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The Impact of Time and Short-Termism on Canadian Corporate Liability Design.

by Yoshua R. Love

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SUPERVISOR: Tommaso Soave
Central European University - Private University

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ABSTRACT

When communities and individuals are the victims of human rights abuses from transnational corporations (TNCs) operating in developing states, they often are unable to achieve vindication of their rights within their own state. There are efforts to ensure access to remedy for those facing violations of human rights in the TNC home state through tort law. Some have argued that the availability of tort claims paired with soft-law guidance will be enough to ensure that TNC conducts human rights due diligence (HRDD). This paper will argue against that, arguing that tort claims are unlikely to provide enough of a deterrence effect to ensure that TNCs follow HRDD and take steps to reduce the risk of human rights violations. To make this argument, this paper will look at the theory behind deterrence and examine how it interacts with time, short-termism, uncertainty and different liability regimes. It will then use these findings to examine Canada's existing corporate liability regimes and conclude that in order to increase compliance with human rights standards, an effective HRDD regime must be implemented, but that focus should also be aimed at reducing uncertainty and short-termism.

INTRODUCTION

The traditional goal of the corporation is to maximize shareholder profit.[1] But what happens when human rights abuses arise as an externality of profit maximization? Many transnational corporations (TNCs) have come under scrutiny for their complicity and engagement in human rights abuses while operating in developing states. At times, public backlash against these abuses has increased, causing negative effects on stock prices and profits.[2] However, these effects are often temporary, with the abuses too quickly forgotten about.[3] When communities and individuals are the victims of human rights abuses from TNCs, they often face opposition from their respective governments, the TNC, and the TNC's home government.[4] Further, courts in these jurisdictions are too often unable to provide a reasonable prospect of success. For many plaintiffs, the only path forward is to bring their claims against the TNC to the TNC's home state. These types of claims traditionally bring with them all sorts of challenges and present a large amount of uncertainty both for plaintiffs and TNCs.

While access to remedy is important for victims in vindicating their rights and providing some compensation for their losses, as the United Nations Guiding Principles on Business and Human Rights (UNGPs) highlight, access to remedy is only one part of the problem.[5] States also have a responsibility to ensure that corporations conduct human rights due diligence (HRDD) and prevent abuses prior to occurrence. Further, under the UNGPs, states must ensure

[1] Milton Friedman, "A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits," *The New York Times*, September 13, 1970, sec. Archives, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

[2] Marcia Narine, "Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts," *Columbia Human Rights Law Review* 47, no. 1 (December 2, 2015): 84–150.

[3] Narine.

[4] Melisha Charles and Philippe Le Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," *The Extractive Industries and Society* 8, no. 1 (March 1, 2021): 467–76, https://doi.org/10.1016/j.exis.2020.12.001.

[5] United Nations Commission on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011), https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights.

that TNCs based in their state do not commit human rights abuses while operating abroad. This means that governments must ensure that when managers at TNCs make decisions, they are concerned about how they will impact the "process, ethical values and broad consequences" for both shareholders and stakeholders in the short term and long term.[6]

In Canada, the current legal landscape for TNCs and human rights relies on harm-based liability through tort and criminal law to ensure compliance with human rights standards. While there has been a recent string of cases that have opened up the availability of torts claims against Canadian TNCs operating aboard, the legal landscape for tort claims is still defined by uncertainty. Additionally, Canada still relies on soft-law HRDD mechanisms to advise and provide tools to help Canadian TNCs conduct business responsibly. Canadian corporations make up half of the world's publicly listed mining and mineral exploration companies; therefore, the efficacy of Canada's regulatory regime has major human rights consequences.[7] Of these companies, 770 have operations abroad in 98 different countries, including in many countries with weak rule of law, high levels of corruption and low standards of living.[8] These foreign mining assets have been valued at 214.7 billion dollars and makeup over two-thirds of total Canadian mining assets.[9] The human rights risks associated with mining and mineral exploration are particularly well documented. Due to the high number of Canadian mining and mineral exploration companies and their continued human rights violations, Canada's regulatory regime and proposed solutions require close analysis.

[6] Malcolm Rogge, "Nevsun Puts Canada's Corporate Decision Makers in the 'Human Rights Zone,'" *Business & Human Rights Resource Centre Blog* Corporate Responsibility Initiative (CRI) Working Papers, no. 70 (March 19, 2020), https://doi.org/10.2139/ssrn.3557902.
[7] Natural Resources Canada, "Canadian Mining Assets," Natural Resources Canada (Natural Resources Canada, January 2024), https://natural-resources.canada.ca/maps-tools-and-publications/publications/minerals-mining-publications/canadian-mining-assets/19323.
[8] Natural Resources Canada/
[9] Natural Resources Canada.

As former Canadian Supreme Court Justice Beverley McLachlin stated: "remedies allow us to mend our wounds and carry on — as individuals and as a society."[10] Remedies also have a deterrence function. Some have argued that increasing access to remedy in the TNC's home state through means such as tort law will be enough to ensure that TNCs conduct HRDD.[11] While remedies are essential for victims of abuses to create closure, compensate them for their losses and vindicate their rights, the deterrence effects caused by the possibility of tort claims against a TNC are limited. One of the reasons for this is due to corporate short-termism. Corporate short-termism impacts firms' decision-making when corporate decision-makers place a higher importance on short-term gains at the expense of long-term performance.[12] As a result of short-termism, long-term corporate risk levels increase. In the context of TNCs, time delays in bringing tort claims and the uncertainty surrounding the legal landscape mean that corporate decision-makers may disregard concerns about human rights impacts and the possibility these impacts lead to future litigation against the company. To overcome the problems that short-termism and uncertainty pose, this paper will argue that effective HRDD regimes should be implemented and that short-termism reform is needed to strengthen the existing tort regime.

In Chapter 1, this paper will examine the theory behind act- and harm-based liability and consider what type of deterrence effect can be gained from each regime type. Additionally, it will analyze how uncertainty, time and short-termism impact each regime. Chapter 2 will apply the analysis from Chapter 1 to the Canadian case, looking at the current legal landscape for Tort claims against Canadian TNCs and the Canadian damages framework. Chapter 3 will

[10] Beverley McLachlin, "'Rights and Remedies - Remarks'" (in Robert J Sharp & Kent Roach, Taking Remedies Seriously, Ottawa: Canadian Institute for the Administration of Justice, 2010), 27, https://ciaj-icaj.ca/wp-content/uploads/documents/import/2009/782.pdf?id=1135&1661636443.
[11] Rogge, "Nevsun Puts Canada's Corporate Decision Makers in the 'Human Rights Zone.'"
[12] Lynne L. Dallas, "Short-Termism, the Financial Crisis, and Corporate Governance," *Journal of Corporation Law* 37, no. 2 (Winter 2021): 265–364.

analyze Canadian policies focused on the conduct of Canadian TNCs and the prospects of mandatory human rights due diligence.

