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 **NORTON ROSE FULBRIGHT**

# **Human rights liability in Canada for global mining operations: *Risks, responses and opportunities***

**Norton Rose Fulbright Canada LLP**  
*March 7, 2017*



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# Presenters



## Michael Torrance

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Partner  
Toronto

Michael Torrance is a Partner in the Toronto office who advises corporations on domestic and international human resources management, occupational health and safety and human rights law, with an expertise in international standards of sustainability and risk management. He is the Local Practice Leader for Occupational Health and Safety for Norton Rose Fulbright Canada LLP in Toronto.

Mr. Torrance's practice also includes Risk Advisory on international standards of environmental and social risk management and human rights due diligence. Mr. Torrance has been extensively published and quoted in the media on sustainability and corporate social responsibility topics. He is the editor and lead author of IFC Performance Standards on Environmental & Social Sustainability: A Guidebook, published by Lexis Nexis in 2012.



## Clarke Hunter, QC

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Senior Partner  
Calgary

Clarke Hunter has practiced litigation and dispute resolution since 1980, following a clerkship with Chief Justice Laskin at the Supreme Court of Canada. He has represented clients in domestic and international arbitrations and mediations, at all levels of the courts in Alberta, in the courts of two other provinces, and in the Federal Court, the Tax Court and the Supreme Court of Canada.

The disputes on which Mr. Hunter has acted have involved a broad range of subject matters, including aboriginal (government side), contractual and joint venture, fiduciary duties, oil and gas, corporate securities, director and officer liability, shareholder remedies, professional negligence, product liability, intellectual property and tax.

# Presenters (cont'd)



## Janne Duncan

Senior Partner  
Toronto

Janne Duncan is a business lawyer with more than 25 years of experience advising public and private enterprises and their boards on often sensitive mandates. She speaks and teaches widely in the areas of mining, governance, executive compensation, corporate social responsibility and disclosure best practices, and co-leads the Women in Line for Leadership board-readiness program for women in the extractive sector co-sponsored by Norton Rose Fulbright Canada and KPMG.



## Anne-Marie Naccarato

Director, Legal, Ethics & Compliance  
Goldcorp Canada Ltd.  
Toronto

Anne-Marie Naccarato has expertise in labour, employment, health, safety, human rights, and ethics areas of law.

# Exploring Human Rights Due Diligence: Report



## Exploring human rights due diligence

Good practices and challenges for business en

### Time For Corporate Minds To Link Human Rights With Legal Fines



Dina Medland, CONTRIBUTOR

I cover corporate leadership, the boardroom and corporate governance. [FULL BIO](#) ✓  
Opinions expressed by Forbes Contributors are their own.



It has taken years for the impact of burgeoning legal fines on corporations to start to sink in and make any impact on their business models- just look at [Deutsche Bank](#). But now the cost of legal fines is beginning to concentrate the minds of shareholders and institutional investors.

Human rights is an issue that has steadily been rising on the global corporate governance agenda, yet few companies seem aware that it is an issue that is now assuming "a hard legal dimension." A study just out reveals that almost half of all global businesses surveyed have never undertaken an exercise in human rights due diligence or a human rights impact assessment.

The relationship between business and society is critical to standards of living and quality of life. Of the 100 largest economies in the world, 51 are corporations - only 49 are countries, as [Amnesty International](#) points out. Yet until very recently, there have been few effective mechanisms at national or international level to prevent corporate human rights abuses or to hold companies to account. The tide is turning, and yet this latest study by the [British Institute of International & Comparative Law \(BIICL\)](#) and the global law firm [Norton Rose Fulbright](#) suggests a high level of corporate complacency.

