

# COMBATTING FORCED LABOUR IN SUPPLY CHAINS FROM A CANADIAN CUSTOMS PERSPECTIVE

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Global supply chains are inordinately complex, and they have gained the public's attention like never before. But the focus is not solely on disruptions; forced labour is increasingly in the spotlight.

## Forced labour is prevalent

Forced labour is not a new concept. The International Labour Organization's ("ILO") *Forced Labour Convention, 1930 (No. 29)*, defines forced labour as "all work or service that is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily".<sup>[1]</sup> The ILO estimates that there were 152 million children in child labour and 25 million children and adults in forced labour in 2019.<sup>[2]</sup> World Vision Canada estimates that \$43 billion worth of Canadian imports are at risk of being produced by child or forced labour as of 2020.<sup>[3]</sup> This is an *increase* from the 2015 estimate of \$34 billion.<sup>[4]</sup> At these estimates, nearly seven percent of Canada's imports could be produced by forced labour, and this would indicate widespread prevalence and integration into global supply chains.<sup>[5]</sup>

## What is Canada doing to address forced labour in supply chains?

### *Import ban on goods linked to force labour*

Earlier this fall, the Canada Border Services Agency ("CBSA") acknowledged to a Canadian media outlet that it seized a shipment of women's and children's clothing originating in China for being linked to forced labour. This marked the first time that the CBSA enforced the import ban on goods linked to forced labour pursuant to tariff item number 9897.00.00 under the *Customs Tariff*, which prohibits importation of "goods mined, manufactured or produced wholly or in part by forced labour".<sup>[6]</sup> This prohibition was brought into effect on July 1, 2020, after the ratification of *Canada-United States-Mexico Agreement Implementation Act*.<sup>[7]</sup>

The CBSA is responsible for enforcing the forced labour prohibition. In doing so, it works closely with the Labour Program of Employment and Social Development Canada ("ESDC"), which researches supply chains and prepares reports signaling when goods are likely mined, manufactured or produced by forced labour. These reports are shared with the CBSA, which may use this information to identify and detain goods

suspected of being produced by forced labour.<sup>[8]</sup>

Currently, if a CBSA officer determines that goods were produced with forced labour, section 59(1) of the Customs Act permits the officer to re-determine the goods' tariff classification, and thereby to reclassify them as prohibited goods under tariff item 9897.00.00.<sup>[9]</sup> The goods may then be detained under section 101 of the *Customs Act*, and subsequently disposed of, abandoned or exported as provided under section 102(1) of the *Customs Act*.

CBSA has yet to institute any sector-specific guidance or rules, and appears to be taking a complaint-based approach with regards to seizing goods suspected of being manufactured by forced labour. For example, it is asking persons with information on goods produced by forced labour to call into its "Border Watch Tip Line".<sup>[10]</sup>

This contrasts with the approach taken by US Customs and Border Protection ("**CBP**"), which has taken measures against certain import sectors, including by detaining shipments of silica-based products (such products ultimately destined for use in solar panels) made by Hoshine Silicon Industry Co. Ltd,<sup>[11]</sup> and by withholding release of both cotton and tomato products from the Xinjiang region.<sup>[12]</sup> The United States has also added polysilicon from China to its "List of Goods Produced by Child Labor or Forced Labor" which now joins cotton, garments, footwear, electronics, gloves, hair products, textiles, thread/yarn and tomato products from various countries on this US list.<sup>[13]</sup>

While no similar sector-specific approaches have yet been outlined in Canada, the Government of Canada has taken a regional approach with respect to doing business with entities related to the Xinjiang region of China, which is discussed below.

Finally, also earlier this fall, Public Services and Procurement Canada ("**PSPC**") withheld deliveries of disposable gloves originating in Malaysia pending an investigation into allegations of forced labour.<sup>[14]</sup> The act was taken following the US CBP's Withhold Release Order relating to disposable gloves originating in Malaysia.<sup>[15]</sup> While not seized by the CBSA, PSPC's decision to withhold the shipments underscores the Government of Canada's commitment to stopping forced labour. This event also influenced recently proposed legislation, discussed below, aimed at supporting the import ban.