CORPORATE LIABILITY DESIGN AND SHORT-TERMISM

An effective corporate deterrence mechanism would make the rational person choose not to engage in certain conduct because they "assess that the prospects of detected, investigated, and punished outweigh the benefits."[13] Liability and deterrence, however, can be separated by act-based and harm-based deterrence. [14] Tort law and criminal law are forms of harm-based liability that impose a sanction ex-post for a wrong. Act-based liability is often seen in "health and safety, environmental and financial regulation" and punishes non-compliance that the state views as likely to cause harm regardless of its actual impact.[15] For business and human rights, act-based liability is most associated with HRDD; however, it can also take on other forms, as seen in modern slavery laws.[16]

The concept of HRDD has been defined most notably as a tool for companies to proactively reduce the risk of negative human rights impacts. Given the authoritative nature of the UNGP and its widespread adoption, this paper will rely on its conception of HRDD. Under the UNGP, HRDD has four components:

> "(a) Identifying and assessing actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

[13] International Organization of Securities Commissions (ISOSCO), "Credible Deterrence in the Enforcement of Securities Regulation," October 2023, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD758.pdf.
[14] Nick Friedman, "Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence," *Oxford Journal of Legal Studies* 41, no. 2 (June 1, 2021): 305, https://doi.org/10.1093/ojls/gqaa052.
[15] Friedman, 305.
[16] "Fighting Against Forced Labour and Child Labour in Supply Chains Act," S.C. 2023, c. 9 § (2024), https://laws.justice.gc.ca/eng/acts/F-10.6/page-1.html.

(b) Integrating findings from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact;

(c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working; and

(d) Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place."[17]

When corporate decision-makers assess their business practices, they evaluate risks and determine how much they should focus their efforts on reducing risks.[18] While the risk of inflicting harm or negative externality might be high, what matters is the risk to the business and profits both now and in the future. For harm-based liability, Corporations then take steps to mitigate the probability of risks occurring depending on the costs of the risks. They generally do this by multiplying the probability of a violation occurring times the probability of getting caught for the violation and the cost of impact if caught. This provides a cost of non-compliance. The cost of non-compliance is then weighed against the cost of taking steps to improve compliance. If corporate decision-makers view the cost of non-compliance as being greater than the cost of compliance, then steps will be taken to reduce the probability of non-compliance. On the other hand, if the cost of reducing the probability of non-compliance is more expensive than the cost of non-compliance, then steps will not be taken to address risk.

[17] United Nations Commission on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.
[18] Friedman, "Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence," 305.

For act-based liability, corporate decision-makers only consider the probability of getting caught for the violation and the cost of impact if caught.[19]

In Nick Friedman's 2020 article on corporate liability design, he highlighted three main advantages of act-based liability.[20] First, it requires a lower sanction amount compared to harm-based liability. This is because it only requires discounting the possibility of getting caught, compared to harm-based liability, which discounts the possibility of an accident occurring and the possibility of getting caught. Second, act-based liability allows for ex-ante enforcement. Third, it does not require complex analysis into whether a rights violation was caused by corporate action or inaction. While I agree with this assessment, it is relevant to further discuss how harm-based sanctions interact with corporate time frames, uncertainty, and remedies. In addition to the points Friedman raised, time is also a major factor in the difference between act- and harm-based liability. For harm-based liability, because it is an ex-post enforcement mechanism, there is always a time delay from when a violation occurs to when liability is imposed. While time delays exist in act-based liability, between the time from when an action or inaction occurs to enforcement, because a violation does not have to occur, harm-based liability necessarily entails a longer time delay than an act-based liability. Because of corporate short-termism, these time delays matter in terms of how much of a deterrence effect can be gained from sanctions.

Short-termism has a well-established foundation in human psychology and the predisposition for instant gratification.[21] This phenomenon is shown in many stories, such as Aesop's fable, the Ants and the Grasshopper.[22] In this fable, the ants worked hard all summer

[19] Friedman, 305.
[20] Friedman, 306.
[21] Kim M. Willey, *Stock Market Short-Termism: Law, Regulation, and Reform*, 1st ed. (Palgrave Macmillan, 2019), 23, http://link.springer.com/10.1007/978-3-030-22903-0.
[22] Æsop, "The Ants and the Grasshopper," in *Æsop for Children* (The Library of Congress), accessed June 13, 2024, https://read.gov/aesop/052.html; Willey, *Stock Market Short-Termism*, 23.

to gather food for winter while the grasshopper played in the sun. When winter came, the ants had food, and the grasshopper was left hungry. The moral of the story is that "there's a time for work and a time for play."[23] In more academic terms, short-term gains should not come at the expense of long-term gains. From the grasshopper to the university student procrastinating to children eating candy till they make themselves sick, the urge for instant gratification is a part of everyday life.[24]

If what was best for the short term was also best for the long term, there would be no intertemporal choice problems.[25] However, because short- and long-term performance may come at the expense of one another, it is important that an appropriate balance be found. For the firm, if these interests are balanced correctly, then short-term actions will have no impact on long-term performance. If long-term performance comes at the expense of short-term performance, then the firm may be forced to shut down. Take, for example, firms that are too early to market. The company may have had customers in the long term, but in the short term, if they are not able to generate enough funds to keep themselves afloat, they will be forced to shut down. If the firm's corporate decision-makers focus on short-term performance at the expense of long-term performance, then we have a problem with short-termism.

In his influential 1996 paper on short-termism, Laverty modelled how corporate decision-makers are influenced by economic, individual, and organizational factors.[26] He argues that these factors directly and indirectly influence managerial decisions which impact the firm's economic performance. The combination of an individual firm's decisions plus the decisions of other firms then creates collective outcomes. The firm's performance and

[23] Æsop, "The Ants and the Grasshopper."
[24] Willey, *Stock Market Short-Termism*, 23.
[25] Kevin J. Laverty, "Economic 'Short-Termism': The Debate, the Unresolved Issues, and the Implications for Management Practice and Research," *The Academy of Management Review* 21, no. 3 (July 1, 1996): 855, https://doi.org/10.2307/259003.
[26] Laverty, "Economic 'Short-Termism.'"

collective outcomes then create other economic influences and feedback loops. While Laverty's work did not examine and try to solve each individual factor that can contribute to short-termism, his model showcases how all three factors are interconnected and deserve attention in their analysis, as well as solutions.

For individual factors, Laverty argues that decision-making making is not always rational and is often guided by heuristics and biases. [27] One way these heuristics and biases lead to higher discounting is because of the "relationship between time and uncertainty."[28] Time is inherently linked to uncertainty because long-term results are "systematically harder to predict" than short-term results. [29] Thus, long-term decisions necessarily entail a higher degree of uncertainty than short-term decisions. When managers conduct a risk analysis, it is done because they believe they can mitigate risk and "change the odds."[30] Risk analyses are done to avoid future losses, losses with a higher discount rate than future gains. Because longer time delays allow for more opportunity to "gather information and reduce the likelihood or size of a negative outcome," managers may have a bias towards avoiding risk in the short term and be less bothered by long-term risk. [31] While time offers more space to reduce future risk, it also allows for time to push things off in the "hope that they will just go away." [32] Thus, even with "actuarial scientists," risk analyses are often "a rather inscrutable or 'intuitive' formation of 'estimates,' subject to a wide margin of error or uncertainty."[33]

[27] Laverty, 843.
[28] Natalie Slawinski et al., "The Role of Short-Termism and Uncertainty Avoidance in Organizational Inaction on Climate Change: A Multi-Level Framework," *Business & Society* 56, no. 2 (February 1, 2017): 261, https://doi.org/10.1177/0007650315576136.
[29] Slawinski et al., 261.
[30] Laverty, "Economic 'Short-Termism,'" 844.
[31] Laverty, 844.
[32] Slawinski et al., "The Role of Short-Termism and Uncertainty Avoidance in Organizational Inaction on Climate Change," 261.
[33] Rogge, "Nevsun Puts Canada's Corporate Decision Makers in the 'Human Rights Zone,'" 11.

