Sheri Meyerhoffer
Canadian Ombudsperson for Responsible Enterprise (CORE)
SENT VIA EMAIL

February 13, 2020

RE: Civil society confidence in the CORE, undermined by absence of powers

Dear Ms. Meyerhoffer,

Thank you for reaching out to us to solicit our initial feedback on the draft standard operating procedures (SOPs) for the Canadian Ombudsperson for Responsible Enterprise (CORE).

In our view, from a human rights perspective, there are substantial shortcomings in the draft SOPs. Among our most significant concerns are:

- The SOPs should be framed around CORE's ultimate goal: advancing fulfilment of Canada's international human rights obligations. However, the draft SOPs articulate that the "central values and principles that inform the CORE's work" include that "human rights disputes are best addressed through collaborative approaches such as mediation and joint fact-finding." This is not a recognized international human rights approach. Notably this focus on joint fact-finding has been repeatedly advanced by industry, in particular the Mining Association of Canada. Civil society and labour groups, along with important contributions from frontline communities, have repeatedly highlighted the serious limitations and problems with this approach.

  While there may be some circumstances in which mediation and joint-fact-finding do indeed offer a resolution that meets international human rights requirements (and thus we are certainly not suggesting it would never be appropriate), there are many other instances in which it is counter-productive, fear-inducing or leads to incomplete and even inaccurate outcomes. It is deeply problematic to see this privileged as the "best" option in a process that is, after all, about examining complaints of human rights abuse. These SOPs are not dealing with such functions as human rights capacity building or human rights awareness programming, which may well benefit from collaborative and joint approaches. You are dealing with sensitive situations, often involving grave human rights abuses, in a context of dramatic power imbalances. Mediation and joint fact-finding should not be considered to be the natural starting point in your reviews.

- The draft SOPs are significantly incomplete in their enumeration of illustrative "international human rights" instruments. While the UN Declaration, ICCPR and ICESCR are of course pivotal sources, the CORE's Order in Council mandate (2019-09-06) defines human rights abuse as "an adverse impact on an internationally recognized human right." There are a number of crucial documents relevant to business and human rights that are not mentioned. We would highlight in particular the absence of reference to the UN Declaration on the Rights of Indigenous Peoples, the Conventions on the Elimination of all forms of Discrimination against Women (CEDAW) and All Forms of Racial Discrimination (CERD) as well as the 8 core ILO labour conventions. A more comprehensive list is included in the CNCA's model Ombudsperson legislation that has

been shared with you previously and is available at: http://cnca-rcrce.ca/wp-content/uploads/2019/04/The-Global-Leadership-in-Business-and-Human-Rights-Act.pdf.

- There is literature relating to Canadian human rights commissions that urge caution relating to the use of mediation to address human rights violations. These considerations include the need to recognize the broader public policy dimension inherent in any human rights case (that may go beyond what could be agreed to in a private agreement) and the need to take into account the potential existence of significant power imbalances between the parties. There is no evidence that this caution has been taken into account in drafting these SOPs. In the same vein, it would be important to clarify that, as joint fact-finding is itself a form of mediation[1], at minimum the informed consent and agreement of both parties is required before joint fact-finding can occur.

- It is troubling that the SOPs explicitly lay out that the CORE may make a finding that a human rights violation has *not* occurred, but do not similarly indicate that the CORE can make a finding that a human rights violation *has* occurred.

The above does not pretend to be an exhaustive commentary on the draft Standard Operating Procedures.[2] We would have other significant feedback to offer. However, given the continued lack of clarity relating to whether and when the CORE will be given the basic minimum powers it needs to be able to fulfill its core investigatory mandate, we are not prepared to engage more fully with this consultation. There are now numerous examples of cases in which the harm endured by complainants has been deepened through their participation in non-judicial mechanisms that did not have the necessary powers.[3] Because of those deeply problematic limitations in your mandate at this time, we are left without confidence that the CORE can be effective in serving the needs of impacted communities who have been waiting far too long for an effective avenue for remedy in Canada.

We wish to highlight that once there is clarity that your office will be granted these basic, minimum, essential powers, we would enthusiastically engage with you to finalize the draft SOPs so they are meaningful to the communities they are intended to serve.

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[1] See for example https://www.beyondintractability.org/essay/joint-fact-finding where joint fact-finding is defined as "mediation within mediation."

