rutgers L Rev 333 at 351–62. However, Phillips and Lim's analysis is limited to American law and predates the Ninth Circuit's rejection of a duty of care in *Wal-Mart Stores*. There is also some academic discussion of the role of tort law in promoting corporate social responsibility more generally, including the potential tort liability of a multinational corporation for its actions abroad. See e.g. Jonathan C Drimmer & Sarah R Lamoree, "Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions" (2011) 29:2 BJIL 456. For a discussion on the tort liability of a parent company in respect of harm caused by an offshore subsidiary, see e.g. Bastian Reinschmidt, "The Law of Tort: A Useful Tool to Further Corporate Social Responsibility?" (2013) 34:4 Company L 103 at 109.

I. Human Rights Due Diligence in Global Supply Chains

A. International Soft Law Initiatives and Canadian Regulations

There are very few binding obligations in either international or domestic law that require corporations to take steps to prevent, monitor or respond to human rights abuses in their supply chains. Under the traditional view of international human rights law, the duty to protect human rights resides with states, whereas corporations have, at best, a responsibility to respect rights.⁸ Further, domestic legislation typically does not impose any obligations on corporations to protect human rights in their global supply chains.⁹ Despite this regulatory vacuum, the rise of voluntary supply chain human rights due diligence can be explained by a number of soft law initiatives and Canadian regulations that encourage corporations to monitor human rights impacts and facilitate human rights improvements.

(i) International Soft Law Initiatives

The international soft law initiatives include the United Nations Guiding Principles on Business and Human Rights (the UN Guiding Principles),¹⁰ the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (the OECD

8. This is the approach taken by the UN Guiding Principles. UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework—Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 17th Sess, Agenda Item 3, UN Doc A/HRC/17/31, 21 March 2011 [*Guiding Principles*]. Note that the traditional view that binding human rights obligations reside solely with states is increasingly being challenged. See David Bilchitz, “A Chasm Between ‘Is’ and ‘Ought’?: A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles” in Deva & Bilchitz, *supra* note 2, 107 at 136–38.

9. There are several exceptions to this internationally. See below.

10. *Guiding Principles, supra* note 8.

Guidelines)¹¹ and voluntary standards for responsible business such as Social Accountability International's SA8000 Standards (SA8000).¹²

The UN Guiding Principles were developed by United Nations Special Representative John Ruggie and endorsed by the United Nations Human Rights Council on June 16, 2011.¹³ The principles are made up of three "pillars": (1) the state duty to protect human rights, (2) the corporate responsibility to respect human rights and (3) access to remedy. The second pillar is most relevant for present purposes.

The first foundational principle of the second pillar states: "Business enterprises should respect human rights."¹⁴ Several additional principles elaborate that to achieve this goal, companies should avoid "causing or contributing to adverse human rights impacts through their own activities" and importantly, also "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".¹⁵ Further, corporations should carry out human rights due diligence to "identify, prevent, mitigate and account for how they address their impacts on human rights".¹⁶ These foundational principles are supplemented by a number of "operational principles": the requirement to publicly set out the corporation's commitment to meet its human rights responsibilities,¹⁷ undertake an assessment of its human rights impacts,¹⁸ respond to identified human rights failures by pressuring responsible parties to change their practices or terminating the business

11. OECD, *OECD Guidelines for Multinational Enterprises* (2011) at 3–4, online: <www.oecd.org> [*OECD Guidelines*].

12. Social Accountability International, *Social Accountability 8000: International Standard* (June 2014), online: <www.sa-intl.org> [*SA8000*]. See also Deva, *supra* note 5.

13. UNHCR, *Protect, Respect and Remedy*, *supra* note 3 at para 54.

14. *Guiding Principles*, *supra* note 8 at 23.

15. *Ibid* at Annex, Principle 13.

16. *Ibid* at Annex, Principle 17.

17. *Ibid* at Annex, Principle 16. The commitment should include the corporation's expectations of parties directly linked to its operations. *Ibid*. The interpretative guide to the UN Guiding Principles specifically highlights suppliers as an example of a party directly linked to a corporation's operations. See UNHRC, *The Corporate Responsibility to Protect Human Rights: An Interpretive Guide*, UN Doc HR/PUB/12/2, June 2012 at 23 [UNHRC, Interpretative Guide].

18. *Guiding Principles*, *supra* note 8 at Annex, Principle 17.

relationship,¹⁹ consult with potentially affected groups²⁰ and communicate how human rights impacts are addressed.²¹

Additionally, the OECD Guidelines, originally adopted in 1976, provide a code of responsible business conduct in a global context that OECD governments (including Canada) and a number of non-member countries have committed to promoting.²² The 2011 revision of the OECD Guidelines was heavily influenced by the UN Guiding Principles.²³ It introduced a new human rights chapter requiring corporations to “[s]eek ways to prevent or mitigate adverse human rights impacts” in their supply chains,²⁴ and promote human rights due diligence and “responsible supply chain management”.²⁵

Finally, SA8000 is a voluntary workplace standard based on International Labour Organization and UN conventions.²⁶ It includes provisions on child labour, forced and compulsory labour, health and safety, freedom of association, discrimination, disciplinary practices, working hours and remuneration.²⁷ To be certified as SA8000 compliant, a corporation “shall conduct due diligence on its suppliers/subcontractors, private employment agencies and sub-suppliers’ compliance with the SA8000 Standard”.²⁸ Due diligence includes “assessing significant risks of non-conformance by suppliers/subcontractors, private employment agencies and sub-suppliers” and “making reasonable efforts to ensure that these significant risks are adequately addressed by suppliers/subcontractors, private employment agencies and sub-suppliers and by [the corporation] itself when appropriate”.²⁹ By

19. *Ibid* at Annex, Commentary to Principle 19.

20. This could include suppliers’ employees. See UNHRC, *Interpretative Guide*, *supra* note 17 at 37.

21. *Guiding Principles*, *supra* note 8 at Annex, Principle 21. The UNHRC *Interpretative Guide* to the UN Guiding Principles specifically highlights that a retail company should be able to communicate how it addresses actual or potential human rights abuses in its supply chain. See UNHRC, *Interpretative Guide*, *supra* note 17 at 50.

22. *OECD Guidelines*, *supra* note 11 at 3.

23. *Ibid* at 3–4.

24. *Ibid* at 31.

25. *Ibid* at 4.

26. *SA8000*, *supra* note 12 at 2.

27. *SA8000*, *supra* note 12.

28. *Ibid* at 16.

29. *Ibid*.

December 31, 2013, over 3,000 factories in 71 countries had been certified as SA8000 compliant.³⁰ While the SA8000 has not been widely adopted by Canadian corporations, the International Organization for Standardization's Consumer Policy Committee recently announced that it is carrying out a feasibility study into using SA8000 as a model for a new corporate social responsibility standard.³¹

(ii) Canadian Regulatory Mechanisms and Potential Developments

The reliance on voluntary human rights initiatives at international law, as opposed to binding obligations, has been the subject of sharp criticism.³² An international treaty requiring companies using foreign labour to carry out human rights due diligence appears unlikely in the near future.³³ There are, however, increasing calls for legislation at the domestic level to mandate human rights due diligence and to require improved transparency from corporations about their human rights impacts abroad. The limited scope of the current regulatory regime suggests that tort law may be an appropriate supplement.

While Canadian corporations are not legally required to carry out supply chain human rights due diligence, Canadian securities law creates an obligation to provide periodic disclosure of all material information for investors, which can include information about social issues, such as human rights impacts.³⁴ Additionally,

30. Social Accountability Accreditation Services, "SA8000 Certified Facilities" (30 June 2014), online: <www.saasaccreditation.org/certifacilitieslist>.

31. Standards Council of Canada, "What is SA8000?", online: <www.scc.ca/en/faq-what-is-sa8000>.

32. See e.g. Deva, *supra* note 5 at 115–17; Nolan, *supra* note 2 at 156.

33. See John Ruggie, "Treaty Road not Travelled", *Ethical Corporation* (May 2008) 42. See also Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lesson from the Anti-corruption Movement" in Deva & Bilchitz, *supra* note 2, 162 (concluding that "the treaty road will take years to traverse" at 183–89).

34. See *Environmental Reporting Guidance*, OSC CSA Staff Notice 51-333 (27 October 2010). This notice, which requires disclosure of material environmental issues, has been interpreted by the Toronto Stock Exchange and Chartered Professional Accountants to also require disclosure of material social issues. Toronto Stock Exchange & Chartered Professional Accountants Canada, *A Primer for Environment and Social Disclosure* (March 2014) at 11, online: <www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/questions-environnementales-et-sociales-informations-a-fournir>.

a corporation must also provide information about any social, environmental or human rights policies that it has implemented, if these are fundamental to its operations.³⁵ These reporting requirements may create pressure from investors to carry out effective due diligence. They also provide a strong incentive for corporations to comply with any human rights policies they have adopted, as there are criminal and civil penalties for misleading or untrue continuous disclosure.³⁶ However, the reporting requirements are limited to investor-centric concerns. Supply chain human rights risks will not always be a material risk from the perspective of an investor, and if a corporation misrepresents its supply chain human rights practices, only investors have access to compensation.

In addition, corporations may be encouraged to carry out human rights due diligence by National Contact Points (NCPs).³⁷ NCPs promote the implementation of the OECD Guidelines and provide a mediation and conciliation platform for allegations that a particular enterprise is not observing the guidelines, including issuing non-binding recommendations.³⁸ The Canadian NCP has not yet made any substantive

35. See *Continuous Disclosure Obligations*, OSC NI 51-102 (31 October 2011), s 5.1(4). National Instrument 51-102 has been adopted by securities commissions throughout Canada. See e.g. Ontario Securities Commission, “Instruments, Rules & Policies: Ongoing Requirements for Issuers and Insiders”, online: <www.osc.gov.on.ca>.

36. See e.g. *Securities Act*, RSO 1990, c S.5, s 122(1).

37. It should be noted that De Schutter et al also refer to section 217.1 of the *Criminal Code* as an example of a regulatory step that encourages human rights due diligence by Canadian corporations. *Criminal Code*, RSC 1985, c C-46, s 217.1. See Olivier De Schutter et al, “Human Rights Due Diligence: The Role of States” (December 2012) at 51, online: International Corporate Accountability Roundtable <accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>. However, in the vast majority of cases, it will be almost impossible to show that a senior officer should have required the supplier to take steps to protect its employees, as required by section 217.1. In any event, section 217.1 is only relevant to workplace injury—it would not be relevant to other supply chain issues such as forced labour or low wages.