This result is even truer for those with a "low tolerance for uncertainty." [34] Uncertainty can also lead to complacency because "uncertainty takes time to resolve."[35] It has also been shown that when information is "limited or inconsistent, individuals will tend to avoid the issue and focus on information that is more certain." [36] Additionally, surveys have shown that when individuals encounter uncertainty while working, they often "focus on the short-term requirements of their job to regain control," regardless of whether it has a negative long-term impact.[37] These time perspectives reflect a "non-conscious process whereby the continual flows of personal and social experiences are assigned to temporal categories, or time frames, that help to give order, coherence, and meaning to those events." [38] Through these time perspectives biases are created that can influence and shape "expectations and goals and for making decisions."[39]

While time and uncertainty are related, the more certain an outcome is, the more it will overcome this bias. Thus, for any liability design it is important that uncertainty be lowered to reduce the timeframe, and it is important that timeframes be reduced to lower uncertainty. Connecting this uncertainty and time bias with harm- and act-based liability regimes, we see that harm-based liability necessarily has more uncertainty compared to act-based liability, both because it takes longer to resolve and because it requires discounting twice.

For organization factors, Laverty argues that inertia, legitimacy seeking, and organizational structure may contribute to short-termism. [40] Inertia is when the "organization's

[34] Slawinski et al., 261.
[35] Drazen Prelec and George Loewenstein, "Decision Making over Time and under Uncertainty: A Common Approach," *Management Science* 37, no. 7 (1991): 784.
[36] Slawinski et al., 261.
[37] Slawinski et al., 261.
[38] Philip G. Zimbardo and John N. Boyd, "Putting Time in Perspective: A Valid, Reliable Individual-Differences Metric," *Journal of Personality and Social Psychology* 77, no. 6 (1999): 1271, https://doi.org/10.1037/0022-3514.77.6.1271; Slawinski et al., "The Role of Short-Termism and Uncertainty Avoidance in Organizational Inaction on Climate Change," 260.
[39] Slawinski et al., 261.
[40] Laverty, "Economic 'Short-Termism,'" 844.

core features (stated goals, forms of authority, core technology, and broad marketing strategy)" are more resistant to change than the environment surrounding them.[41] Laverty argues that degrees of inertia are part of all firms. Because inertia slows down firms' reaction speeds, if firms are not able to pivot to react to changes, they may be unable to balance short- and long-term performance. Laverty also highlighted that organizations seek to legitimize themselves often by looking at the industry's "accepted practice."[42] Relying on "accepted practices" might cause discount rates to move between firms. Additionally, the organizational structure may lead to short-termism through the way information and proposals move through the organizational structure. Top managerial decisions are often made based on different proposals presented by lower-level managers. Because managers lower in the organizational structure eliminate different projects, short-termism might materialize because upper management does not review different long-term options. [43]

For economic factors, Laverty highlighted many different sources that may have contributed to short-termism, including consumers' demand for new and innovative products, which can pressure corporations to produce at too fast a pace without regard for the long-term financial impacts. [44] The pressures to meet certain project deadlines. By meeting these deadlines, firms may sacrifice long-term performance. Interest rates and the cost of borrowing capital can impact the firm if a project drags on. Changing technologies can also cause pressures to innovate too early at the expense of long-term performance. One economic element that has gained a large amount of attention due to its argued prevalence and the scope of its impact is short-termism caused by stock market pressures. This is referred to as stock-market short-termism.

[41] Laverty, 845.
[42] Laverty, 845.
[43] Laverty, 844.
[44] Laverty, 844.

In Kim Willey's book, "Stock Market Short-Termism Law, Regulation, and Reform," an in-depth analysis of the subject, its impact, and different reforms are discussed.[45] The focus on public firms and stock market short-termism is important for four reasons. First, it provides a starting place for analyzing overall short-termism and can show how economic, individual and organizational factors are interconnected; second, it can provide a means of comparison between the private and public companies to see the effect of short-termism; third, because public companies are generally the largest companies in the world, the ways in which they operate can have a large impact; and fourth it can provide a specific sphere for reform. Additionally, for this paper specifically, the large number of publicly traded TNCs who have been implicated in human rights abuses requires further analysis.

The primary goals of stock markets are to "provide liquidity to investors based on reasonably reliable pricing and facilitate the raising of capital by listed companies." Through these two functions, investors can invest in a large number of companies and diversify their holdings. Additionally, the constant moving of the stock market provides an up-to-date value calculation for the stock, which allows for investor liquidity. This reduces the risk for public investors, founders and other initially private investors. It also provides a unit of comparison to determine private company valuations. The benefits of stock markets stem from the "efficient capital market hypothesis," which views markets as "informationally efficient," meaning the "share prices reflect all publicly available information."[46] Additionally, stock markets should also, to a degree, be "fundamentally efficient" with share prices that reflect the "long-term value of the firm."[47] To examine if stock market short-termism exists, Willey firstly builds off of existing definitions of short-termism to create a specific definition of stock market short-termism as when "asset owners (public investors) and intermediaries (asset managers,

[45] Willey, *Stock Market Short-Termism*.
[46] Willey, 129.
[47] Willey, 130.

proxy voting agencies, central depositaries, etc.) in the equity ownership chain weigh near-term financial outcomes too heavily at the expense of more profitable longer-term investment opportunities."[48] This causes managers to weigh short-term financial gains over long-term performance.

The existence of stock market short-termism is supported by multiple different surveys of managers and board members. Much of this evidence was compiled by both Willey and within the United Nations Environmental Program (UNEP) report on Stock Exchanges and Sustainability.[49] In one survey of 401 senior finance executives, 86.3 percent indicated they would be willing to "sacrifice long-term value creation" to meet quarterly earnings estimates.[50] In another survey of 1000 board members and senior managers, 79 percent indicated that they felt pressure to produce results in two years or less. Additionally, 86 percent stated that "longer time horizons to make business decisions" would increase long-term financial returns and increasing innovation.[51] In another study of 600 senior managers, 75 percent stated that "short-term pressures… undermine management's focus on long-term strategic objectives and value creation."[52]

Another form of evidence in support of stock market short-termism comes from quantitative evidence.[53] In David Mile's 1993 paper, "Testing for Short-Termism in the U.K.

[48] Willey, 29.
[49] Siobhan Cleary, "Stock Exchanges and Sustainability," Inquiry Working Paper (United Nations Environment Program, October 9, 2015), 12, http://www.unep.org/resources/report/stock-exchanges-and-sustainability; Willey, *Stock Market Short-Termism*, 131–33.
[50] John R. Graham, Campbell R. Harvey, and Shiva Rajgopal, "Value Destruction and Financial Reporting Decisions," *Financial Analysts Journal* 62, no. 6 (November 2006): 27–39, https://doi.org/10.2469/faj.v62.n6.4351.
[51] Dominic Barton and Mark Wiseman, "Focusing Capital on the Long Term," *Harvard Business Review*, January 2014, https://hbr.org/2014/01/focusing-capital-on-the-long-term.
[52] National Association of Corporate Directors, "More Than Half of Public Company Boards Recognize the Effects of Short-Termism," *Newswire*, December 5, 2016, https://www.globenewswire.com/news-release/2016/12/05/895122/21054/en/More-Than-Half-of-Public-Company-Boards-Recognize-the-Effects-of-Short-Termism.html.
[53] Willey, *Stock Market Short-Termism*, 136.

