CSR RISES
Lawyers Advance Their Clients’ Corporate Social Responsibilities

from left to right:
Ed Waitzer; Stikeman Elliott LLP
Brian Burlett; Heenan Blodgett LLP
John Terry; Torys LLP
CSR BECOMES ENTRENCHED

A decade ago, Corporate Social Responsibility was still virtually unmentioned at the boardroom table and issues like human rights due diligence were at best a footnote in annual reports. But a sea change has occurred as the issue has steadily climbed to the top of the business agenda among multinational corporations that take reputational risk seriously.

By Marzena Czarnecka

"Blood" minerals from Eastern Congo in our cell phones. Our clothes made from cotton from Uzbekistan picked by institutionalized forced child labour. Chocolate harvested by child slaves in Côte d'Ivoire in our morning mocha. Our enlightened, privileged Canadian stomachs turn. As Auret van Heerden, head of the Fair Labor Organization, puts it, "None of us wants to be an accessory after the fact."

Agreed. That's why human rights due diligence has, over the past decade, climbed to the top of the business agenda among those multinational corporations (MNCs) that take reputational risk seriously.

This rise hasn't been meteoric, and the scandals associated with bloody supply chains abroad - or, for that matter, questionable human rights policies at home - may well increase in frequency and profile as investor and public scrutiny of MNCs continues to grow. But even in the absence of "hard" laws - domestic or supra-national - "soft" standards on values-based issues like human rights are gaining ground.

This is an amazing development. "It's significant how what people sometimes euphemistically refer to as 'soft law norms' are finding their way into the law," says Edward Waitzer, a partner at Stikeman Elliott LLP in Toronto. That is certainly the case in the arena of human rights due diligence, an area in which international law has been evolving for more than half a century. But the greatest and most dramatic change may come from the realization by powerful transnational businesses of how interconnected - and vulnerable - global enterprise is when it comes to sins of social omission.

Business has not been anxious to accept this responsibility. In 1996, when several world leaders, including then US president Bill Clinton, and world organizations started to get serious about Corporate Social Responsibility (CSR), corpora-
initiatives but as the century turned, CSR was still virtually unmentioned at the boardroom table, and issues like human rights due diligence were at best a footnote in annual reports. Non-governmental organizations (NGOs) and civil rights societies like Human Rights Watch, Amnesty International and Transparency Watch proliferated, while the tension between them, business and governments continued.

At risk of horribly oversimplifying a complex dynamic, NGOs argued for increased regulation of business to ensure accountability; business countered that voluntarism was an essential and effective component of CSR. The UN, among others, moved to capitalize on this argument by launching the Global Compact in 2000, a voluntary good corporate citizenship program, and a myriad of other international, national and industry-based versions of the Compact, such as the extractive (mining) industry’s Voluntary Principles on Security and Human Rights, followed.

Governments, while certainly not absent from the debate, offered a fractured and inconsistent voice: be they the 192 members of the United Nations, the 25 members of the OECD, or the hundreds of regional state governments – some functional, some rogue, most somewhere in between – they rarely spoke with a consistent voice.

And yet, in this chaotic mess, tangible change happened. “Ten years ago, if you tried to engage a CEO in a discussion of social values, they wouldn’t know how to have that conversation,” says Waitzer. “Today, if you go hang out at Davos or at the International Financial Forum or wherever the big wheels hang out, this – CSR, social issues, human rights – is the major part of their discourse. In a way, that’s all that they talk about.”

Now, as Waitzer acknowledges, “there may be a gap between what they’re talking about and what they’re doing” but they’re certainly talking about it. And grappling with it, because they don’t want globalization to fail.

This concept may be the most salient legacy of the first decade of the 21st century, from unprecedented boom to terrifying bust: the realization that globalization can fail, and its strength – the blurring of borders, the integration of capital markets, the interdependence of economies and nations – is also its greatest vulnerability.

“The old metaphor about the butterfly flapping its wings is real now, people get it,” says Waitzer. The consequence of that interconnectedness is huge. “Imbalances matter,” Waitzer says simply. “You can’t say we don’t care about what happens in other parts of the world, because if you destabilize other parts of the world, it will come back and bite you.”

When business accepts that equation – and if it wants globalization to continue – it also has to accept that not only
CSR BECOMES ENTRENCHED

Sara Seck; University of Western Ontario

does business have the power to effect change on human rights issues around the world, it may be the international force best equipped to do so.

