

# CANADA'S GLOBAL CSR COP? THE PROPOSED CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE

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On January 17, 2018, the Government of Canada announced the creation of an independent Canadian Ombudsperson for Responsible Enterprise (the “**Ombudsperson**”), a development which it claimed was the first of its kind in the world.<sup>[1]</sup> The Ombudsperson will replace the existing Extractive Sector Corporate Social Responsibility (“**CSR**”) Counsellor and marks a major shift in Canada’s approach to CSR norms and policies. Rather than merely advocating for the voluntary adoption of CSR policies and offering the services of the Counsellor to encourage a mediated resolution of disputes, the Ombudsperson is expected to have the power to investigate complaints, compel evidence and make public recommendations with serious potential consequences for Canadian businesses operating internationally.

## **From Counsellor to Ombudsperson: Broader and Deeper Powers**

Canadian companies operating in developing countries are occasionally accused of taking unfair advantage of comparatively weak environmental, labour and social regulations. In response, many companies have undertaken to go beyond compliance with local laws and have adopted voluntary CSR guidelines. The United Nations, the OECD and other international organizations have also promulgated CSR guidelines for multinational enterprises, with a recent emphasis on the relationship between business conduct and international human rights.

In 2009, the federal government announced the creation of the CSR Counsellor to facilitate the resolution of disputes between Canadian resource companies and non-governmental organizations (“**NGOs**”) regarding compliance with CSR guidelines. The Counsellor promoted CSR guidelines and undertook reviews with the consent of the involved parties. Ultimately, this consent-based mediation model drew limited interest from the NGO community, with only six complaints being registered since the creation of the Counsellor’s office. On some occasions, where complaints were registered by NGOs, the responding company declined to participate, essentially without consequence.

The new Ombudsperson will have a broader mandate than the CSR Counsellor. The office of the Ombudsperson will initially have jurisdiction over the garment sector as well as mining, oil and gas companies.

It is expected that this jurisdiction will expand to other sectors within a year of the Ombudsperson taking office.

More fundamentally, the Ombudsperson will have the power to investigate independently, recommend solutions and monitor implementation of those recommendations. While the exact powers of the Ombudsperson have not yet been defined with precision, it is expected that the office will have powers to compel the production of documents and evidence from witnesses in the manner of a commissioner under the *Inquiries Act*.<sup>[2]</sup>

Reports of the Ombudsperson may lead to sanctions in the form of the withdrawal of assistance from the Trade Commissioner Service or future Export Development Canada support. The more important sanctions, however, are likely to be reputational ones in the event of a highly-publicized adverse finding against a company.

At the same time, favourable reports from the Ombudsperson may potentially provide reputational advantages for companies disputing allegations of human rights abuses or other violations of CSR norms. Currently, defamation suits are the only legal option available to corporations seeking to resolve unfounded accusations of misconduct in a neutral forum. These suits are often slow, expensive and rarely result in full economic compensation for the harm caused by defamatory statements.

### **Canada's Increasing Role in International Human Rights Litigation**

The proposed Ombudsperson is part of a growing assertiveness by Canadian authorities over allegations of misconduct by Canadian companies outside of Canada's borders. As a middle power, Canada has been reluctant until recently to exercise extraterritorial jurisdiction over events and persons in foreign countries. Indeed, it has strongly protested the exercise of such powers by the United States, for example in respect of sanctions against Cuba, and has adopted legislation to block such intrusions in its domestic affairs.<sup>[3]</sup>

Recently, Canadian courts have shown a willingness to hear novel claims against the Canadian parents of foreign mining companies. They have declined to strike out tort claims based on alleged duties of care owed for injuries caused by a foreign subsidiary or based on alleged breaches of customary international law.<sup>[4]</sup> The Canadian courts have also refused to stay actions against Canadian parent companies in favour of proceedings in developing countries, citing general concerns over bias and corruption in foreign judicial systems.<sup>[5]</sup>

As these cases are based on alleged parent company acts connected to Canada, they do not necessarily infringe on the international law prohibition of extraterritorial jurisdiction.<sup>[6]</sup> In other words, the nexus to Canada arguably exists to hear such claims in Canada's courts. However, these cases do demonstrate a growing reluctance to defer to foreign judicial systems on grounds of international comity.

Meanwhile, on June 19, 2013 the *Corruption of Foreign Public Officials Act* was amended to allow extraterritorial

jurisdiction on the basis of the Canadian nationality of the accused. Offences committed outside of Canada may be prosecuted in Canada if the accused is any of: (1) a Canadian citizen, (2) a permanent resident present in Canada, or (3) a company established under the laws of Canada.<sup>[7]</sup> Note that acts of foreign subsidiaries of Canadian companies are not covered by these amendments, reflecting the rule of public international law that nationality is based on the place of incorporation.<sup>[8]</sup>

The proposed Ombudsperson would not be enforcing or investigating any Canadian criminal legislation or adjudicating civil disputes. However, the proposed investigation of events with little connection to Canada beyond the ownership of the foreign corporation does represent a form of extraterritorial jurisdiction that Canada has balked at in the past.

### **Strategic Considerations for Canadian Companies Operating Internationally**

The creation of the proposed Ombudsperson has drawn qualified praise from both NGOs and industry groups. However, the potential for the mandatory production of evidence to the Ombudsperson may create difficult issues for Canadian companies that are the subject of an inquiry. Evidence located in foreign jurisdictions can be difficult to collect without the assistance of local authorities. Furthermore, production of evidence in proceedings before the Ombudsperson would need to be carefully co-ordinated with any parallel criminal or civil proceedings, either in Canada or in the foreign jurisdiction.

There is also considerable uncertainty regarding the scope and interpretation of many CSR norms. The voluntary nature of these norms and the use of statements of principle means that they often use vague, aspirational language rather than precisely defined legal terminology. The proposed Ombudsperson will need to provide clarity for all stakeholders in how these norms will be applied in given cases that lead to specific findings and recommendations. While Canada's decision to amend its approach to global CSR norms is commendable, it remains to be seen if the Ombudsperson will be able to overcome the problems that the Counsellor has faced until now.

by George Waggott and Robert Wisner

[1] Global Affairs Canada Press Release, "The Government of Canada brings leadership to responsible business conduct abroad", January 17, 2018.

[2] R.S.C., 1985, c. I-11. The limits of any delegation of powers under the *Inquiries Act* remain to be determined.

[3] *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c.F-29.

[4] *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414; *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856.

[5] *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39.

[6] *R. v. Hape*, [2007] 2 S.C.R. 292.

[7] *Fighting Foreign Corruption Act*, SC 2013, c 26.

[8] *Case Concerning the Barcelona Traction, Light & Power Company Ltd. (Belgium v. Spain)*, [1970] I.C.J. 1.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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