

The Global Leadership in Business and Human Rights Act: An act to create an independent human rights ombudsperson for the international extractive sector
Draft model legislation, November 2, 2016
Commissioned by the Canadian Network on Corporate Accountability

1. Interpretation

- 1.1) Nothing in this Act should be interpreted in any way to deprive any individual, or the Attorney General of Canada, of the duty or the right to bring a legal action or a criminal prosecution in a court in any jurisdiction in Canada against an entity for harms occurring in a foreign state instead of, or in addition to, availing themselves of any rights afforded by this Act.

2. Definitions

- 2.1) An entity is an “affiliate” of an entity if:
- i. It is a subsidiary of the entity; or
 - ii. both are subsidiaries of the same entity; or
 - iii. each of them is controlled by the same person.
- 2.2) “control” means that an entity, directly or indirectly:
- i. owns 20 or more percent of the voting interests in an affiliate or other entity; or
 - ii. ordinarily directs or instructs the conduct of the affiliate or other entity; or
 - iii. alone or in combination with another affiliate of the entity, is empowered through voting interests, or based on an agreement with another party, to elect at least 30 per cent of the Board of Directors of an affiliate; or
 - iv. has the power to cause direction of the management and policies of an entity; or
 - v. determines the salary level or bonus structure for executives or employees of an affiliate or other business entity.
- 2.3) “entity” means a corporation or a trust, partnership, joint venture, or other unincorporated organization:
- i. that is engaged in the commercial development of oil, gas or minerals; or
 - ii. that controls a corporation or a trust, partnership, joint venture, or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals.
- 2.4) “foreign state” means any state other than Canada;
- 2.5) “harm” means:
- i. infringement(s) of the international instruments listed in Schedule 1.
- 2.6) “person” includes a legal person.

- 2.7) “project” means the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. Nonetheless, if multiple such agreements are substantially interconnected, this shall be considered a project.
- 2.8) “subject of an investigation” means any entity named in a complaint under Part 4; or an entity identified by the Ombudsperson under Part 6, sections 1 or 2.
- 2.9) An entity is a “subsidiary” of an entity if:
 - i. It is controlled by
 - 1. That entity; or
 - 2. That entity and one or more entities each of which is controlled by that entity; or
 - 3. Two or more business organizations, each of which is controlled by that entity; or
 - ii. It is a subsidiary of an entity that is a subsidiary of that Entity.

3. Office of the Extractive Industries Human Rights Ombudsperson

Ombudsperson

- 3.1) Within three months of the coming into force of this Act the Governor in Council shall appoint the Extractive Industries Human Rights Ombudsperson following a vote by a majority of the members of the House of Commons and Senate in favour of the appointment of that person.
- 3.2) The Ombudsperson is an Officer of Parliament, and is independent from the Government.
- 3.3) The Ombudsperson holds office during good behaviour for a term of seven years, but may be removed for cause by the Governor in Council.
- 3.4) The Ombudsperson, on the expiration of a first term of office, is eligible to be re-appointed for one further term not exceeding seven years. For greater clarity, the Ombudsperson is eligible for only one re-appointment.
- 3.5) The Ombudsperson shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of Ombudsperson under this Act or any other Act of Parliament and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.
- 3.6) The Ombudsperson shall be paid a salary, fixed by Parliament, equal to the salary of a judge of the Federal Court, and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this Act or any other Act of Parliament.
- 3.7) The provisions of the Public Service Superannuation Act, other than those relating to tenure of office, apply to the Ombudsperson, except that a person appointed as Ombudsperson from outside the public service, as defined in the Public Service Superannuation Act, may, by notice in writing given to the President of the Treasury Board not more than sixty days after the date of appointment, elect to participate in the pension plan provided in the Diplomat-

- ic Service (Special) Superannuation Act, in which case the provisions of that Act, other than those relating to tenure of office, apply to the Ombudsperson from the date of appointment and the provisions of the Public Service Superannuation Act do not apply.
- 3.8) The Ombudsperson is deemed to be employed in the public service of Canada for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act.
 - 3.9) The Ombudsperson shall have expertise and experience in the investigation and documentation of human rights infringements, and have knowledge of international best practices in gender-sensitive investigation and analysis. In addition, the Ombudsperson shall have expertise in one or more of the following areas: international best-practices in the investigation of sexual violence, extractive industries, human rights and environmental impact assessment and auditing, and indigenous rights.
 - 3.10) No person shall be appointed as Ombudsperson if, within the previous five years he or she has been employed, on the Board of directors, or otherwise closely associated with an entity, or its affiliate, as defined in this Act.

