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 Act[1] 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 has 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 p. 4.
[2] See Order in Council mandate 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.

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 skeptical 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 naive. 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?*"[4]

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.'*"[5]

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."[6]

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 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

[4] *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

[5] *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

[6] See Order in Council mandate p. 7.

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 confidently 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.[7]

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,[8] 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 much-critiqued CSR Counsellor was under the same orders to first provide reports to Ministers before they would become public.

Furthermore, when the advisor to the Minister's report 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 (Q&A) on the Government of Canada's web site[9] – 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 both the discredited former CSR Counsellor and the much critiqued National Contact Point for the OECD Guidelines.[10]

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,

[7] In the now removed Questions and Answers 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.
[8] See Order in Council mandate pp. 8-9.
[9] See April 8, 2019, Responsible business conduct abroad – Questions and answers.
[10] For MiningWatch Canada's critique of the former CSR Counsellor's Order in Council mandate see: MiningWatch Canada. Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada. March 2011. For other references to the former CSR Counsellor's mandate see https://international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-arp-rap.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

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"[11] 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 possible 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 section covered: "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, 2918, 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.
- 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.[12] 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."[13]

Further Concerns

There are further concerns related to the advisor to the Minister's Order in Council mandate. We mention 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."[14] This inclusion of the right of companies to file complaints with the advisor to the Minister against those who accuse them of human rights abuses was also a feature of the CSR Counsellor's OIC. It demonstrates a fundamental lack of understanding of the principles at the heart of the UN Guiding Principles, by which the advisor to the Minister is meant to be guided.[15] Recognition of a

[11] 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."
[12] Order in Council mandate pp. 6-7.
[13] See MiningWatch Canada's critique of the former CSR Counsellor's Order in Council mandate see: MiningWatch Canada. Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada. March 2011.
[14] Order in Council mandate p. 5.
[15] Ibid., p. 5.

"governance gap," that leaves vulnerable people whose human rights have been abused by the activities of multinationals with little or no access to justice, is core to the recommendations in the UN Guiding Principles, including the recommendation that strong non-judicial mechanisms need to be created to enhance the possibilities for people harmed by the activities of multi-nationals to have access to justice. It is for this very reason that Civil Society Organizations, unions and academics in Canada worked for over a decade for the creation of an Ombudsperson that could help address the need for access to justice for those harmed by Canadian multinationals operating overseas. 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 any cases she deems frivolous or vexatious, under section 8 of the Order in Council mandate.[16]

2) It is problematic that the advisor to the Minister may refuse to take cases and recommend that matters be referred to law enforcement authorities or regulatory bodies[17] when, for many reasons, including the factors that characterize the governance gap as recognized by the UN Guiding Principles, this may mean that victims of some criminal offences, or of regulatory breaches, will never see justice. In many cases, people who want to bring their issues to an Ombudsperson will do so for the very reason that they cannot access justice in other ways.

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' Procedural Guidance (paragraph 26) states clearly that NCPs should not reject a case simply because parallel proceedings are underway.[18]

4) The advisor to the Minister's OIC contains a far too narrow interpretation of a Canadian company leaving out companies that are listed on Canadian stock exchanges and those who benefit from financial support through Canadian crown corporations, government departments or other agencies. The definition is also not aligned with the UN Guiding Principles, which defines corporate responsibility to respect human rights as extending to a corporation's "business relations" which includes subsidiaries and contractors without exception. The OECD Guidelines for Multinational Enterprises also take an expansive, rather than narrow, definition of the corporation expressly to encourage best practices by all.[19]

[16] Ibid., p. 6.
[17] Ibid., p. 6.
[18] OECD Guidelines for Multinational Enterprises. 2011 Edition. P.83. http://www.oecd.org/daf/inv/mne/48004323.pdf
[19] Ibid. pp.17-18.