



Canada Still Needs an Ombudsperson to Investigate Mining Cases

Not an Advisor to the Minister of International Trade or another CSR Counsellor

May 4, 2019

On April 8, 2019, the Minister of International Trade Diversification appointed Sheri Meyerhoffer as a public servant under the Public Service Employment Act¹ and as a “special advisor to the Minister for International Trade”²

MiningWatch Canada’s Position

The Government of Canada has fundamentally broken its electoral promise of 2015 and its commitment of January 17, 2018 to create an Ombudsperson with: independence from both government and industry; strong investigatory powers to compel documents and witnesses, when necessary, in the course of investigating complaints brought against Canadian mining companies for human rights abuses perpetrated overseas; and the ability to make determinations of fact about whether a Canadian company had caused or contributed to human rights harm.³ Fifteen months after the commitment to create a strong ombudsperson was made in 2018, the government has created an advisory position to the Minister with a deeply flawed and inadequate mandate.

Broken Promises

Promise broken – No powers to compel documents and witnesses

In January, 2018, the Government of Canada committed to giving the Ombudsperson the investigatory powers to compel documents and witnesses.

¹ See [Order in Council mandate](http://orders-in-council.canada.ca/attachment.php?attach=37587&lang=en) (<http://orders-in-council.canada.ca/attachment.php?attach=37587&lang=en>) p. 4.

² Ibid., p. 1.

³ The Ombudsperson was to be empowered to investigate complaints brought against Canadian mining, oil and gas, and garment sectors and was expected to expand to other sectors in the first year of operations.

In order to have the powers to compel witnesses and documents, in cases in which companies are not forthcoming with necessary information, the Ombudsperson should have been created through an Order in Council mandate under the Inquiries Act.

The Government of Canada and Minister of International Trade were fully briefed and aware of this option. Instead, the “special advisor to the Minister” was created under the Public Service Employment Act, which does not provide for powers to compel documents or witnesses. Minister Carr says he has commissioned further legal review to look into the question of how best to give the advisor to the Minister the power to make companies disclose documents and answer questions. This review is to be done by early June.⁴

As the Government of Canada has not managed to ensure an Ombudsperson with the powers to compel documents and witnesses in the 15 months since announcing the creation of an Ombudsperson MiningWatch is highly sceptical of the government’s commitment to keep this promise.

On April 29, 2019, Chair of the UN Working Group on Business and Human Rights, Surya Deva, said: *“Let us not be naïve. Businesses—not just in Canada, all over the world—they do not share documents easily. It is a well-established fact. In fact, they don’t give documents easily even if there is a court case going on, and the plaintiff is asking for documents,” [...] “I would be very surprised if Canadian companies are going to deviate from this assumption. And that’s why you need this power, otherwise you are going to be like the [National Contact Point], and what is the point of having another NCP?”*⁵

And on April 30, 2019, Professor Deva noted that: *“if the government settles on anything short of full power to compel companies to supply witnesses and documents in Meyerhoffer’s investigations, it will hurt Canada’s reputation as a human rights leader. If they’re going to go back on that promise, it won’t really send a good signal to the international community.”*⁶

Promise broken – No ability to recommend sanctions for companies that have caused, or contributed to, human rights abuses

In January 2018, the Government of Canada committed to creating an Ombudsperson that could recommend that the government deny or withdraw trade advocacy support and future Export Development Canada financial support from a company that had caused or contributed to human rights abuses.

The Order in Council mandate of the advisor to the Minister only allows the advisor to the Minister to recommend the denial and withdrawal of trade advocacy support and future Export Development Canada financial support from a company “[i]f a Canadian company has not acted in good faith during the course of or during follow-up of the review process.”⁷

This broken promise is closely related to the broken promise in regard to the powers to compel documents and witnesses. In order to make a determination of fact, which can be reported publicly with confidence, that a company is in fact responsible for having caused, or contributed to, a human rights harm, an

⁴ The following exchange occurred on April 8, 2019 at the announcement of Ms. Meyerhoffer’s appointment: Journalist: “So can I have your thoughts on whether or not you should have those coercive powers to require documents?” Ms. Meyerhoffer: “Yeah. I mean, I think the more tools the Office of the Ombudsperson has in order to fulfil the mandate, the better. And you know, you would hope that you would only use certain tools very rarely.”