38. OECD, “National Contact Points for the OECD Guidelines for Multinational Enterprises”, online: <www.oecd.org/investment/mne/ncps.htm>. For a description of the procedure followed by the Canadian NCP, see Foreign Affairs, Trade and Development Canada, “Procedures Guide for Canada’s National Contact Point for the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises”, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng>.

recommendations; however, its English counterpart has on two occasions drawn attention to the failure of an individual corporation to carry out human rights due diligence.³⁹

The existence of the Canadian NCP may incentivize Canadian corporations to carry out human rights due diligence in their supply chains in order to avoid a negative recommendation and the associated negative publicity. However, as a regulatory mechanism, NCPs are limited by their inability to enforce their recommendations.⁴⁰

B. Potential Reform

The absence of a binding requirement for corporations to carry out supply chain human rights due diligence or to publicly report any actions taken is at odds with the duty of states to protect against human rights abuses by corporations within their jurisdiction.⁴¹ As such, there is some pressure on states to adopt a more regulated approach to human rights due diligence. In a report commissioned by the International Corporate Accountability Roundtable,⁴² De Shutter et al. suggest that states “*may* require the adoption of due diligence measures” throughout corporations’

39. For example, in *Afrimex (UK) Ltd* the NCP concluded that Afrimex had failed to comply with the guidelines because:

Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods [*sic*] to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfil the requirements of the Guidelines.

OECD, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* (2008) at para 62, online: <www.oecd.org/daf/inv/mne/43750590.pdf>. See also OECD, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International Against Vedanta Resources plc* (2009) at paras 75–80, online: <www.oecd.org/investment/mne/43884129.pdf>.

40. See Deva, *supra* note 5 at 88.

41. See *Guiding Principles*, *supra* note 8 at Annex, Principles 1–2. The commentary for Principle 3 provides that states should “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts”. *Ibid* at Annex, Commentary to Principle 3.

42. The International Accountability Roundtable is a coalition of human rights, environmental, labour and development organizations.

business operations.⁴³ They argue that states have a duty to regulate the activities of private persons within their territory—even where the harm is caused to persons in the territory of another state.⁴⁴ Similarly, Justine Nolan argues that domestic governments should “ideally . . . at a minimum, legally requir[e] due diligence to be conducted and the results made public”.⁴⁵

At present, mandating supply chain human rights due diligence or reporting is not on the legislative agenda in Canada. However, there is an emerging, albeit limited, international movement toward mandatory human rights due diligence and reporting in respect of certain human rights issues in supply chains.⁴⁶ The most prominent example is section 1502 of the American *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*.⁴⁷ Section 1502 requires companies that source conflict minerals from the Democratic Republic of Congo to carry out and publicly report on due diligence concerning the source and chain of custody of those minerals.⁴⁸ Another example is the *Directive on the Disclosure of Non-financial and Diversity Information* adopted by the European Union on April 15, 2014.⁴⁹ The Directive requires companies with more than 500 employees to publicly report on due diligence carried out in respect of a range of social and environmental issues including human rights.⁵⁰ The European Union considered the mandatory

43. De Schutter et al, *supra* note 37 at 51 [emphasis added].

44. *Ibid.*

45. Nolan, *supra* note 2 at 156.

46. See Nicola Jägers, “Will Transnational Private Regulation Close the Governance Gap?” in Deva & Bilchitz, *supra* note 2, 295 at 317–19. See also Sandeep Gopalan & Katrina Hogan, “Ethical Transnational Corporate Activity at Home and Abroad: A Proposal for Reforming Continuous Disclosure Obligations in Australia and the United States”, 46:2 Colum HRLR [forthcoming in 2015].

47. Pub L No 111–203, § 1502, 124 Stat 1376.

48. For a detailed discussion of this provision and its implications, see Olga Martin-Ortega, “Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?” (2014) 32:1 Nethl QHR 44 at 64–68.

49. The European Commission recorded its adoption of the *Directive on Disclosure of Non-financial and Diversity Information* in a press statement. See European Commission, Statement, 14/124 “Improving Corporate Governance: Europe’s Largest Companies Will Have to Be More Transparent About How They Operate” (15 April 2014), online: Directive on Disclosure of Non-financial and Diversity Information by Large Companies and Groups <europa.eu/rapid/press-release_STATEMENT-14-124_en.htm>.

50. *Ibid.*

requirement necessary because at present fewer than ten percent of large EU companies voluntarily provide such information.⁵¹ These measures differ from mechanisms such as the current disclosure regime in Canadian securities law because they are intended to facilitate accountability to the public generally, not just to investors.⁵² Emerging state practice, such as the initiatives described above, has the potential to influence obligations of states under international law. As a result, in time a state may have a duty to protect human rights in supply chains by “demanding, ensuring, encouraging or facilitating corporate due diligence”.⁵³

C. Supply Chain Human Rights Due Diligence by Canadian Corporations

Canadian corporations vary significantly in the extent to which they undertake supply chain human rights due diligence. At the more active end of the scale, there are Canadian corporations that impose human rights standards on suppliers, monitor compliance and respond to breaches of the standards, reflecting the soft law initiatives discussed above. For example, Canadian Tire Corporation Limited requires its suppliers to comply with a supplier code of conduct, including ensuring that employees are “present voluntarily, not put at risk of physical harm due to their work environment, fairly compensated and allowed the lawful right of free association”.⁵⁴ The supplier code of conduct suggests that the primary monitoring mechanism is supplier certification, with Canadian Tire reserving the right to assess and monitor a supplier’s practices.⁵⁵ However, Canadian Tire’s website states that the supplier code of conduct is also “supported by an audit process that includes training and education to help [s]uppliers understand and apply all policies”.⁵⁶ In the event

51. European Commission, Memorandum, 14/301, “Disclosure of Non-financial and Diversity Information by Large Companies and Groups: Frequently Asked Questions” (15 April 2014), online: <europa.eu/rapid/press-release_MEMO-14-301_en.htm>.

52. See Jägers, *supra* note 46 at 319.

53. See Martin-Ortega, *supra* note 48 at 74.

54. Canadian Tire Corporation Limited, “Supplier Code of Business Conduct” (4 July 2012) at 5, online: <corp.canadiantire.ca/EN/AboutUs/Documents/CTC%20Supplier%20Code%20of%20Conduct%20July%204%202012.pdf>.

55. *Ibid* at 7–8.

56. “Supplier Code of Business Conduct”, online: Canadian Tire <corp.canadiantire.ca/en/joinourteam/suppliers/Pages/SCBC.aspx>.

that a supplier fails an audit, Canadian Tire states it will work with the supplier on a corrective action plan or terminate the relationship in “zero tolerance” circumstances (including child and forced labour).⁵⁷ Similarly, BlackBerry Limited requires its suppliers to comply with a supplier code of conduct⁵⁸ and has engaged a third party to audit suppliers as part of its “Supplier Social and Environmental Responsibility Audit Program”.⁵⁹ BlackBerry states that the purpose of its audit program is “not only to monitor and assess [suppliers’] level of conformance with [its] Supplier Code, but also to mitigate supply chain [social and environmental] risks and ultimately drive supplier [social and environmental] performance improvement”.⁶⁰

Another example of Canadian corporate human rights due diligence is the steps taken by Loblaw Companies Limited following the April 24, 2013 collapse of the Rana Plaza factory in Savar, Bangladesh, which had supplied Loblaw’s discount garment division, Joe Fresh. While Loblaw’s supplier code of conduct is less comprehensive than those described above,⁶¹ Loblaw’s April 2014 report in response to the Savar building collapse outlined a number of steps it has taken to protect the safety of workers.⁶² This included joining the Accord for Fire and Building Safety

57. *Ibid.*

58. BlackBerry Limited, “Supplier Code of Conduct” (9 April 2013), online: <ca.blackberry.com/content/dam/bbCompany/Desktop/Global/PDF/Investors/Governance/Supplier_Code_of_Conduct_April_2013.pdf>.

59. BlackBerry Limited, “Fiscal 2013 Corporate Responsibility Report” (2013), online: <ca.blackberry.com/content/dam/bbCompany/Desktop/Global/PDF/corporate-responsibility/Fiscal_2013_Corporate_Responsibility_Report.pdf> [BlackBerry Limited, “Corporate Responsibility Report”]. BlackBerry states that in 2013, a total of 85 supplier audits were carried out. *Ibid* at 37.

60. *Ibid* at 26.

61. See Loblaw Companies Limited, “Supplier Code of Conduct”, online: <www.loblaw.ca/files/doc_downloads/2014/SUPPLIER-CODE-OF-CONDUCT-Loblaw_v001_m2f5h7.pdf>. The human rights, health and safety, and labour law obligations in the Supplier Code of Conduct are largely limited to compliance with local laws, and there is no reference to an audit process. Note that the supplier code of conduct does not appear to have been updated following the Savar Building Collapse.

62. Loblaw Companies Limited, Company Statement, “Loblaw Companies Limited Updated Statement on Bangladesh” (23 April 2014), online: <www.loblaw.ca/English/Media-Centre/announcements/default.aspx> [Loblaw Companies Limited, “Statement on Bangladesh”].

in Bangladesh.⁶³ Loblaw reports that since the building collapse it has “[i]ncreased the level of standards and inspections of all factories where its products are sourced” and “audited each of the dozens of factories in Bangladesh producing its goods”.⁶⁴ Loblaw also reports it has “created and stationed a team of employees in the region to ensure the rigour of factory audits and to monitor workplace conditions and local relationships”.⁶⁵

D. The Benefits of Voluntary Human Rights Due Diligence in Supply Chains

As with all corporate social responsibility initiatives, a corporation’s decision to carry out supply chain human rights due diligence is likely driven by multiple factors, and no one factor can be pinpointed as the main motivation.⁶⁶ However, there are three key drivers: pressure from consumers and investors, risk avoidance and deterring increased government regulation.⁶⁷

Many consumers and investors are concerned about the ethical impacts of their actions, making supply chain human rights due diligence an attractive corporate practice. In a 2010 study, 58% of Canadians considered themselves to be ethical consumers,⁶⁸ and almost 75% said that they would be willing to pay more for a “100 dollar” item if they were absolutely guaranteed that it was ethically made.⁶⁹ Similarly, a growing number of investors are concerned with the social and environmental

63. *Ibid.* The Accord for Fire and Building Safety in Bangladesh is an agreement signed by over 150 apparel corporations as well as a number of trade unions and non-governmental organizations that provides for independent factory safety inspections. See “Accord on Fire and Building Safety in Bangladesh” (13 May 2013), online: <bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf>.

