July 10, 2020

To the office of the Canadian Ombudsperson for Responsible Enterprise (CORE)

The CORE has invited some stakeholders, including the Canadian Network on Corporate Accountability, to provide feedback on the following:

- the CORE's draft Standard Operating Procedures;
- the CORE's guidance to complainants; and
- feedback to the communications consulting firm that the CORE has hired to help define CORE's "brand."

As indicated in our letter to an earlier version of the CORE's draft Standard Operating Procedures:

> "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. 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**." [emphasis added]

Unless and until the CORE is transformed into the promised independent office with robust powers to investigate, including the power to compel documents and testimony from companies under investigation, the CORE will not have the minimum powers required to be effective.

The feedback we offer below must be understood in this light. **To be clear: even if you incorporate all the other changes we recommend, without those minimum powers the CORE will nevertheless remain unfit for purpose.** We offer feedback on the draft standard operating procedures and guidance to complainants to help prepare the CORE to operate effectively once it has the requisite powers and independence to be fit for purpose.

We respectfully decline to be interviewed by the consultant firm seeking to help the CORE establish its brand. The communities and organisations that our members work with who have been harmed by corporations around the world are focussed on the urgent need for equitable access to remedy. Two years after such communities and organisations were promised an independent CORE with robust powers to investigate that could help them achieve effective access to remedy, they are still waiting. We believe the CORE's current focus should not include branding and public relations, but rather mustering all its resources to advocate for and secure

from the government the powers it committed to provide to the CORE, and which are necessary for the CORE to fulfil its mandate.

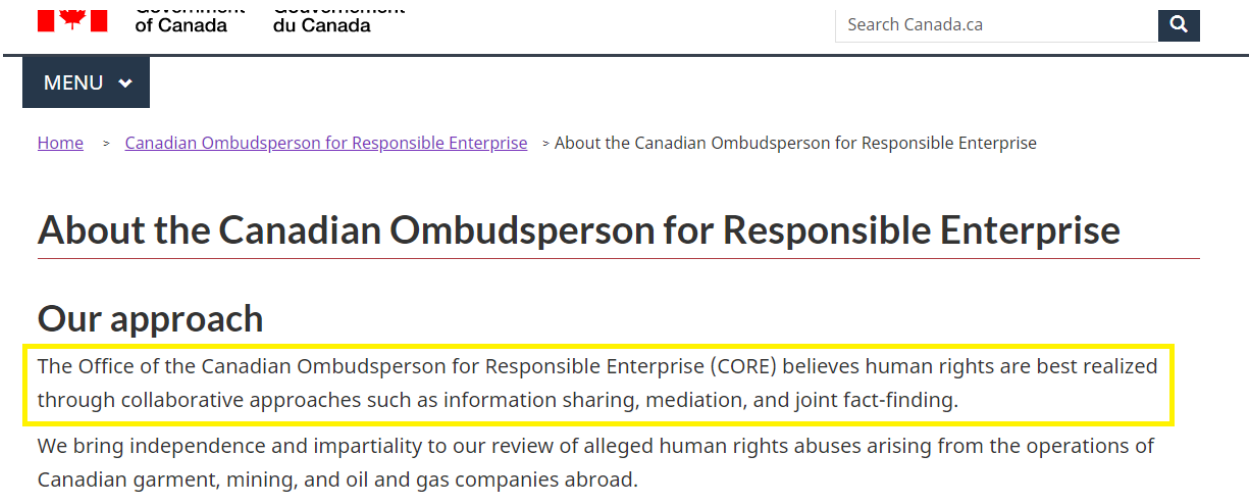
FEEDBACK ON THE DRAFT STANDARD OPERATING PROCEDURES

We appreciate that some of our previous feedback was incorporated. For example, the CORE's draft standard operating procedures now include the explicit acknowledgement by the CORE that

- there is often a significant power imbalance between communities and big business that needs to be addressed for fair outcomes and processes;
- mediation (including joint fact-finding) should not occur unless both parties agree; and
- measures need to be put in place to prevent companies from retaliating and to protect complainants from possible retaliation or reprisals for submitting a complaint to the CORE.

We also appreciate that the CORE will report publicly on an ongoing basis, at various stages of the process and that the CORE will make determinations of fact, including making findings that allegations of human rights abuse are well-founded.

One of our concerns with the earlier draft of the operating procedures was the CORE's statement that "human rights are best realized through collaborative approaches such as information sharing, mediation and joint fact-finding". This is not a recognized international human rights approach. We appreciate that this has been removed from the revised standard operating procedures. We call to your attention, however, the fact that this erroneous language remains on CORE's website (see screenshot below). We strongly suggest that this language be immediately removed.