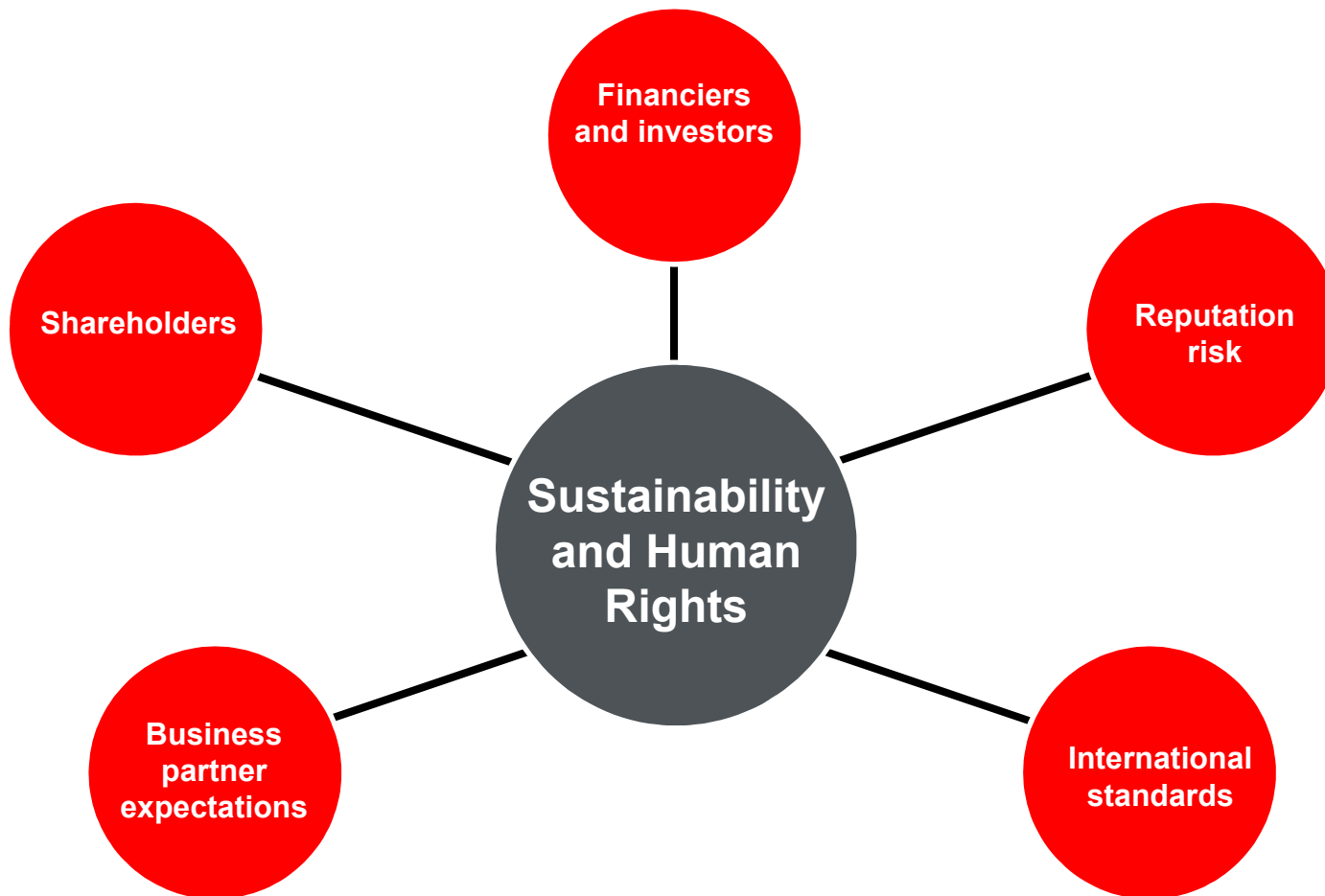
## THE WALL STREET JOURNAL.

RISK & COMPLIANCE JOURNAL.