Assistant Ombudsperson

- 3.11) The Governor in Council may, on the recommendation of the Ombudsperson, appoint one or more Assistant Extractive Industry Human Rights Ombudsperson(s).
- 3.12) An Assistant Extractive Industry Human Rights Ombudsperson is entitled to be paid a salary to be fixed by the Governor in Council and such travel and living expenses incurred in the performance of duties under this Act or any other Act of Parliament as the Ombudsperson considers reasonable.
- 3.13) The provisions of the Public Service Superannuation Act, other than those relating to tenure of office, apply to an Assistant Ombudsperson.
- 3.14) An Assistant Ombudsperson is deemed to be employed in the public service of Canada for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act.

Staff

- 3.15) Such officers and employees as are necessary to enable the Ombudsperson to perform the duties and functions of the Ombudsperson under this Act or any other Act of Parliament shall be appointed in accordance with the Public Service Employment Act.
- 3.16) The Ombudsperson may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Ombudsperson to advise and assist the Ombudsperson, Assistant Ombudsperson, and the officers and employees, in the performance of their duties and functions under this Act or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of such persons.

Delegation

- 3.17) The Ombudsperson may authorize any person to exercise or perform, subject to such restrictions or limitations as the Ombudsperson may specify, any of the powers, duties or functions of the Ombudsperson under this or any other Act of Parliament except,
- i. in any case other than a delegation to an Assistant Ombudsperson, the power to delegate under this section.
- 3.18) An Assistant Ombudsperson may authorize any person to exercise or perform, subject to such restrictions or limitations as the Assistant Ombudsperson may specify, any of the powers, duties or functions of the Ombudsperson under this or any other Act of Parliament that the Assistant Ombudsperson is authorized by the Ombudsperson to exercise or perform.
- 3.19) The Ombudsperson is authorized to exercise the powers and perform the functions of the Treasury Board that relate to human resources management within the meaning of section 7(1)(b) and of the Financial Administration Act.

Objects

- 3.20) With respect to harms suffered by individuals and the natural environment in foreign states, in connection with extractive industries, the objects of the Ombudsperson are to:
- i. Increase accountability and transparency;
 - ii. Promote gender-sensitivity in the investigation, reporting, and resolution of harm;
 - iii. Promote remedies, including full reparations, for harm(s);
 - iv. Promote the avoidance of harm(s);
 - v. Promote the meaningful participation of individuals, groups and local communities in decisions that affect them;
- 3.21) The Ombudsperson shall, whenever possible, share information, and reports with, international corporate social responsibility standards-monitoring bodies, complaint mechanisms, and other institutions that have an interest in, and role in promoting, responsible and sustainable operations by extractive industry entities.

Immunities

- 3.22) The Ombudsperson or any person acting on behalf or under the direction of the Ombudsperson is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Ombudsperson or that person as a result of performing any duties or functions under this Act during an investigation, in any proceeding other than a prosecution for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, or a review before the Federal Court under this Act.
- 3.23) No criminal or civil proceedings lie against the Ombudsperson, or against any person acting on behalf or under the direction of the Ombudsperson, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Ombudsperson under this Act.

- 3.24) The Ombudsperson shall administer a fund for the purposes of financing the legal counsel of complainants engaged in mediation under Part 11, or who are parties to a judicial review under Part 14, to be dispersed by the Ombudsperson in his or her discretion.

4. Complaints

- 4.1) Any person, organization, or group of individuals, resident in Canada or elsewhere, may complain to the Ombudsperson about any harm that may be the subject of an Ombudsperson's investigation.
- 4.2) Every complaint to the Ombudsperson shall be made in writing, in French or in English, but
- i. A complainant may seek permission from the Ombudsperson to submit a complaint in a language other than English or French; and
 - ii. A complainant may seek permission from the Ombudsperson for an exception to the requirement for written complaints.
- 4.3) A complaint may include:
- i. A description of the incident or series of incidents leading to the complaint;
 - ii. The specific harm(s) that occurred, is occurring, or is at risk of occurring;
 - iii. The foreign state in which the alleged harm(s) occurred;
 - iv. The names of any entities involved in the alleged harm(s);
 - v. Any dates, names, places, and details that may assist the Ombudsperson in any investigation.
- 4.4) A complaint may be made at any time.
- 4.5) The Ombudsperson shall provide publicly accessible information about the complaints system under this Part and shall arrange for the provision of assistance to those who wish to file a complaint.
- 4.6) On request of a complainant, the Ombudsperson shall take any and all necessary steps to protect the identity of one or more complainants.
- 4.7) No act or omission of a complainant, or any individual with knowledge of a complaint, undertaken with the intent of taking advantage of the procedures outlined in this Act, or promoting the effective use of those procedures, including but not limited to, making a complaint to the Ombudsperson, publicizing a complaint, or participating in an investigation conducted by the Ombudsperson, may form the basis of any legal action against the complainant.