While the revised draft standard operating procedures are an improvement over the previous version, several concerns remain:

The CORE's mandate is to advance respect for human rights, not to resolve disputes

When the creation of the CORE was announced in January 2018 it was described as being "founded on a commitment to advance human rights and assist Canada in fulfilling its international human rights obligations."[1] That commitment should be preserved in the CORE's own description of its mandate. The standard operating procedures must acknowledge CORE's responsibility in assisting Canada to meet its international human rights obligations, including protecting against human rights abuses by third parties, such as corporations. Instead, the draft standard operating procedures frame allegations of human rights abuses as "disputes", and describe the CORE's function as "dispute resolution". Such language implies that every complaint to the CORE is a mere disagreement between equal parties, rather than consisting of allegations of serious human rights abuse by companies against innocent people.

The CORE should commit to looking into all credible allegations of corporate abuse

The CORE's mandate is to address allegations of human rights abuse arising from the operations of Canadian companies overseas and to assist Canada in upholding its international human rights obligations. While we understand that ombuds offices are generally offered a wide degree of discretion, the CORE's draft standard operating procedures have not found the right balance and should be reviewed to make clear its commitments to fulfill its mandate (i.e. changing more language from "may" to "will").

One example that requires particular attention is the blanket discretion to refuse to review any complaint. The United Nations Guiding Principles on Business and Human Rights highlight the importance of access to remedy. Once the promised powers are secured, the CORE may represent the only viable avenue for some impacted people and communities to seek remedy for serious harms caused or contributed to by Canadian corporations.

The CORE should commit to reviewing every complaint that meets the admissibility threshold.

If the CORE is concerned about case-load management, this could be addressed through policies that express that the CORE's timelines or procedures may need to be adjusted if case-loads at a given time are too high for the CORE to investigate all meritorious complaints in a timely manner. For example, the CORE could triage complaints, prioritize the most urgent cases and/or seek to utilize novel processes if there is a backlog (such as seeking parties' consent to examine

[1] https://www.canada.ca/en/global-affairs/news/2018/01/advancing_canadasapproachonresponsiblebusinessconductabroad.html

like cases together). A blanket discretion to refuse to review meritorious complaints is neither necessary nor justifiable.

Furthermore, the CORE:

1. should not refuse to review cases merely on the basis of parallel proceedings
    - As previously noted, the procedural guidance to the OECD Guidelines on MNEs provide recommendations on this 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)
2. should not terminate a case merely because of delays in response from the complainant(s)
    - The standard operating procedures should acknowledge that people filing complaints often live in highly precarious circumstances, with limited and precarious access to phones or internet, may work very long hours, or may be hiding for their safety.
3. should clarify that referral to one of the listed forums (National Contact Point, law enforcement or regulatory authorities, etc.) will not necessarily result in the end of the ombudsperson review process or end CORE involvement
    - As complainants can, without first bringing a complaint to the CORE, seek the good offices of the NCP and/or bring an alleged criminal or regulatory offence to the attention of Canadian authorities, the CORE should avoid having its processes end with mere referral to one of these forums.

Missing elements from the draft standard operating procedures

We would recommend that the CORE review the CNCA's model legislation and model Order in Council for further guidance on what should be included in its standard operating procedures. If you have questions regarding any elements of these we are happy to discuss these further with you.

One omission in the CORE's current draft standard operating procedures relates to the CORE's ability to make a broad range of recommendations to the Government of Canada. Global Affairs Canada's *Responsible business conduct abroad - Questions and answers* states that the "CORE can 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."[2] However, the CORE's draft standard operating procedures appear to limit what recommendations it can make to Government to law and policy reform related to government or crown corporation financing and services to corporations.

[2] https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng

Another omission is detail relating to CORE-initiated reviews. The CORE should develop protocols for CORE-initiated reviews, in particular those involving in-country and project or factory site visits. Earlier this year, CNCA members wrote to the office of the CORE to express concern that CORE had planned to travel to Colombia and Brazil without "the necessary prior engagement with key stakeholders in Canada, Colombia and Brazil to determine how your visit may harm those communities, and the circumstances and considerations necessary for such a visit to help advance Canada's international human rights obligations and protect impacted communities from further harm as is the stated purpose of your office." In that letter (available in full on our website) we strongly recommend that the CORE "develop protocols for this kind of visit that include at minimum that you consult with key civil society stakeholders, particularly in-country as well as in Canada[3], in the planning of any visit to countries affected by Canadian corporate activity, to determine (among other necessary considerations):

- The circumstances under which such a visit could be helpful to protect and promote the human rights of affected communities, workers and organizations at risk;
- Whether there are factors in such a visit - such as timing and purpose - that could increase the risk to vulnerable people and peoples, and whether they could be mitigated;
- The degree of transparency or confidentiality necessary to protect the human rights of vulnerable people, for instance with respect to where you travel, the stated purpose, who you will meet;
- Whether within such a tour, a visit to a specific community or project site would or would not be helpful, including securing prior consent if the purpose is to seek information from communities."