64. Loblaw Companies Limited, “Statement on Bangladesh”, *supra* note 62.

65. *Ibid.*

66. See Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis Canada, 2009) at 52.

67. See Kerr, Janda & Pitts, *supra* note 66. There are a number of other factors not discussed here, including attracting and motivating employees, pressure from lenders and insurers, and a sense of moral obligation.

68. Abacus Data Research Series, “Ethical Consumerism and Canadians” (2010) at 5, online: <abacusdata.ca/wp-content/uploads/2011/01/CCSR-Ethical-Consumerism-Final.pdf>.

69. *Ibid* at 8.

impacts of their investments.⁷⁰ Accordingly, a corporation that carries out—or claims to carry out—due diligence stands to benefit financially by attracting consumers and investors.⁷¹

A related driver is the important risk avoidance role that human rights due diligence can play in assisting a corporation to identify, respond to and, where appropriate, disclose issues before they hurt its bottom line. It is increasingly difficult for a corporation to distance itself from human rights impacts in its supply chain, as corporations are subject to more supervision by the public and NGOs than ever before.⁷² This is demonstrated by the public outrage against corporations that sold garments manufactured in the Rana Plaza factory that collapsed in April 2013,⁷³ and recent calls for consumers to boycott retailers that sell Thai shrimp linked to slave labour.⁷⁴ As well as the direct impacts of reputational damage, Sherman and Lehr argue that corporations that do not carry out human rights due diligence in their supply chains are vulnerable to mismanagement claims by shareholders, who stand to lose money if human rights issues are revealed in a corporation's supply chain.⁷⁵ In addition, a corporation that claims to carry out human rights due diligence, but does not follow through, is vulnerable to misrepresentation claims by investors and

70. See Kerr, Janda & Pitts, *supra* note 66 at 45–49.

71. Businesses would of course balance this benefit against the costs of carrying out due diligence. See Ivanka Mamic, *Implementing Supplier Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains* (Geneva: International Labour Office & Greenleaf, 2004) at 339.

72. See Kerr, Janda & Pitts, *supra* note 66 at 47–49.

73. See e.g. Julhas Alam, “Joe Fresh Boycott?: Bangladesh Factory Collapse Stokes Anger Among Some Consumers”, *Huffington Post Canada* (26 April 2013), online: <www.huffingtonpost.ca>.

74. See Rebecca Smithers, “Slavery in Prawn Trade: Consumers Urged to Check Source of Seafood”, *The Guardian* (11 June 2014), online: <www.theguardian.com>. See also Kate Hodal, Chris Kelly & Felicity Lawrence, “Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK”, *The Guardian* (10 June 2014), online: <www.theguardian.com>.

75. John F Sherman III & Amy Lehr, “Human Rights Due Diligence: Is It Too Risky?” (2010) Corporate Social Responsibility Initiative Working Paper No 55 at 4–5, online: <www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf>.

consumers, as happened to Nike in the 1990s.⁷⁶ The importance of human rights due diligence as a risk avoidance tool is amplified by the Canadian securities continuous disclosure regime and the role of NCPs, which could expose a failure to carry out human rights due diligence to public or investor scrutiny.

Finally, a corporation may be motivated to carry out human rights due diligence in its supply chain in order to avoid increased government regulation.⁷⁷ By carrying out human rights due diligence voluntarily, corporations can demonstrate that formal government regulation is unnecessary, as such a proposal may be on the political agenda in the future.

II. Prima Facie Duty of Care to Workers in Global Supply Chains

Canadian courts have held that where a defendant has assumed responsibility to protect the plaintiff from injury caused by a third party, and the plaintiff has relied on the defendant's undertaking, the defendant may owe the plaintiff a duty of care.⁷⁸ Therefore, a Canadian corporation that has represented it will protect human rights in its global supply chain may owe a duty of care to reliant workers. However, this duty is novel and must be established using the two-step test formulated by the House of Lords in *Anns v London Borough Council*⁷⁹ and recently clarified by the Supreme Court of Canada in *Hill v Hamilton-Wentworth Regional Police Services Board*.⁸⁰ This Part addresses the first step of that test: whether the relationship between the plaintiff and the defendant discloses "sufficient foreseeability and proximity to establish a *prima facie*

76. See Elizabeth F Brown, "No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?" (2008) 26:2 Yale L & Pol'y Rev 367 at 391-95.

77. See Janelle Diller, "A Social Conscience in the Global Marketplace?: Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives" (1999) 138:2 Intl Labour Rev 99 at 101.

78. See *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at paras 28-36, [2010] 1 SCR 132 [*Fullowka*].

79. [1977] UKHL 4.

80. 2007 SCC 41 at para 20, [2007] 3 SCR 129 [*Hill*].

duty of care”.⁸¹ Given the scarcity of case law addressing a duty of care to workers in global supply chains, I discuss relevant authorities from Canada, the United Kingdom and the United States. Part III will then address the second step in the duty of care inquiry: whether there are “any residual policy considerations which ought to negate or limit that duty of care”.⁸²

For the purposes of this analysis, I use the following hypothetical claim (the Hypothetical Claim): The defendant corporation has publicly represented that it requires suppliers to comply with minimum human rights standards (for example, in respect to health and safety, and hours of work), it monitors compliance with those standards, and it responds to identified breaches by either requiring improvements or terminating the relationship. In Alternative A, the corporation failed to monitor or respond to human rights impacts in its supply chain. In Alternative B, the corporation did monitor or respond to human rights impacts, but the plaintiff alleges that it did so negligently.

A. Foreseeability

The first step of the *Anns* test asks whether the relationship between the plaintiff and the defendant discloses sufficient foreseeability and proximity to establish a prima facie duty of care. It is straightforward for a prospective plaintiff to establish foreseeability (the first requirement): If a Canadian corporation has undertaken to protect human rights in its supply chain and has done so negligently, it is reasonably foreseeable that workers in its suppliers’ factories could be harmed. For example, BlackBerry expressly recognizes that “there is the potential for unethical social and environmental practices” in its supply chain, and that its supply chain social responsibility program is a response to this risk.⁸³ Further, a corporation that has carried out a degree of monitoring will also be aware of the specific risks in each worksite.

81. *Ibid* at para 30.

82. *Ibid* at para 20.

83. BlackBerry Limited, “Corporate Responsibility Report”, *supra* note 59.

B. Proximity

Canadian courts have not yet considered whether the relationship between a Canadian corporation and a worker in its global supply chain could be sufficiently proximate to support a duty of care. However, existing authorities that consider the imposition of a duty of care outline key principles for assuming a responsibility to protect and potentially lay the groundwork for such a claim.

(i) Liability for Failure to Protect from Harm Inflicted by a Third Party

The core question in the proximity inquiry is whether the relationship was “sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved”.⁸⁴ As noted by the Supreme Court in *Childs v Desormeaux*, it is unusual for the courts to impose a duty to protect others: “[G]enerally the mere fact that a person faces danger . . . does not impose any kind of duty on those in a position to become involved”.⁸⁵ However, the Supreme Court identified three factors which can indicate a positive duty to protect: control, autonomy and reliance.⁸⁶

The *Childs* factors were affirmed in the Supreme Court’s later decision in *Fullowka v Pinkerton’s of Canada*.⁸⁷ *Fullowka* arose from the 1992 bombing at Giant Mine near Yellowknife by a striking miner who had been dismissed.⁸⁸ The families of the miners killed in the bombing brought a negligence action against Pinkerton’s, the security company hired to protect the mine during the strike, as well as against the trade union involved in the strike and the Government of the Northwest Territories.⁸⁹ Though the Supreme Court of Canada ultimately rejected all three claims, they accepted that Pinkerton’s owed a prima facie duty of care as a result of having assumed the responsibility of protecting the

84. *Fullowka*, *supra* note 78 at para 26. See also *Hill*, *supra* note 80 at paras 23–24, 29.

85. 2006 SCC 18 at para 31, [2006] 1 SCR 643 [*Childs*].

86. *Ibid* at paras 34–41.

87. *Childs* concerned the liability of social hosts, so the ultimate finding of the Court (rejecting a duty of care) is not directly applicable to the Hypothetical Claim.

88. *Supra* note 78 at paras 3–9.

89. *Ibid* at para 12.

miners from the danger posed by the strike.⁹⁰ *Fullowka* is important for the Hypothetical Claim because it addressed the same broad proposition: In what circumstances is a person directly liable for failing to protect another person from harm caused by a third party? The three *Childs* factors and their application to the Hypothetical Claim are summarized below.

a. Control

The first *Childs* factor is “the defendant’s material implication in the creation of risk or his or her control of a risk to which others have been invited”.⁹¹ In previous authorities where a defendant was found to control the relevant risk, the defendant both had a physical presence at the site of the risk and was either responsible for operating that site or contractually obligated to protect the plaintiffs from the risk. For example, in *Fullowka*, Pinkerton’s was specifically engaged to protect the mine and had employees stationed at the mine for that purpose.⁹² Similarly, in *Crocker v Sundance Northwest Resorts Ltd*, the Supreme Court of Canada held that the operator of an inner tubing event owed a duty of care to a person injured while participating visibly drunk, where the defendant operator’s own employees were in charge of how the event was run.⁹³

Some prospective plaintiffs in the Hypothetical Claim may be able to establish that the defendant’s employees were responsible for inspecting its suppliers’ factories or supervising the inspections. For example, as noted above, Loblaw asserts that its own employees are responsible for monitoring workplace conditions in Bangladesh.⁹⁴ However, often the defendant would not have a physical presence at the relevant factory or have a contractual obligation to protect its suppliers’ workers. Nonetheless, a Canadian corporation that determines the working

90. The Court also found that there were no residual policy considerations that negated the prima facie duty of care. *Ibid* at para 75. However, the Court held that Pinkerton’s had not breached its duty of care. *Ibid* at para 96.

91. *Supra* note 85 at para 38.

92. *Supra* note 78 at paras 28, 32.