5. Rules Respecting a Canadian Nexus

- 5.1) There is a nexus between a subject of an investigation and Canada where:
- i. A subject of the investigation :
 1. Is listed on a stock exchange in Canada; or
 2. Is incorporated in any jurisdiction in Canada; or
 3. Has its principal place of business in Canada; or
 - ii. A subject of the investigation is a subsidiary, or an affiliate, of an entity listed in subsection i; or

- iii. A subject of the investigation is receiving, or has received, support, subsidy, promotion, partnership or protection from the Government of Canada or any of its Departments or Agencies.

6. Investigations

- 6.1) The Ombudsperson shall review every complaint made to him or her, and identify one or more subjects of an investigation;
 - i. The Ombudsperson may, at any time during an investigation, add one or more subjects of an investigation.
- 6.2) Subject to section 4 of this Part, and the provisions of Part 7, the Ombudsperson shall initiate an investigation in every case in which:
 - i. There is, in accordance with the Rules Respecting a Canadian Nexus under Part 5, a nexus between the subjects of an investigation and Canada; and
 - ii. The complaint alleges any of the following:
 - 1. One or more subjects of the investigation has, by act or omission, caused or contributed to harm(s) in a foreign state; or
 - 2. There is a significant risk that one or more subjects of the investigation will, by act or omission, cause or contribute to harm(s) in a foreign state; or
 - 3. A third party with which one or more subjects of the investigation is in a material contractual relationship has, by act or omission, caused or contributed to harm(s), in connection with the material contractual relationship, in a foreign state;
 - 4. There is a significant risk that a third party with which one or more subjects of the investigation is in a material contractual relationship has, by act or omission, caused or contributed to harm(s), in connection with the material contractual relationship, in a foreign state.
- 6.3) In addition to the procedures set out in section 2 of this Part for initiating an investigation, the Ombudsperson may initiate an investigation on his or her own motion where the Ombudsperson has reason to suspect that both sections 6.2i and 6.2ii apply.
- 6.4) Notwithstanding section 2 of this Part, the Ombudsperson may, in his or her discretion, decide not to investigate a complaint if and only if:
 - i. the harm(s) alleged in the complaint are trivial or are not serious;
 - ii. the complaint is frivolous or vexatious or is not made in good faith

For greater clarity, the Ombudsperson shall not decide not to investigate a complaint only on the basis that any individual, or organization, including but not limited to the complainant, has or continues to publicize the incidents and entities involved in the complaint.

- 6.5) In any case where the Ombudsperson decides not to investigate a complaint, the Ombudsperson shall inform the complainant in writing of that decision and state the reasons therefor.

- 6.6) The complainant may request a reconsideration of a decision of the Ombudsperson not to investigate.
- 6.7) The Ombudsperson may reconsider a decision not to investigate under section 4 of this Part if the Ombudsperson is satisfied that the complainant has established that there are compelling reasons to investigate.
- 6.8) The Ombudsperson shall give Notice of the investigation to the subjects of an investigation.
- 6.9) The Ombudsperson shall post a Notice of Investigation on the website of the Ombudsperson.
- 6.10) Subject to the provisions of Part 10, each of the Notices provided for in sections 8 and 9 of this Part shall include:
 - i. The name of the complainant, if applicable and appropriate;
 - ii. The subject(s) of the complaint; and
 - iii. The subject matter of the investigation.
- 6.11) Where the Ombudsperson has reason to suspect that the destruction of evidence may occur, the Ombudsperson may forego the notice requirements under sections 8 and 9 of this Part.

7. Other Proceedings:

- 7.1) Where a proceeding is or has been initiated in a court in any jurisdiction in Canada on a matter substantially similar to the matter of an Ombudsperson investigation, the Ombudsperson may, in his or her discretion, suspend the investigation until the litigation has concluded by settlement or otherwise, or decline to initiate an investigation if the proceeding has been withdrawn, abandoned, settled or decided.
 - i. The Ombudsperson shall not suspend or decline to initiate an investigation pursuant to this section, where there is reason to suspect that the purpose of the litigation in a court in any jurisdiction in Canada is to interfere in the Ombudsperson investigation;
 - ii. The Ombudsperson shall not suspend an investigation pursuant to this section, where, for any reason, the litigation does not, or cannot, proceed, or is in fact not proceeding, or is indefinitely suspended.
- 7.2) Nothing in this Act shall be interpreted in any way to deprive any person of any right to bring a proceeding in a court in any jurisdiction in Canada against any entity for wrongs alleged outside Canada.
- 7.3) Where a legal proceeding on a matter substantially similar to the matter of an Ombudsperson investigation is initiated outside Canada, the Ombudsperson may suspend the investigation until the litigation has concluded by settlement or otherwise or decline to initiate the investigation if the action has been resolved or a decision has been issued, if, and only if, in the opinion of the Ombudsperson:
 - i. There is no unjustified delay in the proceedings outside Canada which, in the circumstances, is inconsistent with an intent to seek a just resolution of the action; and
 - ii. The proceedings outside Canada are conducted independently and impartially, and they were or are being conducted in a manner which, in

the circumstances, is consistent with an intent to seek a just resolution of the action; and

iii. The proceedings outside Canada determined the liability of all the subjects of the investigation, and not only the liability of one subject, or a third party.

