

CORE PRINCIPLES

“Good Faith” Recommendations for
the Canadian Ombudsperson for
Responsible Enterprise



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& Human Rights Clinic



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This report was written by Gina Dhinsa, a student clinician at the International Justice and Human Rights Clinic (IJHR Clinic) at the Peter A. Allard School of Law, University of British Columbia. The report stems from questions and concerns raised by informed actors about the Canadian Ombudsman for Responsible Enterprise's mediation process between individual complainants and Canadian companies. The report was edited by IJHR Clinic Director Nicole Barrett, IJHR student clinicians Nicole Coran and Isabelle Khalifa and edited and endorsed by MiningWatch Canada and the International Human Rights Program at the University of Toronto Faculty of Law.

Introduction

The Canadian Ombudsperson for Responsible Enterprise (CORE) was established by the Government of Canada pursuant to *Order in Council 2019-1323* ("*Order in Council*") following complaints of human rights abuses associated with Canadian companies operating abroad.¹ The *Order in Council* sets out the CORE's mandate.² The *Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise* ("*Operating Procedures*") expand upon the *Order in Council*.³ The focus of this report is section 12 of the CORE's *Operating Procedures*, which establishes a requirement to act in good faith.⁴

Operating Procedures for the Human Rights Responsibility Mechanism of the CORE

12. Requirement to Act in Good Faith⁵

12.1 All parties or subjects of a review are required to act in good faith during HRRM processes including any follow-up or implementation of recommendations or terms of settlement.

12.2 The requirement to act in good faith includes the requirement to keep personal and business sensitive information confidential, to respect confidentiality requirements related to the HRRM, and to refrain from providing false information to CORE and from publicly misrepresenting the process.

12.3 The decision of a party not to participate in joint fact-finding or mediation will not be relevant in considering whether they are acting in good faith. However, once a party has decided to participate in joint fact-finding or mediation, their conduct during the process may be relevant to a consideration of whether they are acting in good faith.

12.4 The Ombud may consider a party to a review or a subject of an Ombud-initiated review who does not actively participate in the review without reasonable explanation,

¹ See Canada, Schedule to Order in Council P.C. 2019-1323 (September 2019), online: *Government of Canada* <orders-in-council.canada.ca/attachment.php?attach=38652&lang=en> [*Order in Council*]. See also Standing Committee on Foreign Affairs and International Development & Subcommittee on International Human Rights, "Mandate of the Canadian Ombudsperson for Responsible Enterprise" (June 2021) at 1, online (pdf): *House of Commons* <epe.lac-bac.gc.ca/100/201/301/weekly_acquisitions_list-ef/2021/21-27/publications.gc.ca/collections/collection_2021/parl/x11-1/XC11-1-1-432-8-eng.pdf>.

² See *Order in Council* at s 4.

³ See Government of Canada, "Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise (CORE)" (2023), online: *Government of Canada* <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/operating_procedures_exploitation.aspx?lang=eng#A> [*CORE Operating Procedures*].

⁴ See *CORE Operating Procedures* at s 12.

⁵ *CORE Operating Procedures* at s 12.

including providing relevant information and documents, making witnesses available on reasonable notice, and responding within the time lines established by the Ombud, not to be acting in good faith.

12.5 The requirement on a Canadian company to act in good faith includes not retaliating or engaging in any act of reprisal against an individual, organization or community who makes a complaint, has a complaint made on their behalf, or participates in the HRRM.

12.6 Refusal without reasonable explanation by a Canadian company to implement a recommendation made by the Ombud may be relevant to a consideration of whether the Canadian company is acting in good faith.

12.7 If the Ombud considers that a Canadian company has not acted in good faith during a review including a follow-up to a review, the Ombud may make recommendations to the Minister on implementing trade measures including:

12.7.1 The withdrawal or denial of trade advocacy support provided to the Canadian company by the Department of Foreign Affairs, Trade and Development (known as “Global Affairs Canada”);

12.7.2 The refusal by the Department of Foreign Affairs, Trade and Development to provide future trade advocacy support to the Canadian company;

12.7.3 The refusal by Export Development Canada to provide future financial support to the Canadian company.

In this report, the International Justice and Human Rights Clinic (“IJHR Clinic”) proposes specific recommendations to expand the CORE’s good faith requirement that are based upon foundational principles in the Canadian law of good faith as well as Canada’s international commitments. These recommendations impose various obligations on the CORE and parties engaged in the CORE process to advance a standard of good faith that is based upon fairness, transparency, and predictability.