93. [1988] 1 SCR 1186 at 1197, 51 DLR (4th) 321 [*Crocker*] (the defendant was also responsible for creating the risk in that case because it had set up an inherently dangerous event and provided alcohol to the individual that was injured).

94. Loblaw Companies Limited, “Statement on Bangladesh”, *supra* note 62.

conditions in its suppliers' factories through a supply contract and has substantial leverage over suppliers could have sufficient control over the risk of human rights abuses, despite not having a physical presence in the factory (although a physical presence would strengthen the claim). The question should be whether in practice the defendant has control of the risk, even if that control is not derived from physical presence, ownership or a contractual obligation. Large buyers (or smaller buyers acting collectively)⁹⁵ have the ability to effectively dictate the working conditions in the factories they buy from and therefore have a high degree of contractual and practical control over suppliers' operations.⁹⁶ A buyer would also have substantial leverage over a supplier where, for example, it has the contractual ability to require the supplier to change its practices following a negative inspection. Finally, although ordinarily the defendant corporation would not have created the risk (unless, for example, the defendant instructed its suppliers to use unsafe machinery or operate in an unsafe way), a prospective plaintiff's claim would be strengthened if the defendant was responsible for amplifying the risk of human rights abuses in its supply chain (by, for example, imposing strict time frames and budgets).

b. Autonomy

The second *Childs* factor seeks to protect the autonomy of persons affected by the positive duty proposed.⁹⁷ The specific concern is to protect the right of people to "engage in risky activities" and the right of bystanders to choose not to intervene.⁹⁸ The Supreme Court in *Fullowka* rejected the notion that imposing a duty of care would interfere with the miners' autonomy, noting that although the miners had decided to

95. This is encouraged by the UN Guiding Principles. See *Guiding Principles*, *supra* note 8 at Annex, Commentary to Principle 19. Issues of breach and causation (which are outside the scope of this article) would be particularly challenging if the defendant only had control of the supplier through its involvement in a buyers' collective.

96. See Ian Sadler, *Logistics and Supply Chain Integration* (London, UK: Sage Publications, 2007) at 178.

97. *Supra* note 85 at para 39. Note that although *Fullowka* approved this factor as part of the prima facie duty inquiry, the Court went on to consider it as part of the residual policy issues. See *Fullowka*, *supra* note 78 at para 61.

98. *Childs*, *supra* note 85 at para 39. See also *Fullowka*, *supra* note 78 at para 27.

continue working, “they made that choice in light of the assurances given to them”.⁹⁹ Similarly, although the plaintiffs in the Hypothetical Claim have knowingly chosen to work in factories where there may be some risk of human rights abuses, they may have done so in light of the assurances made by the defendant to monitor compliance with specified minimum conditions and respond to breaches. Additionally, some plaintiffs will not have a choice about whether or not to work in an unsafe environment or for insufficient pay. In such cases it would be entirely inappropriate to reject a duty of care out of concern for the plaintiffs’ autonomy to “engage in risky activities”.¹⁰⁰

Concern for the defendant’s autonomy, if a duty were imposed in the Hypothetical Claim, is a somewhat more cogent issue. The Supreme Court in *Fulowka* held that imposing a duty on Pinkerton’s would not interfere with Pinkerton’s right to “choose not to intervene”, noting in particular that Pinkerton’s had surrendered much of its autonomy by entering into a contract to guard the miners.¹⁰¹ A prospective plaintiff in the Hypothetical Claim will likely be unable to point to a contractual undertaking to inspect.¹⁰² Nonetheless, a Canadian corporation that has publicly stated it will monitor and respond to human rights issues in its supply chain and has benefited from these statements (for example, by improving its public image) cannot be said to be a “mere bystander”.¹⁰³ Accordingly, I suggest that imposing a duty of care would not unreasonably interfere with the defendant’s autonomy.

c. Reasonable Reliance

The final factor identified in *Childs* is reasonable reliance.¹⁰⁴ This factor requires the plaintiffs to establish that they have relied on the defendant’s undertaking and that the defendant would reasonably expect such

99. *Fulowka*, *supra* note 78 at para 65.

100. Some prospective plaintiffs’ lack of choice is also relevant to the reliance enquiry. See below.

101. *Supra* note 78 at paras 62–63.

102. This was the Ninth Circuit’s finding in *Wal-Mart Stores*. See *Wal-Mart Stores* 9th Cir, *supra* note 6 at 682.

103. *Fulowka*, *supra* note 78 at para 66.

104. *Supra* note 85 at para 40; *Fulowka*, *supra* note 78 at para 27.

reliance.¹⁰⁵ Establishing reasonable reliance in the Hypothetical Claim will be a considerable hurdle. Superficially, workers in a Canadian company's supply chain are in a similar position to the miners in *Fallowka*: Both are exposed to risks in their workplace, and the defendant has represented that it will protect them. However, underlying the Supreme Court's decision in *Fallowka* was an assumption that the miners had a choice about whether or not to continue their employment at the mine. The Court held that the miners continued to attend work in reliance on the defendant security contractors taking reasonable precautions to reduce the risk.¹⁰⁶ Workers in the Hypothetical Claim however may not have a real choice about working for an employer that breaches human rights (for example, due to the absence of social welfare, a competitive labour market or because all factories in the area have similarly poor working conditions) and may not have sufficient bargaining power to negotiate better conditions. Indeed, the requirement for reasonable reliance would produce the perverse result that plaintiffs with the greatest employment options or bargaining power might have a claim, but the most vulnerable workers would not, even though the defendant's action was identical in each case.

However, some employees, particularly in Alternative B, may be able to establish reasonable reliance. I address three particular challenges for a prospective plaintiff in establishing reasonable reliance: lack of knowledge of human rights policies, lack of reliance on the policies in choosing their workplace and unreasonable reliance.

The first challenge for a prospective plaintiff would be to establish that he knew the defendant corporation had a policy of protecting human rights in its supply chain. Although corporations often publish their human rights policies online,¹⁰⁷ it does not necessarily follow that

105. See *Fallowka*, *supra* note 78 ("whether the plaintiff reasonably relied on the defendant to avoid and minimize risk and whether the defendant, in turn, would reasonably expect such reliance" at para 27); *Childs*, *supra* note 85 ("there is no evidence that anyone relied on the hosts in this case" at para 46). Note that plaintiffs could alternatively establish that their position has been otherwise aggravated because third parties that would have protected the plaintiffs did not do so in reliance on the Canadian corporation's undertaking. This possibility is discussed in more detail below.

106. *Fallowka*, *supra* note 78 at paras 28–31, 65.

107. Both Canadian Tire and BlackBerry publish their human rights policies online. See the text accompanying notes 54–60.

foreign workers will be aware of the policy, particularly as the policies published online typically only appear in English. However, in light of the UN Guiding Principles, a corporation may provide information about its monitoring and enforcement procedures to workers in its supply chain more directly.¹⁰⁸ In Alternative B, where inspections are in fact being carried out by or on behalf of a Canadian corporation, a worker's claim would be bolstered if she was aware that the defendant corporation was responsible for the inspections. This is easier for plaintiffs who work for a supplier that only manufactures products for the defendant corporation (or where the defendant corporation is the main client), rather than for plaintiffs who work for a supplier with multiple clients, where the plaintiff may be aware that inspections are carried out, but would not attribute the inspections to the defendant.

Assuming that some prospective plaintiffs could establish that they were aware of the defendant corporation's policy, the next challenge would be to establish that, like the miners in *Fullowka*, the plaintiffs decided to work for the particular employer or took some other action in reliance on the policy. This would be difficult to establish in many cases. However, plaintiffs who have a choice about where to work may be able to establish that they chose to work for a particular employer because they believed the defendant corporation would require the employer to uphold minimum working conditions. For example, Phillips and Lim researched Vietnam's athletic footwear sector and found that 50% of surveyed employees stated that "comfortable working conditions" were the main reason that they choose to work for a particular employer. By contrast, only 2.5% stated that the main reason was high wages.¹⁰⁹ Similarly, Richard Record, Stephanie Kuttner and Kabmanivanh Phouxay found that low wages and working hours (particularly excessive overtime demands) were two of the main reasons that garment workers in Lao decided to stop working for a particular employer.¹¹⁰ Further, where an employee is aware that inspections are in fact being carried out, she may

108. *Guiding Principles*, *supra* note 8 at Annex, Principle 18.

109. Phillips & Lim, *supra* note 7 at 358.

110. Richard Record, Stephanie Kuttner & Kabmanivanh Phouxay, "Voting with Their Feet?: Explaining High Turnover and Low Productivity in the Lao Garment Sector" in Arianna Rossi, Amy Luinstra & John Pickles, eds, *Towards Better Work: Understanding Labour in Apparel Global Value Chains* (Basingstoke, UK: Palgrave Macmillan & International Labour Organization, 2014) 148 at 165.

have relied on those inspections as evidence that a particular piece of machinery or chemical was safe and would otherwise have made enquiries about the safety of the equipment, refused to use it or reported it to a third party.¹¹¹

Finally, a prospective plaintiff must establish that her reliance on the defendant corporation was reasonable. In *Fullockka*, the Supreme Court found that the miners' reliance was reasonable because of the defendant's presence at the mine and the assurances given to the miners.¹¹² In Alternative A, it would be difficult to establish that any reliance was reasonable where the plaintiff was aware that the defendant was not monitoring or enforcing minimum human rights standards. Equally, it would be difficult to argue that reliance is reasonable if it should have been obvious to the plaintiffs that the defendant was turning a blind eye to human rights issues that violated its policy. However, the reasonableness requirement can probably be satisfied in circumstances where the defendant appears to be monitoring and responding to human rights issues in its supply chain in accordance with its representations.

(ii) Aggravation of Position as Reasonable Reliance

If a prospective plaintiff cannot establish that she reasonably relied on the defendant's undertaking, reliance could still possibly be established if there is evidence that a third party relied on the undertaking and this reliance aggravated the plaintiff's plight. This was the case in *Goodwin v Goodwin*, a decision of the British Columbia Court of Appeal.¹¹³ The defendant in *Goodwin* was contracted by the local authority to keep roads clear from ice.¹¹⁴ The defendant advised the local authority that it would remove ice from a particular road but failed to do so once it realized that the road fell outside its contract. The plaintiff was then injured in an accident caused by the ice.¹¹⁵ The plaintiff did not know that the defendant had undertaken to remove the ice. However, the Court held that there was a duty of care because if the defendant had not undertaken to remove ice from a road, the local authority would have made other arrangements

111. See Phillips & Lim, *supra* note 7 at 358.

112. *Supra* note 78 at para 32.

