Empowering the CORE

Requirements for an Effective Canadian Ombudsperson for Responsible Enterprise

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International Justice and Human Rights Clinic

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Research for this report involved in-depth reviews of relevant legal, academic, and policy sources. In particular, lessons are drawn from responsible business regimes in other jurisdictions, and existing Canadian administrative bodies. Case studies are based on publicly available sources.

This report builds on the IJHRC's previous work, including its human rights report *In the Dark: Bringing Transparency to Canadian Supply Chains* and its model legislation, *Transparency in Supply Chains Act: A Proposed Model Bill*. Both projects relied heavily on expert input from scholars, politicians, activists, and industry representatives. Individuals who contributed significantly to these projects are acknowledged in those documents.

*"…[T]here is a role for an institution like an ombudsperson to provide an **effective remedy** in a timely and inexpensive manner. In order to be effective, the government should establish an entity which is **independent**, well-resourced, and has power to **investigate allegations**, conduct fact finding, and **enforce** its orders, in line with other similar institutions in Canada."*

Statement at the End of Visit to Canada by the United Nations Working Group on Business and Human Rights, June 2017 (emphasis added)

Introduction

In 2019, following complaints of human rights abuses associated with Canadian companies operating abroad, Canada created the Canadian Ombudsperson for Responsible Enterprise ("the CORE").[1] The long-awaited CORE was established to promote responsible business practices and replace Canada's ineffective Corporate Social Responsibility Counsellor (the "CSR Counsellor"). The CSR Counsellor, which operated from 2009 to 2018, was widely criticized as it could only preside over voluntary mediation between a company and individuals complaining the company had violated their human rights. The CORE was intended to be different and more effective than its predecessor because it would be able to conduct independent investigations into alleged corporate violations abroad. The Government of Canada promised to equip the CORE with the necessary tools to conduct such investigations, "including the compelling of witnesses and documents."[2] To date, however, these powers have not been expressly designated.

In this report, the International Justice and Human Rights Clinic ("IJHRC") proposes specific ways to transform the CORE into an effective investigative mechanism that would enable Canada to comply with its international human rights obligations related to business. Analysing the CORE's Order in Council 2019-1323[3], we conclude the Office would be better equipped to meet its stated mandate to "promote the implementation" of international business and human rights standards[4]

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[1] See Canada, *Schedule to Order in Council P.C. 2019-1323* (September 2019), online: <https://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en> [*Order in Council*].
[2] Canada, Global Affairs Canada, *Responsible Business Conduct Abroad – Questions and Answers* (16 September 2019), online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.
[3] See *Order in Council*, *supra* note 1.
[4] Section 4(a) of the Order in Council specifically lists the United Nation's *Guiding Principles on Business and Human Rights* and the Organisation for Economic Co-operation and Development's *Guidelines for Multinational Enterprises.*

if it had a) greater independence from government b) powers of investigation, such as the ability to compel information and testimony, and c) the express power to grant a wider array of remedies than those outlined in Order in Council 2019-1323. We draw support for these proposals from numerous sources.

Section I surveys and considers the successes and failures of responsible business regimes from other jurisdictions, focusing on a comparative analysis of legislation that requires businesses to monitor their supply chains and work to eliminate human rights abuses within them. We also consider features of Canadian administrative regimes that address matters relevant to the CORE, such as environmental protection, human rights, and labour disputes. Finally, we discuss the CORE's jurisdiction to grant potential remedies and highlight how our proposals will help the CORE avoid the shortcomings of its predecessor, the Corporate Social Responsibility (CSR) Counsellor.

Section II proposes a separate administrative body, referred to below as a Compliance Committee, to help ensure Canada can effectively oversee its companies operating abroad. The complementary functions of the CORE and the Compliance Committee – investigation and adjudication – would allow victims of corporate human rights abuse to access remedies for the harms they have suffered.

Section III proposes next steps to ensure the CORE will be able to effectively oversee Canadian supply chains and business operations overseas.

I. Key Features of an Effective Ombudsperson

To be effective, a responsible business Ombudsperson requires a) independence from government and business b) effective powers of investigation and c) the ability to recommend remedies. We discuss various aspects of these requirements in further detail below.

A. Independence from government and business

A high degree of independence from business and the executive branch of government is critical for the effective functioning of bodies overseeing responsible business regimes. Even governments that officially commit to respecting human rights may promote business interests for political reasons. Some political parties run for office on platforms and ideologies that promise to advance private business. Some businesses believe that compliance with human rights standards will raise their operating costs and lobby aggressively to eliminate them. Governments

and civil servants may thus feel pressure to prioritize business interests at the expense of human rights.

The *California Transparency in Supply Chains Act* (the "*California Act*"), for example, illustrates the difficulties associated with oversight of responsible business regimes that is not at arm's length or may be influenced by political considerations. The California Attorney General (an elected position) possesses exclusive authority to enforce the *California Act*, which requires companies to disclose their efforts to eradicate modern slavery in their supply chains.[5] The *California Act* allows the Attorney General to apply to court for an injunction if entities are not complying with the legislation. To date, the California Attorney General has never attempted to use this power.[6] However, an analysis by KnowTheChain, which evaluated the *California Act* five years after the law's signing, concluded that 69% of companies subject to the law were not complying with the legislation.[7] The Attorney General's inactivity thus does not appear to be due to a lack of potential cases.

Another example of the potential pitfalls associated with politicized oversight of responsible business regimes comes from the United Kingdom. There, the UK *Modern Slavery Act of 2015* ("UK *MSA*")[8] established the position of an "Independent Anti-Slavery Commissioner" to encourage "good practice"[9] in "the prevention, detection, investigation and prosecution of slavery and human trafficking offences."[10] While ostensibly an independent body, evidence shows that the Anti-Slavery Commissioner's work has been hampered by political interference. For example, the first UK Anti-Slavery Commissioner resigned in 2018, pointing to interference from the UK Home Office as a reason for her resignation.[11] She stated: "At times independence has felt somewhat discretionary from the Home Office rather than legally bestowed."[12] Further, the Group of Experts on Action Against Trafficking in Human Beings was critical of the Anti-Slavery Commissioner's lack