#### *Obligations on Canadian businesses*

CBSA guidelines require importers to ensure that any goods that they are importing into Canada are compliant with Canadian law. The importer must conduct due diligence on its supply chains to ensure that goods it imports into Canada are not mined, manufactured or produced wholly or in part by forced labour.<sup>[16]</sup>

Beyond those obligations on importers, the *Customs Act* obliges "any person" in possession of prohibited

imports, or who believes on reasonable grounds that he is in possession of prohibited imports, to report those goods.<sup>[17]</sup>

#### *Potential new obligations on Canadian businesses arising from proposed legislation*

Compliance with these obligations is difficult. This is because global supply chains are complex, and often consist of complicated networks of businesses across numerous countries. Identifying where and to what extent forced labour may have occurred at various steps in the chain may be beyond the capabilities of importers or end purchasers.

In an effort to seek greater supply chain transparency, a bill has been tabled several times in the Parliament of Canada in recent years (see our previous commentary about previous attempts to pass supply chain transparency legislation here).<sup>[18]</sup> Most recently, on November 24, 2021, Bill S-211, a bill to enact the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, was introduced in the Senate.<sup>[19]</sup> On December 14, 2021, the Senate completed the second reading of the bill and referred it to the Standing Senate Committee on Human Rights for consideration for further deliberations.

Bill S-211, if passed, would impose reporting obligations on government institutions and any “entity” producing, selling or distributing goods in Canada.<sup>[20]</sup> In contrast to previous supply chain transparency bills, the scope Bill S-211 was broadened to cover federal government institutions. This expansion was a direct result of the PSPC’s decision to stop shipments of disposable gloves as this event highlighted that the federal government is a “major economic actor” that “also runs the risk of importing goods made with forced labour”.<sup>[21]</sup> The bill’s definition of “entity” covers large companies, meaning: companies listed on a stock exchange in Canada; companies prescribed by regulation; or companies that meet two of the following three conditions (i) have at least \$20 million in assets, (ii) have generated at least \$40 million in revenue; and (iii) employ an average of at least 250 employees. These entities will be required to submit an annual report outlining measures taken to prevent the use of forced labour in Canadian goods.<sup>[22]</sup> The report must also describe the business’ corporate structure and its supply chains, and identify those parts of its supply chains that carry a risk of forced labour. Failure to comply with the reporting obligations may result in fines of up to \$250,000.<sup>[23]</sup> Companies must submit this report to CBSA and must make it available public, such as by publishing the report on the company website.<sup>[24]</sup>

#### *Efforts to address forced labour in specific regions: Xinjiang Entities*

As noted above, the Government of Canada has identified the Xinjiang region as an area of special concern. It published a special advisory on doing business with entities related to the Xinjiang region of China, which states that the Government of Canada considers that Xinjiang-related entities pose a particular risk of forced labour, and outlines additional due diligence best practices related to those goods.<sup>[25]</sup> While third party audits

are expressly listed as important, they may not be sufficient, and entities doing business with those in Xinjiang should take particular care in understanding how goods are produced throughout the supply chains.

The Canadian government has also imposed sanctions against four officials and one entity in relation to alleged human rights violations, including forced labour, in Xinjiang, prohibiting Canadians from transacting with those listed.<sup>[26]</sup> Similarly, the United States has also listed five Xinjiang entities, including Hoshine, to its “Entity List” thereby prohibiting, absent a licence, transfers of certain goods to the listed entities.<sup>[27]</sup>

Canadian importers doing business with entities in Xinjiang are also currently required to sign an “Integrity Declaration”.<sup>[28]</sup> Signing the Integrity Declaration means that the company attests, among other things, that it is aware of Canadian law with respect to the prohibition of forced labour; that to the best of its knowledge it is not directly or indirectly sourcing products from Chinese entities implicated in forced labour; and that it is committed to reviewing its supply chain to ensure there are no linkages to forced labour.

A second bill, also progressing through the Senate, would have a blunter impact on Canadian importers doing business in connection with Xinjiang. Introduced on November 24, 2021, Bill S-204, *An Act to amend the Customs Tariff (goods from Xinjiang)* would outright prohibit goods produced, wholly or in part, in the Xinjiang Uyghur Autonomous Region of China.<sup>[29]</sup> This bill is currently at the second reading stage in the Senate, and has not yet been reviewed by the House of Commons.

Should Bill S-204 become law, it would significantly increase existing restrictions with respect to the production and import of goods from this region.