Each section of this report will outline a central principle reflected in the Canadian law of good faith and/or Canada’s international obligations, and propose specific recommendations based upon the identified principle:

Section I focuses on the principle of honest conduct.

Section II considers the principle of recognizing power imbalances.

Section III outlines the principles of cooperation and genuine participation in negotiations.

Section IV explores the principle of prohibiting unfair unilateral action during negotiations.

Section V focuses on the principle of procedural fairness.

Each section of this report also explores the ways in which our proposed recommendations would enhance the effectiveness of the CORE and address the barriers that complainants face.⁶

This report represents a collaborative effort between the IJHR Clinic and a diverse group of stakeholders committed to promoting human rights and corporate accountability – including, MiningWatch Canada, Above Ground, and the International Human Rights Program at the University of Toronto Faculty of Law. The IJHR Clinic integrated the perspectives and concerns of these Canadian organizations into this report’s recommendations to provide the CORE with a solid basis upon which to improve its good faith requirement. Research for this report involved in-depth analyses of the relevant areas of Canadian law where good faith requirements exist – namely: contract law, employment law, insurance law, and labour relations law. We also assessed relevant provisions of the *Canadian Charter of Rights and Freedoms*⁷ and *Civil Code of Québec*, as well as Canada’s international legal obligations under relevant binding treaties.

For the purposes of this report, the term “CORE process” refers to the CORE’s independent fact finding, joint fact finding, reporting, problem-solving, information-sharing, facilitated negotiation, and mediation processes.⁸

I. Honest Conduct

This section will first provide an overview of research drawn from diverse legal sources to illustrate that honesty is a central principle in the Canadian law of good faith. Next, we propose specific recommendations to expand the CORE’s good faith standard based upon this research.

A. Summary of Relevant Legal Sources

Contract Law

In *Bhasin v Hrynew (Bhasin)*, the Supreme Court of Canada (SCC) recognized good faith as a general doctrine of contract law that requires parties to “...perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.”⁹ The SCC also found that a duty of honesty flows from the principle of good faith in contract law.¹⁰ Specifically, parties must not “...lie or otherwise

⁶ This analysis will be based upon Principle 31 of the *United Nations Guiding Principles on Business and Human Rights*. As stated in section 3.5 of the CORE’s *Operating Procedures*, “The effectiveness criteria for non-judicial grievance mechanisms set out in Principle 31 of the [*United Nations Guiding Principles on Business and Human Rights*] are guiding principles for the CORE.”

⁷ See *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11 [*Canadian Charter of Rights and Freedoms*].

⁸ See *Core Operating Procedures* at ss 3.3-3.4.

⁹ *Bhasin v Hrynew*, 2014 SCC 71 at para 63 [*Bhasin*].

¹⁰ See *Bhasin* at para 73.

knowingly mislead each other about matters directly linked to the performance of the contract.”¹¹ The SCC elaborated upon the duty of honest performance in *C.M. Callow Inc. v Zollinger (Callow)*, stating that dishonest and misleading conduct is not limited to “direct lies” and includes “...half-truths, omissions and even silence, depending on the circumstances.”¹² The SCC’s analysis in *Bhasin* and *Callow* thus illustrates that honest and non-misleading conduct is central to the concept of good faith in Canadian contract law.¹³

Employment Law

In *Wallace v United Grain Growers Ltd. (Wallace)*, the SCC recognized that employers owe a duty of good faith to their employees in the course of termination.¹⁴ The SCC stated that although the requirement of good faith in employment law is context-specific,

...at a minimum...employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.¹⁵

Wallace thus highlights that honesty is a central feature of the obligation of good faith in Canadian employment law.