[5] See Benjamin Thomas Greer, "Opaque Transparency: Why California's Supply Chain Transparency Act is Unenforceable," (2017) 8:1 *Oñati Socio-legal Series* 32 at 41.
[6] International Corporate Accountability Roundtable & Focus on Labour Exploitation, *Full Disclosure: Towards Better Modern Slavery Reporting* (San Francisco, 2019) at 14.
[7] See KnowTheChain, *Insights Brief: Five Years of the California Transparency in Supply Chains Act* (San Francisco, 2015) at 5.
[8] *Modern Slavery Act 2015* (UK), c 30 [UK MSA]. The UK government has recently proposed amendments to strengthen and expand the transparency in supply chains provisions of the Modern Slavery Act 2015 to require companies to undertake due diligence and risk assessment measures.
[9] *Ibid*, s 41(1).
[10] *Ibid*, s 41(1)(a).
[11] See Gary Craig, "Britain's Modern Slavery Act: Flies in the Ointment" E-International Relations (June 2018), online: <https://www.e-ir.info/2018/06/13/britains-modern-slavery-act-flies-in-the-ointment/>.
[12] *Ibid.*

of independence, pointing to the fact that the body is required to report to the government's executive branch.[13]

The lack of independence from government is likewise a concern for Canada's CORE. The CORE's Order in Council specifies that reports must be submitted to the Minister before they are tabled in Parliament.[14] Further, reports that consider the mining or oil and gas sector must first be provided to the Minister of Natural Resources, again, before the report is tabled in Parliament.[15] Unfortunately, these requirements point to a lack of independence from the executive branch of government and thus increase the likelihood that the CORE's work will be inappropriately politicized. The CORE should be able to consider all instances of human rights abuses pursuant to its mandate, without fear of upsetting political actors.

Ability to review and comment

Relatedly, the CORE should be explicitly empowered to evaluate legislation, regulations and policies that may conflict with responsible business practices, include these reviews in annual reports to Parliament and place concerns on Parliament's agenda for discussion.

Pursuant to sections 13 and 14 of Order in Council 2019-1323, the CORE may complete and publish annual reports and reports related to specific cases. These sections likely provide the CORE with the power to evaluate relevant government legislation and polices. When evaluating legislation, the CORE could raise awareness of human rights concerns related to business practices that implicate a number of laws, regulations and government policies.[16] In addition, the CORE should evaluate legislative provisions to ensure their compliance with the United Nations Guiding Principles and OECD Guidelines.[17]

The mandates of comparable international and domestic institutions include the ability to review legislation and regulations. The express power to evaluate legislative and/or policy instruments

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[13] See Group of Experts on Action Against Trafficking in Human Beings, *Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by the United Kingdom: Second Evaluation Round* (Strasbourg, 2016) at 11.

[14] See below, where we outline concerns of reports being submitted to a minister prior to tabling in Parliament.

[15] *Supra* note 1, s 15.

[16] See *Modern Slavery Act 2018 No 30* (NSW) at s 9(1)(f) [NSW *MSA*]. The New South Wales Anti-Slavery Commissioner is empowered to "monitor the effectiveness of legislation and governmental policies and action in combating modern slavery".

[17] If the CORE is empowered to issue guidelines setting out standards, then government legislation, regulations and policies could be evaluated based on these standards: See e.g. model supply chain legislation, *Transparency in Supply Chains Act*, International Justice and Human Rights Clinic (April 2019), online: <http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/tsca_proposed_model_bill_with_cover.pdf> at s 6(a) [*TSCA*].

against responsible business standards is found in the UK *Modern Slavery Act* ("*MSA"*), the New South Wales *Modern Slavery Act* ("NSW *MSA"*), and the *Canadian Human Rights Act* ("*HRA*").

The UK's *MSA* permits the Independent Anti-Slavery Commissioner to evaluate government policy, but this power is constrained because ministerial approval is required before evaluation and monitoring can occur. In contrast, the more recent NSW *MSA*[18] gives that Australian state's Anti-Slavery Commissioner the power to review New South Wales' legislation without political constraints.[19] The express power to evaluate legislation and government policies would be one positive step towards granting the CORE the necessary independence to determine if Canada's legislation aligns with its human rights commitments. Legislators could then decide whether to act on the basis of these expert reviews.

The express power to review Canadian law and policy against human rights standards is seen in other areas of Canadian law. The *HRA*, for example, empowers the Human Rights Commission to comment on Canadian legislation, regulations, or policies that may be inconsistent with the purposes of the *HRA*.[20] These comments are included in reports to Parliament.[21] Similarly, expressly providing the CORE with the ability to point out inconsistencies between international human rights standards and particular government policies would focus the attention of lawmakers on these conflicts. Expressly granting the CORE this power would also strengthen the Office's independence, as it would guarantee its ability to draw attention to issues of importance, regardless of the political perspective of the government of the day.

The effectiveness of the CORE would, moreover, be strengthened if it could raise any concerns identified directly with Parliament by placing items on Parliament's agenda to ensure they are discussed and responded to, as officers with similar functions around the world can do.[22]

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[18] NSW *MSA, supra* note 16.

[19] The NSW Commissioner is empowered, for example, to "monitor the effectiveness of legislation and governmental policies and action in combating modern slavery." In fact, each annual report to Parliament is legally required to include an evaluation of the performance of government entities within the scope of the NSW *MSA*. See s 9(1)(f).

[20] *Canadian Human Rights Act*, RSC 1985, c H-6 at s 27(1)(g) [*HRA*].

[21] *Ibid.* See also the powers of certain provincial representatives for children and youth or seniors for example British Columbia's *Representative for Children and Youth Act*, SBC 2006, c 29, as well as Newfoundland and Labrador's *Seniors' Advocate Act*, SNL 2016, c S-13.002.

[22] See for example, the powers of the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, online: <http://english.bnrm.nl/>

Report directly to Parliament

Reports produced by the CORE, including annual reports and reports on particular issues, should be submitted directly to Parliament.[23] This process could be accomplished by providing the reports to the respective speakers of the House of Commons and Senate. Legislation enacted in other jurisdictions, such as the UK's *MSA* and NSW's *MSA*, stipulate that reports are to be submitted to the responsible minister.[24] While the NSW *MSA* allows for a procedure relatively free from political interference, submission directly to Parliament would be ideal. This method would eliminate the appearance of potential interference with report findings by the executive branch.