## Conclusion

Canadian businesses will face significant new compliance requirements should either Bill S-211 or S-204 pass. Even absent additional legislation, Canada may soon take increased sector-specific measures such as those taken by the United States in respect of goods from Xinjiang, including but not limited to cotton products, tomato products, or polysilicon. With increased scrutiny of supply chains and corporate social governance more broadly, companies may wish to accelerate the review of their supply chains and further assess associated human rights and reputational risks.

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1 [Ending child labour, forced labour and human trafficking in global supply chains](#): International Labour Organization, Organisation for Economic Co-operation and Development, International Organization for Migration and United Nations Children’s Fund, 2019, p.5. [Ending Forced Labour in Supply Chains]

2 Ending Forced Labour in Supply Chains, p. 2.

3 World Vision, [Black Friday and a dark decade: Child labour numbers and risky goods imported to Canada](#)

[continue to increase](#), 23 November 2021.

4 World Vision, [Supply Chain Risk Report: Child and Forced Labour in Canadian consumer products](#), 2016, p. 6.

5 This is based on Canada's total imports of goods and services in 2020, which totalled \$638.76 billion.

6 [Customs Tariff](#), SC 1997 c. 36, Chapter 98, Item No. 9897.00.00.

7 [Canada-United States-Mexico Agreement Implementation Act](#), SC 2020, c. 1.

8 CBSA, [Memorandum D9-1-6 – Goods manufactured or produced by prison or forced labour](#), May 28, 2021.

9 Customs Act, RSC 1985, c. 1. 2nd supp, s. 59(1).

10 CBSA, [Memorandum D9-1-6 – Goods manufactured or produced by prison or forced labour](#), May 28, 2021.

11 This US' sector-based measure also contrasts with Canada's regional approach to goods produced in the Xinjiang Uygur Autonomous Region, which is discussed later in this article.

12 US Customs and Border Patrol, [CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang](#) (1 January 2021), Press Release.

13 US Department of Labor, Bureau of International Labor Affairs, [List of Goods Produced by Child Labor or Forced Labor](#), online (last accessed 17 December 2021). Note that this list is aimed at raising public awareness about forced labor and child labor, and does not itself prohibit or restrict the importation of the identified goods.

14 Public Services and Procurement Canada, [Contracts with Supermax Healthcare Canada](#) (10 November 2021), Press Release.

15 US Customs and Border Patrol, [CBP Issues Withhold Release Order on Supermax Corporation Bhd. and its Subsidiaries](#) (20 October 2021), Press Release.

16 CBSA, [Memorandum D9-1-6 – Goods manufactured or produced by prison or forced labour](#), May 28, 2021.

17 [Customs Act](#), s. 15.

18 While legislation targeting transparency issues in supply chains has been previously proposed, progress has stalled because of lack of political will or election calls. [Bill C-423](#) was a Private Member's Bill introduced in 2018. [Bill S-211](#) was a Senate Public Bill introduced in February 2020 and [Bill S-216](#) was also a Senate Public Bill, introduced in October 2020. Senator Julie Miville-Dechéne sponsored Bills S-211 and S-216 and the current bill under consideration.

19 Bill S-211, [An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff](#), 1st Session, 44th Parliament, 2021.

20 Bill S-211, s. 5 and s. 9.

21 Canada, Parliament, [Debates of the Senate](#), 44th Parl, 1st Sess, Vol 153, No 9 (8 December 2021) at 247.

22 Bill S-211, s. 6 and s. 11.

23 Bill S-211, s. 19(1).

24 Bill S-211, s. 8 and s. 13 (1).

25 Global Affairs Canada, [\*Global Affairs Canada on doing business with Xinjiang-related entities\*](#), online (last accessed 17 December 2021).

26 Global Affairs Canada, [\*Canada joins international partners in imposing new sanctions in response to human rights violations in Xinjiang\*](#), (22 March 2021) Press Release; [\*Special Economic Measures \(People's Republic of China\) Regulations\*](#), SOR/2021-49, s. 3 and sched. Part 1 and Part 2.

27 US Department of Commerce, [\*Commerce Department Adds Five Chinese Entities to the Entity List for Participating in China's Campaign of Forced Labor Against Muslims in Xinjiang\*](#), (24 June 2021) Press Release.

28 Global Affairs Canada, [\*Integrity Declaration on Doing Business with Xinjiang Entities\*](#) (last accessed: 16 December 2021).

29 Bill S-204, [\*An Act to amend the Customs Tariff \(goods from Xinjiang\)\*](#), 1st session, 44th Parliament, 2021.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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