

## **Establishing a human rights *Ombudsman* for Canada's international extractive sector**

*Recommendations by the  
Canadian Network on Corporate Accountability (CNCA)  
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Given the accountability gap that exists with respect to the international operations of Canadian companies, new mechanisms are needed to allow those who are negatively affected by these operations to seek remedy in Canada.<sup>1</sup> The creation of a human rights *Ombudsman* for the extractive sector, which is independent, impartial and empowered to investigate and report publicly, will help to fill the existing international gap.

The *Ombudsman* should be mandated to receive complaints regarding the international extractive sector (e.g. mining, oil and gas) operations of Canadian companies; conduct independent investigations to evaluate compliance with corporate accountability standards; offer mediation services, if requested; and make recommendations to both companies and the Government of Canada.

### **POWERS OF THE OMBUDSMAN**

Established through enabling legislation, an effective ombudsman should have the power to:

- Engage in independent fact-finding;
- Make a determination of whether a corporation has breached its responsibility to respect human rights or the corporate accountability standards elaborated below;
- Make recommendations to the parties to the complaint, including with respect to remedial action;
- Make recommendations to the Government of Canada, with respect to the particular complaint and with respect to legislative reform and government policy on the international operations of the Canadian extractive sector;
- Report publicly on findings of its investigations and its recommendations and conclusions; and
- Engage the services of a professional mediator.

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<sup>1</sup> The international accountability gap with respect to business and human rights is well documented in the UN *Protect, Respect and Remedy Framework*, which was unanimously adopted by the UN Human Rights Council in 2008.

In order for the *Ombudsman* to conduct independent investigations and recommend remedial action where required, it needs to have a sufficiently broad mandate. The central purpose of the *Ombudsman* will be to evaluate whether companies are fulfilling their responsibility to respect human rights, including the rights of indigenous peoples, labour rights, and the right to a healthy environment. In cases where the evaluation concludes that human rights have been infringed, the *Ombudsman* will make recommendations, particularly to companies and the Canadian government, in order to remedy the situation. Review of a complaint can involve an independent investigation, or a combination of independent investigation followed by a process of mediation.

### **Six stages of the *Ombudsman* process:**

1. **Complaint is filed** by an individual or a group of individuals. Both parties (complainant and respondent) are invited to provide information to the *Ombudsman*.
2. *Ombudsman* makes an evaluation whether both criteria (see below) have been met. The *Ombudsman* posts a brief public description of the complaint that has been brought forward, the parties involved, and a **determination of admissibility**.
3. *Ombudsman* conducts an **independent investigation** and engages in fact-finding and evidence gathering. Both parties may be required to provide additional evidence on an ongoing basis throughout the investigation.
4. *Ombudsman* issues a **public report on the investigation**, including fact-finding and a reasoned assessment of whether and how the corporate responsibility to respect human rights or other corporate accountability standards has been breached.
5. Following the investigation, **mediation** may occur with the consent of both parties. The *Ombudsman* will determine whether mediation will occur.<sup>2</sup>
6. *Ombudsman* issues a **final public report outlining his/her findings and recommendations** and the reasons for those findings and recommendations.

Timeliness and responsiveness are important principles in a non-judicial grievance mechanism such as this. Timelines for the different stages in the *Ombudsman* process should be laid out in accompanying regulations. The determination of admissibility (Step 2, above) should happen within one month of receiving the complaint. There should be a maximum time limit of 12 months for the overall process – from receipt of the complaint to issuing of the final public report.

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<sup>2</sup> An optional mediation stage is provided at this point in case the parties wish to enter into dialogue following the publication of the *Ombudsman*'s findings and conclusions. For parties who wish to enter directly into mediation without any investigatory or fact-finding stage, the National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises would be a more appropriate venue to bring a complaint.

## **Criteria for the admission of complaints:**

1. The *Ombudsman* shall receive complaints of **adverse human rights impacts caused or contributed to by the failure of a corporation to respect human rights**. As indicated in various international human rights standards – including the UN Guiding Principles on Business and Human Rights<sup>3</sup>, which implements the UN *Protect, Respect and Remedy Framework* – corporations have a responsibility to respect human rights and “should avoid infringing on the human rights of others.”<sup>4</sup> The *Ombudsman* shall take into consideration internationally accepted human rights laws and norms including but not limited to the nine core international human rights treaties and their optional protocols, the UN Declaration on the Rights of Indigenous Peoples, and ILO’s Declaration on Fundamental Principles and Rights at Work.

The *Ombudsman* shall also take into consideration the following internationally accepted norms and standards, all of which have been supported and endorsed by the Government of Canada:

- UN Guiding Principles on Business and Human Rights;
- OECD Guidelines on Multinational Enterprises;
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas;
- IFC Performance Standards on Environmental and Social Sustainability; Guidance Notes to those standards; the World Bank Group’s Environmental, Health and Safety General Guidelines;
- Voluntary Principles on Security and Human Rights; and
- Sustainability reporting guidelines of the Global Reporting Initiative.

The *Ombudsman* may also take into consideration any relevant codes of conduct or other voluntary corporate social responsibility policies and standards that have been adopted or endorsed by the company that is the subject of the complaint.