As it is uncertain whether the CORE is able to name companies in its annual reports to Parliament, its ability to spur positive changes in corporate behaviour due to public identification is potentially limited.[25] In Australia, the responsible minister must include the names of companies not compliant with the *Act* in reports to Parliament.[26] We recommend a similar approach be adopted in Canada. Lists of companies that fail to provide statements or fail to cooperate in an investigation initiated by the CORE should be forwarded to Parliament. Through the tabling of these annual lists, findings of non-compliance would form part of the public record. Given the likelihood that civil society organizations and the media would draw the public's attention to these lists, companies subject to the CORE's mandate would have significant incentive to adopt responsible business practices or strengthen existing practices to remain off the list.[27] Since its Order in Council requires the CORE to notify companies if it appears that information published in a report may have an adverse effect on them, such a notification may be a further incentive for companies to take steps to become compliant to avoid being publicly listed.[28]

Sufficient and Uncompromised Budgetary Resources

Even if the CORE had the necessary elements of institutional independence described above, its ability to fulfil its mandate could be seriously compromised by a lack of financial independence. Sufficient and continuous funding is crucial to the CORE's independence. The CORE should not be concerned that its funding might be reduced were it to pursue activities unfavourable to business

[23] The IJHRC recognizes that this ability is not currently provided for in the CORE's mandate as outlined in Order in Council 2019-1323. The fact that reports are to be provided to the responsible Minister before tabling in each house of Parliament is problematic.
[24] See UK *MSA*, *supra* note 8, s 42(8); NSW *MSA, supra* note 16, s 19(1).
[25] This assumes that the CORE will have some role in overseeing (future) supply chain legislation. Corporations that fail to cooperate with the CORE in some other way, however, could still be named in reports subject to changes in the CORE's mandate.
[26] See Austl, *Modern Slavery Act 2018* (Cth), 2018/153, s 23A.
[27] The "name and shame" approach is likely insufficient on its own. It can be a useful policy tool, however, when combined with other measures.
[28] *Order in Council*, *supra* note 1, s 16.

or political interests. International standards established by the Venice Principles on the Protection and Promotion of the Ombudsman Institution (the "Venice Principles") support the proposition that the CORE should enjoy budgetary independence.[29] The Principles affirm that states have positive and negative duties to protect ombudspersons from threats, including the suppression of funding, that would undermine their independence. Funding "must be adequate to the need to ensure full, independent and effective discharge of [their] responsibilities and functions." Further, financial audits "shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate."[30]

The Venice Principles

The Venice Principles outline the core tenets of effective ombudspersons. Developed by the European Commission for Democracy Through Law (the "Venice Commission"), the Principles affirm that effective ombudspersons are independent, objective, transparent, fair, and impartial. The Venice Commission is comprised of 62 member states, including Canada.

The Principles highlight the need for meaningful independence and powers of ombudspersons – and by extension, of the CORE. The following provisions bolster our proposals vis-à-vis the CORE:

Independence from Government

(1) "… the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence."

Powers of Investigation

(16) "The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials … The Ombudsman shall have the power to interview or demand written explanations of officials and authorities …"

Ability to review and comment

(18) "… the Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation."

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[29] See Council of Europe/Venice Commission, European Commission for Democracy Through Law (Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution*, (Strasbourg: Venice Commission, 2019), online: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e> [Venice Principles].

[30] *Ibid*, principle 21.

Report directly to Parliament

(20) "The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities."

Sufficient and Uncompromised Budgetary Resources

(21) "Sufficient and independent budgetary resources shall be secured to the Ombudsman institution … [They] must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions … The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate."

B. Powers of Investigation

Creating an office able to investigate human rights abuses abroad was a central feature of advocacy campaigns that brought the CORE into being. The CORE's predecessor, the Corporate Social Responsibility Counsellor ("CSR Counsellor"), lacked the ability to conduct independent investigations. Instead, the Office merely undertook research to assist in mediation between companies and stakeholders.[31] Significantly, the CSR Counsellor could not compel documents and testimony when human rights abuses were brought to its attention.[32]

"…concerns exist that the originally envisioned mandate and role of CORE did not fully materialize, in particular regarding the extent of its ***investigative*** *powers…"*

End-of-Visit Statement by the United Nations Special Rapporteur on Human Rights and Hazardous Substances and Wastes, Baskut Tuncak, on his Visit to Canada, June 2019

[31] See Canada, Global Affairs Canada, *Reviewing Corporate Social Responsibility Practices* (31 March 2017), online: <https://www.international.gc.ca/csr_counsellor-conseiller_rse/Reviewing_CSR_Practices-Examen_Pratiques_RSE.aspx?lang=eng>.

[32] See Canada, Global Affairs Canada, *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor* (20 October 2010), online: <https://www.international.gc.ca/csr_counsellor-conseiller_rse/rules_procedure-regles_procedure.aspx?lang=eng>.

The CSR Counsellor was roundly critiqued as ineffective, resulting in calls for an investigative ombudsperson.[33] None of the CSR Counsellor's files during its operation from 2010 to 2018 reached the formal mediation stage.[34] In half of these cases, the corporate party withdrew from the process while other stakeholders desired to continue dialogue.[35]

Case Study: Excellon Resources Inc. in La Sierrita, Mexico

The CSR Counsellor's first file illustrates how crucial powers of investigation are to addressing Canadian corporate misconduct abroad.

In April 2011, the CSR Counsellor received a request for review arising from La Platosa mine in La Sierrita, Mexico, operated by the Canadian company Excellon Resources. The requesters alleged beatings at the mine, violations of workers' safety, and suppression of the right to organize.[36] Excellon denied wrongdoing but engaged in the review process.

Through visits to Mexico City and La Sierrita, the CSR Counsellor received "credible, third party information, from a variety of sources" detailing beatings at the mine site.[37]

Abruptly, however, Excellon withdrew from the review in September 2011.[38] The company's unilateral decision led to the termination of the proceedings before the CSR Counsellor without a resolution, as the Office lacked the power to compel documents and testimony or otherwise independently investigate.

Rising unrest in La Sierrita

Conflict escalated in La Sierrita soon after the CSR Counsellor lost the file. Landowners in the community were angered when Excellon explored outside of its lease area and caused significant environmental damage.[39] A local NGO commissioned an independent study of

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[33] Petition e-2564 to the House of Commons (19 October 2020), online: <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-2564>.

[34] See Canada, Global Affairs Canada, *Registry of Requests for Review* (30 May 2017), online: <https://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?lang=eng>.

[35] *Ibid.*

[36] See Canada, Global Affairs Canada, *Closing Report Request for Review File #2011-01-MEX* (October 2011), online: <https://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-01-MEX_closing_rep-rap_final.aspx?lang=eng>.

[37] *Ibid.*

[38] *Ibid.*

[39] See MiningWatch Canada, "Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy and the Violation of Land and Labour Rights in Durango, Mexico" (February 2015) at 8, online (pdf): *MiningWatch* <https://miningwatch.ca/sites/default/files/excellon_report_2015-02-23.pdf>.