And not because the events of the past 15 years – or 15 months – have softened its laissez-faire capitalist heart. Rather, because in this interconnected world, business – transnational business in particular – is more vulnerable to pressure than any government: political pressure, economic pressure, legal pressure, but most importantly, reputational pressure.

The company that perhaps best illustrates this in Canada is Calgary-based Talisman Energy Inc., which in 2001 found itself facing a class-action lawsuit in the US under the Alien Tort Claims Act by the Presbyterian Church of Sudan for complicity in genocide because of its 1998 investment in an oil project partly controlled by the Khartoum government. Ten years later, Talisman regularly pops up on lists such as the Jantzi-Macleans’ 50 Most Socially Responsible Corporations list.

“Talisman was the original poster child for people saying here’s a bad MNC that’s doing bad things abroad,” says John Terry, a partner with Torys LLP in Toronto. Torys was among the advisors who worked with Talisman through the Sudan lawsuit. Along with the rest of Corporate Canada – and the world – they witnessed the process through which Talisman moved from ignoring public opinion and eschewing responsibility for the political situation in Khartoum and the human rights fiasco in Sudan to recognizing that there was a direct link between its share price, shareholder dissatisfaction and future business prospects and its Sudan stake.

The US class action dogged Talisman until 2009, when it was finally dismissed — long after it had exited its Sudan stake. A CSR team, created in the middle of the Sudan controversy by now Vice President, Corporate Affairs Reg Manhas, undertook the Herculean task of rebuilding Talisman’s reputation and social licence to operate, which is critical to a company with Talisman’s penchant to, as Terry puts it, “go into interesting places.”

As Talisman bowed to reputational pressure, global businesses argued that, because of such pressure, they didn’t need further regulation; that because investors, consumers et al. would punish them when they were perceived to have done wrong, that would offer sufficient pressure to do right. NGOs and civil rights activists have countered that, absent remedy and enforcement, there is no real accountability.

This has been a thorny issue for the international community, eternally walking the tightrope of respecting local jurisdiction while promulgating global standards. In 2003, the UN almost fell off the tightrope with its draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which attempted the shift from voluntary compliance by business to binding compliance. The exercise failed, chiefly because of “the perception that the Norms extended the reach of international human rights instruments beyond states such that they would have direct, binding application vis-à-vis corporations as well,” says Dr. Aaron Dhir, a professor at Osgoode Hall Law School. “The concern is that international law, traditionally premised on the centrality of the state, provides little authority for doing this.”

Stalemate? Not for long. Enter John G. Ruggie, the Berthold Beitz Professor in Human Rights and International Affairs at Harvard’s Kennedy School of Government, as well as an Affiliated Professor in International Legal Studies at Harvard Law School, who is earning his place in corporate and social history as the Special Representative of the United Nations’ Secretary General for Business and Human Rights, a role to which he was appointed in July 2005.

In June 2011, Ruggie will present his final report on business human rights, the culmination of six years of research, consultation and review that’s taken Ruggie and his team around the world. What he proposes — indeed, what he has already proposed in earlier commentaries, drafts and reports — is expected by many to be a seminal turning point in how business, governments and other stakeholders understand human rights, human rights due diligence, and state and corporate responsibilities vis-à-vis both in the global business context.

And it’s a considerable departure from the 2003 draft norms.
While NGOs and some states supported them, “business hated these,” says Burkett. Ruggie himself saw them as committing “doctrinal excesses”: overstepping the bounds of international law, and without a snowball’s chance in hell of success as a result.

What is he offering instead? Well, by 2008, he presented the UN with what Dhir calls “a very thorough blueprint of the various attempts at tackling the business and human rights conundrum,” identifying relevant governance gaps and other shortcomings in the current landscape. He also articulated a three-pillar policy framework, already entering the human rights lexicon as the Protect-Respect-Remedy framework, in which governments have a duty to protect human rights, business has a responsibility to respect human rights, and victims of violations have greater access to effective remedy.

The framework was unanimously accepted by the UN Human Rights Council, and Ruggie has spent the past three years operationalizing it. In November 2010, he released for comment a draft report of Guiding Principles, 29 “operational and cultural changes in and among governments as well as business enterprises,” the implementation of which would shift states and businesses from “institutional misalignments onto a socially sustainable path.”