2. The substance of the complaint must be **directly linked<sup>5</sup> to the international activities of a company or legal person operating in the extractive sector**, where that company or legal person, or its parent or controlling entity, is a Canadian company. Such “activities” include the exploration and drilling for; and the production, conservation, processing or transportation of; and site closure and remediation related to; mineral resources, oil or gas. A “Canadian company” would include any company or legal person that is incorporated by or under an Act of Parliament or of any province or territory, or

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<sup>3</sup> The UN Guiding Principles were unanimously endorsed by the Human Rights Council in June 2011.

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>4</sup> Ibid. P. 13. The author of the Guiding Principles defines the corporate responsibility to respect human rights as “do no harm.” <http://www.hks.harvard.edu/news-events/news/testimonies/john-ruggie-testimony-oct>

<sup>5</sup> Consistent with the OECD Guidelines, the *Ombudsman* will also admit complaints regarding adverse human rights impacts that are linked to a company by a business relationship. The OECD Guidelines state that a corporation should “seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.” (General Policies A.12.)

that is a reporting issuer under Canadian securities legislation.

If the *Ombudsman* determines that a complaint does not meet the criteria or that it is frivolous or vexatious, the *Ombudsman* shall decline to examine the matter.

### **Independent investigation:**

An independent investigation of facts will occur with respect to all eligible complaints to the *Ombudsman*. An investigation includes the possibility of receiving evidence from the complainant, the respondent and other interested parties; on-the-ground investigation; and the making of determinations of fact, including determinations whether an adverse human rights impact has occurred, whether human rights have not been respected, and/or whether standards have been breached. Under its enabling legislation, the *Ombudsman*'s office should be provided with powers for the compelling of documents and the compelling of testimony under oath.<sup>6</sup> Conclusions and findings of all investigations, and the basis on which those conclusions and findings were reached, will be made public.

The *Ombudsman* will make a practice of informing a foreign government of any planned visit to their country. It should also seek to enter into mutual assistance agreements with local justice authorities in relevant foreign countries. Since the office of the *Ombudsman* will not be involved in law enforcement activities, it should take the position that foreign visits and meetings with complainants take place for the sake of information gathering, leading at most to recommendations for future practice.

While the *Ombudsman* should proceed principally on the basis of complaints received, the office should also be able to launch investigations proactively where s/he has reason to believe that there are or are likely to be contraventions of human rights standards by Canadian extractive sector companies in their foreign operations. Such a power to initiate investigations will allow for systemic interventions, which can lead to a coherent assessment of how practice can be improved. In such cases, the *Ombudsman* can exercise powers and functions outlined in these recommendations.

### **Mediation:**

Mediation will be an option in all cases, but requires the consent of both parties. Information disclosed during mediation is confidential, unless both parties waive confidentiality. Mediation at the *Ombudsman* office will not be available to parties who are engaging in mediation within another mechanism in Canada, such as the National Contact Point for the OECD Guidelines on Multinational Enterprises. The results of mediation (i.e. the content of any agreement reached, the failure of parties to reach an agreement), will not be confidential and will be reported publicly.

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<sup>6</sup> Examples of similar investigatory powers in an ombuds role include the federal Information Commissioner (*Access to Information Act* R.S.C. 1985, c. A-1), the Financial Consumer Agency of Canada (*Financial Consumer Agency Act* S.C. 2001, c. 9), and Quebec's Office of the Public Protector (*Public Protector Act* of Quebec, R.S.Q. c. P-32).

## **Recommendations:**

The *Ombudsman* should be given a wide level of discretion with respect to the nature of recommendations s/he may propose to both the parties to a complaint and to the Government of Canada.

Any recommendations, or determinations regarding remedy, should comply with international human rights standards, consistent with Section 31(f) of the UN Guiding Principles. If there is a recommendation for remedy, a timeline will be stipulated for implementation of that remedy. In cases where adverse human rights impacts have occurred, recommendations should include the suspension of political, diplomatic and financial support by the Government of Canada to the company, including through Export Development Canada.

The *Ombudsman* should play a monitoring role to follow up on the implementation of (a) recommendations made to the company and/or the Government of Canada; and (b) any agreements reached through mediation. The *Ombudsman* will follow up with both parties to assess progress in implementation after six months and after one year of issuing his/her final report.

## **Interaction with other mechanisms:**

- When the subject matter of a complaint is substantially the same as a claim that is currently before a Canadian court, the *Ombudsman* will suspend any investigation pending completion of the legal proceeding.
- The *Ombudsman* may investigate a complaint even if a Canadian court has decided not to proceed in relation to a legal claim on the same matter.
- Prior use of other dispute resolution or grievance mechanisms – whether at the site-level, national level or international level – is not a prerequisite to bringing a complaint to the *Ombudsman*.
- A complaint does not need to have been brought to the *Ombudsman*'s office prior to being brought before a Canadian court in the form of a civil suit.
- Parallel legal proceedings taking place outside of Canada are not a barrier to bringing a complaint to the *Ombudsman*. However, the *Ombudsman* should be given discretion to suspend an investigation where a parallel proceeding is underway outside of Canada and the *Ombudsman* concludes that: (i) the parallel process will be expeditious; (ii) the subject matter of the complaint is substantially the same as what is at issue in the proceeding; and (iii) there is no benefit to the complainant of proceeding with the investigation.