Excellon's wastewater – disposed of on communal land used for agriculture – which found that the water contained five times the level of arsenic safe for human consumption.[40]

By the summer of 2012, La Sierrita community members established a peaceful protest camp outside the Excellon property.[41] The camp was violently evicted and burnt on the morning of October 12th, 2012.[42] Hired men, who arrived in several buses inscribed with the Excellon logo carried out the eviction, according to activists at the site.[43] Protestors report that the Chief Operating Officer of Excellon, Robert Moore, directly participated by pulling down fencing on the private property of a woman who gave permission for the camp to be on her land.[44] Over 100 Mexican federal and state police also arrived to evict the camp,[45] where less than a dozen protestors were present that morning.[46]

No remedies from voluntary dispute-resolution bodies

After the CSR Counsellor failed to resolve the conflict, members of La Sierrita filed a complaint with the OECD National Contact Point ("NCP").[47] They explicitly requested that their complaint be handled by Canada's NCP as opposed to Mexico's, due to concerns of procedural flaws at Mexico's NCP. Canada nonetheless deferred the request to Mexico and the complaint was closed without resolution.[48]

Residents of La Sierrita have not yet received adequate remedy for years of environmental damage, labour rights violations and protest repression at the hands of Excellon Resources.[49] Without the ability to meaningfully investigate, the CSR Counsellor could not prevent escalating human rights violations in La Sierrita.

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[40] See Proyecto de Derechos Económicos Sociales y Culturales (ProDESC), "Proyecto de Derechos Económicos Sociales y Culturales" (undated) at 6, online (pdf): <https://www.ohchr.org/Documents/Issues/Water/HRViolations/ProDESC.pdf>.
[41] *Supra* note 39 at 4.
[42] *Ibid* at 10.
[43] *Ibid*.
[44] See Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), "Fact Sheet: La Platosa Conflict in Durango, Mexico" (5 November 2012), online (pdf): <https://miningwatch.ca/sites/default/files/faq_sheet_la_sierrita_excellon_nov12_.pdf>.
[45] *Supra* note 39 at 4.
[46] *Supra* note 44 at 1.
[47] *Supra* note 39 at 8.
[48] *Ibid* at 8.
[49] *Ibid*.

Power to compel, search, and seize

To be effective, the CORE requires the power to compel information from the parties to the complaint about the alleged rights violation.[50] While the CORE may fact-find without a company's participation, its inability to compel information leaves the Office nearly as powerless as the prior CSR Counsellor if a company refuses to cooperate. The power to compel would be an effective tool to assist in determining whether complaints have merit, rather than requiring the Office to seek documents from other government bodies or hoping for voluntary production of information from the company itself.

Several jurisdictions have provided their responsible business regulatory bodies with the power to compel information. The NSW *MSA* requires that all entities within the state or owned by the state provide information to the Anti-Slavery Commissioner if it is likely to be of assistance.[51] The UK *MSA* requires public authorities to comply with requests for information "so far as reasonably practicable," but does not require the same from private companies.[52]

The ability to compel information should not be limited to governmental bodies. Rather, this power should extend to all sources of information likely to be of assistance to the CORE to determine whether complaints have merit, explicitly ensuring that provision of such information will not violate privacy provisions. The power to compel is particularly crucial in the context of investigatory functions. Without this power, the effectiveness of any investigatory function would be greatly reduced.

Several administrative bodies in Canada provide for robust powers to compel information relevant to their statutory mandates. Ontario's *Occupational Health and Safety Act,*[53] for example, provides health and safety inspectors with the ability to engage in "reactive" inspections. These inspectors have the power to enter a premises without warrant or notice,[54] "require the production of any drawings, specifications, license, document, record or report,"[55] and make inquiries of any person who was in a relevant workplace.[56] Robust powers to compel information are also found in the *Canadian Environmental Protection Act* ("*CEPA*").[57] The *CEPA* confers investigatory powers on

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[50] For clarity, "information" includes documents, information stored on a computer, testimony, oral histories, substances and samples, results of tests, or any other physical or electronic material that may aid the CORE in its review. The type of information relevant to a review will vary depending on the alleged violation.
[51] NSW *MSA, supra* note 16 at s 14(2)(a).
[52] UK *MSA, supra* note 8 at s 43(2).
[53] *Occupational Health and Safety Act* RSO 1990, c O1 [*OHSA*].
[54] *Ibid,* s 54(1)(a).
[55] *Ibid,* s 54(1)(c).
[56] *Ibid,* s 54(1)(h).
[57] *Canadian Environmental Protection Act,* SC 1999, c 33 [*CEPA*].

enforcement officers, who may enter premises, examine substances, books, records and other documents, take samples, seize evidence, and conduct tests.[58]

Similarly, the CORE should be able to obtain search warrants or conduct warrantless searches in appropriate circumstances. Where there are reasonable grounds to believe that relevant evidence is at risk of destruction or disposal, the CORE should be empowered to enter any relevant premises and seize any required documents and physical evidence without a warrant. Where there is no urgency, the CORE could be authorized to apply to obtain a search warrant on *ex parte* application to a Federal Court judge.[59] The Federal Court would then determine whether to grant the warrant, and if so, under what conditions.

Upholding Canada's international human rights commitments vis-à-vis the operations of Canadian corporations abroad is as pressing as promoting the health and safety of workers or protecting the Canadian environment.[60] The CORE, therefore, must be provided with similarly robust powers to compel.[61]

Promote cooperation and penalize obstruction

In order for the CORE's power to compel information to be effective in practice, it must be combined with the ability to impose sanctions for failure to cooperate. The *HRA*, for example, provides: "No person shall obstruct an investigator in the investigation of a complaint."[62] In addition, the *HRA* establishes a regulatory offence resulting from the obstruction of an investigation.[63] Provisions like these could be directly incorporated into the CORE's constituting instrument. Doing so would establish real consequences for those who fail to comply with the CORE's directions. In addition, it would allow the CORE to effectively pursue the purpose of its mandate – upholding Canada's international human rights commitments in relation to responsible business conduct. It would also allow the Ombudsperson to effectively carry out its mandate.[64]

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[58] *Ibid,* s 218(10).

[59] The *HRA* provides for this power in respect of Commission investigations. See *HRA, supra* note 20 at s 43(2.2).

[60] The *HRA*, similarly, empowers the Canadian Human Rights Commission to investigate complaints by searching premises and seizing relevant evidence. In the case of the search power, a warrant is necessary, which is obtained by *ex parte* application to the Federal Court. A judge then decides whether to issue the warrant, and if so, whether any conditions should apply. See *HRA, supra* note 20, s 43.

[61] See *TSCA, supra* note 17 at s 8 for our proposed approach to conferring the power to compel information on the CORE.