Stock Market," he compared cash flows against equity prices between the years 1980 and 1988.[54] He found after five years, cash flows are "discounted at twice the rate of shorter-term flows."[55] Following Mile's work, other scholars have adopted his methodology and applied it to other countries and time frames and have reached similar findings.[56] One recent example is the 2023 work by Sampson and Shi, which conducted a market-wide analysis of U.S. stock markets from 1980 to 2013.[57] During the period, they found an "unequivocal increase" in discounting of long-term expected cash flows."[58]

Further support and evidence of short-termism also appear when looking at the impacts of stock market short-termism. Willey groups consequences into four categories of harm, "reduced trust in the stock market," "wealth transfer from future to current asset owners," "reduced firm productivity," and "societal costs."[59] While these harms were theorized by Willey as applying to stock market short-termism, many of them apply to other types of short-termism. If businesses trust the stock market less, then fewer companies will engage in initial public offerings, more will seek private equity investments, and will engage in public-to-private buyouts more often. This could lead to less opportunity for public investors to invest in younger companies, therefore reducing investment options and the quality of investment options.[60] Willey then argues wealth transfers from future to current asset owners are an issue because, when present shareholders pressure companies to "unduly extract short-term lesser value returns" through "cash distributions, buybacks and/or high share prices," it results in a

[54] David Miles, "Testing for Short Termism in the UK Stock Market," *The Economic Journal* 103, no. 421 (1993): 1379–96, https://doi.org/10.2307/2234472.
[55] Miles, 1394.
[56] Willey, *Stock Market Short-Termism*, 136.
[57] Rachelle C. Sampson and Yuan Shi, "Are U.S. Firms Becoming More Short-Term Oriented? Evidence of Shifting Firm Time Horizons from Implied Discount Rates, 1980–2013," *Strategic Management Journal* 44, no. 1 (2023): 258, https://doi.org/10.1002/smj.3158.
[58] Sampson and Shi, 258.
[59] Willey, *Stock Market Short-Termism*, 11.
[60] Willey, 207.

net loss for public investors.[61] This can hurt future shareholders through the eventual lowering of share price and through the firm missing out on alternative long-term investments. Willey argues that these two impacts militate in favour of reforms to reduce stock market short-termism.

When looking at societal impact, Willey acknowledges that managers may be driven to show short-term financial returns at the expense of funding long-term sustainable business endeavours. [62] She also acknowledges that societal issues, such as sustainability, are caused by many different factors. However, Willey argues that "short-term actions do not necessarily equate to societal harm" and that these harms do not offer a "sufficiently viable basis" to justify reform to reduce stock market short-termism.[63] She also argues that sustainability issues cannot be addressed solely through efforts to reduce stock market short-termism and that they require "tailor solutions".[64]

While it is certainly true that addressing stock market short-termism will not solve social issues, if a regime is in place that imposes sanctions for non-compliance in the long term, efforts to address short-termism will help strengthen the efficacy of that regime. Thus, this paper argues that societal harms do justify short-termism reform. To substantiate her claim, Willey references the UNEP report. [65] This report acknowledges that there is a disconnect between many advocating for a greater long-term focus and those who view sustainability as a core aspect of a greater long-term focus. Just because a business has a long-term focus does not mean they will be sustainable or protect human rights. Following this rationale, the report finds that it does not abandon short-termism reform for societal reasons; rather, it argues that

[61] Willey, 210.
[62] Willey, 210.
[63] Willey, 197.
[64] Willey, 210.
[65] Cleary, "Stock Exchanges and Sustainability," 12.

"lengthening time horizons is a necessary but insufficient condition for ensuring a transition to a more sustainable economy (own emphasis added)."[66]

With short-termism, firms will "seek investment opportunities that yield short-term returns."[67] Because of the different temporalities associated with act- and harm-based liability, when looking at the deterrence effect that can be generated from each liability regime, it is important to consider temporality within the firm and short-termism. Firms often suffer from short-termism due to a number of different economic, individual, and organizational factors, which are interconnected and form networks through managerial decisions and firm outputs. Addressing short-termism is not in itself a solution to societal issues and production externalities; firms may have a long-term focus and not care about societal issues. Non-sustainable behaviour is a result of "numerous factors" that require "tailor solutions." [68] However, short-termism does impact how effective these solutions are, particularly for harm-based liability regimes. Thus, short-term reform is necessary to strengthen and support compliance regimes and the deterrence effects that they generate.[69]

TORT CLAIMS AGAINST CANADIAN TRANSNATIONAL CORPORATIONS

The high number of human rights and environmental abuses caused by Canadian TNCs has led to Canada being criticized by international organizations, scholars, and the international community for failing to prevent human rights abuses and hold violators accountable.[70] While Canadian courts have taken some steps to increase access to remedy for violations caused by Canadian TNCs, the legal landscape for bringing cases against TNCs is still defined by

[66] Cleary, 12.
[67] Sampson and Shi, "Are U.S. Firms Becoming More Short-Term Oriented?," 258.
[68] John Asker, Joan Farre-Mensa, and Alexander Ljungqvist, "Corporate Investment and Stock Market Listing: A Puzzle?," *The Review of Financial Studies* 28, no. 2 (2015): 342–90.
[69] Asker, Farre-Mensa, and Ljungqvist.
[70] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects."

uncertainty. Additionally, HRDD legislation largely relies on soft law mechanisms to try and guide TNCs as opposed to ensuring compliance. To better understand what types of deterrence are generated by Canada's corporate liability regimes, this chapter will first look at several recent cases involving TNCs; second, it will look at how damages are calculated in Canadian courts to determine the impact of damages on uncertainty and deterrence, third it will look at Canada's current HRDD regime.

Traditional corporate law provides protections for TNCs from the actions of their subsidiaries, sub-contractors, and controlled suppliers through the doctrines of limited liability and separate legal entities.[71] This has historically made bringing claims against parent corporations challenging, as corporations would hide behind a "corporate veil." This is showcased in the case of *Piedra v. Copper Mesa Mining Corp* (2011), where the Ecuadorian plaintiffs submitted that Copper Mesa, two directors and the Toronto Stock Exchange (TSE) were liable after Copper Mesa's sub-contracted security force used "intimidation, death threats, and violence" against the plaintiffs.[72] The Court relied on the "*Cooper-Anns test*" to determine if there exists a duty of care. Prior to commencing the test, the court must determine whether the duty of care is recognized by the law. If the duty of care is recognized by law, the "*Cooper-Anns test*" consists of two steps: first, "the two parties must… be sufficiently proximate to one another," and second, "whether there are residual policy considerations that militate against recognizing a novel duty of care." The Ontario Court of Appeal unanimously affirmed that there was no legal basis for a duty of care for any of the respondents.

When abuses are committed abroad, Canadian courts have often been hesitant to encroach on other states' sovereignty. Courts will dismiss cases under *forum non conveniens* if they find they do not have jurisdiction and there is a more appropriate court to hear the case.

[71] Charles and Billon, 473.
[72] Piedra v. Copper Mesa Mining Corporation, No. ONCA 191 (COURT OF APPEAL FOR ONTARIO 2011).