7.4) For greater clarity, a proceeding instituted by, or on behalf of, or paid for by, the subject of an investigation, or an entity, its affiliate, a subsidiary or a third party with which the entity or its affiliate or subsidiary is in a material contractual relationship is not an action in a court in any jurisdiction in Canada, or a legal proceeding outside Canada, for the purposes of this Act.

8. Investigatory Powers of Ombudsperson

8.1) In conducting an investigation, the Ombudsperson shall take appropriate measures to ensure effective investigations, and in doing so, shall respect the interests and personal circumstances of complainants, harmed individuals, and witnesses, including age, gender, and health, and take into account the nature of any harm alleged, in particular where it involves sexual violence, gender violence or violence against children.

i. The Ombudsperson shall establish and make available procedural rules for:

1. the investigation of sexual violence, reflecting international best practice including the Rules of Procedures and Evidence of the International Criminal Court, which prohibit questioning about prior or subsequent sexual conduct, and the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict;
2. investigations involving children;
3. the protection of the safety, physical and psychological well-being, dignity and privacy of harmed individuals and witnesses.

ii. Before issuing procedural rules under this section, the Ombudsperson shall post a Notice of draft procedural rules on the website of the Ombudsperson, and invite comment on the draft before they are finalized and issued.

8.2) In the course of an investigation under this Act, the complainant, and the subjects of an investigation shall be given an opportunity to make representations to the Ombudsperson, and may be represented by a representative of their choice in making representations, but no one is entitled as of right to be present during representations made to the Ombudsperson by any other person.

8.3) In the course of an investigation under this Act, the Ombudsperson may rely on extrinsic reports or other information.

8.4) Within 30 days of the issuance of the Notice of Investigation under Part 6, the Ombudsperson shall make a formal request to any complainant; to the subject(s) of an investigation; to the individuals who suffered or may suffer the alleged harm; and any other interested parties, for any and all information, document or physical evidence relating to the subject matter of the investigation.

- i. The request shall be made in writing, and published on the website of the Ombudsperson.
- 8.5) Within 60 days of receiving the request described in section 4 of this Part, every recipient of a request shall respond to the letter in writing.
- i. Such response shall:
 - 1. List the documents and the physical evidence provided in response to the request;
 - 2. Identify any document, part of a document, or physical evidence which has been provided, over which there is a claim of confidentiality or privilege under Part 10;
 - 3. List the persons to whom the Ombudsperson should speak to obtain further information about the investigation, including persons outside of Canada;
 - 4. Identify any exclusions from the request and the rationale for their exclusion;
 - 5. List the Codes of Conduct, if any, to which the recipient of the letter is a party, and any relevant Corporate Codes of Conduct.
 - ii. Any document or physical evidence provided to the Ombudsperson shall be included with the response, or otherwise promptly forwarded to the office of the Ombudsperson;
 - iii. Recipients of a request may provide detailed information relating to the investigation in the form of a written statement.
- 8.6) Where the Ombudsperson has reason to suspect that the destruction of evidence relevant to the investigation may occur, the Ombudsperson may forego the formal requests under section 4 of this Part.
- 8.7) The Ombudsperson may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada if, in the Ombudsperson's opinion, there is evidence of such offence.
- 8.8) The Ombudsperson may disclose to a foreign official, information he or she has obtained through an investigation if he or she has reason to believe the information relates to the commission of an offence under the law of the relevant foreign jurisdiction.

Search Warrant

- 8.9) Where a justice is satisfied by an information on oath submitted by the Ombudsperson to the justice by telephone, or in writing, that there are reasonable grounds to believe that there is in a building, receptacle or place, anything that there are reasonable grounds to believe will assist the Ombudsperson in his or her investigation of harm(s)
- He or she may, at any time issue a warrant authorizing the Ombudsperson to search the building, receptacle or place for any such thing and to seize it, and
- i. subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division;

- ii. If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division, after it has been endorsed by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication;
- iii. Where the Ombudsperson is authorized under this section to search a computer system in a building or place for data, he or she may:
 - (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
 - (b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;
 - (c) seize the print-out or other output for examination or copying; and
 - (d) use or cause to be used any copying equipment at the place to make copies of the data.
- iv. Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search:
 - (a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
 - (b) to obtain a hard copy of the data and to seize it; and
 - (c) to use or cause to be used any copying equipment at the place to make copies of the data.

Production Order

- 8.10) On ex parte application made by the Ombudsperson or public officer, a justice may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing information that is in their possession or control at that time.
 - i. Before making the order, the justice must be satisfied by information on oath that there are reasonable grounds to believe that
 - (a) harm(s), as defined in this Act, has or have been or may be committed; and
 - (b) the document or data is in the person's possession or control and will afford evidence respecting the harm(s) under investigation.