There should also be clarity on whether the CORE anticipates it will accept recommendations for projects or issues it should examine aside from a direct request for review from the affected community or organization. The CORE should also consider in what circumstances a complaint may be converted into a CORE-initiated review. At 14.1.6, for example, the following language should be added "and it is not the case that this complaint can be converted to a CORE-initiated review."

Finally, there are several areas where there is a lack of clarity and specificity in the draft standard operating procedures:

- How will CORE strive to balance power as it commits to do in the section on dispute resolution? On this issue, see our feedback to the guidance for complainants, below.

[3] We noted that "it appears that in the making of these plans, no members of either the Canadian Network on Corporate Accountability or CCIC's Americas Policy Group - both highly engaged with communities in Latin America affected by Canadian business activity - were consulted, nor were key affected communities, workers or local human rights organizations that are involved in business and human rights issues."

- What is meant by a "flexible approach" in moving between dispute resolution and a review process? Specifically, it must be made clear that FPIC will be secured from vulnerable communities and other complainants to move their complaint from a review process to a dispute resolution process.
- To what extent can confidentiality and anonymity be guaranteed? What measures and protocols will the CORE and its staff implement to enhance these guarantees for vulnerable community complainants?
- What consequences are envisioned for those companies who are found to engage in retaliation or reprisals but who do not receive Export Development Canada (EDC) or trade commissioner service support or financing? The CORE should also examine its language around future EDC financial support. The language currently appears to exaggerate the consequence of a CORE recommendation, since without changes to the *Export Development Act*, there is no guarantee a CORE recommendation will be followed.
- Why will the CORE notify companies of a complaint that the CORE decides to reject and does not review? Why will the CORE notify companies before *starting* its initial assessment?
- Why will the CORE not directly monitor implementation of the terms of the settlement and instead only possibly *assist* in monitoring the implementation?
- Why are remedies limited to those specifically mentioned in the United Nations Guiding Principles on Business and Human Rights? This is an area in which the CORE should retain discretion, permitting it to recommend a remedy tailored to the needs of the situation.
- Why will the CORE always share information with the host country National Contact Point (NCP) and the Canadian NCP? This question is relevant given the lack of civil society confidence in the Canadian NCP, its failure to result in remedy for complainants, and its lack of independence from government (here in Canada and in many parts of the world). In fact, the inadequacies of the NCP in addressing corporate malfeasance are a large part of what ultimately led to the CORE being created. The CORE should minimize integration with the NCP, share only limited information, subject to the informed consent of the complainant(s), and ensure that complainants' confidentiality and anonymity are guaranteed.

FEEDBACK ON THE DRAFT GUIDANCE TO COMPLAINANTS

Unsubstantiated assertions should be adjusted

We have several questions about unsubstantiated assertions that are made in the draft guidance to complainants. We recommend that the guidance be reviewed for unsubstantiated assertions, and adjusted accordingly.

For example, while we very much welcome the recognition in several places that a power imbalance often exists between impacted people / communities and large multinational companies, that such power imbalances may make joint fact-finding impossible, and that an effective ombudsperson should be able to help counter that power imbalance, the guidance does not specify how the CORE will seek to address power imbalances. For example, the Guidance should make it explicit that complainants can be supported by a lawyer throughout the process; that the test for "good faith" does not require complainants to agree to mediation (i.e. that a complainant can refuse mediation, including joint fact finding, on any grounds and without providing reasons, without prejudice) and that complainants can continue to engage in campaigning while a complaint is before the CORE.[4]

Similarly, the draft guidance indicates that the CORE takes retaliation or reprisal "very seriously" and that the CORE offers to keep information confidential. No information is provided about how the CORE will guarantee confidentiality of identity or information. No reference is made to the application of the Access to Information Act, or the implications of its application on the CORE's ability to maintain complainant anonymity. CORE mentions some actions it may take (contact law authorities, prepare reports, recommend withdrawal of support), which we presume would be in response to retaliation. The guidance does not state whether the CORE will seek complainants' informed consent prior to doing any of those things. It should.

Compounding the concern that the lack of specificity might reasonably raise amongst potential complainants, the guidance ends with a warning to complainants that if they ask for confidentiality, and request that certain information not be shared with the company accused of human rights abuse, that this request for confidentiality may result in their complaint being refused or terminated. The criteria under which such a request would result in the complaint being refused or terminated must be limited so as not to compound the barriers faced by complainants. These criteria must also be transparently specified in the guidance so as to allow a complainant the full information necessary for them to assess the risks and benefits of laying a complaint.

