Overlooked? Canada's new supply chain transparency law expands import ban on forced and child labour

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After numerous false starts, Canada's Parliament on May 3, passed a human rights and supply chain transparency law, formerly Bill S-211, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act.* Most of the attention on the new law has been on supply chain reporting requirements for certain private and government entities. BLG has detailed the reporting and other requirements of Bill S-211 in previous articles, including this comprehensive April 2023 publication on how to report; see full list of related content at the bottom of this page.

Conversely, much less attention has been given to changes Canada's new supply chain transparency law makes to the existing import ban on goods produced using forced labour. In the short-term, these changes are likely more important for most businesses than the new reporting requirements because they will create heightened audit and enforcement risks for any company that imports or uses imported goods in its supply chains.

In this bulletin, we explain the import ban, how the new law changes it, and what businesses need to know to manage the heightened risks. These changes are scheduled to come into force on January 1, 2024. However, the government publicly signaled that it may delay some or all the new requirements of Bill S-211. Currently, it is unclear whether the government intends to delay the new reporting requirements, changes to the import ban, or both.

Canada's import ban on goods produced using forced labour

As an outcome of the NAFTA renegotiations, Canada adopted a prohibition on the importation of goods produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour. Canada gave effect to this prohibition through amendments to the *Customs Tariff*.

All imported goods must be classified according to the Schedule to the *Customs Tariff*, which is based on the World Customs Organization Harmonized Commodity Description and Coding System. In Canada, this includes a chapter on prohibited goods: chapter 98. Typically, importers are responsible for determining whether the goods they intend to import are prohibited. However, the import ban follows the goods and therefore applies regardless of who possesses them. This means that distributors, re-sellers, and other intermediaries in Canada, as well as end users, are at some risk from the import ban.

So far, in the nearly three years since this import ban took effect, the government's enforcement of it has been weak. This stands in sharp contrast to the enforcement of similar laws in the United States, where U.S. Customs and Border Protection is aggressively enforcing both the general prohibition under the Tariff Act of 1930 on goods produced by forced labour and specific rules under the Uyghur Forced Labour Prevention Act restricting goods from the Xinjiang region of China.

Moreover, the Canada Border Services Agency (CBSA), the federal agency responsible for enforcing the import ban, has failed to issue any meaningful guidance on its enforcement. To date, importers have simply been told that they are responsible to conduct due diligence on supply chains to ensure that any imported goods are not tainted by forced labour. This has regrettably left importers, purchasers, and users of imported goods guessing about the extent of their legal exposure and how best to mitigate it.

Effect of Bill S-211 on the import ban

The new law expands the existing import ban to specifically cover and define "child labour" – whether coerced or not – and introduces a new definition of "forced labour." The definitions adopt and expand on the definitions in the International Labour Organization's *Forced Labour Convention* and *Worst Forms of Child Labour Convention*. In addition to the definitions in the ILO conventions, child labour is defined to include labour or services provided by persons under the age of 18 that: would be contrary to Canadian law; interfere with their schooling; or otherwise be mentally, physically, or morally dangerous to them.

The new law therefore has arguably expanded the scope of activity that constitutes forced or child labour and therefore is subject to the import ban. However, we think its most meaningful effect will be to put a greater public and policy focus on the importation of goods produced by forced or child labour, which is likely to make enforcement of the import ban a higher government priority. At the same time, we would expect the CBSA to make use of information filed under the reporting requirements of the new law to inform enforcement of the import ban.

CBSA powers to enforce the import ban

The CBSA has wide-ranging powers under the *Customs Act* to enforce the import ban. These powers apply not just when goods cross the border but also after those goods have been released and sold to intermediaries or end users in Canada. Liability and risk related to the import ban extents to any owner of imported goods. In practice, this may mean that the most significant risk ultimately rests with end users of imported goods,

particularly in cases where the importer is a non-resident of Canada or simply an intermediary or trading company.

The CBSA has broad powers to examine and detain goods suspected of being produced by forced labour, seize goods and evidence, destroy or dispose of goods, and implement “ascertained forfeitures” (that is, payments when the physical seizure of goods is not possible or practical). CBSA enforcement can occur both at the border *and* post-importation, after goods have been sold or transferred to other persons in Canada. In the case of border enforcement, the CBSA may stop goods and investigate on the basis of information it has gathered internally or from other government departments, or because of tips received from a foreign customs or law enforcement authority.

The CBSA has so far decided to operationalize post-importation enforcement through its Trade Compliance Verification procedures, which are post-importation audits conducted by the CBSA to ensure compliance with import requirements. This means that the CBSA may initiate an audit to determine whether certain imported goods are prohibited because they were produced by forced or child labour.

The auditing process typically includes questionnaires and other requests for information and documents, site visits, and in-person interviews. Importantly, these audit powers extend not only to importers of goods but also to any owner of the goods. This process is subject to a statutory appeal scheme, including administrative appeals with the CBSA itself and from there to the Canadian International Trade Tribunal and ultimately the Federal Court of Appeal.

Businesses that are subject to an audit by the CBSA respecting forced or child labour should immediately seek legal counsel.

Top issues for business

How can I determine if I am at risk?

If you import goods or use imported goods, you are at some level of risk. The level of risk and potential legal exposure will depend on the kinds of goods you import or use, and from where those goods are sourced. There are obvious and publicly well-documented issues respecting goods sourced from certain regions in China, Southeast Asia, and parts of Africa. But there are emerging issues closer to home too, including recent reports about the use of migrant child labourers in food processing and manufacturing facilities in the United States. Businesses should carefully review their supply chain and business partners to identify where and how goods are produced, and the entities involved in producing those goods.

What is my obligation to correct customs declarations?

Importers have a legal obligation to make corrections to customs declarations within ninety days after the importer has “reason to believe” that a declaration is incorrect. This would include reason to believe that imported goods are prohibited by the import ban. Importers must continually assess whether they have knowledge sufficient to trigger their customs-related obligation to report and make corrections. Before you make this decision, seek legal counsel.

What does due diligence mean?

While the CBSA advises importers to conduct “due diligence” on their supply chains, it has provided no meaningful guidance on what due diligence should look like, nor what might satisfy this due diligence requirement. Please see our September 2022 article respecting some of the hallmarks of good due diligence in this context, as they evolve internationally.

Think about contractual protections now

Businesses should consider ways to mitigate risk arising from the import ban by reviewing their supplier and business partner relationships. In the event of a CBSA audit, businesses will need access to information that may be held by others in their supply chain. Businesses should consider upfront which party will bear responsibility for commercial losses in the event imported goods are detained, delayed, or even seized by the CBSA.

Contact us

To stay updated on how the above changes could affect your business, reach out to members of our International Trade & Investment Group or any of the contacts listed below.

By

Matthew Kronby, Jesse Goldman, Benedict S. Wray, Jacob Mantle

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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