Investigative Interview

- 8.11) The Ombudsperson may, for the purposes of furthering an investigation, apply ex parte to a judge for an order for the gathering of information.
- 8.12) The judge to whom the application is made may make an order for the gathering of information if they are satisfied that:

- (i) there are reasonable grounds to believe that harm(s), as defined in this Act, has or have been or may be committed;
 - (ii) information concerning the harm(s) is or are likely to be obtained as a result of the order; and
 - (iii) reasonable attempts have been made to obtain the information by other means.
- 8.13) An order made under section 11 of this Part shall order the examination, on oath or not, of the person named in the order and require the person to attend at the place fixed by the judge, or the judge named in subsection (ii) for the examination and to remain in attendance until excused by the presiding judge, and may:
- i. order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;
 - ii. designate another judge as the judge before whom the examination is to take place; and
 - iii. include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.
- 8.14) No answer given or thing produced in a proceeding under section 11 of this Part shall be used or received in any criminal proceedings against that person, save prosecution for perjury.
- 8.15) Evidence derived from the evidence provided at a hearing under section 11 of this Part may not be presented in evidence against the witness in another prosecution even if the Crown is able to establish, on a balance of probabilities, that it would have inevitably discovered the same evidence through alternative means.

9. Information-gathering in foreign jurisdictions

- 9.1) Where the law of a foreign state does not prohibit it, the Ombudsperson may gather information in furtherance of his or her investigation, in a foreign state.
- 9.2) Where an investigation requires the Ombudsperson to gather information or meet with individuals in a foreign jurisdiction, he or she will inform the foreign government of his or her meeting and information-gathering activities.
- 9.3) In gathering information in foreign jurisdictions, the Ombudsperson shall endeavour to enter into mutual assistance agreements, letters rogatory, or other like legal agreement, with local authorities.
- 9.4) For greater clarity, the Ombudsperson shall not participate in law enforcement activities in any foreign jurisdiction.

10. Confidentiality claims

- 10.1) If the Ombudsperson is satisfied, on a balance of probabilities, that any information or evidence, or the source of any information or evidence, received or obtained in the course of his or her investigation is:
 - i. personal information as defined in the Privacy Act or in any provincial or territorial privacy act; or

- ii. commercially sensitive; or
- iii. litigation or solicitor-client privileged;

The Ombudsperson shall undertake to protect the confidentiality of the evidence or information, or the source of the information or evidence.

- 10.2) If the Ombudsperson has reason to suspect that the publication of any evidence, information, the name of a complainant, or the source of any evidence or information, might endanger the safety of an individual or group of individuals, the Ombudsperson shall undertake to protect the confidentiality of the evidence or information, part thereof, or the source of the information or evidence.
- 10.3) If the Ombudsperson has reason to suspect that the publication of any evidence, information, or the source of any evidence or information may interfere in, or be put to a use that would constitute an abuse of the Ombudsperson process, in a separate legal proceeding, the Ombudsperson shall undertake to protect the confidentiality of the evidence or information, part thereof, or the source of the information or evidence.
- 10.4) For greater clarity, where the Ombudsperson has undertaken to protect the confidentiality of any evidence, or information, or part thereof, or the source of any information or evidence, then the information, evidence or source of information or evidence shall not be compellable to be produced in any criminal or civil proceeding in Canada or elsewhere.
- 10.5) Any recipient of a request for evidence or information from the Ombudsperson may request that all or part of the evidence or information he or she is providing to the Ombudsperson be kept confidential, or that the source of the evidence or information be kept confidential.
 - i. The Ombudsperson shall respond to any request made under this section in writing.
- 10.6) The Ombudsperson may decline to undertake to protect the confidentiality of evidence or information if the Ombudsperson is of the opinion that the public interest in disclosure outweighs the claim to confidentiality.
 - i. Any person who is affected by a refusal by the Ombudsperson under this section may apply to Federal Court for a ruling.

11. Mediation - Settlement

- 11.1) Subject to section 2 of this Part, the Ombudsperson may attempt to resolve issues under investigation by means of dispute resolution mechanisms such as mediation and conciliation.
 - i. The Ombudsperson may delegate the powers listed under this Part to a mediator.
- 11.2) The powers in section 1 of this Part may be exercised if and only if:
 - i. The complainant and one or more subject(s) of the investigation give their informed consent to mediation or conciliation; and
 - ii. The matter under investigation is, in the opinion of the Ombudsperson, appropriate for mediation; and