For example, in *Bil'in (Village Council) v. Green Park International Ltd* (2009), the plaintiffs filed an injunction against Quebec construction companies Green Park International and Green Mount International.[73] The plaintiffs submitted that the respondents had aided Israel in constructing Israeli settlements in Palestinian territory, which breached Article 49(6) of the Fourth Geneva Convention and Article 8(2)(b) of the Rome Statute. The Superior Court of Québec struck the case as *forum non conveniens,* finding that Israeli courts held jurisdiction. This ruling was grounded in Article 3135 of the Civil Code of Québec, which states that a "Québec authority may decline jurisdiction when it considers that the authorities of another country are in a better position to decide."[74] In a recent string of cases, however, the courts have broadened the ability of plaintiffs to bring cases by breaking down corporate veils and expanding their interpretation of court jurisdiction.[75]

In *Choc v. Hudbay Minerals Inc (2013),* the plaintiffs, who were members of the Maya-Q'eqchi' First Nations community in Guatemala, claimed that during a period between 2007 to 2009, community members were shot, raped and murdered by the security personnel of a Hudbay subsidiary.[76] In 2010, the plaintiffs launched a case at the Ontario Superior Court of Justice claiming that because Hudbay knew the security personnel had a history of violence and that there was a high risk that the security personnel would commit further acts of violence, the shooting was the direct result of negligent mismanagement by Hudbay.[77] At the pre-trial hearing, Hudbay filed two motions to strike. These motions raised two key questions: can the

[73] Bil'in (Village Council), et al. v. Green Park International inc., et al., No. QCCS 4151-- (Supreme Court of Québec 2009).
[74] "Civil Code of Quebec," Article 3135 https://www.legisquebec.gouv.qc.ca/en/document/cs/CCQ-1991/20140501#se:3135.
[75] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects."
[76] Choc v. Hudbay Minerals Inc, No. ONSC 1414 (Ontario Superior Court of Justice 2013).
[77] Klippensteins, Barristers & Solicitors, "Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.," n.d., http://www.chocversushudbay.com/about/.

corporate veil be broken to hold Hudbay liable for the actions of a subsidiary, and can Hudbay be directly liable for the actions?

On the first question, the court recognized three circumstances that would constitute breaking the corporate veil: (a) "where the subsidiary is completely dominated and controlled and being used as a shield for fraudulent or improper conduct;" (b) "where the subsidiary is seen to be an agent; and (c) where a statute or contract requires it."[78] Based on the arguments submitted by Choc, the court found that, if recognized at trial, allegations that the subsidiary was acting as an agent of Hudbay would satisfy breaking the corporate veil. For the second question, the court used the "*Cooper-Anns test*" to determine if Hudbay owed a duty of care to the plaintiffs. The court found that the plaintiffs could establish a duty of care on the basis that it was reasonably foreseeable that the actions of the security personnel would lead to the claims made by the plaintiffs. This case is still currently before the courts.[79]

In *Garcia v. Tahoe Resources Inc* (2017), during a 2013 protest against the Escobal mine near San Rafael Las Flores, Guatemalan citizens claimed they were shot by Tahoe Resources' security personnel in Guatemala.[80] In 2014, seven plaintiffs brought suit for damages, including punitive damages, claiming "direct liability for battery, vicarious liability for battery, and negligence."[81] Tahoe Resources then filed for a motion to strike on the basis of *forum non conveniens,* arguing that the trial should be held in Guatemala. The plaintiffs argued that the courts in Guatemala provided no reasonable prospect of success. The court found a stay of proceedings based on forum non conveniens under s. 11 of the Court Jurisdiction and Proceedings Transfer Act. It also held that an ongoing criminal suit and a

[78] Choc v. Hudbay Minerals Inc at 45.
[79] Canadian Bar Association -, "Disputes between Canadian Companies and Foreign Litigants," accessed January 31, 2024, https://www.cba.org/Publications-Resources/Practice-Tools/Business-and-Human-Rights/Business-and-Human-Rights-in-Canada/Disputes-between-Canadian-companies-and-foreign-li.
[80] Garcia v. Tahoe Resources Inc, No. BCCA 39 (Court of Appeal for British Columbia 26 2017).
[81] Garcia v. Tahoe Resources Inc at 23.

potential civil case in Guatemala made Guatemala a clearly more appropriate forum for the case. Additionally, it was found that there was no reasonable prospect of justice in Guatemala. Following the court's decision, the plaintiffs then appealed the case to the British Columbia Court of Appeal (BCCA), who overruled the decision, finding that "(1) the limitation period for bringing civil suits (2) discovery procedures for civil suits; and (3) the risk of unfairness in the justice system." outweighed finding Guatemala to be a more appropriate forum.[82] Following this finding, in 2019, Canadian Company Pan American Silver bought Tahoe Resources Inc., and by 2020, the case was settled with the plaintiffs and a public apology was issued.[83]

In *Nevsun Resources Ltd. v. Araya (2020)*, the plaintiffs claim that from 2008 to 2010, during the construction of the Nevsun subsidiary-owned Bisha mine, they were subjected by a sub-contractor to violations of customary international law (CIL), which included "forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity."[84] They also claimed violations of domestic torts of "conversion, battery, unlawful confinement, conspiracy and negligence."[85] At the pre-trial hearing, Nevsun filed motions to strike, which raised two questions. First, can TNC be held liable in Canada for breaches of CIL? Second, to what extent can courts rule on matters that involve the actions of foreign states? The second question is only relevant to cases where both a Canadian TNC and a foreign state are connected to a violation. For this issue, the court ruled 7 – 2 that even though the subcontractor had direct connections to the state of Eritrea, the court could rule on the matter without directly impugning Eritrea, which would encroach on Eritrea's state sovereignty. For the first question, the court ruled 5 - 4 that it is "not plain and obvious" that claims against Canadian TNCs, based upon

[82] Garcia v. Tahoe Resources Inc at 47–49.
[83] Hassan Ahmad, "Against Settlement in Transnational Business and Human Rights Litigation," *Osgoode Hall LJ (Forthcoming in 2024)*, September 15, 2023, https://commons.allard.ubc.ca/fac_pubs/740.
[84] Nevsun Resources Ltd. V. Araya, No. 37919 (Supreme Court of Canada February 28, 2020).
[85] Nevsun Resources Ltd. V. Araya.

violations of CIL, are bound to fail. This decision was grounded in the court's view that Canadian courts play an important role in the development of international law and the fact that through the doctrine of adoption, CIL forms a part of Canadian Common Law.[86] Following the Supreme Court's finding in 2020, the case was privately settled.[87]

These three cases represent meaningful developments by Canadian courts to reduce legal barriers for foreign plaintiffs in bringing claims against Canadian corporations for violations of human rights. However, the current legal climate is still defined by uncertainty. Plaintiffs still face immense challenges in bringing cases which require legal navigation of a foreign legal system, financing, and travel to a foreign state. For many, this in not in the realm of possibilities without external support. Thus, for TNCs, uncertainty exists in whether tort claims will be brought following a human rights violation. Additionally, uncertainty exists because all the cases were motions to strike, with none of them resulting in a final verdict. Thus, it remains to be seen if a positive remedy for plaintiffs would be found in similar cases.

Further, in all three cases, time delay existed. For *Choc v. Hudbay Minerals Inc.*, the case is still ongoing. *In Nevsun Resources Ltd. v. Araya* and *Garcia v. Tahoe Resources Inc.*, a resolution took 12 -13 years. The time delays in these cases place the impact of liability in the long term. These time delays create uncertainty and cause any sanction or financial loss incurred to be heavily discounted. Further, because courts have not ruled on damages for violations of human rights by TNCs, damage amounts pose uncertainty. In the next chapter, the uncertainty surrounding damages will be explored to determine how damages may be constructed and what deterrence effect could be gained.

[86] R. v. Hape, No. 31125 (Supreme Court of Canada June 7, 2007).
[87] Yvette Brend, "Landmark Settlement Is a Message to Canadian Companies Extracting Resources Overseas: Amnesty International," *CBC News*, October 23, 2020, https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910.