113. 2007 BCCA 81 at para 31, 279 DLR (4th) 227 [*Goodwin*].

114. *Ibid* at para 2.

115. *Ibid* at paras 1–2.

for its removal. Therefore, the plaintiff's position was made worse by the defendant's undertaking.¹¹⁶

Applying this reasoning to the Hypothetical Claim, it may be possible to establish that the defendant's policy has aggravated the plaintiff's plight. This would be the case, for example, if there was evidence that a trade union, NGO or the media would have supervised or reported on human rights issues or advocated for workers in a particular factory, but did not do so in reliance on the Canadian corporation's representations.¹¹⁷ Another example would be where the supplier itself would have carried out appropriate (or more appropriate) safety inspections but did not do so in reliance on the defendant corporation.¹¹⁸

(iii) Abandoning the Reliance Requirement

Given the disconnect between the Canadian context in which the reliance requirement was developed and the reality for many vulnerable workers in global supply chains, I argue that there are compelling reasons for the court to find that prospective plaintiffs in the Hypothetical Claim do not need to establish reasonable reliance. Although *Childs* and *Fullowka* identified reasonable reliance as a factor that is ordinarily present in cases where a duty to protect is appropriate, the Supreme Court made it clear in its earlier decision in *Cooper v Hobart* that "[t]he factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case."¹¹⁹ There are no mandatory factors; rather the overriding question is whether it is "just and fair", having regard to the closeness of the relationship between the plaintiff and the defendant, to impose a duty of care on the defendant.¹²⁰

In addition to the factors of control and autonomy discussed above, representations by the defendant that it will take action for the plaintiff's

116. *Ibid* at paras 30-31.

117. Phillips & Lim, *supra* note 7 at 358.

118. *Ibid*. Phillips and Lim state that "many suppliers apparently rely on buyers' assistance in health and safety matters. Those we interviewed generally acknowledged the need for buyer support in achieving code compliance." *Ibid*.

119. 2001 SCC 79 at para 35, [2001] 3 SCR 537 [*Cooper*]. See also *Hill*, *supra* note 80 at para 24.

120. *Cooper*, *supra* note 119 at para 34.

benefit can indicate proximity,¹²¹ as can the fact that the defendant has benefited economically from the circumstances giving rise to the risk.¹²² Finally, it was noted in *Childs* that “the vulnerability of the [plaintiff] and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk”.¹²³ Though this statement was made regarding paternalistic relationships (such as between a teacher and a student), it recognizes that a duty of care can be established by high levels of control, coupled with the particular vulnerability and dependence of the plaintiff. Accordingly, in circumstances where it is not possible for the plaintiff to establish reasonable reliance due to his own vulnerability, it may be “just and fair” to impose a duty of care in the absence of reliance because the defendant receives an economic benefit from utilizing cheaper labour abroad, has represented that it will protect workers in its global supply chain, has benefited from those representations, and has the ability to influence conditions in the factory where the plaintiff works. Further, a claim would be strengthened if the defendant knew that its undertaking was the main protective mechanism for employees in its supply chain.¹²⁴

However, I recognize that Canadian courts, lower courts in particular, would likely be reluctant to abandon the reliance requirement because it would be a significant departure from both the approach taken in *Childs* and *Fullowka* and the general principle that a duty to protect is a limited exception to the rule against a duty to take positive action.¹²⁵

C. Direct Liability of Parent Company for Harm Caused by Subsidiary's Operations

A prospective plaintiff could also be assisted by an emerging principle in Canadian and English law that a parent company can be directly

121. See *ibid*; *Hill*, *supra* note 80 at para 24. See also *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 at paras 67–69, 116 OR (3d) 674 [*Hudbay Minerals*].

122. See *Crocker*, *supra* note 93 at para 24.

123. *Childs*, *supra* note 85 at para 38.

124. These were the facts in *Wal-Mart Stores*, where the defendant was aware that in many cases its auditing process was the main law enforcement mechanism for labour conditions in its supplier's factories. See *Doe I v Wal-Mart Stores*, 2007 WL 5975664 (Cal Dist Ct) [*Wal-Mart Stores DC*].

125. *Childs*, *supra* note 85 at paras 31–34.

liable for harm caused by a subsidiary's operations where it has assumed responsibility to protect the plaintiffs from the relevant harm. The relationship between buyer and supplier is not as close as the relationship between a parent company and its subsidiary, where the parent has direct control over the actions of its subsidiary through voting powers. Nonetheless, where a buyer has significant control over its suppliers' operations and, more specifically, its human rights performance, the relationship may parallel the relevant aspects of the parent/subsidiary relationship that supports liability. Canadian courts have not yet made a final determination on direct parent company liability; however, the Ontario Superior Court refused to strike out claims of this nature in the decisions *United Canadian Malt Ltd v Outboard Marine Corporation of Canada Ltd*¹²⁶ and *Choc v Hudbay Minerals*.¹²⁷ Direct parent company liability is also supported by the recent decision of the English Court of Appeal in *Chandler v Cape Plc*.¹²⁸

(i) Canadian Authority

Direct parent company liability for the harm caused by a subsidiary's operations was first considered in Canada by the Ontario Superior Court of Justice in *United Canadian Malt*. The defendant in *United Canadian Malt* was an American corporation with a Canadian subsidiary. The plaintiff claimed that chemicals used on the Canadian subsidiary's property migrated to the plaintiff's property. The plaintiff's claim alleged that the parent "effectively controlled" its subsidiary. Specifically, it was alleged that the American parent "managed, directed and controlled" the clean-up of the subsidiary's property, had represented that it was responsible for the environmental problems arising from its subsidiary's business and had stripped assets from the subsidiary after discovering the contamination.¹²⁹ Though the Court held that the plaintiff had an arguable case for piercing the corporate veil and holding the parent company liable for the subsidiary's torts, the Court also suggested that the American parent could be directly liable (i.e., without piercing the

126. (2000), 48 OR (3d) 352, 96 ACWS (3d) 948 (Sup Ct J) [*United Canadian Malt*].

127. *Supra* note 121.

128. [2012] EWCA Civ 525 [*Chandler*].

129. *United Canadian Malt*, *supra* note 126 at paras 22–23.

corporate veil) on the basis that it had assumed responsibility for the contamination problem.¹³⁰

The Ontario Superior Court of Justice considered this issue again in 2013 in *Hudbay Minerals*¹³¹—another motion to strike. The plaintiffs in *Hudbay Minerals* were indigenous Guatemalans that lived in a community where the Guatemalan subsidiary of a Canadian mining corporation operated. The plaintiffs alleged that a security company working for the Guatemalan subsidiary committed serious human rights abuses (including rape and murder) when removing local residents from their land for the purposes of the mining operation.¹³² The plaintiffs brought a claim against the Guatemalan subsidiary and the Canadian parent. The Superior Court refused to strike out the claim against the parent company. The Court specifically relied on the fact that the parent company had made public statements that it was committed to promoting human rights in its Guatemalan operations (including claiming to have conducted extensive training of security personnel), which would have led to expectations on the part of the plaintiffs.¹³³ Therefore, this decision recognizes that public statements by a corporation to protect a third party can indicate a relationship of proximity.¹³⁴

(ii) English Jurisprudence

a. Decision of English Court of Appeal in *Chandler v Cape Plc*

While Canadian courts have yet to make a final determination on direct parent company liability, the English Court of Appeal recently confirmed in *Chandler* that under English law, a parent company may in “appropriate circumstances” be directly responsible for the health

130. *Ibid* at para 24.

131. At the date of writing, *Hudbay Minerals* has not settled and is proceeding to trial.

132. *Hudbay Minerals*, *supra* note 121 at para 4.

133. *Ibid* at paras 68–69, 79.

134. It should be noted that the plaintiffs in *Hudbay Minerals* also alleged that the parent company’s executives and employees were *directly* in charge of on-the-ground operations at the relevant site and had control over security personnel. *Ibid* at para 67. However, these allegations were not expressly relied upon by the Superior Court. Though a defendant corporation in the Hypothetical Claim may have less control than that alleged in *Hudbay Minerals*, I argue that it may still have sufficient leverage to require its suppliers to respect specified minimum standards in their factories.

and safety of its subsidiary's employees.¹³⁵ Though the appropriate circumstances highlighted by the Court of Appeal are specific to the parent/subsidiary relationship, the relevant parallels to the buyer/supplier relationship can inform the Hypothetical Claim.

The plaintiff in *Chandler* had contracted asbestosis from exposure to dust while employed by Cape Products, a subsidiary of Cape Plc.¹³⁶ The asbestos business was legally owned and operated by Cape Products, but Cape Plc maintained a "certain level of control" over Cape Products. Cape Plc was not responsible for implementing health and safety measures at Cape Products or for devising or implementing operational health and safety policies. However, there was evidence that Cape Plc involved itself in particular issues relating to health and safety policy at Cape Products. In particular, Cape Plc had been involved in the question of whether an employee diagnosed with asbestosis could continue to be employed. Cape Plc had superior knowledge about the asbestos business because it operated its own asbestos factories and had greater resources than Cape Products. Cape Plc was aware of the link between asbestos production and asbestosis because its group medical adviser was engaged in research on this issue and was aware that Cape Product's asbestos business was carried out in a way that exposed employees.¹³⁷ The plaintiff brought a negligence claim against Cape Plc, arguing that it owed him a direct duty of care to advise on or ensure a safe work environment.¹³⁸ The Court of Appeal upheld the plaintiff's claim.¹³⁹

There is a significant parallel between the amount of control the parent company in *Chandler* had over its subsidiary's health and safety operations and the amount of control some buyers have over their suppliers. The defendant corporation in the Hypothetical Claim would have less control over its suppliers' general business operations than Cape Plc had over Cape Products.¹⁴⁰ However, a corporation contractually

135. *Supra* note 128 at para 80.

136. *Ibid* at paras 1-3 (the plaintiff worked for the brick manufacturing arm of Cape Products and was exposed to dust from an asbestos factory operated by Cape Products on the same site).

137. *Ibid* at paras 73-79.

138. *Ibid* at para 1.

139. *Ibid* at para 79.