- iii. The complainant involved in the mediation is a directly affected party, and in the opinion of the Ombudsperson, is well-suited to represent the individuals affected by the harm under investigation; and
 - iv. The investigation of the complaint has been carried out to such an extent that, in the opinion of the Ombudsperson, the relevant facts are before the parties; and
 - v. No more than 90 days have elapsed since the complainant and the entities consented to mediation or conciliation;
 - 1. On consent of the complainant and the subjects to an investigation, the Ombudsperson may agree to extend the mediation or conciliation period for a further 30 days, as many times as the parties consent.
- 11.3) A complainant or subject of an investigation may make a request to the Ombudsperson for mediation or conciliation at any time.
- 11.4) Any party to a mediation or conciliation may be represented by a representative or representatives of their choice.
- 11.5) The Ombudsperson may enter into legal arrangements to pay for the reasonable legal expenses of a complainant or group of complainants participating in mediation or conciliation under this Part.
- 11.6) Where a settlement of a complaint is agreed to, made in writing, signed by the parties to the settlement, and approved by the Ombudsperson, the settlement is binding upon the parties to the settlement, and the party alleging breach may apply to the Federal Court for enforcement.
- 11.7) In exercising his or her discretion to approve any settlement in this section, the Ombudsperson shall have regard to:
- i. The Ombudsperson's mandate to promote gender-sensitivity;
 - ii. The Ombudsperson's mandate to promote full reparation for harm(s);
 - iii. The Ombudsperson's mandate to promote the avoidance of harm(s);
 - iv. The Ombudsperson's mandate to promote meaningful participation by individuals, groups and communities in decisions affecting them; and
 - v. The capacity of the parties to the settlement to express their informed consent to the terms of the settlement.
- 11.8) The parties to a settlement may, as an alternative to the Ombudsperson report under Part 13, and with the approval of the Ombudsperson, agree to a written summary of the complaint, the investigation and the settlement.
- i. Any such summary shall be posted promptly on the website of the Ombudsperson;
 - ii. In exercising his or her discretion to approve any written summary in this section, the Ombudsperson shall have regard to the Ombudsperson's public interest mandate to improve transparency and accountability for entities and their affiliates.

12. Discontinuance of Investigation

- 12.1) The Ombudsperson may discontinue an investigation if the Ombudsperson is of the opinion that

- i. The parties have entered into a settlement in accordance with the requirements in Part 11 of this Act and the Ombudsperson is of the view that no compelling reason remains to continue the investigation; or
 - ii. The Ombudsperson has completed the investigation and complied with the procedures under Part 13 of this Act; or
 - iii. The Ombudsperson has completed the investigation, and is of the opinion that the provisions of Part 13 section 1 do not apply, and that no compelling reason remains to continue the investigation.
- 12.2) Where the Ombudsperson discontinues an investigation pursuant to section 1 of this Part, the Ombudsperson shall:
- i. Notify the complainant, if any, of the discontinuance and the reason therefor;
 - ii. Notify the subjects of the investigation of the discontinuance and the reason therefor;
 - iii. Publish a summary of the investigation on the website of the Ombudsperson, unless a report has been prepared pursuant to Part 13 or Part 11 of this Act in which case that summary shall be published on the website of the Ombudsperson.

13. Procedure after Investigation

- 13.1) In every case where, after making an investigation under this Act, the Ombudsperson is of the opinion that:
- i. A subject of the investigation has, by act or omission, caused or contributed to harm, in a foreign state; or
 - ii. There is a significant risk that a subject of the investigation will, by act or omission, cause or contribute to harm, in a foreign state, and the entity or its affiliate has not exercised reasonable due diligence to mitigate the risk;
 - iii. A third party with which a subject of the investigation is in a material contractual relationship has, by act or omission, caused or contributed to harm, in connection with the material contractual relationship, in a foreign state, and a subject of the investigation, knew or ought to have known at any time that the third party would or did cause harm; or
 - iv. There is a significant risk that a third party with which a subject of the investigation is in a material contractual relationship will, by act or omission, cause or contribute to harm, in connection with the material contractual relationship, in a foreign state, and a subject of the investigation, or the third party has not exercised reasonable due diligence to mitigate the risk;
- The Ombudsperson shall issue a public report with his or her opinion, and the reasons therefor, and may make such recommendations as he or she thinks fit.
- 13.2) In forming and reporting on his or her opinion regarding an alleged infringement of human rights, the Ombudsperson shall have reference to the practice of competent international bodies, and to:
- i. the Rio Declaration on Environment and Development;