[62] *HRA, supra* note 20, s 43(3).

[63] *Ibid*, s 60(1)(c).

[64] We envision the purpose of supply chain legislation to be the upholding of Canada's international human rights commitments. The purpose of the IJHRC's model supply chain legislation, the *TSCA*, is "to ensure that Canadian businesses act in a manner consistent with Canada's commitments to international human rights standards, and to identify, prevent, and remediate human rights violations in the supply chains of Canadian businesses": see *TSCA, supra* note 17.

Analogously, the Human Rights Commission pursues the purpose of the *HRA* through its investigatory powers[65]

Inspectors appointed under Ontario's *Occupational Health and Safety Act* may enforce their orders by applying for an injunction.[66] A person who refuses to comply with an inspector's order commits an offence. The result is a fine not more than $100,000, twelve months' imprisonment, or both.[67] Similarly robust sanctions should attach to those who fail to comply with the CORE's investigations. Because the CORE will deal with complaints regarding the conduct of companies abroad, it is particularly important to authorize it to make rulings restricting the international movement of documents and assets pending an investigation, and to enforce them by applying for court orders such as Mareva injunctions (freezing orders)[68] and preservation orders.

To avoid situations where companies operating abroad keep documents outside of Canada and are unable or unwilling to provide them for the purposes of the CORE's investigation, measures to secure compliance should be provided. For example, companies could be required, on penalty of sanction, to maintain key records and documents in Canada, and/or submit reports disclosing any incidents that potentially violate human rights.

Continue investigation if companies withdraw from voluntary resolution

Currently, under the CORE's Order in Council, the Office can continue an investigation independently, even if a party under review refuses to participate.[69] Parties can voluntarily engage in 'joint fact-finding' or 'informal mediation' with the CORE.[70] If a company withdraws, however, the CORE can continue to investigate a complaint. This ability distinguishes the CORE from the CSR Counsellor and National Contact Point, both of which lose jurisdiction if one party withdraws from their processes. This feature assists in ensuring accountability and investigation of abuses once a file has been placed in the hands of the CORE.

The CORE's ability to continue with an investigation after a party's withdrawal cannot function, however, without the power to compel information. If a company chooses to withdraw from the CORE's voluntary services, it is doubtful whether the company will then willingly provide information when the CORE initiates an investigation. The CORE should, therefore, be authorized

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[65] The purpose of the *HRA* is to ensure equal opportunity and prevent discrimination. See also *TSCA, supra* note 17, s 2

[66] *OHSA, supra* note 53, s 60.

[67] *Ibid*, s 66(1).

[68] See e.g., *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2.

[69] *Supra* note 1, s 7(b).

[70] *Ibid*, s 1(1) and 4(e), respectively.

to order the production of information and consider setting timelines for finalizing its investigation.

Conduct country and site visits abroad

The CORE has the power to conduct country visits during an investigation.[71] Site-visits were also used by the CSR Counsellor, and aided that office greatly with its reviews. In the Excellon case, the CSR Counsellor met with Mexican stakeholders who otherwise may not have provided information. The CSR Counsellor was able to verify beatings that occurred within the La Platosa mine through its communications with stakeholders on the ground. The CORE will be conducting similar inquiries, where alleged abuses occur outside Canada's borders. The CORE should therefore prioritize consultations with local stakeholders and make requests to enter relevant foreign workplaces. Where required to gain further information or information that cannot be otherwise compelled, country visits should be a necessary feature of the CORE's operations.

Employ informed specialists

Complex interviews of stakeholders who have suffered trauma must be conducted by persons sensitive to such circumstances. The CORE should therefore ensure that its personnel possess the necessary skills to undertake a trauma-informed approach to their duties and receive ongoing training on legal issues, mediation skills and human rights situations abroad.

The CORE should also recognize when external expertise might substantially improve investigations or be safer for victims of human rights abuse. Investigations into a broad array of human rights areas may require specialists with training outside of the CORE's internal expertise. Impacts on health caused by environmental damage, for example, might involve a trained expert taking samples and conducting tests. Health Canada works in coordination with Environment Canada, for instance, to assess health risks posed by substances under the *Canadian Environmental Protection Act*[72] and employs specialists who "ensure that harmful effects on human health are avoided or minimized."[73]

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[71] *Ibid*, s 14(1)(e).
[72] See Canada, Health Canada, *Environmental Contaminants* (13 May 2016), online: <https://www.canada.ca/en/health-canada/services/environmental-workplace-health/environmental-contaminants.htm>.
[73] *Ibid*.

C. Recommend appropriate remedies

The CORE can recommend remedies to any person, including the subject(s) of its review, in its final report following an investigation.[74] The remedies expressly listed in Order in Council 2019-1323 are financial compensation, a formal apology, or changes to a Canadian company's policies.[75] These remedies, however, may not fully redress – or halt – human rights violations.

*"…the Committee is concerned … about the **inaccessibility to remedies** by victims of … violations. The Committee regrets the absence … of a legal framework that would **facilitate such complaints.** [Canada] should … develop a legal framework that **affords legal remedies** to people who have been victims of activities of such corporations operating abroad."*

Concluding observations on the sixth periodic report of Canada, UN Human Rights Committee, August 2015

Concerningly, an earlier iteration of the CORE's Order in Council prefaced this list by stating that remedies "include but are not limited to any of the following"[76] – words that do not appear in Order in Council 2019-1323. A Global Affairs Canada webpage further includes cessation of an activity and mitigation measures as remedies the CORE can recommend,[77] though these are missing from the Order in Council.

For clarity, we suggest that the Order in Council explicitly list 'ceasing an activity' and 'mitigation measures' (negative or positive actions) among the remedies the CORE can recommend, and that the words 'but not limited to' be restored. Below are elaborations on the existing remedies, and proposals for further measures that would allow the CORE to better respond to various corporate practices.

Cessation/prescriptive action proposals

The CORE's Order in Council should be interpreted broadly, until explicitly modified, to allow the CORE to recommend a company cease an activity or take positive measures with a view to preventing further violations. Financial compensation is of little use where water continues to be contaminated, rights to organize are obstructed, or in the context of ongoing violence. An apology or change to voluntary company policies similarly falls flat; these remedies will not stop ongoing human rights abuses. Further, they may not correct the root of a problem underlying community

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[74] *Supra* note 1, s 11(1).
[75] *Ibid.*
[76] Canada, *Schedule to Order in Council P.C. 2019-0299* (31 April 2019), online: <https://orders-in-council.canada.ca/attachment.php?dattach=37587&lang=en>.
[77] *Supra* note 2.

opposition to a project. For these reasons, the CORE may recommend that a company cease an activity or take a particular action.