### The Morning Risk Report: Human Rights Due Diligence Shields Against Brand Damage

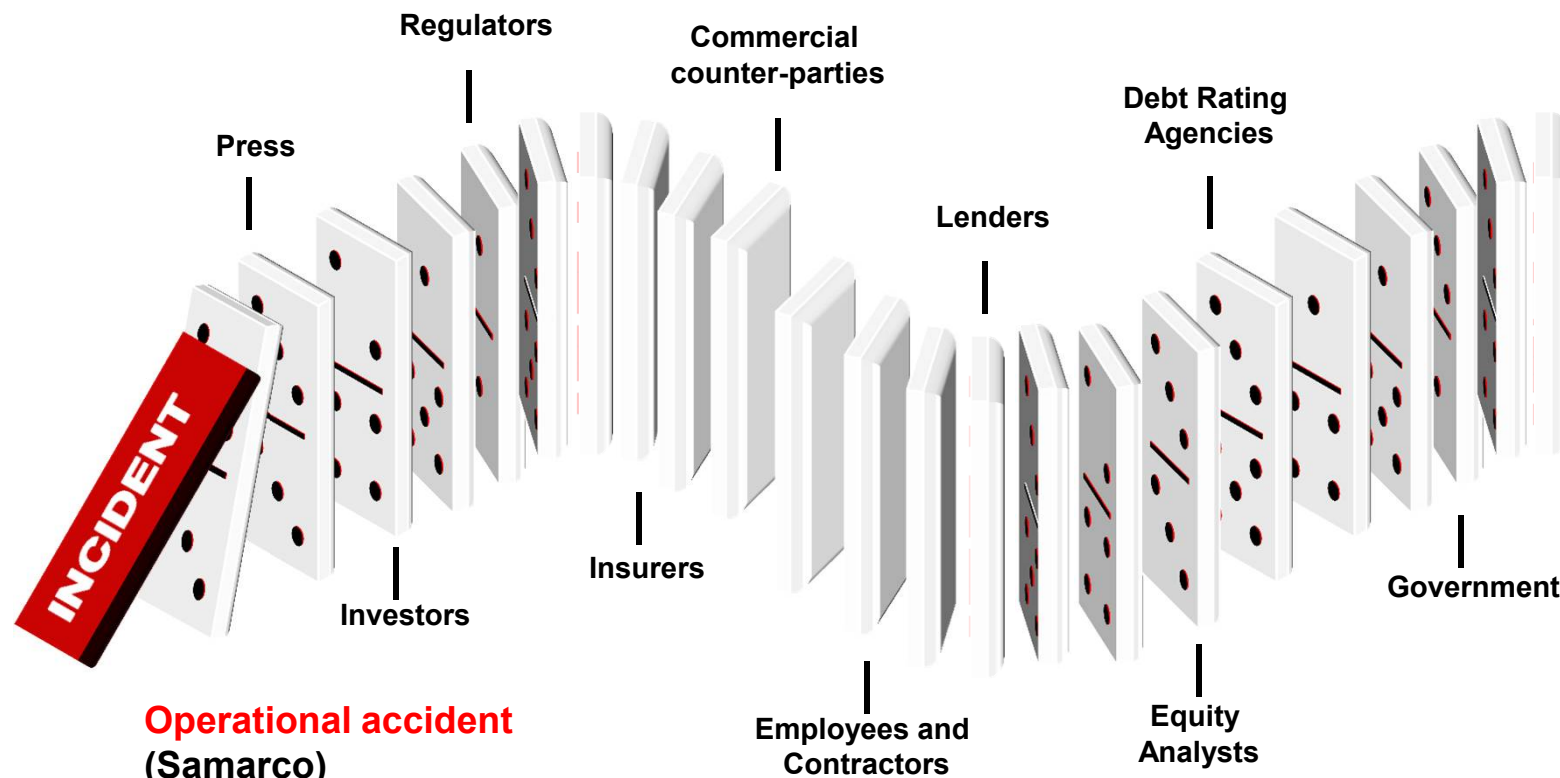
By [MARA LEMOS STEIN](#)

# Drivers of risk



# Risks are interconnected: The domino effect

One incident can lead to follow-on consequences and loss of confidence across multiple issues and parties:

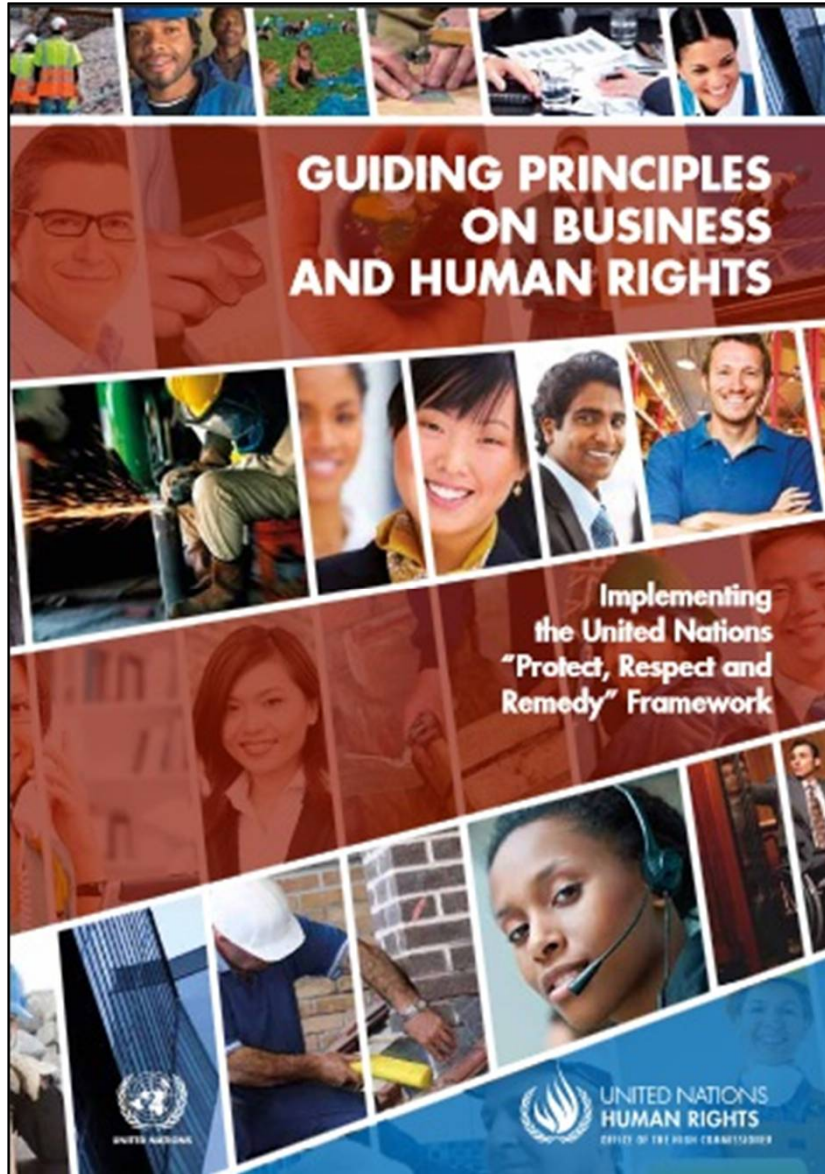


**Operational accident**  
(Samarco)  
**Fraud/Anti-corruption**  
(Petrobras)  
**Business interruption**  
(Venezuela)

# Emerging human rights scenarios

<b>Investors</b>	<ul style="list-style-type: none"><li>• Shareholder activism</li></ul>
<b>Governance</b>	<ul style="list-style-type: none"><li>• Subsidiary relationships and supply chain code of conduct development</li></ul>
<b>Investment approach</b>	<ul style="list-style-type: none"><li>• Investment due diligence (local laws and international standards)</li></ul>
<b>Litigation</b>	<ul style="list-style-type: none"><li>• Various cases raising global human rights issues in Canadian legal claims</li></ul>





## Guiding principle 17: Human rights due diligence

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

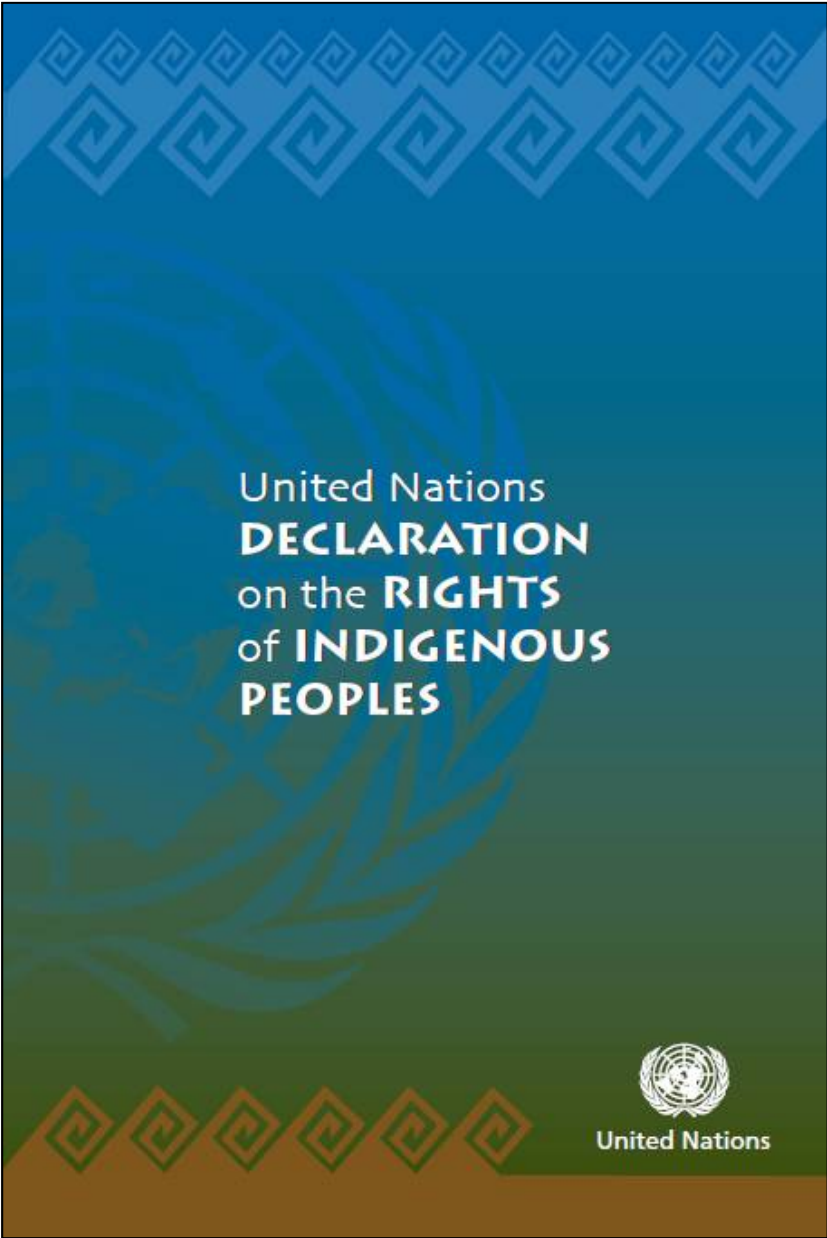
Human rights due diligence:

- a) Should cover adverse human rights impacts that the business 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;
- b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

# IFC Performance Standards on Environmental and Social Sustainability

Effective January 1, 2012





# HUMAN RIGHTS ASSESSMENT

of Goldcorp's Marlin Mine

Commissioned on behalf of Goldcorp  
by the Steering Committee for the Human  
Rights Impact Assessment of the Marlin Mine

Prepared by  
On Common Ground Consultants Inc.  
Vancouver, BC, Canada



May 2010

# Canadian legislative developments

- Canada's enhanced Corporate Social Responsibility (CSR) Strategy - "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad"

"Companies are expected to align with CSR guidelines... As a penalty for companies that do not embody CSR best practices and refuse to participate in the CSR Counsellor's Office or NCP dispute resolution processes, Government of Canada support in foreign markets will be withdrawn"

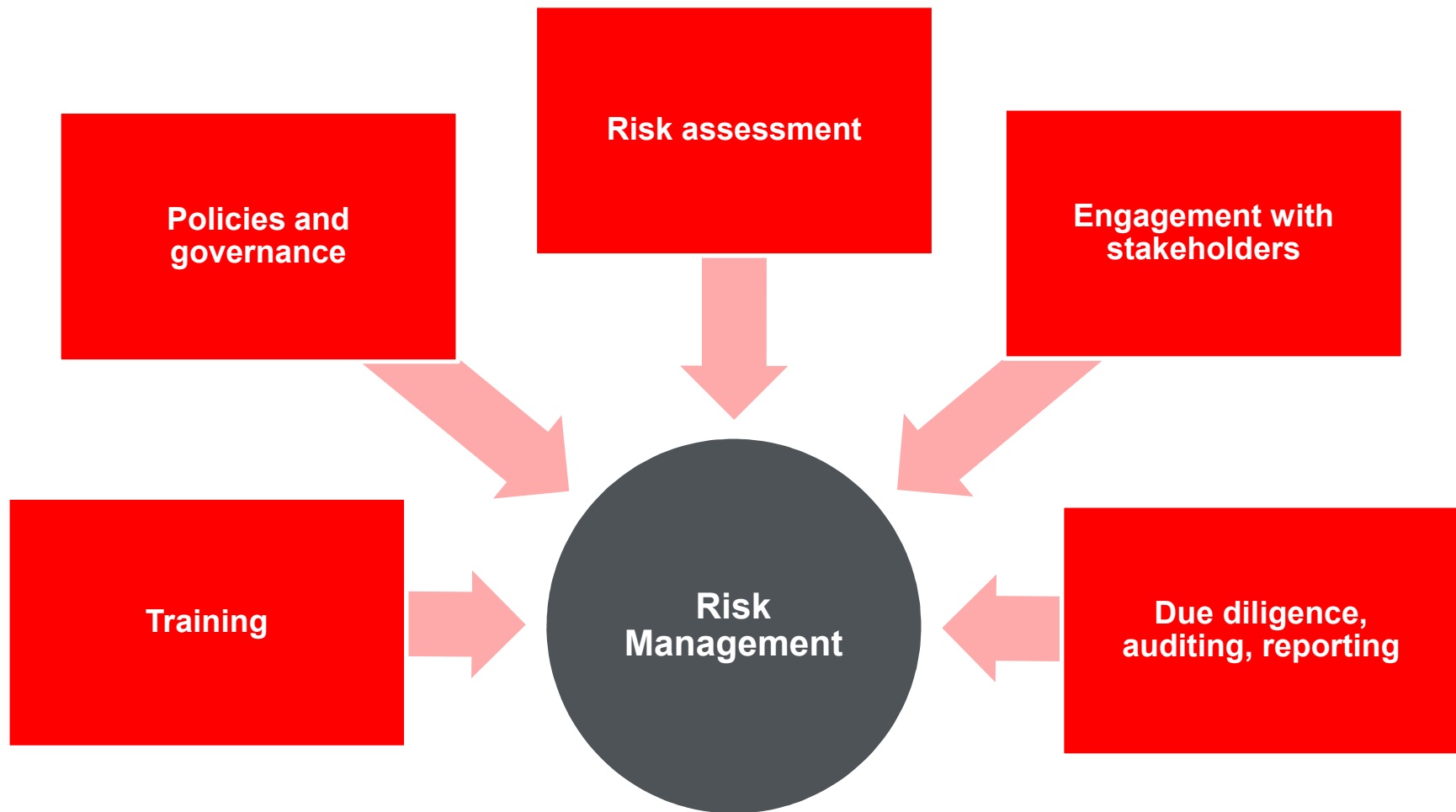
- Extractive Sector Transparency Measures Act (ESTMA)