- ii. the UN Guiding Principles on Business and Human Rights;
 - iii. the Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: "Mapping report" (Human Rights Council).
- 13.3) In forming and reporting on his or her opinion under this Part, the Ombudsperson may also consider international norms including but not limited to:
- i. OECD Guidelines on Multinational Enterprises;
 - ii. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas;
 - iii. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector;
 - iv. IFC Performance Standards on Environmental and Social Sustainability; Guidance Notes to those standards; the World Bank Group's Environmental, Health and Safety General Guidelines;
 - v. Voluntary Principles on Security and Human Rights;
 - vi. Sustainability reporting guidelines of the Global Reporting Initiative; and
 - vii. Any international Codes of Conduct, or Corporate Codes of Conduct, which the entity or affiliate has signed on to or adopted.
- 13.4) In his or her report under this Part, the Ombudsperson may make any recommendation of any kind, to any person, or any agency and body of the Government of Canada, including but not limited to:
- i. recommendations to a subject of the investigation, or a third party, regarding remedy and reparations for the harm(s) done;
 - ii. recommendations to a subject of the investigation, or a third party, regarding steps to be taken in the case under investigation to prevent further harm(s);
 - iii. recommendations to a subject of the investigation, or a third party, regarding steps to be taken in all its operations to avoid harm(s);
 - iv. recommendations to the complainant, a subject of the investigation, or a third party, regarding steps they might consider to resolve any conflict arising from the project;
 - v. recommendations to the Government of Canada or any governmental department or agency, regarding any acts or omissions in the case under investigation, or any practice, law or policy on which the act or omission was based, or the need for any practice;
 - vi. recommendations for further investigation by a separate authority or body, as appropriate;
 - vii. recommendations to a subject of the investigation regarding consultations in the project at issue, and policies and practices to meaningfully consult on this and other projects in the future.
- 13.5) The Ombudsperson shall specify a timeframe for the implementation of every recommendation made under this Part.
- 13.6) Any person, or any agency and department of the Government of Canada, who is the subject of a recommendation under this Part shall notify the Om-

budsperson, within the timeframe given, in writing, of the steps taken to give effect to each recommendation under this Part.

- i. After receiving the notice under this section, the Ombudsperson shall solicit the perspective of any complainant and other affected individuals on the steps taken to give effect to each recommendation under this Part.
- 13.7) The Ombudsperson shall issue a follow-up report, summarizing his or her opinion on the progress made in implementing the recommendations of his or her report under this Part, within 6 months of the latest deadline for a recommendation in its report under this Part.
- 13.8) Any report or follow-up report of the Ombudsperson under this Part shall be delivered to any and every person named in any report or recommendation under this Part, to any person named in a complaint, to any complainant, and to any person named in a Notice of Investigation under Part 6.
- 13.9) Any report or follow-up report of the Ombudsperson under this Part shall be delivered to the international corporate social responsibility standards-monitoring bodies, complaint mechanisms, and other institutions that have an interest in, and role in promoting, responsible and sustainable operations by extractive industry entities, as prescribed in regulation.
- 13.10) Any report or follow-up report of the Ombudsperson under this Part shall be published on the website of the Ombudsperson, and in the *Canada Gazette*, within 18 months of the issuance of the Notice of Investigation under Part 6.
 - i. The Ombudsperson may, in his or her discretion, extend the timeframe for the publication of the report when the investigation requires it;
 - ii. When the Ombudsperson exercises his or her discretion to extend the timeframe for the publication of the report, a notice of extension and reasons for extension shall be posted on the website of the Ombudsperson.
- 13.11) The Ombudsperson shall cause any report or follow-up report under this Part to be laid before both Houses of Parliament.
 - i. A committee of the House of Commons as may be designated or established by the House of Commons for that purpose shall review the report and submit a report on the review to the House of Commons within 60 days.
- 13.12) No adverse finding shall be made against any person until reasonable notice of the proposed finding has been given, and the person has been allowed the full opportunity to respond in writing. The Ombudsperson may, on request, grant an in person hearing.

14. Public Support for Entities in Foreign Jurisdictions:

- 14.1) This Part applies in every case where, after making an investigation under this Act the Ombudsperson is of the opinion that:
 - i. A subject of an investigation has, by act or omission, caused or contributed to harm(s), in a foreign state; or
 - ii. there is a significant risk that a subject of an investigation will, by act or omission, cause or contribute to harm(s), in a foreign state, and the sub-

ject of the investigation has not exercised reasonable due diligence to mitigate the risk;

- iii. a third party with which a subject of the investigation is in a material contractual relationship has, by act or omission, caused or contributed to harm(s), in connection with the material contractual relationship in a foreign state, and the subject of an investigation, knew or ought to have known at any time that the third party would or did cause harm; or
- iv. there is a significant risk that a third party with which a subject of an investigation is in a material contractual relationship will, by act or omission, cause or contribute to harm(s), in connection with the material contractual relationship, in a foreign state, and the subject of the investigation, or the third party has not exercised reasonable due diligence to mitigate the risk.