In the Excellon case, La Sierrita members wanted to stop discharge from the mine, La Platosa, from entering their drinking and irrigation water. The CORE should be empowered to recommend that a company cease activities that cause harm to local communities. The community also wanted Excellon to build a water treatment plant and invest in other social spending, which it had contracted to do. The CORE should be expressly enabled to recommend that a company take action to address instances such as this, where financial compensation or an apology is inadequate.

Ongoing monitoring

The CORE should determine whether a violation is a symptom of a broader, systemic issue. For example, physical and sexual violence is sometimes used to repress local anti-project activists, such as occurred in two cases that were litigated in Canadian courts.[78] Frequently, the problem underlying such assaults is a lack of community consent to an extractive project. To be effective remedies for the assault must therefore address the lack of community consent.

Considering the above, the CORE has a role to play in ensuring companies implement its recommendations even after the close of an investigation. Remedies aimed at systemic change may need to be implemented in stages, or over long periods of time. The CORE might also find it helpful to adjust recommendations in response to shifting circumstances and the needs of stakeholders. For these reasons, the CORE should make use of its ability to monitor and continue reporting on company compliance with its recommendations.

Tailor remedies to the specific human right breached

The CORE will be exposed to a wide array of human rights abuses. It is foreseeable that the Office will receive complaints about workers' rights, forced or child labour, environmental health impacts, protest repression, sexual violence, and breaches of Indigenous communities' right to free, prior and informed consent.

Addressing each of these instances will usually require recommending a combination of remedies,[79] some of which are 'backward-looking' and some of which are 'forward-looking'. The CORE should also analyze the *objective* of the remedy in each instance. These objectives can

[78] See *Choc v Hudbay Minerals Inc,* 2013 ONSC 1414; *Garcia v Tahoe Resources Inc*, 2017 BCCA 39.

[79] As stated, these include (1) financial compensation, (2) an apology, and (3) changes to company policies, from Order in Council 2019-1323. Further, (4) cessation of activities and (5) mitigating measures are listed in a Global Affairs Canada webpage, *supra* note 2. Finally, (6) the CORE should also be able to recommend withdrawal of government financial support as a punitive/deterrence measure.

include restoration of the applicant to their position prior to the violation, compensation when that is not possible, and deterrence through punishment of the perpetrator and prevention of future violations.

Taking complainant perspectives into account

If a community or individual has expressed a preference for a certain type of redress from a Canadian company, the CORE should prioritize this request. Community members of La Sierrita, for example, specifically identified the redress they sought from Excellon. This included the provision of "full compensation to the community for all damages that the mine operation has caused to their lands," ceasing "all efforts to block or obstruct workers' freedom of association," and to "respect and protect individual and collective human rights through the adoption and implementation of policies to guarantee respect for community and worker rights in any future operations."[80] They added that Excellon should "cease investing in lobbying efforts to pressure state officials in Canada, Mexico, or anywhere else. This practice fosters corruption and impunity and encourages the use of repressive armed force against communities and workers, putting their lives and/or physical integrity at risk."[81] Recommending redress that community members are actively seeking would increase the CORE's legitimacy in the eyes of the project-affected groups. The CORE's complaint form could include a section to detail the remedy sought by the applicant.

Community compensation

Some corporate acts may impact many individuals, and potentially an entire community. An example is contamination of a central water supply resulting in lasting sickness or death. It will sometimes be appropriate for the CORE to recommend compensation to a large group of impacted stakeholders, if a violation of their rights is found.

Further, failure to be specifically named in the initial complaint should not preclude victims identified through the course of investigation from receiving financial compensation. In other words, although an individual complainant may bring forward an issue to the CORE, the CORE should be able to recommend compensation to all community members impacted by the same issue.

Withdrawal of government support and trade advocacy

Currently, the CORE may only enforce a recommendation by asking that the Minister for International Trade implement trade measures against a company. Order in Council 2019-1323 states that this may be done when a company "has not acted in good faith during the course of or

[80] *Supra* note 39 at 15.
[81] *Ibid* at 15.

follow-up to the review process." Therefore, trade measures may be recommended if the company is reluctant to cooperate with investigations of alleged abuse or implementation of a recommendation from the CORE.

Companies would face stronger sanctions, however, were they to engage in equivalent violations within Canada. Returning to Ontario's workplace safety legislation, violations of the law can result in fines up to $100,000 and/or twelve months of imprisonment and can be enforced by an order from a safety inspector.[82] Regarding environmental regulation, the current enforcement mechanism of the CORE pales in comparison to penalties available for violations of environmental standards in Canada, which include steep financial penalties – up to $1 million per day that an offence continues – and/or imprisonment of up to three years.[83]

The CORE should be expressly empowered to recommend the loss of trade advocacy in direct response to human rights abuses perpetrated by a company. Currently trade advocacy is linked only to cooperation with the CORE's review process after the fact rather than to the actual violation itself. A Canadian company currently faces a loss of trade advocacy if it "has not acted in good faith during the course of or follow-up to the review process."[84] A recommendation of withdrawal is not expressly provided for with respect to any other circumstance. This means that a company may have committed a violation but no complaint to the CORE exists, or the company has cooperated fully with the CORE *and thus it will not be subject to trade sanctions.* In particularly egregious cases, it may be desirable to take a punitive approach regardless of the existence of a complaint or the company's cooperation with the CORE's review. In short, the power to recommend the rescission of trade advocacy because of human rights violations should be expressly provided for in the Order in Council.

Of equal concern, the Canadian Government is not bound to withdraw trade advocacy at the CORE's recommendation. As of January 2019, the Government of Canada has only sanctioned one company under the trade advocacy withdrawal mechanism.[85] The Excellon case illustrates the ineffectiveness of enforcement mechanisms dependent on government discretion and raises the concern whether the CORE's recommendation of the withdrawal of trade advocacy from a non-compliant Canadian company would be an effective remedy.

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[82] *OHSA, supra* note 53, s 66(1).

[83] See Canada, *Guide to Understanding the Canadian Environmental Protection Act: Chapter 14* (4 July 2019), online: <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/publications/guide-to-understanding/chapter-14.html>.

[84] *Supra* note 1, s 10.

[85] House of Commons, Standing Committee on Foreign Affairs and international Development, *Race to the Top: Improving Canada's Extractive Sector Corporate Social Responsibility Strategy to Safeguard Human Rights In Latin America*, 42-1 (January 2019) at 37, online (pdf): <https://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP10279319/faaerp22/faaerp22-e.pdf>.