⁵ Hill Times. Canada must ‘walk the talk,’ give corporate ethics watchdog power to compel evidence: UN expert. <https://www.hilltimes.com/2019/04/29/canada-must-walk-the-talk-give-corporate-ombudsperson-more-powers-and-budget-un-expert/198285>

⁶ Canadian Broadcasting Company. UN official criticizes Canadian delays setting up corporate ethics watchdog. <https://www.cbc.ca/news/politics/un-watchdog-carr-corporate-ethics-1.5116399>

⁷ See [Order in Council mandate](#) p. 7.

Ombudsperson may require access to critical company documents or testimony in a case. Only if an Ombudsperson can be confident in its assessment that a company has caused or contributed to a human rights harm will that Ombudsperson be able to recommend that the Government of Canada deny or withdraw trade advocacy support and future Export Development Canada financial support from a company on the basis of having caused or contributed to a human rights abuse.

The logical implication of not creating an Ombudsperson with the powers to compel witnesses and documents is that the Government of Canada has created an advisor to the Minister who may not have the necessary tools to be able to make determinations of fact about whether or not a company caused or contributed to a human rights abuse.

Promise broken – No independence

In January, 2018, the Government of Canada committed to creating an independent Ombudsperson.⁸

By creating an advisor to the Minister under the Public Service Employment Act, and by stating in the Order in Council mandate that all reports prepared by the advisor to the Minister must first be provided to the Minister of International Trade before they are published,⁹ the Government of Canada has not created an independent Ombudsperson, but rather a public servant that will always act in consideration of whether the Minister will approve of the text provided. As ministers are subject to being lobbied by the very companies under investigation this requirement works against independence of the advisor to the Minister. It should be noted that the former Office of the Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor) was under the same orders to first provide reports to Ministers before they would become public.

Furthermore, when the report in question concerns companies in the mining, oil or gas sectors, the report must also first be provided the Minister of Natural Resources. There is no explanation provided for why two ministers must first see reports concerning mining, oil and gas companies, but not companies in the garment sector. This plainly speaks to the excessive influence the extractive sector has in Canadian politics and to the success of its lobbying power.

Why does the “advisor to the Minister” suddenly look so much like the ineffective former CSR Counsellor and discredited National Contact Point (NCP)?

Both the Order in Council mandate of the advisor to the Minister and the greatly changed Questions and Answers on the Government of Canada’s web site¹⁰ - which were altered on the day the advisor to the Minister was announced after having been unchanged since the Ombudsperson was announced in January 2018 - have brought the mandate and procedures of the advisor to the Minister very closely in line with those of both the discredited former CSR Counsellor¹¹ and the much critiqued National Contact Point for the OECD Guidelines.¹²

⁸ In the now removed Q&A that was posted on the Government’s web site at the time the Government of Canada announced the Ombudsperson, January 17, 2018, the Ombudsperson is repeatedly described as “independent.” That description of the Ombudsperson has been removed from the revised Q&A posted on April 8, 2019. There is still mention of the possibility of the “advisor to the Minister” carrying out independent fact-finding.

⁹ See [Order in Council mandate](#) pp. 8-9.

¹⁰ See April 8, 2019, [Responsible business conduct abroad – Questions and answers](#).

¹¹ See Appendix A for the Order in Council mandate of the former CSR Counsellor.