14.2) If, in any case to which this Part applies, the Ombudsperson is

- i. not satisfied that the subject of the investigation did or is undertaking all reasonable steps to comply with the terms of a settlement under Part 11, or any recommendations made under Part 13, whichever applies; or
- ii. of the opinion that the harm(s) done were of such a serious nature that it would be inappropriate for the Government of Canada to provide a support or subsidy, or promote or protect the subject of the investigation

the Ombudsperson may recommend to any and all government agencies or departments, that they withdraw any existing support or subsidy, and terminate any promotion or protection of the subject of the investigation or the project in which the harm(s) occurred for a stipulated period, or until specified conditions are met. The Ombudsperson may recommend that the subject of the investigation or the project in which the harm(s) occurred be ineligible for future support, subsidy, promotion or protection for a stipulated period or until specified conditions are met.

14.3) The Ombudsperson may make a recommendation under this section at any time after, or at the same time as, the issuance of a report under Part 13;

- i. The Ombudsperson shall, in making a recommendation under this Part, stipulate a timeframe within which the recommendation is to be implemented by the government agency or department;
- ii. A recommendation under this Part shall be made in a written report, and the Ombudsperson shall cause the report to be laid before both Houses of Parliament, posted on the website of the Ombudsperson, and published in the Canada Gazette;
- iii. A committee of the House of Commons as may be designated or established by the House of Commons for that purpose shall review the report and submit a report on the review to the House of Commons within 60 days.

14.4) If in the opinion of the Ombudsperson, a government agency or department to which he or she has issued a recommendation under this Part has failed to implement that recommendation within the stipulated timeframe, the Ombudsperson may serve the body with a Notice of Non-Compliance requiring it to

- provide within 30 days reasons consistent with the objects of the Ombudsperson Office for its failure to implement the recommendation, or to establish that it has complied with the notice.
- 14.5) On receipt of a government agency or department's response to a Notice of Non-Compliance under section 4 of this Part, or 30 days after the Notice of Non-Compliance, whichever comes first, the Ombudsperson may apply to Federal Court for judicial review of the reasonableness of the government agency or department's response.
- i. Where the Ombudsperson makes an application under this section for a judicial review of a failure to implement a recommendation, any complainant may appear as a party to the review.
 1. The Ombudsperson may enter into legal arrangements to pay for the reasonable legal expenses of a complainant or group of complainants acting as a Party under this Part.
 - ii. The head of a government agency or department who has failed to implement a recommendation under this Part shall forthwith on being given notice of any application made under this section give written notice of the application to any third party that may be affected by the review;
 - iii. Any third party that has been given notice of an application for a review under this section may appear as a party to the review;
 - iv. An application made under this section shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the Federal Courts Act.

15. Conflict of Interest

- 15.1) No Ombudsperson, or Assistant Ombudsperson shall beneficially own, directly or indirectly, any shares of any entity, holding company, insurance holding company, or of any other body corporate, however created, which could be the subject of a complaint to the Ombudsperson, unless those shares are held in a blind trust.
- 15.2) The Ombudsperson, or Assistant Ombudsperson shall not accept or receive, directly or indirectly, any grant or gratuity from an entity, holding company, insurance holding company, or from a director, officer or employee of any of them, and no such extractive industry company, holding company, insurance holding company, external complaints body, director, officer or employee shall make or give any such grant or gratuity.

16. Review Clause

- 16.1) At the start of the fifth year after the day on which this Act receives royal assent, the provisions enacted by this Act shall be referred to the Committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established for the purpose of reviewing the provisions.
- 16.2) The Committee to which the provisions are referred is to review them and submit a report to the House or Houses of Parliament of which it is a Committee, including a statement setting out any changes to the provisions that the Committee recommends.

Schedule 1:

- i. the nine core human rights treaties:
 - 1. the International Covenant on Civil and Political Rights (ICCPR);
 - 2. the International Covenant on Economic, Social and Cultural Rights (ICESCR);
 - 3. the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
 - 4. the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
 - 5. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
 - 6. Convention on the Rights of the Child (CRC);
 - 7. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW);
 - 8. Convention on the Rights of Persons With Disabilities (CRPD);
 - 9. the International Convention for the Protection of All Persons from Enforced Disappearance (CED);
- ii. the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
- iii. International Labour Organization Convention 169, the Indigenous and Tribal Peoples Convention;
- iv. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms;
- v. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- vi. the Geneva Conventions;
- vii. the 8 core international Labour Organization Conventions:
 - 1. the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ;
 - 2. the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ;
 - 3. the Forced Labour Convention, 1930 (No. 29) ;
 - 4. the Abolition of Forced Labour Convention, 1957 (No. 105) ;
 - 5. the Minimum Age Convention, 1973 (No. 138) ;
 - 6. the Worst Forms of Child Labour Convention, 1999 (No. 182) ;
 - 7. the Equal Remuneration Convention, 1951 (No. 100) ;
 - 8. the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Consequential Amendments:

To a range of Acts dealing with various forms of support, subsidy, promotion, protection of entities, including Export Development Canada, Foreign Affairs Act, etc.

Amendment to the Access to Information Act, creating a mandatory exemption for information covered by the confidentiality provisions in Part 10.