

New Ombudsperson an Attempt to Increase Canada's Oversight of Business and Human Rights Abroad

On January 17, 2018, Canada's federal government announced the creation of a "best in class" independent Canadian Ombudsperson for Responsible Enterprise (Ombudsperson) and a corresponding multi-stakeholder Advisory Body. The announcement reveals a strengthening and expansion of Canada's approach to ensuring Canadian companies operating abroad are in compliance with expected international standards of behaviour.

Ombudsperson for Responsible Enterprise

The arm's length Ombudsperson will be given a mandate to address complaints related to allegations of human rights abuses arising from a Canadian company's activity abroad.

The new Ombudsperson represents a significant departure from its predecessor, the Extractive Sector CSR Counsellor (CSR Counsellor), whose mandate will end in May 2018. Whereas the CSR Counsellor focused exclusively on the extractive sector, the Ombudsperson will have a multi-sectoral focus. While the Ombudsperson's initial focus will be on the mining, oil and gas, and garment sectors, it is anticipated that the scope of focus will extend to other industries within one year.

The mandate of the Ombudsperson will be broader than that of the CSR Counsellor, who lacked the ability to conduct investigations without the consent of the involved company. The Ombudsperson is expected to have the ability to:

- undertake collaborative fact-finding;
- initiate independent fact-finding, with or without a complaint having been filed;
- report publicly throughout an investigation; and
- make recommendations to parties involved in the complaint, as well as the Canadian government.

As a first step, the Ombudsperson will attempt to engage in a collaborative process, wherever possible, to resolve disputes or conflicts between impacted communities and Canadian companies. However, should a company be obstructionist or refuse to participate in the collaborative process, the Ombudsperson will have the ability to conduct an independent investigation. The Ombudsperson will report publicly at various stages of the investigation process and when monitoring any recommendations.

To ensure effectiveness, the Government stated that it is committed to providing the Ombudsperson with the tools required to ensure compliance with information requests, including compelling witnesses and documents.

Upon findings of wrongdoing or human rights violations abroad, the Ombudsperson will be authorized to recommend interim or final sanctions to the federal government, including the withdrawal of certain government services, such as trade advocacy and future Export Development Canada support. Evidence of any criminal wrongdoing may be referred to the appropriate law enforcement authorities.

The Ombudsperson is anticipated to provide public and annual reports to the Minister of International Trade, who will then table the annual reports in Parliament. In the reports, the Ombudsperson may make specific recommendations which will be monitored for implementation.

The Ombudsperson will also have the authority to recommend certain remedies for violations, including:

- compensation;
- an apology;
- cessation of particular activities;
- mitigation measures; and
- corporate policy changes.

In fulfilling its mandate, the Ombudsperson will be guided by internationally respected norms, including the *UN Guiding Principles on Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*.

While there is not yet a timeline for the operationalization of the Ombudsperson, its mandate will be set out in an upcoming Order in Council.

Advisory Body on Responsible Business Conduct

Concurrent with the creation of the Ombudsperson will be the establishment of a multi-stakeholder Advisory Body on Responsible Business Conduct. The Advisory Body will include industry and members of civil society. It will advise the federal government on the effective implementation and development of laws, policies and practices addressing business and human rights. Additionally, it will provide advice to the federal government on the business conduct of Canadian companies operating abroad in all sectors.

Legal Landscape

The creation of the Ombudsperson's office will not affect the right of any party to bring a legal action in a Canadian jurisdiction regarding allegations of harms committed by a Canadian company abroad.

Canadian companies have been under increased legal scrutiny from Canadian courts regarding alleged human rights abuses abroad. Recent cases in Ontario and British Columbia may signal a shift in the case law, permitting foreign nationals to bring claims in the Canadian courts for activities that occurred in jurisdictions outside the country. The cases to date have largely involved alleged violence committed by locally-employed security forces at mines owned by Canadian companies or their subsidiaries.

These cases and the changing legal landscape with regards to human rights claims originating outside of Canada will be the subject of an upcoming article.

Canada on the International Stage

In the face of growing discontent with globalization, Canada has set a course to reform, rather than reverse, globalization. To date, Canada has taken a different path than other countries in its reformist approach.

While numerous countries have established UN-encouraged National Action Plans to implement the *UN Guiding Principles on Business and Human Rights* or enacted anti-slavery legislation, Canada has taken a novel approach to corporate social responsibility and the promotion and respect of human rights abroad. It is yet to be seen whether the Advisory Committee will recommend the creation of a Canadian National Action Plan or anti-slavery legislation similar to that in France or the UK.

The creation of the Ombudsperson and Advisory Body are the first of their kind and follow on the heels of two other significant developments - Canada's assumption of the G7 Presidency and endorsement of The Global Deal.

Canada assumed the G7 Presidency on January 1, 2018. As President, Canada is responsible for setting the 2018 agenda. Canada's advancement of domestic and international priorities are framed by key themes, including "investing in growth that works for everyone." The G7 Leaders' Summit will be hosted in the Charlevoix region of Quebec from June 8-9, 2018.

In addition, Canada recently became a partner to The Global Deal. The Global Deal is a multi-stakeholder partnership promoting quality industrial relations and increased social dialogue as a means to reduce possible inequalities arising from globalization, enhance economic growth and contribute to sustainable development. The Global Deal includes consultation and the exchange of information between representatives of government, employers and workers on issues relating to economic and social policy. The Global Deal aims to implement a number of the goals set out in the UN's 2030 Agenda for Sustainable Development.

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