Civil Code of Québec

Research on Canadian civil law further illustrates that honesty is central to good faith obligations. Article 6 of the *Civil Code of Québec (CCQ)* states: “Every person is bound to exercise his civil rights in accordance with the requirements of good faith.”¹⁶ The SCC has clarified that the duty of good faith encompassed in Article 6 of the *CCQ* includes a requirement of honesty.¹⁷ This requirement is assessed on both a subjective and objective standard.¹⁸ As noted by the SCC, under the *CCQ*,

a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society.¹⁹

¹¹ *Bhasin* at para 73.

¹² *C.M. Callow Inc. v Zollinger*, 2020 SCC 45 at para 91 [*Callow*].

¹³ See *Bhasin* at paras 63-73; *Callow* at para 91.

¹⁴ See *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 at para 95, 152 DLR (4th) 1 [*Wallace*].

¹⁵ *Wallace* at para 98.

¹⁶ Art 6 Civil Code (Québec) [*CCQ*].

¹⁷ See *Bhasin* at para 83.

¹⁸ See *Bhasin* at para 83.

¹⁹ *Bhasin* at para 83.

The requirements of good faith and honesty recognized by the *CCQ* thus differ from the common law duty of honesty in contractual performance outlined in the above discussion of *Bhasin*. The duty of honesty articulated in *Bhasin* is solely subjective in nature, requiring parties to not “knowingly mislead” one another.²⁰ The objective and subjective evaluation of good faith conduct under the *CCQ* thus highlights the expansive nature of the obligation of honesty in Canadian civil law.

B. Recommendations to the CORE

Incorporate a Duty of Honesty

As supported by the above summary of legal sources and articulated by the SCC, “[t]he requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith.”²¹ The CORE should incorporate a duty of honesty in its good faith requirement to reflect this foundational understanding in Canadian law. Currently, the CORE’s good faith requirement does not include an obligation for parties to a complaint to act honestly throughout the CORE process.

In establishing a duty of honesty, the CORE should seek guidance from the standards set out by the SCC in *Bhasin*, *Callow*, and *Wallace*, as well as the *CCQ*. Specifically, the CORE’s requirement to act in good faith should prohibit parties from engaging in untruthful, misleading, and deceitful conduct.²² In line with the *CCQ*, the CORE should adopt both an objective and subjective standard to assess whether parties to a complaint are fulfilling their duty to act honestly. An objective standard of assessing honest conduct would provide parties to a complaint with a clear standard to guide their actions, while a subjective standard would bring the CORE’s good faith requirement in line with the overarching duty of honesty recognized by the SCC in *Bhasin*.²³ Of concern, however, is the CORE’s inability to compel evidence, which severely weakens its ability to effectively assess whether parties to a complaint are fulfilling their duty of honesty.²⁴ Realizing the power to compel documents and testimony is thus central to the CORE’s ability to advance a standard of good faith that encompasses a duty of honesty.

²⁰ *Bhasin* at para 73.

²¹ *Bhasin* at para 73.

²² See *Bhasin* at para 73; *Callow* at para 91; *Wallace* at para 98.

²³ See *Bhasin* at para 73.

²⁴ A recent independent discussion paper commissioned by the CORE recommend that the CORE should have the power to compel the production of evidence. See Chris Gill, “Ombud independence and the Venice Principles: A report commissioned by the Canadian Ombudsperson for Responsible Enterprise” (24 May 2023) at ss 4.11.2-4.11.3, online (discussion paper): *Government of Canada* <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/ombud_independence-independance_ombudsman.aspx?lang=eng>. See also Allard International Justice and Human Rights Clinic, “Empowering the CORE: Requirements for an effective Canadian Ombudsperson for Responsible Enterprise” (December 2020) at 11, online (PDF): <allard.ubc.ca/sites/default/files/2021-02/Empowering-the-CORE-FINAL.pdf>.