QUANTIFYING DAMAGES

Risk analysis looks at the probability of a violation occurring, the probability of getting caught, and the damage if caught. By examining the damage regime in Canada it can help explain the deterrence effect caused by the availability of tort claims against Canadian TNCs. In the three previously discussed cases, claims against Canadian TNCs were based upon Canadian intentional and negligence torts including torts based upon CIL as well as claims based upon foreign tort law. While there has not been an authoritative ruling on the matter by the Supreme Court of Canada, damages are generally reviewed by lower courts as being procedural, meaning that regardless of whether a tort case against a Canadian TNC relies on domestic torts or if Canadian courts substantively apply foreign tort law, Canada's damage regime will be at play.[88]

In personal injury cases, the fundamental principle for selecting damages is *restitutio in integrum.* This principle is similar to the principle of reliance damages in contract law and requires a "backward-looking" analysis to return the plaintiff to their original state prior to any violation occurring. While monetary damages often cannot return the plaintiffs to their position before the injury, the goal of damage is to restore as "nearly as possible" or provide "substitutes for what he has lost." The framework for how damages should be determined was set out in three different 1978 cases, often referred to as the "trilogy." Under the current framework, damages are separated by special (past) and general (future) losses. These losses are then separated into pecuniary damages and non-pecuniary damages. Pecuniary cover financial and

[88] Thomas Andreas Klatt v. La Toc Holdings Limited, No. CV-10-416817 (Ontario Superior Court of Justice March 29, 2021); Harris v. Hillyer, No. 200601T3132 (Supreme Court of Newfoundland and Labrador March 28, 2022).

easily quantifiable losses, such as loss of income, reduced future earnings and the cost of medical care.[89]

Non-pecuniary damages compensate intangible losses such as pain and suffering, loss of amenities and loss of expectation of life.[90] In the trilogy cases, the Supreme Court developed what is referred to as a "functional approach" to non-pecuniary damages and set a "rough upper limit" for damage amounts. The goal of this approach is to "provide a measure of 'solace' for the plaintiff's misfortune."[91] By providing solace for the plaintiff's misfortune, the remedy, as best as possible, tries to reverse irreplicable damage. In recognizing that non-pecuniary maintains a large degree of arbitrariness and judicial fragmentation, the Court set a "rough upper limit" of $100,000 for most cases.[92] Once adjusted for inflation, the limit sits at around $457,000. In further implementation of this "limit," it has been treated as a firm ceiling and decisions that have sought to go beyond the limit have been overturned.[93] As it was put by the BCCA, the ceiling acts "like a governor on an engine" to limit what might otherwise be an unlimited sum"[94] The limit further does not set a floor and is generally reserved for cases with "catastrophic or close to catastrophic" injuries.[95] By using a functional approach, the courts have created through precedents bands of compensations which take into consideration the objective seriousness of the violation and the "condition of the plaintiff" [96] Non-pecuniary damages should be roughly similar for individuals with similar injuries, but that may also

[89] Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed., Essentials of Canadian Law (Irwin Law, 2008), 112.
[90] Cassels and Adjin-Tettey, 168.
[91] Cassels and Adjin-Tettey, 169.
[92] Cassels and Adjin-Tettey, 169.
[93] Cassels and Adjin-Tettey, 170; Lindal v. Lindal, No. 629 (Supreme Court of Canada December 17, 1981).
[94] Boyd v. Harris, No. 29934 (Court of Appeal for British Columbia March 15, 2004).
[95] Michael v Bergeron, No. 194356 (Supreme Court of British Columbia April 30, 2024).
[96] Wolber v. Ivanova, No. CA49115 (Court of Appeal for British Columbia May 29, 2024).

diverge different subjective experiences.[97] These damages range from around $300,000 for severe brain injuries to $50,000 for more minor injuries such as whiplash.[98]

Aggravated damages can also be used to compensate non-pecuniary harms.[99] This type of damage, however, is only awarded in cases where "the defendants' conduct has been particularly high-handed or oppressive." [100] In these cases, the defendant has been harmed through "humiliating and undignified circumstances."[101] High-handed or oppressive conduct, however, requires that the "defendant be motivated by actual malice, which increased the injury to the plaintiff." [102] These damages are usually awarded in cases of intentional torts, where conduct is "clearly malicious or repugnant to the court's scenes of propriety."[103] However, the actual malice requirement can also be met in cases of negligence, but it requires recklessness as opposed to "carelessness."[104] This "carelessness" requires that it was reasonably foreseeable that the defendant's actions would cause damage.[105]

While pecuniary, non-pecuniary, and aggravated damages serve the goal of compensating this victim, another function and principle which features in tort law is restitution-based damages. Restitution-based damages, which take the form of punitive damages, are aimed at preventing unjust enrichment."[106] In *Whiten v. Pilot Insurance (2002),* 11 considerations were laid out for punitive damages.[107] These considerations stated that

[97] Cassels and Adjin-Tettey, *Remedies: The Law of Damages*, 170.
[98] Kairos Anggadol, "Personal Injury Settlement Amounts 101," Canadian Lawyer Magazine, January 26, 2024, https://www.canadianlawyermag.com/practice-areas/personal-injury/personal-injury-settlement-amounts-101/383159.
[99] Cassels and Adjin-Tettey, *Remedies: The Law of Damages*, 216.
[100] Hill v. Church of Scientology of Toronto, No. 24216 (Supreme Court of Canada July 20, 1995).
[101] Cassels and Adjin-Tettey, *Remedies: The Law of Damages*, 217; Norberg v. Wynrib, No. 21924 (Supreme Court of Canada June 18, 1992).
[102] Hill v. Church of Scientology of Toronto, 2 at 196.
[103] Cassels and Adjin-Tettey, *Remedies: The Law of Damages*, 217.
[104] Cassels and Adjin-Tettey, 218.
[105] Huff v. Price, No. CA009320 (Court of Appeal for British Columbia December 3, 1990).
[106] Cassels and Adjin-Tettey, *Remedies: The Law of Damages*, 249.
[107] Whiten v. Pilot Insurance Co., 1 SCR 595, 94 (Supreme Court of Canada 2002).

punitive damages are (1) an "exception rather than the rule," (2) should be applied only where conduct is "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) The damages should be "reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant." (4) Damage amounts should have "regard to any other fines or penalties suffered by the defendant." (5) Punitive damages should be given only when "misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation." (6) Punitive damages are not compensatory in nature. (7) They should provide retribution, deterrence and denunciation. (8) While general damages provide some retribution, deterrence and denunciation, punitive damages should be applied only when general damages are "insufficient to accomplish these objectives." (9) The damage amounts must not be "greater than necessary to rationally accomplish their purpose." (10) Punitive Damages should be given to the plaintiff "as a 'windfall' in addition to compensatory damages." (11) Punitive damages carry a stigma, meaning moderate awards are "generally sufficient."[108]

When firms conduct risk analyses and find a cost of non-compliance, if potential damage amounts are low, it is unlikely the firm will care about the damages. Looking at how Canadian tort law quantifies damages shows that Canadian tort law has the theoretical ability to inflict a large deterrence effect. Pecuniary and non-pecuniary damages are the most common. Under pecuniary and non-pecuniary damages, compensation amounts are generally lower and directly tied to the harms suffered by the plaintiff. There is also the possibility of aggravated and punitive damages. Punitive damages can be given with the explicit purpose of inflicting

[108] Whiten v. Pilot Insurance Co., 1 SCR at 94.

deterrence. The existence of punitive damage makes it so tort law can make the cost of non-compliance high. What this analysis shows is that because different compensation amounts can be awarded, which can vary greatly, there is uncertainty for both plaintiffs and corporations. This uncertainty interacts with other sources of uncertainty that are present in the legal landscape and can contribute to short-termism. From the analysis of Canada's tort law system, it is clear that "tailor-made" solutions are necessary; however, it is also clear that steps can be taken to strengthen and support the deterrence effects caused by tort law.