Mere words? No. This is the real thing, says Sara Seck, a law professor at the University of Western Ontario, who has been following Ruggie since 2005. What separates this initiative from the ill-fated draft Norms and other attempts to operationalize human rights due diligence and business responsibility is the level of buy-in, even before the release of the final report.

“It’s so significant because it has been accepted by so many different stakeholders,” says Seck.

Donna Kennedy-Glans, Calgary business lawyer and oil patch executive-cum-social activist and CSR advisor, agrees. “I like his process,” she says simply. Kennedy-Glans is, among other things, the founder of Integrity Bridges, a volunteer humanitarian organization that trains and mentors community leaders in health care, law, journalism, education and politics. “He has gone to all groups. I’ve tracked what he’s said to NGOs, critics, lawyers. He’s done an amazing job of bringing things together in a transparent process,” she says.

Among the stakeholders Ruggie has pulled into the process have been some of the world’s leading business law firms. In Canada, Stikeman Elliott participated in the Special Representative’s early “corporate law mapping” exercise, providing Ruggie’s team with pro bono research and commentary alongside firms such as Clifford Chance LLP, Linklaters and Weil, Gotshal & Manges LLP.

“One doesn’t want to say that endorsement from corporate lawyers is a significant event, but certainly endorsement of signifiant corporate lawyers of a human rights framework’s robustness is astonishing,” says Seck. What’s equally astonishing is Ruggie’s concentrated effort to bring dissenters on board. His 2008 report raised the ire of, among others, Martin Lipton, the Lipton in New York’s Wachtel., Lipton, Rosen & Katz. In a client memo authored with colleague Kevin Schwartz, Lipton cautioned Corporate America against Ruggie’s project: “The Report bears significant, potentially harmful implications for global business and for meaningful accountability in various social actors’ duties to fulfill the promises of international human rights instruments.”

Fast-forward two years, and Lipton is a Ruggie convert. “This draft report’s sensible guidance will be widely applauded,” reads his client commentary on Ruggie’s draft Guiding Principles, which “insightfully marries aspirations with practicality. It identifies a host of tangible opportunities for nations and businesses to contribute to the goal of preventing human rights abuses... The draft report’s eminently reasonable guiding principles can be endorsed, and practically implemented, by corporations.”

The relationship between business and NGOs in this arena being what it has been, an endorsement like that may well terrify NGOs. But it shouldn’t.

Ruggie does not absolve states from their duty to protect human rights; if anything, he maps out how they can be more vigilant and proactive. He also sets out guidelines through which violations of corporations’ duty to respect human rights
can be remedied, both through judicial and non-judicial means. But the critical part of the entire six-year project, the part that will either earn it a star spot in the history of the evolution of human rights concepts – or relegate it to the trash heap of aspirational but failed initiatives – isn’t what NGOs think of it, or how they will use it. It’s all about what multinational corporations do: how, once the Guiding Principles go from draft to final, they will approach their human rights policies going forward.

“The responsibility to respect is not understood as a legal obligation, which for lawyers makes it a little curious,” says Seck. But for businesses operating in 2011 – as Talisman learned back in 2001 – the social licence to operate is just as critical as the legal licence. The Ruggie framework, says Seck, gives companies struggling with how to maintain this licence, “a sense of what it is they are supposed to turn their mind to and how.” Absent a framework or a roadmap, they may freeze up and do nothing, even when the business and reputational cost of doing nothing is considerable.

And we all – NGOs, governments, conscientious individuals and concerned consumers – need them to do something. Because our complicated, interconnected world is about to get even more complicated and interconnected, making the issues even more thorny.

Not that they have ever been easy. From the 1948 UN Universal Declaration of Human Rights through to the 1999 ILO Agenda for Decent Work and the current OECD review of human rights guidelines for MNCs, the human rights agenda has been set by Western economies, and beset by a tension between developed countries and developing countries — marked by what Dina Aloisi, Vice President, Corporate Social Responsibility for Goldcorp, Inc., characterizes as “a very paternalistic view of developing country governments.

“I find that very frustrating,” Aloisi says. “NGOs talk about the governments of Guatemala, for example, in such condescending ways. And I see them do it for Argentina, Chile, and they say, ‘We as Canadians have to go in there and show them how to regulate their industries.’” Guatemala is a particularly sore point for Goldcorp: the Inter-American Commission on Human Rights (IACHR) asked the Guatemala government to suspend operations at Goldcorp’s Marlin Mine there. The Guatemala government is investigating, and NGOs such as IACHR and MiningWatch Canada are watching. Goldcorp maintains its operations there adhere to “the highest standards, with an abiding commitment to the responsible stewardship of the environment and to the human rights of the people in communities near Marlin,” according to a Goldcorp press release.