“***CSR in the shadow of the law***”

# Hard law developments

- Likely area of new regulation in Canada
- New legislation already seen in other jurisdictions
  - UK *Modern Slavery Act* – reporting obligations
  - *California Transparency in Supply Chains Act* – reporting obligations
  - Action plans for implementation of UN Guiding Principles on Business and Human Rights
- New case law in Canada
  - Tort claims – *Hudbay; Teti v. Mueller; Nevsun; Tahoe Resources*
  - Jurisdictional and Corporate Veil Issues in Foreign Judgment Context - *Chevron*
  - Class actions – *Rana Plaza (Loblaws, BV International)*

# Risk management





# Panel questions and discussion

## Questions for Clarke Hunter:



*What are the implications of the Chevron litigation for Canadian companies?*

*Are there new risks for companies in first instance cases from Hudbay, Teti, Nevsun & Tahoe? If so, what are they?*

*What is your take on this as a litigator, in terms of risk management advice for companies?*



## Questions for Janne Duncan:



*From a corporate governance perspective, how do you manage this risk?*

*From a securities law perspective, what does this mean?*

*Do securities regulators in Canada care about human rights risks? If so, how does that get expressed?*



## Questions for Anne-Marie Naccarato:



*As a global leader in human rights what is Goldcorp's approach? How does your company manage these risks?*

*Does this new case law change anything?*

*How does your company decide when to adopt voluntary standards? Or not to?*

*What risks do companies face in making these decisions?*



## Questions for the Panel:



*How are transparency obligations changing in this new paradigm?*

*How should a company's approach to transparency change, if at all?*

*Is there an evolving role for the legal function in managing these issues, along with CSR/Sustainability professionals? What is the ideal relationship?*



## Questions for the Panel: (cont'd)



*Where is this all going?*

*What are the biggest trends you foresee in the coming decade for the governance of sustainability and human rights?*





# Questions & answers

# Contact

## **Janne Duncan**

Senior Partner, Norton Rose Fulbright

[janne.duncan@nortonrosefulbright.com](mailto:janne.duncan@nortonrosefulbright.com)



## **Clarke Hunter**

Senior Partner, Norton Rose Fulbright

[clarke.hunter@nortonrosefulbright.com](mailto:clarke.hunter@nortonrosefulbright.com)

## **Michael Torrance**

Partner, Norton Rose Fulbright

[michael.torrance@nortonrosefulbright.com](mailto:michael.torrance@nortonrosefulbright.com)

## **Anne-Marie Naccarato**

Director, Legal, Ethics, and Compliance – Canada & US

Goldcorp Canada Lt.d

[Anne-Marie.Naccarato@goldcorp.com](mailto:Anne-Marie.Naccarato@goldcorp.com)



The logo for Norton Rose Fulbright, featuring a gold chevron icon above the text "NORTON ROSE FULBRIGHT" in red, uppercase, sans-serif font.

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