CANADIAN POLICY ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

In Canada, the policy targeting TNCs' impact on human rights is generally soft law and aimed at supporting Canadian TNCs to act in a socially responsible way as opposed to act-based liability, which ensures compliance. This includes an Ombudsperson with limited powers, a policy on best practices, and a new act-based liability law focused on forced labour and child labour. This current regulatory regime exists despite multiple attempts from within the legislature to introduce stronger legislation. These proposals have faced strong resistance from industry, as well as the Conservative and Liberal parties. Until 2024, with the introduction of the Fighting Against Forced Labour and Child Labour in Supply Chains Act (Canada's Modern Slavery Act), all proposals to introduce act-based liability faced steep opposition and had been set aside.[109] While it may seem like the tides have shifted, Canada is still politically a long way away from implementing a mandatory HRDD regime. To explain why this is the case, this section will first go through a brief history of Canada's policy towards regulating the conduct of TNCs; second, it will discuss the deterrence effects gained from these policies; and third, it will discuss a number of failed reformist bills.

[109] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects."

In 2005, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) conducted the "Mining in Developing Countries: Corporate Social Responsibility Report," which provided the legislature with several recommendations, including a recommendation for Canada to mandate conformity with international human rights law.[110] In response to this report, advocacy groups, Export Development Canada (EDC) and the Canada Pension Plan Investment Board (CPPIB) provided a proposal to parliament which included corporate social responsibility (CSR) standards with HRDD guidelines; and to ensure compliance, an independent Ombudsperson office and a tripartite compliance review committee.[111] The Ombudsperson office would investigate claims of human rights abuses by Canadian corporations, and the tripartite committee would adjudicate cases of non-compliance.[112] Notably, this proposal did not include conformity with international human rights law.[113]

In 2009, the Canadian Government responded to this proposal and the SCFAIT with the Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector (BCA). The BCA retained the CSR and the HRDD guidelines. However, instead of mandatory guidelines, engaging with the CSR Councillor was voluntary and could be revoked at any time.[114] Instead of the Ombudsman office and tripartite review committee, the BCA created the Office of the Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor), which could act as a mediator between corporations and complainants. However, by removing the mandatory requirements and compliance tool in the EDC and CPPIB proposal and the SCFAIT report, the BCA gave the CSR Counsellor no way to ensure that corporations engaged in HRDD or provided a remedy

[110] Standing Committee on Foreign Affairs and International Trade [SCFAIT], "Committee Report No. 14" (Ottawa: House of Commons of Canada, 2005), https://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14/.
[111] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469.
[112] Charles and Billon, 469.
[113] Charles and Billon, 469.
[114] Charles and Billon, 469.

if abuses occurred. Additionally, the CSR Counsellor had a limited mandate and only operated within the extractive sector.[115]

In 2014, the Canadian Government revitalized the BCA through the Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad (DBCW).[116] The DBCW gave the CSR Counsellor the ability to provide advice and determinations on whether TNCs followed CSR standards. If corporations do not follow the CSR standards or engage with the CSR counsellor, they may be barred from using Trade Commissioner Services and other auxiliary governmental advocacy mechanisms. In 2021, the Canadian Government updated the DBCW by releasing the "Responsible Business Conduct Abroad: Canada's Strategy for The Future (RBCA)." This policy is similar to its predecessor and serves more as an update to the DBCW than a stand-alone policy. Like the DBCW, the goal of the RBCA is to support Canadian TNCs by explaining the current legal landscape and advising on best practices.

What was more noticeable than the RBCA was the 2019 replacement of the CSR counsellor with the "Office of the Canadian Ombudsperson for Responsible Enterprise" (CORE)[117] The CORE creation was noticeable because, unlike the CSR counsellor, it could investigate claims of human rights abuses, had an increased budget to conduct independent investigations and its mandate would be expanded over time to cover other sectors beyond extractive sectors. Additionally, there was speculation and optimism that it would have the

[115] Global Affairs Canada, "Role of the Office of the Corporate Social Responsibility Counsellor," Government of Canada, December 16, 2016, https://www.international.gc.ca/csr_counsellor-conseiller_rse/Our_Role-Notre_Role.aspx?lang=eng.

[116] Foreign Affairs, Trade and Development Canada, "Canada's Renewed CSR Strategy: Doing Business the Canadian Way: A Strategy to Advance CSR in Canada's Extractive Sector Abroad," news releases, November 14, 2014, https://www.canada.ca/en/news/archive/2014/11/canada-renewed-csr-strategy-doing-business-canadian-way-strategy-advance-csr-canada-extractive-sector-abroad.html.

[117] Government Of Canada, "Canadian Ombudsperson for Responsible Enterprise," 2019-1323 § (2019), https://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en.

power to "compel documentation and witnesses."[118] Nevertheless, the CORE's mandate still falls to the same shortcomings as the CSR councillor as it cannot enforce compliance with investigations or impose meaningful sanctions for non-compliance with CSR, nor can it compel documentation and witnesses. The CORE also faces concerns about its efficacy within its mandate due to it only releasing its "first initial assessment reports of complaints brought before the Ombud… nearly four years after the mechanism's creation."[119]

Another mechanism that has existed in Canada since 2000 is the National Contact Point for Responsible Business Conduct, which is required for members parties to the Organisation for Economic Co-operation and Development (OECD).[120] The role of the NCP is twofold: it should help "promote awareness and adoption by Canadian companies of the OECD Guidelines on Multinational Enterprises," and second, it can act as a mediator under the OECD specific instance process.[121] However, similarly to CORE and the CSR counsellor, if a TNC does not engage with the specific instance process the Government of Canada may withdraw support by removing government services and trade advocacy by Canadian representatives.[122] The NCP has additionally faced criticism for its lack of independence due to it sitting withing the federal government.[123] It is also criticized for being opaque, having a high threshold for accepting

[118] John Ruggie, "Canadian Ombudsperson for Responsible Enterprise," April 8, 2019, https://www.business-humanrights.org/en/latest-news/john-ruggie-welcomes-appointment-of-canadian-ombudsperson-for-responsible-enterprise/.
[119] Tomoya Obokata, "Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences - End of Mission Statement," September 6, 2023, 3, https://www.ohchr.org/sites/default/files/documents/issues/slavery/sr/statements/eom-statement-canada-sr-slavery-2023-09-06.pdf.
[120] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects"; "Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015" (Organisation for Economic Co-operation and Development (OECD), 2016); Global Affairs Canada, "About the National Contact Point for Responsible Business Conduct," Government of Canada, January 13, 2023, https://www.international.gc.ca/trade-commerce/ncp-pcn/about-a-propos.aspx?lang=eng.
[121] Global Affairs Canada, "About the National Contact Point for Responsible Business Conduct."
[122] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469.
[123] Obokata, "Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences - End of Mission Statement," 3.

complaints, no proper follow-up procedures, failing to provide findings or remedies, and other procedural shortcomings."[124]

There was, however, a shift from assistance to mandatory compliance and act-based liability in 2024 through the creation of the Fighting Against Forced Labour and Child Labour in Supply Chains Act (Canada's Modern Slavery Act).[125] However, while Canada's Modern Slavery Act is a positive step, it should be distinguished from mandatory HRDD legislation which would be more "stringent, and require companies to substantively demonstrate the measures they are taking to avoid, as well as address human rights violations"[126] As stated within the Act, its purpose is to support the "fight against forced labour and child labour" by requiring Canadian TNCs report annually on their "structure, activities and supply chains," their "policies and due diligence processes" in connection with modern slavery; Aspects of their supply chains which carry modern slavery risks and the steps taken to mitigate this risk; Any measures to remedy those who have suffered modern slavery in their supply chains; "Any measures taken to remediate the loss of income… that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains; Employee training on modern slavery; And how the governmental has assessed the efficacy of their modern slavery prevention.[127]