¹² For MiningWatch Canada’s critique of the former CSR Counsellor’s Order in Council mandate see: https://miningwatch.ca/sites/default/files/MiningWatch_Brief_on_CSR_Counsellor.pdf, March 2011. For other references to the former CSR Counsellor’s mandate see https://international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-arp-

For example:

- Whereas the Q&A questions related to the Ombudsperson of January 17, 2018 spoke consistently of the Ombudsperson undertaking “investigations,” the revised Q&A page of April 8, 2019 speaks of “reviews” of cases. This is the language used by the NCP and by the former CSR Counsellor, both bodies that do not, and did not, undertake investigations.
- Whereas the Q&A questions related to the Ombudsperson of January 17, 2018 mentioned ‘sanctions’¹³ which could “include the withdrawal of certain Government services, such as trade advocacy and future Export Development Canada support, for companies found to be involved in wrongdoing.” The word “sanction” has been removed from the revised Q&A page of April 8, 2019 and withdrawal of political or financial support to a company by the Government of Canada is only described as a response to non-cooperation of a company with the process. This is also the case for the NCP.
- One entire section that was in the Q&A questions related to the Ombudsperson of January 17, 2018, has been removed. This was: “What penalties will be applied to business if the Ombudsperson uncovers wrongdoing abroad? / What remedy can complainants expect?” Neither the former CSR Counsellor nor the existing NCP apply penalties, or sanctions, on the basis of findings of fact that human rights have been abused. Nor do they raise expectations of remedy for those who have been harmed.
- In the now removed Q&A that was posted on the Government’s web site at the time the Government of Canada announced the Ombudsperson, January 17, 2018, the Ombudsperson is repeatedly described as “independent.” That description of the Ombudsperson herself has been removed from the revised Q&A posted on April 8, 2019. There is still mention of the possibility of the advisor to the Minister carrying out independent fact-finding.
- In the January 17, 2018 Q&A it was understood that the Ombudsperson could “make recommendations to the Government on fulfilling Canada’s human rights obligations, and the effective implementation and development of its laws, policies and practices related to responsible business conduct by Canadian companies operating abroad in all sectors.” This text has been removed and any recommendations the advisor to the Minister may wish to make are now narrowly confined to specific cases under review.¹⁴ This is also the case for the NCP and was also the case in the OIC for the CSR Counsellor which stipulated that “[t]he CSR Counsellor will not make policy or legislative recommendations to the Government of Canada.”

Further Concerns

There are further concerns related to the advisor to the Minister’s Order in Council mandate. We mention just some of these here.

1) One of the more egregious aspects of the advisor to the Minister’s Order in Council mandate is the fact that she may “review a complaint that is submitted by a Canadian company that believes it is the subject of an unfounded human rights abuse allegation where the abuse allegedly occurred after the day on which the first Ombudsperson is appointed or, if it allegedly occurred before that day, is ongoing at the time of the complaint.”¹⁵ This inclusion of the right of companies to file complaints with the Ombudsperson against those who accuse them of human rights abuses was also a feature of the CSR Counsellor’s OIC. It

[rap.aspx?lang=eng](https://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process_inbrief-processus_examen_enbref.aspx?lang=eng), and for the CSR Counsellor’s process see https://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process_inbrief-processus_examen_enbref.aspx?lang=eng

¹³ Note that both “sanction” and “remedy” are core concepts within the UN Guiding Principles (2011) by which the Ombudsperson is supposed to be guided. See [Order in Council mandate](#) p. 5. In the Guiding Principles, remedy may include: “apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well the prevention of harm through, for example, injunctions or guarantees of non-repetition.”

¹⁴ [Order in Council mandate](#) pp. 6-7.