C. Impact on the Effectiveness of the CORE

Incorporating a duty of honesty in the CORE's good faith requirement would increase the effectiveness of the CORE process.²⁵ Indeed, the "predictability"²⁶ of the CORE process would be enhanced by advancing a definition of good faith already widely recognized in Canadian law. Incorporating a duty of honesty that prohibits misleading and deceitful conduct would also build stakeholder trust and confidence in the CORE, thus enhancing its "legitimacy"²⁷ and "transparency."²⁸

II. Recognition of Power Imbalances

This section surveys Canadian contract law, employment law, insurance law, and the CCQ to illustrate that the relative position of parties to a dispute is a foundational consideration in the Canadian law of good faith. Indeed, the presence of power imbalances between parties to a dispute significantly influences both the recognition of good faith requirements and the substance of these requirements in Canadian law.

A. Summary of Relevant Legal Sources

Contract Law

The relative position of parties to a dispute was critical to the SCC's definition of good faith in the context of contract performance.²⁹ The duty of good faith in contract law recognizes the commercial nature of parties and was established to both reflect the "reasonable expectations of

²⁵ As stated in section 3.5 of the CORE's *Operating Procedures*, "The effectiveness criteria for non-judicial grievance mechanisms set out in Principle 31 of the [United Nations Guiding Principles on Business and Human Rights] are guiding principles for the CORE."

²⁶ "Predictability" is included in Principle 31 of the *UN Guiding Principles on Business and Human Rights* as a feature of effective non-judicial grievance mechanisms. See United Nations, "Guiding Principles on Business and Human Rights" (2011) at principle 31, online (pdf): *Office of the United Nations High Commissioner for Human Rights* <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> [*UN Guiding Principles*].

²⁷ "Legitimacy" is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

²⁸ "Transparency" is categorized as central to the effectiveness of National Contact Points for Responsible Business Conduct (NCPs) in the Organisation for Economic Cooperation and Development's *Guidelines for Multinational Enterprises on Responsible Business Conduct*. The CORE is mandated under section 1.1 of the *CORE Operating Procedures* to promote the implementation of these *Guidelines*. See Organisation for Economic Cooperation and Development, "Guidelines for Multinational Enterprises on Responsible Business Conduct" (2023) at 65, online (pdf): *OECD* <www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en> [*OECD Guidelines for Multinational Enterprises*].

²⁹ See *Bhasin* at para 34.

commercial parties” and promote “commercial certainty.”³⁰ Accordingly, the obligation of good faith in contract law does not amount to a fiduciary duty or a duty of loyalty.³¹ Rather, commercial parties must give “appropriate regard to the legitimate contractual interests of the contracting partner” during the performance of a contract and must not “seek to undermine” these interests.³² The recognition and scope of the duty of good faith in contractual performance is thus heavily influenced by the commercial nature of parties and acknowledges the “exercise of free bargaining power” generally present between commercial parties.³³

Additionally, the relative position of parties to a dispute has influenced Canadian courts in assessing whether the duty of good faith in contract law extends to contractual negotiations. Notably, a duty to negotiate in good faith may be required if a “special relationship” exists between parties, particularly where one party relies on another to access information essential to making an “informed choice,” and where the party who holds access to this information “...has an opportunity, by withholding (or concealing) information, to bring about the choice made by the other party.”³⁴ One party’s reliance on another must be justified, however, for a duty of good faith to be recognized in contractual negotiations.³⁵ Whether reliance is justified is assessed contextually by considering factors such as “[t]he relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing.”³⁶ The presence of power imbalances and disparities in access to information thus plays a central role in shaping good faith standards in the context of contractual negotiations.

Employment Law

Power imbalances also inform good faith standards in employment law. Indeed, the presence of unequal bargaining power and access to information between employers and employees was a driving factor in the recognition of the duty of good faith in Canadian employment law.³⁷ Notably, the SCC in *Wallace* cited research which notes:

...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining

³⁰ *Bhasin* at para 34.

³¹ See *Bhasin* at para 65.

³² *Bhasin* at para 65.

³³ *Wallace* at para 91. See also *Bhasin* at para 70.

³⁴ *978011 Ontario Ltd. v Cornell Engineering Co.*, [2001] 198 DLR (4th) 615 at paras 32-34, 12 BLR (3rd) 240 (ON CA) [*Cornell Engineering*].