[2] For example, the broad swath of reasons for which the CORE can refuse or terminate a complaint is concerning. The sweeping discretion to exclude complaints merely on the basis of the existence of parallel proceedings does not take into account the OECD Guidelines on MNEs procedural guidance on that point (see the *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, para 26, page 83: http://www.oecd.org/daf/inv/mne/48004323.pdf)

[3] See for example: MiningWatch's submission to the NCP peer review highlighting three cases (Porgera, Centerra, Sakto) provided under "B. NCP narrative and language used in dismissing complaints harms victims and notifiers" p.39 https://miningwatch.ca/sites/default/files/miningwatchcanadasubmissiontoncppeerreviewjanuary2018.pdf ; "Remedy Gone Wrong Barrick Gold's Grievance Mechanism in Tanzania Deepens Harm" https://miningwatch.ca/sites/default/files/handoutforunforum2018onnorthmara.pdf

Why are investigatory powers so important?

As you know, our organisations have been engaging with the Government of Canada for many years around the creation of an effective and equitable non-judicial grievance mechanism for communities negatively impacted by the operations of Canadian mining, oil, and gas companies around the world. We have undertaken years of outreach with subject matter experts and practitioners, have engaged with impacted communities to understand their needs and have amassed extensive evidence relating to the failures of existing non-judicial mechanisms in Canada (such as the National Contact Point for the OECD MNE Guidelines and your predecessor office, the CSR Counsellor).

Based on those years of outreach and research, it is patently evident that for the CORE to have *any* possibility of offering something meaningful to impacted communities it must have the power to independently investigate, including the power to compel documents and testimony.

A central purpose of an Ombudsperson is to conduct investigations. As Gregory Levine writes in his authoritative text, Ombudsman Legislation in Canada: An Annotation and Appraisal, Thompson-Reuters, 2012:

> Investigation lies at the heart of the ombudsman project classically defined. Through it ombudsmen apprehend the facts of situations and achieve an understanding which helps them to resolve complaints through settlement or recommendation. (p. 69)

Levine is the former General Counsel of the Ombudsman Office in British Columbia: his text is singular in its review of Ombudsman offices in Canada. He explains the link between effective investigations and investigative powers:

> To be an effective investigator, ombudsmen need powers respecting access to people and records.… Ombudsman legislation across the country empowers the ombudsman to investigate effectively and efficiently. The investigative powers are not without restriction but they stand among the most powerful given any public official. (p. 69)

Moreover:

> Ombudsman work depends on information, accurate and pertinent information. The power to obtain records and to hear people's understandings of events is critical to the ombudsman project. In turn, the power to compel the production of records and to compel testimony under oath is an important underpinning of ombudsman work. (p. 72)[4]

It is the power to independently investigate that differentiates the ombudsperson from the National Contact Point, and helps to fill the gap between mediation offered at that office and recourse to Canadian courts. It is only through a full assessment of the facts that the ombudsperson can exercise its other functions: it is what allows the making of findings of fact, which are fundamental to making effective recommendations for prevention of harm, necessary law and policy reform and appropriate remedy, and it is the basis on which the ombudsperson

[4] This material comes from CNCA's Q&A #3 (attached) which provides an overview of the importance and prevalence of investigatory powers to the ombudsperson function. http://cnca-rcrce.ca/wp-content/uploads/2020/02/QA-3-The-CORE-and-Investigative-Powers.pdf

reports can include robust findings of fact and tailored recommendations. Without independent investigatory powers, the rest of the ombudsperson function crumbles. Furthermore, it is the existence of those powers to compel documents and testimony that can help to correct the significant power imbalance that exists between impacted communities and large multinational companies. It is the existence of these powers that may create the incentive structure needed to enable collaborative approaches to actually succeed, where those are appropriate.

Without these investigatory powers (which were expressly part of the government's January 2018 CORE announcement) civil society will not have confidence that the CORE will be able to serve impacted communities. Until such time as it is clear that the CORE has the minimum powers necessary to begin to address the serious and widespread human rights violations linked to Canadian companies around the globe we will be unable to substantively and substantially engage with your office. No modifications to the draft operating procedures will overcome the fact that, as currently structured, the CORE will, as has been the case in the past, require vulnerable people to depend on the good will of the very companies accused of abuses.

The CORE cannot be oriented around mediated settlements; it needs to be grounded in an understanding of how to advance respect for international human rights, and be empowered to undertake independent investigations that can help facilitate access to effective remedy and lead to recommendations that will help prevent future harm.

We realize that the heart of our concern is beyond your capacity or mandate to address directly. We do urge that you continue to both privately – but more importantly publicly -- advocate for the CORE to be given the powers that are so urgently needed, and were explicitly promised – to impacted communities, to Canadian civil society, and indeed to you.

Best regards,

Alex Neve
Secretary General
Amnesty International Canada

Emily Dwyer
Coordinator
Canadian Network on Corporate Accountability

Catherine Coumans
Co-Manager
MiningWatch Canada