140. Cape Products was a wholly owned subsidiary of Cape Plc, and the two companies had directors in common. *Ibid* at paras 8, 10.

empowered to monitor and respond to specific human rights issues in a supplier's factories has at least as much control over specific human rights issues as Cape Plc had over Cape Products. In addition, in Alternative B the defendant would also have ongoing involvement in issues relevant to health and safety policy as in *Chandler*.¹⁴¹ Indeed, it would have gone further than *Chandler* by carrying out monitoring, and therefore taking a more general responsibility for on-the-ground implementation of health and safety policies and the management of human rights issues.¹⁴²

While the factual overlap would assist a prospective plaintiff in the Hypothetical Claim, the Court of Appeal in *Chandler* identified four factors relevant to a duty of care, two of which would be difficult to apply to most buyer/supplier relationships. After summarizing Cape Plc's involvement in Cape Products' operations, the Court of Appeal concluded that "in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees".¹⁴³ The Court then set out the four factors that, in the case before it, supported a duty of care:

(1) the *businesses of the parent and subsidiary are in a relevant respect the same*; (2) the parent *has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry*; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.¹⁴⁴

Read literally, the Court of Appeal's first factor, that the "businesses" of the parent and the subsidiary in *Chandler* were "in a relevant respect the same",¹⁴⁵ suggests a requirement that the parent and the subsidiary are operated as one, at least in respect of the relevant risk. However, in the context of the overall decision, it seems unlikely that the Court of Appeal intended such a high threshold. This is evidenced by the Court of Appeal's acceptance that health and safety was not, on the whole, centrally managed by Cape Plc: There was no evidence that Cape Plc

141. *Ibid* at para 76.

142. The Court of Appeal accepted that Cape Plc was not responsible for the actual implementation of health and safety measures at Cape Products. *Ibid* at para 74.

143. *Ibid* at para 80.

144. *Ibid* [emphasis added].

145. *Ibid* at para 80.

dictated Cape Products' health and safety policy or was responsible for the actual implementation of health and safety measures at Cape Products. The issue was rather whether Cape Plc was expected to take steps or give advice about asbestos risk at the Cape Products' factory, given that Cape Plc had involved itself in some matters of health and safety policy (specifically whether the employee with asbestosis could remain employed) and maintained a degree of control over Cape Products (for example, in relation to capital expenditure and product design).¹⁴⁶ An alternative meaning of "relevantly the same" suggested by Andrew Sanger is that the parent and the subsidiary in *Chandler* produced the same product.¹⁴⁷ This factor is not stressed in the judgment, and it is difficult to see how the overlap in business product is, of itself, crucial to the establishment of a duty of care. However, if a Canadian court adopts this factor in the buyer/supplier context, it would not be satisfied in the Hypothetical Claim, where typically the supplier's business produces the relevant product and the defendant's business sells it.¹⁴⁸

The second problematic factor from *Chandler* concerns asymmetrical information—that a parent had, or ought to have had, superior knowledge of some aspect of health and safety in the particular industry.¹⁴⁹ An example of asymmetrical information would be where a defendant corporation knows more about the danger of a particular piece of equipment than its offshore supplier. However, asymmetric information would not be present where the defendant corporation had allegedly failed to monitor or respond to unsafe work hours or inadequate wages. It could be argued however that the purpose of the asymmetric information factor in the English Court of Appeal's reasoning was to limit a duty of care to circumstances where it should have been obvious to the defendant that the relevant employer would not address the risk unless the defendant intervened, which would often be the case in the circumstances of the Hypothetical Claim.

146. *Ibid* at paras 72–74.

147. Andrew Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary" (2012) 71:3 Cambridge LJ 478 at 480. This was the interpretation taken by the Dutch District Court in the Shell Nigeria Litigation, discussed below.

148. Although in some cases a defendant may operate its own factories, as well as sourcing materials or products from abroad.

149. *Chandler*, *supra* note 128 at para 80.

More generally, it must be stressed that the Court of Appeal did not frame the four factors as compulsory requirements, but rather as an example of the circumstances where it is appropriate to find a duty.¹⁵⁰ Therefore, when addressing a buyer/supplier relationship it may be appropriate for a court to find a duty of care even though not all of the factors identified in *Chandler* are present, particularly if there is evidence of a high degree of control and involvement by the buyer in its suppliers' human rights practices.

b. Application of *Chandler v Cape Plc* by Hague District Court in Shell Nigeria Litigation

The Hague District Court recently rejected an attempt by Nigerian fishermen and farmers to apply the *Chandler* decision to three cases against Shell parent companies in circumstances similar to the Hypothetical Claim (the Shell Nigeria Litigation).¹⁵¹ However, a court considering the Hypothetical Claim would be unlikely to give much weight to these decisions due to their unusual origin and issues with the Hague District Court's reasoning.

The plaintiffs in the Shell Nigeria Litigation alleged that they suffered damage due to oil pollution from installations operated by Shell Nigeria and brought a claim against two Shell parent companies, as well as Shell Nigeria itself. The Hague Court applied Nigerian law, but relied heavily on English jurisprudence, particularly *Chandler*. The plaintiffs argued that the Shell parent companies owed them a duty of care because they

150. *Ibid.*

151. District Court of the Hague, 30 January 2013, *Akpan v Royal Dutch Shell PLC*, No C/09/337050 / HA ZA 09-1580 (Netherlands), online: <milieudedefensie.nl> [*Akpan*]; District Court of the Hague, 30 January 2013, *Dooh v Royal Dutch Shell PLC*, No C/09/337058 / HA ZA 09-1581 (Netherlands), online: <milieudedefensie.nl>; District Court of the Hague, 30 January 2013, *Dooh v Shell Petroleum NV*, No C/09/365482 / HA ZA 10-1665 (Netherlands), online: <milieudedefensie.nl>; District Court of the Hague, 30 January 2013, *Oguru v Royal Dutch Shell PLC*, No C/09/330891 / HA ZA 09 0579 (Netherlands), online: <milieudedefensie.nl>; District Court of the Hague, 30 January 2013, *Oguru v Shell Petroleum NV*, No C/09/365498 / HA ZA 10-1677 (Netherlands), online: <milieudedefensie.nl>. Although the Hague District Court issued separate decisions in *Akpan*, *Dooh* and *Oguru*, its reasoning in respect of parent company liability was the same in each decision. All three decisions have been appealed. See Milieudedefensie, "Appeal Filed on 1 May 2013", online: <milieudedefensie.nl/english/shell/courtcase/press>.

were aware of the risk of oil spills in Nigeria, had publicly announced that they intended to prevent oil spills in Nigeria, and in practice interfered with and exercised influence on the subsidiary's activities in Nigeria. The Hague District Court found those factors were insufficient to give rise to a duty of care for five particular reasons. First, the relationship between a parent company and the employees of its local subsidiary (as in *Chandler*) is closer than the relationship between a parent company and persons living in the community where a local subsidiary operates.¹⁵² Second, Shell's subsidiary was only indirectly responsible for the oil spill, as the court found the oil spill was caused by sabotage,¹⁵³ whereas in *Chandler* the subsidiary had directly harmed its employees by allowing them to work in an unsafe work environment.¹⁵⁴ Third, the businesses of the parent companies and the subsidiary were not "essentially the same" because the parent companies "formulate[d] general policy lines . . . and [were] involved in worldwide strategy and risk management", whereas the subsidiary was involved solely in the production of oil in Nigeria.¹⁵⁵ Fourth, it was not clear that the Shell parent companies had more knowledge of the specific risks of an oil spill than the subsidiary, which was directly engaged with operations in Nigeria.¹⁵⁶ Finally, because the Nigerian subsidiary was the party on the ground with greatest awareness of local conditions, it was not clear why the community would rely on the parent corporation to protect it from oil spills.¹⁵⁷

The Shell Nigeria Litigation has limited persuasive value for the Hypothetical Claim because it was decided by a Dutch court applying English law via Nigerian law. Additionally, the Dutch Court's reasoning is problematic in three ways. First, the Court appears to have treated the collection of factors identified in *Chandler* as mandatory requirements, rather than as an example of where a duty could arise, as they were framed by the English Court of Appeal.¹⁵⁸ Secondly, the distinction between

152. See e.g. *Akpan*, *supra* note 151 at para 4.29.

153. *Ibid* at para 4.21.

154. *Ibid* at para 4.30.

155. *Ibid* at para 4.31.

156. *Ibid*.

157. *Ibid*.

158. *Ibid* at para 4.28.

offshore and local subsidiaries is not supported by *Chandler*.¹⁵⁹ Finally, the indirect cause of the oil spill should not be relevant in assessing whether a parent company has a duty of care to take steps to prevent oil spills as a result of its subsidiary's activities. The Dutch Court should only have considered this factor as part of its breach and causation analyses. In light of these issues, the Shell Nigeria Litigation demonstrates, at most, the factual difficulty of establishing reasonable reliance where a third party (the subsidiary in this case; the supplier in the Hypothetical Claim) also has a degree of responsibility to protect the plaintiffs.¹⁶⁰

D. The Ninth Circuit's Decision in Doe I v Wal-Mart Stores

Finally, although not binding on a Canadian court, the American Ninth Circuit's decision in *Wal-Mart Stores* must be addressed because it is the only decision to consider the duty of a buyer to protect workers in its global supply chain in circumstances similar to those of the Hypothetical Claim. I argue that the Ninth Circuit's decision should not inform a Canadian court's inquiry because it is based on a preliminary question specific to American law and because the Ninth Circuit conflated an undertaking to protect with a contractual duty, which is inconsistent with Canadian authorities.

The plaintiffs in *Wal-Mart Stores* were employed by Wal-Mart's suppliers in a number of countries including China, Bangladesh, Indonesia, Swaziland and Nicaragua.¹⁶¹ Wal-Mart's contract with those suppliers included a code of conduct requiring the suppliers to comply with local labour laws and industry standards (the Wal-Mart Standards).¹⁶²

159. The Court of Appeal referenced with apparent approval the Queen's Bench decision in *Connelly v Rio Tinto Zinc Corp PLC (No 3)*, where the Court found it was arguable that a parent company owed a duty of care to employees of its offshore subsidiary. *Connelly v Rio Tinto Zinc Corp PLC (No 3)*, [1999] CLC 533 (QB); *Chandler*, *supra* note 128 at para 66. For a comprehensive discussion of English authority up to and including *Chandler*, see Richard Meeran "Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations" in Deva & Bilchitz, *supra* note 2, 378 at 386-93.