³⁵ See *Cornell Engineering* at para 34-35.

³⁶ *Cornell Engineering* at para 34.

³⁷ See *Wallace* at paras 91-94.

power and the information necessary to achieve more favourable contract provisions than those offered by the employer....³⁸

The SCC also noted that the power imbalance between employers and employees extends beyond the employment contract and exists throughout the duration of the employment relationship.³⁹ This power differential, along with the foundational role that employment plays in supporting the livelihoods of employees led to the SCC categorizing employees as a “vulnerable group in society.”⁴⁰ The duty of good faith with respect to termination was accordingly recognized to protect employees at the time when they are “most vulnerable.”⁴¹ The Supreme Court’s analysis of the duty of good faith in *Wallace* thus illustrates the highly influential nature of power disparities in shaping good faith standards in Canadian employment law.

Insurance Law

The duty of good faith in insurance law is shaped by imbalances in power and access to information between the insurer and insured and imposes specific requirements on each of these parties.⁴²

With respect to the insured, the duty of good faith requires “...disclosing facts material to the insurance policy.”⁴³ This requirement recognizes that insurers rely on their insureds to provide them with information necessary to accurately assess insurance policy risk.⁴⁴ The presence of disparities in access to material information between the insurer and insured was thus central to recognizing an obligation of disclosure as a component of good faith conduct in Canadian insurance law.⁴⁵

With respect to insurers, the duty of good faith requires acting “promptly and fairly” in the investigation, assessment, and resolution of insurance claims.⁴⁶ The recognition of this requirement was significantly influenced by the power imbalance which renders insureds vulnerable.⁴⁷ Notably, the Ontario Court of Appeal held that the requirement for insurers to act promptly exists because insureds are often under “financial pressure” to resolve their claims as quickly as possible.⁴⁸ The requirement to act fairly requires insurers to not “...deny coverage or

³⁸ *Wallace* at para 91.

³⁹ See *Wallace* at para 92.

⁴⁰ *Wallace* at para 93.

⁴¹ *Wallace* at para 95.

⁴² See *Andrusiw v. Aetna Life Insurance Co. of Canada*, [2001] 289 AR 1 at paras 85, 33 CCLI (3rd); *Bhasin* at para 55.

⁴³ *Bhasin* at para 55; *Andrusiw* at para 85.

⁴⁴ See *Bhasin* at para 55; *Lee v. Canadian Northern Shield Insurance Co.*, 2005 BCSC 866 at para 42 [*Lee*].

⁴⁵ See *Lee* at para 42.

⁴⁶ *702535 Ontario Inc. v Non-Marine Underwriters, Lloyd's London, England*, [2000] 184 DLR (4th) 687 at paras 27, 95 ACWS (3rd) 556 (ON CA) [*Non-Marine Underwriters*]; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para 63 [*Fidler*].

⁴⁷ See *Non-Marine Underwriters* at paras 28-29.

⁴⁸ *Non-Marine Underwriters* at para 28.

delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement."⁴⁹

The vulnerability of insureds was elaborated by the Alberta Court of King's Bench in *Andrusiw v Aetna Life Insurance Co. of Canada (Andrusiw)*, as follows:

A great deal has been made in the case law...of the fact that insurers vis à vis their insureds are in a superior bargaining position and one which places the insureds in positions of dependency and vulnerability.⁵⁰

Notably, the vulnerability faced by insureds led to the requirement in Canadian insurance law that insurers "...must give as much consideration to the welfare of the insured as to its own interests."⁵¹ The duty of good faith is thus more onerous in insurance law than in contract law.⁵² As previously discussed, commercial parties in contract law are not required to give equal weight to each other's interests and are rather required to "...have *appropriate regard* to the legitimate contractual interests of the contracting partner."⁵³ The scope of the duty of good faith in insurance law thus highlights the significant weight afforded to the existence of power imbalances in insurer-insured relationships and an understanding of the vulnerabilities faced by the insured.