Case Study Continued: Canadian Embassy Involvement with Excellon Resources

An access to information request by MiningWatch Canada yielded documents from the Department of Foreign Affairs, Trade and Development (DFATD) which showed the Canadian Embassy in Mexico had knowledge of the repression of La Sierrita's peaceful protest during the summer of 2012.[86]

The accessed documents, and the fact that La Sierrita's complaints were previously before the CSR Counsellor, indicate that "Canadian officials in Ottawa and the Embassy in Mexico had considerable information about this conflict."[87] The documents also show that the Embassy lobbied Mexican officials on Excellon's behalf prior to the protest camp eviction on October 24th.[88]

Early in the protest, members of La Sierrita requested a meeting with the Canadian Embassy in Mexico City to share their concerns.[89] Canadian Ambassador Sara Hradecky agreed to the meeting, stating in an internal memo that the Embassy's role was "to listen, possibly to *gather intel helpful to the company*" [emphasis added].[90] On August 28th, 2012, the Executive Vice President of Excellon emailed Embassy trade commissioners to report that Mexican officials had agreed to intervene with La Sierrita's protest camp.[91]

There was no evidence that the Embassy made any effort to prevent the Mexican military, or indeed members of Excellon, from using force against the La Sierrita community members while their camp was razed.[92]

The experience in La Sierrita does not appear to be unique. The Canadian Embassy in Mexico is also reported to have turned a blind eye to human rights violations perpetrated by Canadian companies operating there. Canada's Embassy in Mexico is currently the subject of a complaint pending before the Canadian Federal Courts for supporting the actions of Canadian mining company Blackfire in Chiapas, Mexico, even when those actions were opposed by local inhabitants and led to the death of a local activist.[93]

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[86] *Supra* note 39 at 1.
[87] *Ibid* at 3.
[88] *Ibid*.
[89] *Ibid* at 5.
[90] *Ibid*
[91] *Ibid* at 9.
[92] *Ibid* at 10.
[93] See *Gordillo v Canada (Attorney General)*, 2019 FC 950, currently before the Federal Court of Appeal; United Steelworkers, MiningWatch Canada and Common Frontiers, "Corruption, Murder and Canadian Mining in Mexico:

Public reports

The CORE should report publicly on whether a company has complied with its recommendations and whether the Canadian Government has issued the sanctions it recommends and place this report prominently on its website. This report would increase transparency, assist civil society, the media and the public in accessing valuable information, and lessen concerns that the government could choose to protect companies "under the radar."

II. Compliance Committee

As the Excellon case demonstrates, simply recommending withdrawal of trade advocacy will not be a consistently adequate enforcement measure or remedy. Below, we outline why an administrative tribunal tasked with adjudicating complaints following a CORE-initiated investigation holds promise. Implementing such a tribunal would assist in ensuring that the results of CORE investigations lead to sufficient responses. The administrative tribunal, which we call a Compliance Committee (the "Committee"), would be created by statute to adjudicate potential instances of non-compliance with responsible business practices.[94] Other models for adjudication, with the appropriate statutory underpinning, could also be considered. We detail below the characteristics required for the Committee to effectively adjudicate non-compliance.

To be effective, the Committee should have the power to:

- order damages to compensate victims who have suffered human rights abuses due to non-compliance; and
- make cease and desist orders and apply to the Federal Court for injunctions against Canadian corporations to enforce them, where appropriate.

A. Creation and Composition

The formation of a tripartite Compliance Review Committee was recommended by the 2007 National Roundtables on Corporate Social Responsibility.[95] Implementing such a Committee as an administrative decision-maker would ensure separation of the investigative and adjudicatory

The Case of Blackfire Exploration and the Canadian Embassy," (May 2013), online (pdf): <https://miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf>.

[94] Compliance would be measured against the CORE's guidelines, discussed below.

[95] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report* (Ottawa, 2007), s 2.4.2.1.

functions, thus decreasing the potential for procedural fairness challenges based on claims of bias.[96]

Creating a separate Compliance Committee would demonstrate to the parties subject to the regime that their cases are being determined in a manner consistent with analogous Canadian administrative processes. The Canadian human rights system, for example, is structured in a similar manner.[97] Specifically, the *HRA* provides that the Human Rights Commission may investigate potential instances of discrimination. Following investigations to determine if cases have merit, the Human Rights Tribunal adjudicates cases which are not otherwise resolved.[98] Like the Human Rights Commission, the CORE could also address systemic issues by undertaking studies and issuing recommendations, whereas the Committee can focus on adjudication of individual cases.

The Committee should be composed of current or former employees of the Government of Canada, members of the business community, and current or former members of civil society organizations with experience in human rights, in equal proportion.[99]

B. Adjudication

The CORE should be empowered to enact guidelines, a violation of which would lead to liability as determined by the Committee. As the CORE cannot currently issue guidelines leading to legal liability, legislation is likely required to provide the CORE with the ability to do so. These guidelines should provide specifics pertaining to how entities can comply with Canada's human rights obligations under international law. Grievances alleging that a company has violated the guidelines could be submitted by or on behalf of individuals or organizations. The CORE could then investigate these allegations, report its findings, and publish these reports on its website. See section 6(a) of the IJHRC's proposed *Transparency in Supply Chains Act* [*TSCA*] for suggested provisions enabling the CORE to enact guidelines.[100] Following an investigation, if the CORE determines that a complaint has merit, the Office would forward the file to the Committee. The Committee would then come to an independent determination as to whether the guidelines were breached. An administrative appeal mechanism to ensure accurate decision-making and conserve the resources of the Federal Court required for any potential judicial review, could also be considered.

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[96] Consideration should be given to empowering the CORE to appear in an amicus role before the Committee. In many instances, the CORE's expertise in responsible business practices could prove invaluable to the Committee as they make their determinations and craft their remedies.
[97] See *HRA, supra* note 20.
[98] Cases may be resolved through settlement or conciliation, for example. See *ibid*, s 47-48.
[99] See *TSCA, supra* note 17, s 12 for model provisions in this regard.
[100] *Ibid*, s 6(a).

C. Remedies and enforcement

This section first considers damages (monetary compensation) and then injunctions (an order to perform or not perform a specific act).

Damages

For the same reason the CORE may find financial compensation to be an appropriate remedy, the Committee may similarly find an order of damages to be appropriate. The Committee, however, should have the power to *order* rather than merely *recommend* damages where it finds non-compliance with the CORE's guidelines.

The Committee should be empowered to award damages where it determines that:

- The CORE's guidelines have not been complied with; and
- The non-compliance led to interference with the human rights of at least one person or resulted in significant environmental damage that was not mitigated.