160. This is a factual rather than legal difficulty because the English Court of Appeal in *Chandler* appears to have accepted that a parent company may owe a duty of care in circumstances where the subsidiary also owed a duty of care. *Chandler*, *supra* note 128 at paras 66, 81.

161. *Wal-Mart Stores* 9th Cir, *supra* note 6 at 680.

162. *Ibid.*

The supply contract also provided that Wal-Mart would undertake affirmative measures to implement and monitor these standards, such as on-site inspection of production facilities (which were in fact carried out).¹⁶³ Failure to comply with these standards could result in Wal-Mart terminating the business relationship.¹⁶⁴ The supply contract further required suppliers to post a local language copy of the Wal-Mart Standards in their factories.¹⁶⁵

In addressing the claim, the Ninth Circuit relied on the California Supreme Court's summary of the principle of negligent undertaking in *Delgado v Trax Bar & Grill*, which provides that:

[A] volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (a) the volunteer's failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result.¹⁶⁶

As can be seen, conditions (a) and (b) of the test overlap substantially with the Canadian requirements for aggravation of position or reasonable reliance.

However, the Ninth Circuit focused on the preliminary issue of whether Wal-Mart had "undertake[n] to provide protective services" to the plaintiffs.¹⁶⁷ Wal-Mart argued this required a "clear, express, active undertaking".¹⁶⁸ Earlier in its decision, the Ninth Circuit had rejected an alternative claim based on third party beneficiary of contract, holding that Wal-Mart had simply reserved the right to inspect its suppliers' factories, but had not adopted a duty to inspect. This was primarily

163. *Ibid.*

164. *Ibid.*

165. *Wal-Mart Stores DC*, *supra* note 124 at para 4. Note however that the statement that Wal-Mart would monitor compliance with the Wal-Mart standards was contained in the supply contract itself, which was not posted. *Wal-Mart Stores DC*, *supra* note 124 (Oral argument at 00h:18m:20s), online: <www.ca9.uscourts.gov/media/view.php?pk_id=0000003403>.

166. 113 P (3d) 1159 at 1175 (Cal 2005). See also *Restatement (Second) of Torts* § 323 (1986) (the relevant restatement at the time *Wal-Mart Stores* was decided). Section 323 has since been replaced. See *Restatement (Third) of Torts* § 42 (2012).

167. *Wal-Mart Stores* 9th Cir, *supra* note 6 at 684.

168. *Wal-Mart Stores* 9th Cir, *supra* note 6 (Appellee's Answering Brief at 32-34) (WL Can).

because the contract contained consequences for a supplier failing an inspection, but no consequences for Wal-Mart if it did not inspect.¹⁶⁹ The Ninth Circuit appears to have treated the plaintiffs' negligent undertaking claim essentially as a repeat of this third party beneficiary claim, holding that "Wal-Mart did not undertake any obligation to protect Plaintiffs . . . Wal-Mart merely reserved the right to cancel its supply contracts if inspections revealed contractual breaches by the suppliers."¹⁷⁰ Any inspections carried out by Wal-Mart did not disturb this conclusion as there was no obligation to inspect so any inspections carried out were gratuitous.¹⁷¹

The decision that there was no undertaking is surprising given that Wal-Mart publicly stated the "fundamental objective" of its Factory Certification Program, which it uses to implement the Wal-Mart Standards, was to "encourag[e] implementation of necessary changes that will ultimately result in an improved quality of life for the workers who supply [its] stores".¹⁷² However, in any event, in Canada there is no threshold question of whether the defendant has "assumed responsibility" or "undertaken" to protect the plaintiff. Rather, such considerations are effectively shorthand for whether there is sufficient proximity between the plaintiff and the defendant. The UK Supreme Court has addressed this point expressly, holding that "assumption of responsibility" simply means "that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law."¹⁷³ Further, the Ninth Circuit considered that the workers' duty of care claim was answered by the fact that there was no contractual duty to protect,¹⁷⁴ whereas Canadian courts do not require a contractual

169. *Wal-Mart Stores* 9th Cir, *supra* note 6 at 681–82.

170. This statement was made with cross-reference to the Court's decision regarding the third party beneficiary claim. *Ibid* at 684.

171. *Ibid*.

172. Wal-Mart Factory Certification Supplier Manual, cited in *Wal-Mart Stores* 9th Cir, *supra* note 6 (Appellants' Reply Brief at para 48).

173. *Phelps v Hillingdon LBC*, [2001] 2 AC 619 (HL (Eng)). This passage from *Phelps* was cited by the House of Lords in *Customs and Excise Commissioners v Barclays Bank Plc*, [2006] UKHL 28 at para 5. See also *Chandler*, *supra* note 128. The Court noted, "[t]he word 'assumption' is . . . something of a misnomer. The phrase 'attachment' of responsibility might be more accurate." *Ibid* at para 64.

174. *Wal-Mart Stores* 9th Cir, *supra* note 6 at 684.

or formal legal relationship, even in duty to act cases or where the loss occurred indirectly.¹⁷⁵ For example, in *Goodwin*, the British Columbia Court of Appeal did not limit the defendant contractor's duty to protect simply because it had not contracted to remove ice from the specific road.¹⁷⁶

Finally, it should be noted that a corporation marketing itself as socially responsible may not wish to rely on *Wal-Mart Stores* because the corporation's brand could be damaged by arguing that it reserves the right to monitor human rights in its supply chain but does not commit to doing so.

Wal-Mart Stores does, however, reinforce the challenge of establishing reliance in the circumstances of the Hypothetical Claim. The Ninth Circuit did not consider whether the plaintiffs had relied on the undertaking in dismissing the action. However, this issue was addressed in briefs submitted in the hearing as well as in questions from the bench during oral argument. Most relevantly, an *amicus* brief by the Pacific Legal Foundation, in support of Wal-Mart, stressed that there was no evidence of reliance or that Wal-Mart had aggravated the plaintiffs' position:

[The plaintiffs] do not allege that (1) they would not have worked for Wal-Mart suppliers had they known that Wal-Mart would not reasonably enforce the Standards; (2) Wal-Mart's purported half-hearted enforcement of the Standards made its suppliers *more likely* to harm [the plaintiffs] than if the Standards [had] never been promulgated; (3) Wal-Mart has assumed any duty owed by its suppliers to [the plaintiffs]; or (4) other entities were discouraged from policing Wal-Mart's suppliers *and* would have been successful in such policing had Wal-Mart not announced its intent to enforce the Standards.¹⁷⁷

In addition, Gould J suggested during oral argument that the plaintiffs could not have relied on any undertaking by Wal-Mart unless they knew about the existence of the Wal-Mart Standards and Wal-Mart's entitlement to inspect.¹⁷⁸

175. See Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, Ont: LexisNexis Canada, 2011) at 307.

176. *Goodwin*, *supra* note 113.

177. *Wal-Mart Stores DC*, *supra* note 124 (Brief of the *Amicus Curiae*, Pacific Legal Foundation), cited in Haley Revak, "Corporate Codes of Conduct: Binding Contract or Ideal Publicity?" 63:6 *Hastings LJ* 1645 at 1663 [emphasis in original].

178. *Wal-Mart Stores 9th Cir*, *supra* note 6 (Oral argument, Appellants at 00h:12m:50s).

E. Conclusion on Prima Facie Duty of Care Inquiry

Recognizing a prima facie duty of care in the circumstances contemplated by the Hypothetical Claim would certainly go further than any current Canadian authority, but it would not necessarily strain existing principles. In certain circumstances, the relationship between a Canadian corporation and workers in its supply chain should satisfy the three factors that support a duty to protect. Specifically, in some circumstances it could be established that the defendant had sufficient *control* of the risk of human rights abuses in the plaintiff's workplace, that imposing a duty would not unreasonably interfere with the defendant's *autonomy*, and the plaintiff had *reasonably relied* on the defendant's representations to carry out human rights due diligence in his workplace.

A prospective plaintiff's claim would be supported by the Ontario Superior Court's recognition in *Hudbay Minerals* that public statements can support a duty of a parent company to persons affected by its subsidiary's operations. To a lesser extent, the UK Court of Appeal's decision in *Chandler* concerning direct parent company liability to a subsidiary's employees could also assist the plaintiff. A prospective plaintiff would need to address the decisions in *Wal-Mart Stores* and the Shell Nigeria Litigation, which have the closest factual parallels to the Hypothetical Claim and where a duty of care was rejected. However, these decisions are not binding on a Canadian court and I have argued they should not be followed.

The requirement for reasonable reliance is likely to be the most challenging issue for a prospective plaintiff. I have argued that reasonable reliance should not be required in the context of the Hypothetical Claim. If reasonable reliance is required, however, a prospective plaintiff may be able to succeed if either the plaintiff was aware of and reasonably relied on the defendant's representations in making his employment decisions (for example, by choosing to work for a particular employer or not to dispute certain work practices), or the plaintiff's position was aggravated by the defendant's undertaking because a third party (such as an NGO) would have otherwise protected the plaintiff.

III. Residual Policy Issues

I have argued that in certain circumstances a Canadian court could find that a Canadian corporation that undertook to carry out supply chain human rights due diligence owes a prima facie duty of care to employees in its supply chain. If a prima facie duty was found, the next step would be for the court to consider whether any residual policy issues suggest that a duty of care should not be recognized or should be restricted.¹⁷⁹ Possible policy concerns include floodgates arguments, deterring voluntary supply chain human rights due diligence, the existence of other avenues of redress, economic concerns and intrusion on sovereignty of states in global supply chains. These concerns will only negate the prima facie duty of care if they are compelling¹⁸⁰ and “a real potential for negative consequences” is apparent.¹⁸¹

A. Floodgates

The most commonly relied on policy ground to negate a duty of care is that it would open the floodgates to an indeterminate number of claims.¹⁸² This proposed duty of care, however, would not carry a “risk of liability for an indeterminate amount for an indeterminate time to an indeterminate class”.¹⁸³ As discussed in the prima facie duty of care analysis above, a corporation would only owe a duty of care to workers in its supply chain where it has assumed the responsibility to protect such workers. The floodgates argument would be more compelling if reliance was not required to establish proximity, because a corporation would then owe a duty of care to all workers covered by its representations, rather than only the minority that may have relied. However, even in this case, the proposed duty would be restricted to situations where there is an economic relationship of buyer and supply chain worker, and a corporation could constrain its exposure by making “accurate and

179. *Hill*, *supra* note 80 at para 20.