The annual reports must be submitted to the Government and shared publicly on the company's website[128] However, while the act imposes fines for failing to report and for false reports, it does not establish mandatory HRDD for Canadian TNC or require companies to

[124] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469.
[125] "Fighting Against Forced Labour and Child Labour in Supply Chains Act," S.C. 2023, c. 9 § (2024), https://laws.justice.gc.ca/eng/acts/F-10.6/page-1.html.
[126] Olga Martin-Ortega, Martina Trusgnach, and Cindy Berman, "Push, Pull, Dance: Approaches to Address Labour Abuse in Public Health Supply Chains," *Journal of Industrial Relations*, April 13, 2024, 10, https://doi.org/10.1177/00221856241242222.
[127] Fighting Against Forced Labour and Child Labour in Supply Chains Act, 6.2.
[128] Fighting Against Forced Labour and Child Labour in Supply Chains Act, 8.

prevent, address or remedy abuses once identified.[129] As Tomoya Obokata, the U.N. Special Rapporteur on Contemporary Forms of Slavery stated after his 2023 country visit to Canada: Canada's Modern Slavery Act "promotes transparency to some extent; however, there is a risk of this becoming a box ticking exercise where companies simply submit the same statement every year, as has been reported in other jurisdictions." [130] Therefore, while the law does provide act-based liability, in practice, it is only skimming the surface of what is needed.

Since the beginning of Canadian policy on the conduct of Canadian TNCs while operating abroad, the approach has been to provide guidance instead of ensuring compliance. With many "reformulations" over the years, plus many ongoing critiques of how Canadian TNCs operate abroad, one might wonder why Canada's regulatory regime has been so stagnant and still operates without mandatory HRDD. When looking at past attempts to reform the system it becomes clear as to why more action has not been taken.

Since 2009, there have been four separate private member bills (C-300, C-323, C-571, and C-262) that have sought to strengthen the regulations surrounding the conduct of TNCs[131] Of the four bills, Bill C-300 is the most interesting and gained the most amount of support. Bill C-300 was introduced on February 9, 2009, by seasoned Liberal Member of Parliament John McKay. It called for the creation of a compliant mechanism for extractive TNCs who obtain investment from the Canadian Government. Under this complaint mechanism, the Minister of Foreign Affairs and the Minister of International Trade could receive complaints against Canadian extractive TNCs for violating international human rights and environmental

[129] Obokata, "Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences - End of Mission Statement," 2.
[130] Tomoya Obokata, "Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences - End of Mission Statement," 2.
[131] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469; "C-262" (2022), https://www.parl.ca/DocumentViewer/en/44-1/bill/C-262/first-reading.

standards.[132] It would then allow Export Development Canada and the Canada Pension Plan Investment Board to hold back investments and financial aid if there was found to be non-compliance.[133] On October 27th, 2010, the Bill was defeated 140 to 134.[134] At the time, the Conservative Party held a minority government, and 139 conservative members voted against the Bill. They were joined by one independent conservative member. All present members of the Bloc Quebecois, Liberal and NDP voted in support. However, what is most interesting about this vote is not who voted but who did not. The Conservatives had four absent, the Bloc had seven absent, the NDP had four absent, and the Liberals had 13 absent, including the Liberal Party leader Michael Ignatieff. What this shows is that the Bill could have passed had there been more political will from the non-governing parties, and in particular, the Liberals. While Bill-C00 was tabled by a Liberal Member of Parliament, the vote on the Bill, together with the policy choices from the Liberal and Conservative governments, makes it clear there remains strong support for the interests of Canadian TNCs from both parties. The other private member Bills had gained even less traction in the House of Commons compared to C-300, and none of them were ever subjected to a vote or made it past the first reading.[135]

While the Liberals have shown more of a threshold for innovation, with the implementation of the CORE and Canada's Modern Slavery Act, and the Conservative Party undoubtedly carries the stronger reputation for protecting business interests, there is a lack of appetite from both parties for mandatory HRDD in Canada and other policies which ensure compliance. While there may be many explanations for why this is, one such explanation may

[132] Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469.
[133] Charles and Billon, 469.
[134] "VOTE NO. 125" (2010), https://www.ourcommons.ca/Members/en/votes/40/3/125; The Canadian Press, "Mining Bill Defeated in Commons," *CBC News*, October 28, 2010, https://www.cbc.ca/news/politics/mining-bill-defeated-in-commons-1.971597; Charles and Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects," 469.
[135] VOTE NO. 125.

be due to businesses engaging in "nearly 70 percent of lobbying contacts."[136] It could rest in the concern for the Canadian economy and the economic benefits Canadian TNCs bring to Canada through job creation, taxation, and reinvestments.

Another reason, why soft policies have gained more support is due to the higher time and financial resources required to implement a mandatory HRDD regime. Under the current system, plaintiffs are responsible for bringing claims and bear the costs of doing so. These costs are not just financial but also the time and effort required to compile evidence to try and meet the evidentiary burden. With policies that aim to support TNC to be responsible, the financial and time resources are much lower compared to what would be required under a mandatory HRDD regime. Under a mandatory HRDD regime, resources would have to be invested to follow up with HRDD reports, to investigate if reports are accurate and to be able to compel companies to turn over documentation and witnesses.[137] All these costs add up and may be part of the reasons why HRDD has not been placed on the policy agenda.

CONCLUSION

For those wanting to progress the cause of preventing human rights abuses by Canadian TNCs, the challenge is how to get policy legislated that supports this cause. HRDD can overcome many of the shortfalls of harm-based labially by reducing uncertainty and time. Indeed, there is a plethora of work in support of mandatory HRDD, rightfully highlighting its ability to reduce the risk of TNCs committing violations aboard. However, if the political climate does not allow for such reforms, then alternatives should be pursued that are in line

[136] Nicolas Graham, Bryan Evans, and David Chen, "Canada's Lobbying Industry: Business and Public Interest Advocacy from Harper to Trudeau," *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 56, no. 4 (2023): 992.

[137] Robert McCorquodale et al., "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises," *Business and Human Rights Journal* 2, no. 2 (July 2017): 195–224, https://doi.org/10.1017/bhj.2017.2.

with the overall goal. The Canadian Courts have taken some steps to increase access to courts for foreign plaintiffs. However, the legal space is still defined by uncertainty. When looking at the approaches from the Canadian government, there are many different soft-law tools to help guide and support firms to be able to follow human rights standards. However, deterrence, requires for the costs to outweigh the benefits.[138] If firms view it as in their interests to make decisions that risk violating human rights, then soft law will do little to stop them.

By addressing short-termism, it can help firms balance short- and long-term performance, by doing this, Canadian TNCs will discount less the availability of tort claims for violations of human rights abuses. As such, the deterrence effects from the existing harm-based liability legislation will increase, and more firms will seek to engage in HRDD and take steps to reduce the risk of being involved in human rights violations. An additional potential benefit of advancing short-termism reform is its broader market impact. This is good in itself but is also beneficial in terms of how it uses an "economic benefit" frame. Given the current political climate, where affordability and the economy are at the top of the agenda, if issues are framed in these terms, they are more likely to gain political traction.[139] Because short-termism is inherently an economic issue that can have negative implications for human rights, it may be more palatable in today's political climate than other efforts to strengthen compliance with Human Rights standards, which can be viewed as impacting firm performance and creating additional barriers to production.

[138] International Organization of Securities Commissions (ISOSCO), "Credible Deterrence in the Enforcement of Securities Regulation."

[139] Oksana Kishchuk, "Gen Z - Top Issues Facing Canada," *Abacus Data* (blog), August 31, 2023, https://abacusdata.ca/genz-top-issues-facing-canada/.

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