[4] Campaigning can be a key tool for communities and workers to help correct power imbalances and can be part of at risk individuals security strategies. The Canadian National Contact Point has been criticized (including in its recent peer review) for effectively having a bar on campaigning.

At the beginning of the guidance it states that the CORE has "the power to address human rights violations" and that the CORE has "power to investigate," without any explanation of what precise power(s) this is in reference to. The guidance indicates in one place that a review of a complaint is "like an investigation" and in another that during independent fact-finding the CORE will "investigate". What is the distinction?

Several adjectives are used to describe what an ombuds is (independent, fair, just, inclusive, offering informality), again, without substantiation (eg referencing powers, arms-length structure, etc).

The guidance indicates that the "Canadian companies that the CORE deals with know that they have a responsibility to respect human rights." On what basis is that claim made? Is CORE asserting that it will only deal with companies that recognize this responsibility or that CORE believes that all Canadian companies understand this responsibility? Either interpretation is problematic.

Guidance does not provide certainty to complainants

Overall, the guidance provides very little assurance to complainants that a meritorious complaint will be examined and addressed in a fair and predictable manner. The decision to use "may" rather than "will" throughout the guidance contributes to this uncertainty and lack of transparency and should be systematically re-examined.

The use of the word "may" in the guidance results in the CORE effectively declaring it can for *any* reason:

- refuse to admit a complaint even if it meets all of the admissibility criteria
- refuse to review a complaint if the parties tried to mediate but failed to reach an agreement[5], and / or
- decide not to make any recommendations, even if the CORE determines that serious human rights abuse occurred.

The acceptance and rejection of complaints is thus made arbitrary and non-transparent. In situations in which vulnerable individuals and communities have learned through experience not to trust powerful actors from the global North, such an arbitrary process creates uncertainty for complainants and their supporters, and deepens mistrust. The CORE should do an initial assessment and review all complaints that meet the admissibility criteria and should in principle review all complaints where mediation was tried and did not produce a result (except, of course, if complainants desire otherwise). Whenever it makes a finding that human rights abuse allegations are founded, the CORE's final report should include recommendations to prevent and/or remedy harm.

[5] This in fact makes trying mediation more risky for complainants and less attractive.

In addition, the example provided of what would constitute a frivolous or vexatious claim (related to land use) would seem to require an initial assessment to ascertain veracity. We would suggest that a different example be given.

Omissions and inconsistencies:

We have also identified omissions and inconsistencies in the guidance. These include:

- The description of human rights abuse and those affected by it is incomplete. It appears to focus almost exclusively on labour rights and only references factories (not mine or oil and gas sites) and harm to the environment. The guidance should make mention of communal rights, the rights of Indigenous peoples, religious minorities, persons with disabilities, undocumented workers and other marginalized groups. It currently does not.
- The CORE's ability to make broad recommendations to the Government of Canada on policy and law reform should be mentioned.
- There are inconsistencies between what is included in the draft standard operating procedures and what is indicated in the guidance to complainants. For example, the draft standard operating procedures specify that complaints made anonymously may still be reviewed, but the guidance appears to preclude that possibility. The draft standard operating procedures also indicate that there are language restrictions in making complaints and that the Access to Information Act applies to the CORE[6]. The guidance to complainants mentions neither.
- The guidance to complainants states at p.2 that the CORE can examine allegations of abuse that "occur anywhere throughout the supply chain, and in some cases can include the companies' contractors and subcontractors." This should also be expressly stated in the CORE's standard operating procedures. The word "supply chain" does not appear anywhere in the standard operating procedures.
- The lists of recommendations by the CORE on pages 3 and 12 don't correspond to one another.
- In the admissibility criteria outlined in "Can the CORE help," mention should be made of abandoned or unclosed mines.

[6] In discussing the use of personal information, the guidance should highlight the application of the Access to Information Act to the CORE, and the implications of this - if any - to maintaining confidentiality and anonymity.

RESPONSE TO INVITATION TO PROVIDE FEEDBACK ON BRANDING

We respectfully decline the invitation to be interviewed by the consultant firm that the CORE has retained to help the CORE establish its "brand". We believe this is a misplaced priority and a misuse of resources. The CORE office's resources should be dedicated exclusively to activities that will help Canada uphold its international human rights obligations. Under the current circumstances, this means the CORE should prioritize advocating for the basic minimum powers needed to serve impacted individuals and communities whose rights have been, or are being, abused in every corner of the world as the result of unscrupulous corporate conduct and the systems that enable companies to act with near impunity. The individuals and communities who have been waiting for an effective grievance mechanism for over a decade deserve better.

As stated previously, 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 your office to finalize the draft standard operating procedures and guidelines so that they are meaningful to the individuals and communities they are intended to serve.

Best regards,

Emily Dwyer
Coordinator, Canadian Network on Corporate Accountability