It’s an attitude rooted in what Julius Grey, a labour-side human rights lawyer with Montréal boutique Grey Casgrain, calls “one of the most dangerous myths around human rights due diligence,” namely, “that so-called Western and democratic countries do not violate human rights.” While the action lists of organizations like Amnesty International intermittently indict both Western states and Western-based business, at home the government of Alberta is currently the target of a campaign regarding oil and gas development processes on First Nations lands, and Barrick Gold Corporation is on the mat for the actions of police and private security forces at its Porgera Joint Venture mine in Papua New Guinea — most of the focus on human rights violations, be they in the name of business, politics or religion, reflects this developed/developing, democratic/undemocratic dichotomy, the attempts at universality in human rights definition and compliance constantly compromised by political and cultural incompatibilities.

So it’s never been easy. But sometime between 1996 and 2011, perhaps even precisely in 2005, as Ruggie started to dismantle the UN draft Norms and to develop the Protect-Respect-Remedy framework, the politico-cultural diversity inherent in how we talk about human rights got even more diverse because globalization got a heck of a lot more ... global.

We all lived through this change: when CSR and human rights due diligence first came to the forefront of business, globalization mostly meant North American and European businesses expanding around the world. Today, globalization clearly includes the rise of Russian, Chinese, Indian, Brazilian and other transnational companies in the world economy.

"Prior to recession, the US was still the dominant economy," says Burkett. "The recession really accelerated certain trends, and it is very clear now China, India and Brazil are really
becoming significant players within the world economy. We see everything through our North American lens. Well, they have a different lens." Each of them has a completely different lens. Brazil pays more attention to social issues than its North American trade partners. India is, as Burkett puts it, "a thriving, messy, democracy," and China ... China is boycotting the 2010 Nobel Peace Prize.

Think about it. In a world in which China is the new economic superpower (and Russian oligarchs global investors), human rights due diligence by MNCs acquires a whole new meaning. "This is part of why I'm investing time in Ruggie and why I think what he's doing matters," says Waitzer. "The greatest leverage on China is through supply chains. So when WalMart says, 'Here are standards that we are applying through our supply chain,' China pays more attention to that than when the UN or Europe or Canada tries to rattle the cage — and it's working. If you go to business sessions in China or conferences that they run, China understands that they need to adapt to all these things."

That's how NGOs such as van Heerden's Fair Labor Organization see it too. "Let's face it, the contract from a major multinational brand to a supplier in India or China has much more persuasive value than the local law or local environmental standards," he says bluntly in a July 2010 TED Talk. "Those factories may never see an inspector ... But you lose that contract for a major brand name, that's the difference between staying in business and going bankrupt."

And you will lose that contract. "The WalMarts of the world have figured out that they have to do that because reputational risk goes the other way," says Waitzer. "It's not the manufacturer in China that bears the reputational risk when something goes wrong, it's the CEO of WalMart. It's that kind of leverage that's going to drive China getting onside with all of this."

That leverage is the reason MNCs need to get onside with human rights due diligence ahead of hard laws and realize they have to tell the world what it is they are doing. Canadian mining companies learned this the hard way recently, when they found themselves faced with Bill C-300, a.k.a. the Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act, a private member's Bill pushed by Liberal MP John McKay, which passed two readings before its eventual narrow defat on October 28, 2010.

The Bill was supported by many CSR academics, legal scholars and organizations such as the Canadian Network on Corporate Accountability and MiningWatch Canada, but strongly fought by the mining industry. During the industry lobbying process, the decision-makers at Goldcorp found themselves taken aback at how Canadian politicians and the public viewed their practices. "We'd take visitors to our sites, and they'd find out that we recycle 90 per cent of our water, and they'd be shocked," says Aloi. "And we'd say, well, what did you think we were doing?"