Damages provide redress to victims of harm and deter human rights-infringing behaviour. Jurisdictions such as France and the Netherlands have made damages available to enforce responsible business practices. The French *Duty of Vigilance Law*[101] as well as the Dutch *Child Labour Due Diligence Law* provide for potential monetary payments from corporations to victims. Damages advance the *Vigilance Law's* twin aims: remediation, by compensating victims of abuse for the harms suffered, and prevention, by signalling to corporations that financial consequences may result from a failure to comply with applicable due diligence laws.

The French *Vigilance Law* requires corporations to create a vigilance plan. It also provides for damages if harm arises in the context of a non-compliant (or non-existent) plan and the harm would not have occurred had there been a compliant plan. Similarly, the proposed Committee should be empowered to order damages in response to non-compliance with the CORE's guidelines. As in the *Vigilance Law*, a causal link between the non-compliance and the harm should be established for damages to be available. Doing so will be difficult in some cases.[102] Commentators argue in relation to the *Vigilance Law*, however, that the mere existence of damages as a cause of action affects corporate behaviour by creating legal and financial risks associated with failing to turn proper attention to potential human rights abuses.[103]

[101] *Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, JO, 27 March 2017.
[102] See Stéphane Brabant & Elsa Savourey, "France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies," (2017) Int Rev Compliance Bus Eth at 2.
[103] *Ibid* at 4.

Injunctions

The ability to seek injunctions holds promise as an enforcement mechanism to ensure compliance with the Committee's orders. Legislation establishing the Compliance Committee should explicitly provide the Committee with the ability to apply to Federal Court to seek an injunction.[104] The objective of injunctions is to induce compliance with legislative and/or policy schemes through a court's sanctioning power. Non-compliance with injunctions may lead to contempt of court proceedings and monetary penalties, allowing the Committee to effectively address and prevent non-compliant activities.

The possibility of injunctions is found in supply chain legislation such as the *California Act* and France's *Vigilance Law*. Pursuant to the *California Act*, the California Attorney General possesses exclusive authority to enforce that state's legislation.[105] The Attorney General may file a civil action for injunctive relief. Theoretically, if the judge grants the injunction, the company would be ordered to take a specific action. To date, however, the Attorney General has not used this power.[106] The legislative message is clear, however. Corporations that benefit from human rights abuses cannot be encouraged. Indeed, the mere possibility of injunctions against non-compliant corporations may lead companies to develop clauses in their supply chain contracts targeting instances of modern slavery.[107]

France's *Vigilance Law* establishes periodic penalty payments, which are essentially financial injunctions. Periodic penalty payments are injunctive fines which must be paid on a daily or per-event basis.[108] The payments are imposed by French courts where it is shown that an entity has failed to comply with its vigilance obligations. The rationale behind the payments is that they will encourage entities to comply with their vigilance obligations by, for example, establishing, publishing, or implementing a vigilance plan.[109] The goal is to encourage the implementation of vigilance plans to prevent future human rights violations.[110] The payments, therefore, can be ordered before human rights abuses occur.

[104] See *TSCA, supra* note 17, s 14(2)(b) for a model provision.
[105] Greer, *supra* note 5 at 41.
[106] *Supra* note 7 at page 14.
[107] Brabant & Savourey, *supra* note 102 at 4.
[108] *Ibid* at 1.
[109] Canadian legislators could consider setting up a fund whereby monetary penalties collected from non-compliant entities be used to develop materials aimed at ensuring higher levels of responsible business conduct.
[110] Brabant & Savourey, *supra* note 102 at 4.

III. Next Steps

What are the next steps to pursue to ensure the CORE has effective oversight of Canadian supply chains?

A. Legislation

Enacting legislation is the most effective means to give the CORE the independence and powers we recommend in Section II and create the Compliance Committee to ensure effective oversight. One example of such legislation is the IJHRC's proposed *Transparency in Supply Chain Act*.[111] Sections 5-11 of the *TSCA* provide for an independent Ombudsperson with investigatory powers. The CORE could be that Ombudsperson if the powers enumerated under the *TSCA* were conferred on the CORE. Sections 12-14 of the *TSCA* also provide an example of how to establish the Compliance Committee by legislation.

B. Order in Council under the Inquiries Act

If comprehensive legislation similar to the *TSCA* is not passed, a new order in council could confer some of the recommended independence and powers on the CORE.[112] The Compliance Committee, however, may only be created through legislation.

The CORE was established by Order in Council 2019-1323, which appears to have been issued pursuant to the Crown's prerogative powers, as exercised by the Prime Minister.[113] It is not clear which of its prerogative powers the Crown purported to exercise in creating the CORE and it is therefore not clear that this common law power provides a basis for authorizing the CORE to compel information or to conduct searches and seize documents. Under its current Order in Council, the CORE may therefore be unable to exercise the powers recommended in Section II. To remedy this shortcoming, a new Order in Council for the CORE could be established.

Establishing the CORE pursuant to the *Inquiries Act*, RSC 1985, c I-11 would provide the Office with the power to compel information.[114] This change would not, however, provide the CORE with all of the necessary powers of search and seizure, as the *Inquiries Act* only authorizes a commissioner to enter a public office or institution and examine documents as a part of a departmental

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[111] *TSCA, supra* note 17.

[112] The only manner by which to establish the Compliance Committee and provide the CORE with the power to enact guidelines is, in our opinion, through legislation.

[113] See Canada, *Orders in Council – Search* (April 2017), online: <https://orders-in-council.canada.ca/results.php?lang=en> which notes that *Order in Council 2019-1323* was enacted pursuant to "other than statutory authority".

[114] Section 5 of the *Inquiries Act*, RSC 1985, c I-11 provides commissioners with the power to compel information.

investigation and does not permit entry onto private premises.[115] Despite this limitation, a new Order in Council issued under the *Inquiries Act* would be a welcome step forward vis-à-vis the CORE's ability to meet its mandate and meaningfully investigate human rights abuses by Canadian corporations operating abroad.

Conclusion

This report offers several proposals to make the CORE better equipped to meet its purpose. These proposals are based on the efforts of other jurisdictions to combat human rights abuses, analogous Canadian legislation, and the experiences of communities directly impacted by corporate non-compliance with human rights standards. From these sources, we conclude that greater independence from political and business influence, meaningful powers of investigation, and a greater and more express scope for remedies are required. By implementing the proposals in this report, Canada would become a global leader in responsible business and the CORE would be equipped to effectively address human rights abuses caused by corporate entities operating overseas.

[115] *Inquiries Act*, *supra* note 114, s 7.