180. *Ibid* at para 47.

181. *Ibid* at para 48.

182. See *Linden & Feldthusen*, *supra* note 175 at 307.

183. *Ultramares Corp v Touche*, 174 NE 441 at 444 (NY 1931), cited in *Fallowka*, *supra* note 78 at para 70.

demonstrable” statements about the extent to which it is involved in protecting human rights in its supply chain.¹⁸⁴

B. Deterring Voluntary Supply Chain Human Rights Due Diligence

A more compelling policy concern is that recognizing this duty of care would deter corporations from taking on any protective role in their supply chains and therefore have a chilling effect on a behaviour that should be encouraged. This argument was made in *Hudbay Minerals*.¹⁸⁵ However, tort liability would be unlikely to drastically change corporations’ policies concerning human rights due diligence—consumer and investor pressure, risk avoidance and a desire to avoid mandatory regulation all act as counter-incentives. Additionally, a duty of care would not impose absolute liability on Canadian corporations—they would only be liable for human rights issues they assumed responsibility for.

Importantly, liability arising from inaccurate representations about supply chain human rights does not necessarily deter supply chain human rights management, but can instead encourage corporations to carry out meaningful human rights due diligence. For example, Nike was the “poster child” for the argument that corporations would be deterred from adopting aspirational codes of conduct due to fear that they would be sued for false and deceptive advertising,¹⁸⁶ but Nike has now arguably become an industry leader in addressing human rights issues in its supply chain.¹⁸⁷ More generally, there is no empirical evidence that corporations stepped back from corporate social responsibility initiatives following the Nike litigation.¹⁸⁸

184. See Sherman & Lehr, *supra* note 75 at 13. This comment was made in the context of liability to consumers, but is equally applicable to tort liability to suppliers’ employees.

185. Although not addressed in the Superior Court’s judgement, it was addressed in the parties’ submissions. *Hudbay Minerals*, *supra* note 121 (Reply Factum of the Defendant at para 14).

186. See Brown, *supra* note 76 at 391–95.

187. See Nicole Deitelhoff & Klaus Dieter Wolf, “Business and Human Rights: How Corporate Norm Violators Become Norm Entrepreneurs” in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge, UK: Cambridge University Press, 2013) 222 at 230–44.

188. See Brown, *supra* note 76 at 391–95.

C. Existence of Other Avenues for Redress

Another potential policy issue is whether existing mechanisms provide a sufficient avenue for redress.¹⁸⁹ As noted above, Canadian corporations that falsely claim to regulate human rights in their supply chains could potentially be liable to investors and consumers. In addition, employees in a Canadian corporation's supply chains could allege that the corporation has failed to comply with the OECD Guidelines before the Canadian National Contact Point. These mechanisms arguably already deter Canadian corporations from falsely claiming to protect human rights in their supply chains and encourage careful human rights due diligence. However, none of the existing mechanisms would provide compensation to a worker who has suffered loss due to a Canadian corporation negligently carrying out supply chain human rights due diligence. Accordingly, it is unlikely that the existence of these mechanisms would be sufficient to displace a prima facie duty of care.

D. Economic Concerns

The proposed duty of care could arguably have negative consequences for international commerce. This argument was raised by the United States Chamber of Commerce, an *amicus curiae* in *Wal-Mart Stores*. The Chamber of Commerce argued:

If claims such as Plaintiffs' were actionable, companies operating in the United States will face new burdens in doing business overseas. Every time they entered into a commercial arrangement with a foreign company or in a foreign locale, they might be exposing themselves to potential liability, even when their actions—like the Defendant's in this case—are far removed from the alleged harm. A retailer like the Defendant, which stocks myriad types of merchandise, has thousands of suppliers in countries all over the globe. Controlling labor practices of all of these companies is simply impossible In addition to the immediate harms to global companies, secondary harms will likely fall on consumers in the form of higher prices, as companies attempt to pass on their extra costs.¹⁹⁰

189. See e.g. *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115 at para 84, 256 DLR (4th) 674 (where the court found that the existence of an alternative compensatory mechanism was a compelling policy reason against imposing a duty of care).

190. *Wal-Mart Stores DC*, *supra* note 124 (Brief of the *Amicus Curiae*, Chamber of Commerce of the United States of America at 12).

However, this argument ignores the fact that the proposed duty would reflect the level of control the corporation has over its supply chain and the specific representations the corporation has made. The proposed duty would not impose an absolute obligation on Canadian corporations to guarantee the human rights of workers in their supply chains. It is entirely appropriate, to the extent that the proposed duty may increase the operational costs of Canadian corporations who purchase goods offshore,¹⁹¹ that those increased costs are ultimately borne by consumers and investors. As recently noted by former Supreme Court Justice Ian Binnie, “[o]rdinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World.”¹⁹²

E. Intrusion on Sovereignty of States in Global Supply Chains

The final policy argument is that it is not the place of Canadian courts to regulate offshore labour conditions; to do so would be an intrusion on the policy of other states. A general issue arising from human rights due diligence is the tension between the sovereignty of states that manufacture goods and the human rights obligations and corporate goals from states that purchase goods. This tension is aptly demonstrated by the current impasse concerning factory safety in Bangladesh between the Bangladeshi government and two supplier collectives that were created following the

191. The proposed duty could increase operational costs for two reasons. First, the threat of litigation may encourage corporations to carry out more comprehensive human rights due diligence that could require hiring specialist staff or contractors and, for example, terminating business relationships with suppliers even where those suppliers manufacture goods at the lowest price. Second, in specific cases where a corporation has undertaken to carry out human rights due diligence, and it is alleged that its negligence caused harm to individual workers, a corporation may incur litigation costs and potentially be liable to pay compensation. Whether the direct costs of litigation would be passed on to consumers or investors will depend in part on whether these costs are covered by insurance and the extent to which the new duty impacts insurance premiums.

192. The Honourable Ian Binnie, “Judging the Judges: ‘May They Boldly Go Where Ivan Rand Went Before’” (2013) 26:1 Can JL & Jur 5 at 16. This passage was relied on by the plaintiffs in *Hudbay Minerals*. *Supra* note 121 at para 73.

Rana Plaza building collapse.¹⁹³ However, it is corporations themselves that run the risk of intruding on state sovereignty by undertaking to carry out supply chain human rights due diligence. The enforceability of such undertakings by supply chain workers in Canadian courts would not substantially aggravate this intrusion. In certain cases, it may be inappropriate for a Canadian court to hear a claim; for example, if there are civil or criminal proceedings against the supplier or the Canadian corporation in the foreign jurisdiction where the work is carried out. However, these issues can be dealt with on a case by case basis.

F. Policy Issues Supporting the Imposition of a Duty of Care

The issues discussed above must be balanced against policy matters that support the imposition of a duty of care.¹⁹⁴ First, the imposition of a duty of care could deter corporations from falsely claiming to protect human rights in their supply chains, and conversely, encourage corporations to carry out more effective human rights due diligence. This is consistent with the purposes of tort law, which include “a disincentive to risk-creating behaviour”.¹⁹⁵ It is also consistent with Canada’s recognition (as an OECD member) that corporations should carry out supply chain human rights due diligence and Canada’s general “commit[ment] to promoting responsible business practices” abroad by Canadian corporations.¹⁹⁶ In addition, imposing a duty of care would also provide compensation in circumstances where plaintiffs would otherwise be uncompensated for a loss resulting from a corporation negligently carrying out human rights due diligence—which is a primary objective of tort law.¹⁹⁷ Finally, a defendant corporation would have benefited from

193. The tension has arisen due to attempts by the primarily European-based Accord on Fire and Building Safety in Bangladesh and the North American-based Alliance for Bangladesh Worker Safety to close buildings in Bangladesh that have failed safety inspections. See discussion in Steven Greenhouse & Julifkar Ali Manik, “Stalemate over Garment Factory Safety in Bangladesh”, *The New York Times* (25 June 2014), online: <www.nytimes.com>.

194. *Hill*, *supra* note 80 at para 43.

195. *Resurface Corp v Hanke*, 2007 SCC 7 at para 6, [2007] 1 SCR 333.

196. Foreign Affairs, Trade and Development Canada, “Corporate Social Responsibility” (14 November 2014), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.

197. See Linden & Feldthusen, *supra* note 175 at 308.

claiming to carry out human rights due diligence in its supply chain. In the absence of a duty of care, a corporation would be free to take the benefits of claiming to protect workers in its supply chain without any corresponding obligation to those workers.

Conclusion

There are calls for binding obligations to carry out supply chain human rights due diligence, which are just beginning to be formally addressed by the UN Guiding Principles, the OECD Guidelines and the SA8000 Standards. The duty proposed in this article is much narrower. It would not require all Canadian corporations to monitor and respond to human rights impacts in their supply chains; it would only impose an obligation on corporations who have undertaken to carry out due diligence not to do so negligently. Further, the requirement for reasonable reliance would likely limit successful claims to workers who have the ability to choose a safe workplace or whose workplace would have otherwise been subject to effective supervision by third parties;¹⁹⁸ although, I have argued that there is scope for abandoning the reliance requirement to reflect the realities of global production. Additional analysis is also required to determine whether, and in what circumstances, a prospective plaintiff would be able to establish that the defendant has breached its duty of care and that the breach caused the plaintiff loss.¹⁹⁹

Nonetheless, I have argued that in the right circumstances tort law could provide compensation to workers in a Canadian company's supply chain who suffer losses because of negligent monitoring and responses to human rights issues. I have further argued that the scope of this duty should be expanded through modifications to the traditional negligence

198. The reasonable reliance requirement also means that a corporation is more likely to owe a duty of care if it in fact monitors or responds to human rights impacts in its supply chain, and that a corporation simply making empty promises may not owe a duty of care.

199. See discussion in Reinschmidt, *supra* note 7 (arguing that "the regulatory scope of tort law and its theoretical capability as a tool to facilitate social responsibility is considerably limited by some structural characteristics of torts" at 106). Prospective plaintiffs will also face a number of other hurdles. These include cost barriers to bringing a claim, whether the plaintiffs could achieve class action certification, and the need to establish that a Canadian court has jurisdiction to hear the claim.

test to reflect the developments in tort law and the realities of global production. A duty of care could also promote more effective supply chain human rights due diligence. Tort law may therefore have a role to play in promoting the accountability of Canadian corporations for their human rights impacts in global supply chains.