Well, bad things. Because enough MNCs have done so in the past — if not actively, then through omission or lack of vigilance over their partners, contractors and members of the supply chain — and some are still doing so today. And they have been slower than civil liberties activists in understanding the speed and extent with which, in an interconnected world, they can be punished for their sins of commission or omission — Barrick Gold's recent Papua New Guinea challenge is a case in point. Human Rights Watch and members of the International Human Rights Clinic at Harvard Law School and the Center for Human Rights and Global Justice at the New York University School of Law were gathering data on human rights violations at the Porgera Joint Venture since 2006. Barrick, according to its own statements, found out about the most serious of these in 2010, by which time it was in the middle of a nasty, multi-stakeholder crisis. It's been reacting ever since and learning that it's not the governments of Papua New Guinea or Canada that it must placate, but international public opinion.

It's the lesson Talisman learned at great cost 10 years ago, and Barrick is learning at substantial cost now. The company is very active in its CSR activities, joining the 10-year-old extractive industries' Voluntary Principles on Securities and Human Rights in November 2010, making a commitment to select a director...
CSR BECOMES ENTRENCHED

with solid CSR experience and setting up an external CSR Advisory Board. “There is incredible leverage that can be used by activists,” says Waitzer, taking a dispute that originates on the ground in Papua New Guinea, Ecuador, India or wherever, “and taking it up to the CEO of a big mining company.” Or, when it’s a small company, to the Stock Exchange. In 2010, a group of Ecuador community activists brought a lawsuit in the Ontario Superior Court against junior Canadian miner Copper Mesa and the TSX, although the TSX delisted the company on January 19, 2010 (the Ecuador activists are represented by Toronto lawyer Murray Klippenstein).

Events like this point to how the “remedy” aspect of Ruggie’s Protect-Respect-Remedy framework may play out. For Julius Grey, the ability — and willingness — of Canadian provincial courts to take Canadian MNCs to task “upon proof that the companies’ activities are in some way threatening human rights” would go a long way toward ensuring businesses that don’t take their human rights obligations seriously are held accountable.

Right now, ability and willingness remain limited. Ontario courts threw out Copper Mesa, and in the US, only a handful of cases have used the Alien Claim Torts Act. In the majority of these, American courts were reluctant to take jurisdiction.

The preference in even the hard-talking Western developed democracies seems to be for soft, non-judicial solutions: in Canada, as Bill C-300 failed, the office of Canada’s first CSR Counsellor for the extractive sector opened for business on October 20, 2010, after a year of consultation. Filled by Marketa Evans, a former director with NGO Plan International — and before that, an executive director of the University of Toronto’s Munk School of Global Affairs and as founder of the Devonshire Initiative (a less than successful earlier attempt to get Canadian mining companies and NGOs to work together), the office, at press time, has been untested. Because nothing on the human rights due diligence front is simple, there is some concern that NGOs may boycott the CSR Counsellor office because they don’t trust it.

To a certain extent, the success of the CSR Counsellor and NGO buy-in into formal processes may be as irrelevant as domestic courts’ reluctance to pronounce on international human rights abuses. Waitzer believes most credible corporations won’t wait for hard laws, and the smart ones will increasingly move on these issues before NGOs put them on the mat and they’re tried and convicted in the court of public opinion.

“If you understand all this stuff, you can get out ahead of it and manage it before it manages you,” Waitzer says. That’s why CSR executive positions are proliferating; that’s why transnational business and its advisors are buying into Ruggie: the business case for CSR has been made, and NGOs and others have demonstrated that they can effectively use the modern world’s interconnectivity and global communication chains to effect real pressure and damage on companies’ reputations — and thus share price and future opportunities.

It is because he recognized from just how many angles transnational business is vulnerable to this type of pressure that Ruggie has hustled to get global industry buy-in into his framework. Vulnerable and powerful, and never more so when it acts in its own self-interest, business is saying, as Ruggie prepares his final report, that it recognizes its obligation to respect human rights in its far-reaching business operations.

This is good news: extremely good news. “Bringing the global business community onsite is more powerful than trying to change laws,” sums up Waitzer. “The laws will catch up.”

The real test, of course, will come when MNCs really walk the talk: when and how their human rights due diligence activities and other CSR policies change as the Protect-Respect-Remedy framework moves from draft to reality and institution.

Dina Aloi believes this process has already begun. “I relied on the Ruggie materials when we developed our human rights policy and our CSR policy,” she says. Ruggie’s all the rage at the International Council on Mining and Metals, an umbrella group for the world mining industry. ICCM’s human rights committee, which Aloi chairs, is reviewing the Draft Guiding Principles and discussing how to implement Ruggie’s recommendations.

“Human rights due diligence is key to avoiding problems,” she says. “Anything that helps us do that, we want to build upon.”

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