

CANADA APPOINTS FIRST OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE, PAVING THE WAY FOR THE INVESTIGATION OF HUMAN RIGHTS ABUSES BY CANADIAN MULTINATIONALS

15 April 2019 | Global
Legal Briefings

Sheri Meyerhoffer will serve as the first ombudsperson, following her appointment on April 8, 2019.¹ The Government of Canada announced the creation of the Ombudsperson role in January 2018, but until now it was unknown who would fill the position.²

As this position is the first of its kind globally, much remains to be seen about how it will operate in practice, and what impact it will have. The Ombudsperson's mandate has been defined in broad terms by the Government of Canada, but the Ombudsperson will have discretion to further shape the role through decisions on procedure.

The Ombudsperson has a mandate to review complaints of alleged human rights abuses arising in connection with activities of Canadian companies' outside Canada. Specifically, the Ombudsperson is empowered to:

- review allegations of human rights abuses, either upon receiving a complaint or on her own initiative;³

- conduct fact-finding, either jointly with the stakeholders involved or independently;⁴
- recommend that any party involved in a review take certain actions, including payment of compensation, a formal apology, and changes to the policies of a Canadian company;⁵ and
- publicly report such recommendations and the findings of a review.⁶

At present, this mandate extends only to Canadian companies operating in the mining, garment, and oil and gas sectors, but it is expected to expand to other sectors in the future.⁷

The Government of Canada is currently studying whether, in addition to the powers listed above, the Ombudsperson will be given authority to compel witness testimony and the production of documents.⁸

Ms. Meyerhoffer's appointment is an important milestone; the Ombudsperson has jurisdiction to review complaints of alleged abuses that occurred after the date of her appointment, but not before, unless they remain ongoing at the time of the complaint.⁹

Any recommendations made by the Ombudsperson following a review will be just that—recommendations, not legally binding obligations. But companies may face risks to their reputation or business relationships if they ignore the recommendations. And if the Ombudsperson concludes that a company has not acted in good faith regarding a review or recommendations, she may recommend that the Government prohibit the company from receiving financial support from Export.

Development Canada or trade advocacy support from the Department of Foreign Affairs, Trade and Development.¹⁰

The appointment of the Ombudsperson also presents an opportunity for Canadian companies. Under an innovative procedure, companies may submit a complaint to the Ombudsperson and request a review when they believe they are the target of unfounded allegations of human rights abuses.¹¹ Companies stand to benefit from having such allegations reviewed by an independent, credible third party—a conclusion by the Ombudsperson that a company has acted responsibly may go a long way toward assuaging concerns from investors, the public, and other stakeholders.

It remains unclear how the Ombudsperson will work alongside the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and which was established in 2000. Like the Ombudsperson, the NCP is a non-judicial mechanism for review of human rights allegations against Canadian companies; specifically, allegations that a company has not acted in accordance with the OECD Guidelines. While there are differences between the two bodies—for example, the NCP cannot conduct reviews on its own initiative like the Ombudsperson, but is also not limited to reviewing complaints relating to specific sectors—there are many similarities, and thus a potential for overlap between their work.

According to the Canadian Government, the Ombudsperson role is intended to complement the NCP.¹² To that end, the Ombudsperson may recommend that a complaint submitted to her be referred to the NCP, if it falls within the NCP's mandate.¹³ But it remains to be seen when and how the Ombudsperson will exercise this power, and whether parties that might have filed complaints with the NCP will choose the Ombudsperson instead.

The immediate next steps for the Ombudsperson will be to establish procedures for the review process, including how complaints are submitted and reviewed.

¹Global Affairs Canada, *Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise*, <https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html>

²Global Affairs Canada, *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html

³Order In Council No. 2019-0299, ¶ 4, available at <http://orders-in-council.canada.ca/attachment.php?attach=37587&lang=en>; see also Global Affairs Canada, *Canadian Ombudsperson for Responsible Enterprise (CORE): What is the Mandate of the Ombudsperson?*, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng> (noting that the Ombudsperson's mandate is defined in the Order in Council).

⁴Order In Council ¶ 7(b)

⁵Order in Council ¶ 11.

⁶Order in Council ¶ 14.

⁷Order in Council ¶ 2.

⁸See John G. Ruggie, *Canadian Ombudsperson for Responsible Enterprises*, available at https://www.business-humanrights.org/sites/default/files/documents/Canadian%20Ombudsperson%20for%20Responsible%20Enterprise_John%20G.%20Ruggie.pdf; Gabriel Friedman, *Lobbied to Death: Liberals Face Backlash over Corporate Responsibility Ombudsman*, Financial Post, available at <https://business.financialpost.com/commodities/mining/lobbied-to-death-liberals-face-backlash-over-corporate-responsibility-ombudsman>.

⁹Order in Council ¶¶ 4(c)-(e).

¹⁰Order in Council ¶ 10.

¹¹Order in Council ¶ 4(d)

¹²Global Affairs Canada, Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise, <https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html>

¹³Order in Council ¶ 7(d).

KEY CONTACTS

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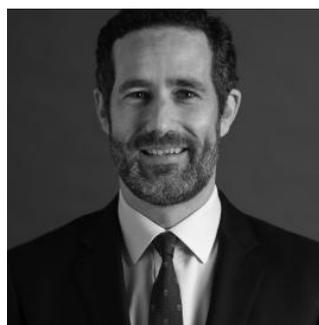
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