

Canada's Modern Slavery Legislation is Now in Force – What You Need to Know

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On January 1, 2024, Canada's modern slavery legislation, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*¹ (the Act), came into force. As discussed in our previous commentary, the Act has implications for several businesses and other "entities" in Canada, including the imposition of significant annual reporting obligations, with the first report under the Act due by May 31, 2024 (potentially earlier for federally incorporated entities – see below for additional details).

Public Safety Canada has released guidance (the Guidance) about the application of the Act, as well as report content and format. Key details of the Guidance are below.

New Requirement: Mandatory Online Questionnaire

In addition to the annual reporting requirement under the Act, the Guidance introduces a mandatory questionnaire (the Questionnaire) for reporting entities. As part of the process of submitting an annual report to the Minister of Public Safety, reporting entities will also be required to complete a comprehensive online Questionnaire. Failure to complete the Questionnaire is an offence under the Act, subject to the same penalties as failure to file a report.

Information provided in the Questionnaire must be consistent with the information provided in an entity's report.

Guidance on Application of the Act

As discussed in our previous commentary, the Act defines an "entity" as a corporation, trust, partnership, or other unincorporated organization that:

- is listed on a stock exchange in Canada;
- has a place of business in Canada, does business in Canada, or has assets in Canada, and satisfies at least two of the following in at least one of the two most recent financial years, based on its consolidated financial statements:
 - had at least \$20 million in assets;

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- generated at least \$40 million in revenue; or
- employed an average of at least 250 employees; or
- is prescribed by regulations.

The Act applies broadly and requires reporting by “entities” that:

- produce, sell, or distribute goods in Canada or abroad;
- import goods produced abroad into Canada; or
- control an entity engaged in the aforementioned activities.

The Guidance provides commentary in respect of several of the above items, as outlined below. Companies should consider this commentary in determining whether the Act applies to them.

Business Presence in Canada

In determining whether a company has a “place of business in Canada”, the Guidance indicates that companies should use the ordinary sense of these words and the criteria applied by the Canada Revenue Agency.

Further, the Guidance notes that “doing business in Canada” does not require having a place of business in Canada. Rather, companies may be considered to be doing business in Canada if they produce, sell, or distribute goods in Canada; have employees located in Canada; make deliveries, payments, purchases, or contracts or acquire assets in Canada; or have assets, inventories, or bank accounts in Canada.

Size-Related Thresholds: Assets, Revenue, and Employees

The Guidance confirms that the size-related thresholds (of assets, revenue, and employees) are to be calculated on a global, consolidated basis and a reporting entity’s revenue, assets, and employees include the revenue, assets, and employees of any entity that it controls, but not of any entity that owns or controls it (i.e., its parent). Accordingly, assets are not restricted to assets located in Canada, revenue is not restricted to revenue from business activities in Canada, and the number of employees is not restricted to those living or employed in Canada.

The Guidance also provides that assets are to be calculated on a gross (not net) basis.

“Employee” as used in the Act is to have the same meaning as in Canadian common law and includes people employed on a full-time, part-time, or temporary basis, but does not include independent contractors.

Producing, Selling, Distributing and Importing Goods; Exclusion of Minor Dealings

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The Guidance clarifies that the terms “selling, distributing and importing goods” do not include services that solely support the production, sale, distribution, or importation of goods (for example, marketing, administrative services, financial services, and software services). Entities should apply the ordinary sense of these words in determining whether they are engaged in selling or distributing goods, or importing goods into Canada.

The Guidance notes that “goods” refers to goods that are the subject of trade and commerce, understood in the ordinary sense of the word.

Notably, an entity is considered to be “importing goods into Canada” if the entity is responsible for accounting for those goods under the *Customs Act*.² Purchasing goods produced outside Canada from a third party, where that third party is considered to be the importer for purposes of the *Customs Act*, does not constitute “importing goods.”

Although the Act does *not* prescribe a minimum threshold value of goods that an entity must produce, sell, distribute, or import in order for the Act to apply, the Guidance indicates that the Act should be read as excluding very minor dealings.

Control

The Guidance indicates that the term “control” should be applied broadly, includes both direct and indirect control, and extends down the organizational chain.

Questions Remain

While the Guidance has provided clarification on certain elements of the Act, key interpretive questions remain. For example:

- The Act requires entities incorporated under the *Canada Business Corporations Act* or any other federal legislation to provide their report to shareholders along with their annual financial statements. Where such entities provide their annual financial statements to shareholders prior to May 31, the reporting deadline under the Act may be effectively accelerated to such earlier date.
- The Guidance does not address how an entity’s “average” number of employees is to be determined, leaving room for interpretation on this point.

In addition, applying an “ordinary sense” interpretation to words in the Act may lead to inconsistent interpretations on the application of the Act.

Report Content and Format

Content

Reports must include information addressing each of the requirements in Sections 11(1) and 11(3) of the Act, including:

- the steps taken to prevent and reduce the risk of forced or child labour in the entity's production of goods or in the productions of goods imported into Canada by the entity;
- the entity's structure, activities and supply chains;
- the entity's policies and due diligence processes relating to forced and child labour;
- the parts of the entity's business and supply chains that carry a risk of forced or child labour;
- measures taken to remediate forced or child labour and loss of income to the most vulnerable families resulting from measures taken to eliminate forced or child labour;
- training provided to employees; and
- how the entity assesses its effectiveness in ensuring that forced and child labour are not used in its businesses and supply chains.

The Questionnaire is designed to collect the information necessary to satisfy the requirements under the Act. Accordingly, the Questionnaire can be used as a guide to develop the entity's annual report.

The Guidance confirms that there is no prescribed level of detail for Questionnaire responses or the report. Instead, entities should use discretion in determining the appropriate level of detail proportionate to their size and risk profile.

Approval and Attestation

Reports must be approved by the entity's governing body and include an attestation (the required form of which is provided in the Guidance) signed by one or more members of the entity's governing body, together with the approving member's name and title, the date of signature and a statement that the approving member has the legal authority to bind the entity.

Format

Reports must be in English and/or French and cannot exceed 10 pages in length (or 20 pages in length if the report is in both English and French). Reports must be submitted as a PDF file which does not exceed 100MB.

Reporting in Multiple Jurisdictions

Reports should indicate whether the reporting entity also reports under legislation in other jurisdictions, such as the United Kingdom's *Modern Slavery Act 2015*³ and Australia's *Modern Slavery Act 2018*.⁴

Joint Reports

An entity may submit a joint report covering its own actions and those of any entities it controls. Joint reports should only be submitted if the information provided applies generally to all entities covered by the report.

If submitting a joint report, the legal name of each entity covered by the report must be clearly identified.

What's Next?

Given the fast-approaching deadline of May 31, 2024, for the initial report under the Act (and potentially earlier for federally incorporated entities), businesses should prioritize determining whether they have a reporting obligation under the Act and, if so, gathering the information that they require in order to prepare their initial report.

¹ *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c. 9.

² *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp).

³ *Modern Slavery Act 2015*, (UK).

⁴ *Modern Slavery Act 2018*, (Commonwealth), 2018/153, (Austl).