¹⁵ *Ibid.*, p. 5.

demonstrates a fundamental lack of understanding of principles at the heart of the UN Guiding Principles, by which the advisor to the Minister is meant to be guided.¹⁶ The recognition that there is a governance gap, that those whose human rights are harmed by the activities of multinationals have little or no chance at access to justice, is core to the UN Guiding Principles. It is for this very reason that Civil Society Organizations in Canada worked to see an Ombudsperson created that could help fill that gap. It is widely recognized that corporations have ample means to their disposal to seek justice for perceived wrongs against them. Furthermore, the advisor to the Minister may dismiss cases she deems frivolous or vexatious, under section 8 of the Order in Council mandate.¹⁷

2) It is problematic that the advisor to the Minister may recommend that matters be referred to law enforcement authorities or regulatory bodies¹⁸ when for many reasons, including the factors that create the governance gap recognized by the UN Guiding Principles, this may mean that victims of criminal offences or of regulatory breaches will never see justice.

3) It is equally problematic that the advisor to the Minister may refuse a complaint because it “is being reviewed, or has been reviewed, in another forum.” The OECD Guidelines, by which the advisor to the Minister is to be guided, are clear that cases may not be dismissed by NCPs for reasons of such parallel procedures.

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¹⁶ Ibid., p. 5.

¹⁷ Ibid., p. 6.

¹⁸ Ibid., p. 6.

Appendix A – Order in Council Mandate of the former Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor

Whereas, pursuant to paragraph 127.1(1)(c) of the Public Service Employment Act, the Governor in Council may appoint a special adviser to a minister;

And whereas the Governor in Council deems it necessary that there be a special adviser to the Minister for International Trade acting as the extractive sector corporate social responsibility counsellor;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, hereby sets out in the annexed schedule the terms and conditions of employment of the special adviser to the Minister for International Trade, to be known as the Extractive Sector Corporate Social Responsibility Counsellor, who may be appointed by the Governor in Council under paragraph 127.1(1)(c) of the Public Service Employment Act.

SCHEDULE

INTERPRETATION

1. The following definitions apply in this schedule.

“Canadian extractive sector company” means an oil, gas or mining company that has been incorporated in Canada or that has its head office in Canada. (entreprise canadienne de l’industrie extractive)

“Counsellor” means the Extractive Sector Corporate Social Responsibility Counsellor. (conseiller)

“Department” means the Department of Foreign Affairs and International Trade. (ministère)

“Minister” means the Minister for International Trade. (ministre)

“National Contact Point” means the interdepartmental committee, chaired by a representative of the Department, created in accordance with the OECD Guidelines for Multinational Enterprises. (point de contact national)

“performance guidelines” means the International Finance Corporation Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative and the OECD Guidelines for Multinational Enterprises, all of which deal with corporate social responsibility and are endorsed by the Government of Canada. (lignes directrices)

APPOINTMENT

2. The Counsellor shall be appointed by the Governor in Council, pursuant to paragraph 127.1(1)(c) of the Public Service Employment Act, for a term of three years, which term may be renewed, and may only be removed for cause by the Governor in Council.

STAFF AND SUPPORT

3. The staff of the Office of the Counsellor shall be employed under the Public Service Employment Act and shall be part of the Department.

MANDATE

4. The mandate of the Counsellor shall be

- (a) to review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada; and
- (b) to advise stakeholders on the implementation of the performance guidelines.

LIMITATIONS ON AUTHORITY

5. (1) The Counsellor shall not review any activity that occurred before the day on which the first Counsellor was appointed.
- (2) The National Contact Point shall remain the primary authority concerning the OECD Guidelines for Multinational Enterprises.
- (3) If a request for review is received by the Counsellor that relates only to the OECD Guidelines for Multinational Enterprises, the Counsellor shall refer the request to the National Contact Point.
- (4) If a request for review is received by the Counsellor or the National Contact Point that relates to the OECD Guidelines for Multinational Enterprises and any other performance guidelines, the Counsellor shall lead the review and shall consult with the National Contact Point on issues relating to the OECD Guidelines for Multinational Enterprises.
- (5) The Counsellor shall not
 - (a) make binding recommendations;
 - (b) make policy or legislative recommendations;
 - (c) create new performance standards; or
 - (d) apply standards other than the performance guidelines.
- (6) The Counsellor shall only undertake a review with the express written consent of the parties involved.

REQUESTS FOR REVIEW

6. (1) The Counsellor may review an issue on receipt of a request from
 - (a) an individual, group or community that
 - (i) reasonably believes that it is being or may be adversely affected by the activities of a Canadian extractive sector company in its operations outside Canada, and
 - (ii) believes that the activities referred to in subparagraph (i) are inconsistent with the performance guidelines; or
 - (b) a Canadian extractive sector company that believes it is the subject of unfounded allegations concerning its corporate conduct outside Canada in relation to the performance guidelines.
- (2) The Counsellor may not on his or her own initiative review the activities of a Canadian extractive sector company but may informally approach a company if he or she believes that early dialogue could prevent a dispute from arising or escalating.
- (3) In undertaking reviews, the Counsellor will aim to foster constructive collaboration and dialogue between stakeholders.

- (4) The review process shall comprise the following five stages:
- (a) initial assessment;
 - (b) informal mediation;
 - (c) fact-finding;
 - (d) access to formal mediation; and
 - (e) reporting.
- (5) The Counsellor may
- (a) refuse to deal with a request for review;
 - (b) determine how a review is to be conducted;
 - (c) determine at what stage to conclude a review; and
 - (d) determine whether a review should be terminated before completion.
- (6) In exercising the powers referred to in subsection (5), the Counsellor shall consider
- (a) the amount of time that has elapsed since the alleged activity occurred;
 - (b) the amount of time that has elapsed since the requester became aware of the issue;
 - (c) the nature and seriousness of the issue;
 - (d) whether the request was made in good faith;
 - (e) the extent to which other redress mechanisms have been exhausted; and
 - (f) whether the issue is substantiated.
- (7) As soon as is practicable, the Counsellor shall inform the parties of the results of the review or any action taken during the review.
- (8) Subject to subsection (9), the Counsellor shall issue a written public statement following the conclusion of a review of the activities of a Canadian extractive sector company operating outside Canada.
- (9) Before issuing a public statement, the Counsellor shall inform the parties of the results of the review and shall share the statement with the Minister and the Minister of Natural Resources, as well as with the Minister of International Cooperation if, in the view of the Counsellor, the review is relevant to the mandate of the Minister of International Cooperation.
- (10) The Minister may direct the Counsellor to study other matters related to the Counsellor's mandate and the Counsellor shall report back to the Minister on those matters. The Minister shall determine whether to make public the results of such a study.

ACCOUNTABILITY AND ANNUAL REPORT

7. (1) The Counsellor shall report directly to and be accountable to the Minister.
- (2) The Counsellor shall submit an annual report on the activities of the Office of the Counsellor to the Minister, the Minister of Natural Resources and the Minister of International Cooperation, and the Minister shall table the annual report in Parliament.

(3) The Counsellor shall publish the annual report as soon as it has been tabled in Parliament by the Minister.

(4) If it appears to the Counsellor that information in an annual report would reflect adversely on any person or organization, he or she shall give them an opportunity to comment and shall include a fair and accurate summary of the comments in the annual report. With respect to including personal information in the annual report, the Counsellor shall comply with the relevant provisions of the Access to Information Act, the Privacy Act and any other applicable Act of Parliament.

OTHER REPORTS AND RECOMMENDATIONS

8. (1) The Counsellor shall only issue statements or reports in accordance with subsections 6(8) and 7(3).

(2) In reviewing the activities of a Canadian extractive sector company, the Counsellor shall, if the company is found to be operating in a manner that is inconsistent with the performance guidelines, make recommendations to assist the company in ensuring that its activities are consistent with those guidelines, except in cases referred to in subsection 5(3).

CONFIDENTIALITY

9. The Counsellor and persons acting on his or her behalf shall not disclose any information that is acquired while carrying out the Counsellor's responsibilities without the permission of any person affected, except in accordance with an Act of Parliament.