Civil Code of Québec

The requirement of good faith outlined in Article 1437 of the *CCQ* is also substantially influenced by the presence of power imbalances between parties to a dispute. Article 1437 of the *CCQ* states:

An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.⁵⁴

In *Québec c Kabakian-Kechichian (Kabakian-Kechichian)*, the Quebec Court of Appeal emphasized that Article 1437 of the *CCQ* is grounded in the principle that contracts of adhesion should not be

⁴⁹ *Non-Marine Underwriters* at para 29.

⁵⁰ *Andrusiw* at para 85.

⁵¹ *Usanovic v. Penncorp Life Insurance Co.*, [2017] 138 OR (3rd) 462 at para 27, 68 CCLI (5th) 17 (ON CA) [*Usanovic*]; *Bhasin* at para 55.

⁵² See *Bhasin* at 65.

⁵³ *Bhasin* at para 65 (emphasis added).

⁵⁴ Art 1437 *CCQ*.

used as a tool for powerful parties to exploit weaker parties.⁵⁵ In analyzing the meaning of *CCQ* Article 1437, the Quebec Court of Appeal found that abusive clauses are those which disadvantage a weaker party in both an “excessive” and “unreasonable” way.⁵⁶ Whether a clause is “excessive” can be assessed objectively (for example, by requiring a party to meet a requirement that would be impossible to satisfy) or subjectively by considering a contracting party’s unique circumstances.⁵⁷ Whether a clause is “unreasonable” is assessed on an objective standard.⁵⁸ Article 1437 of the *CCQ* and the Quebec Court of Appeal’s analysis in *Kabakian-Kechichian* thus emphasize the significant weight given to power imbalances when assessing good faith in Canadian civil law.

In sum, the outlined synthesis of Canadian contract law, employment law, insurance law, and the *CCQ* illustrate that the presence of power imbalances profoundly influences the recognition and substance of good faith standards in Canadian law.

B. Recommendations to the CORE

The CORE’s good faith requirement should reflect the existing understanding of good faith in Canadian law, as outlined in section A above.⁵⁹ Further, advancing a standard of good faith that recognizes the relative positions of parties engaging in the CORE process is imperative to the CORE achieving its commitment to address power imbalances.⁶⁰

As noted in the *UN Guiding Principles on Business and Human Rights (UN Guiding Principles)*, which the CORE is mandated to promote:⁶¹

In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them.⁶²

Likewise, individuals bringing complaints against corporations in Canada through the CORE process are akin to the vulnerable parties described in employment law, insurance law and the *CCQ* who face disparities in bargaining power and access to the information needed to advance their claims. Indeed, CORE complainants – many of whom are individuals living in developing

⁵⁵ See *Québec (Procureur général) c Kabakian-Kechichian*, [2000] RJQ 1730 at para 53, 2000 CanLII 7772 (QC CA) [*Kabakian-Kechichian*].

⁵⁶ *Kabakian-Kechichian* at para 49 (translated).

⁵⁷ *Kabakian-Kechichian* at para 55 (translated).

⁵⁸ *Kabakian-Kechichian* at para 58 (translated).

⁵⁹ See *CORE Operating Procedures* at s 12.

⁶⁰ See *CORE Operating Procedures* at s 3.6 and s 9.1.1.

⁶¹ See *CORE Operating Procedures* at s 1.1.

⁶² *UN Guiding Principles* at 35.

countries – do not experience the “exercise of free bargaining power” found in commercial contractual relationships.⁶³

To advance a standard of good faith built upon a recognition of power imbalances between parties to a complaint, the CORE should adopt the following requirements:

Adopt an Obligation to Act in a Timely Manner

The CORE should expand its good faith obligation to require corporations to act “promptly and fairly” throughout the CORE process.⁶⁴ While the requirement of prompt and fair action as a component of good faith conduct originates from insurance law, this requirement’s underlying rationale of protecting weaker parties is highly pertinent to the CORE process. Indeed, corporations who hold more bargaining power, access to legal representation, and financial resources than complainants are able to routinely extend mediation and other administrative procedures in a manner that exploits the vulnerable position of complainants.⁶⁵

Further, Canada is required under the International Labour Organization’s (ILO) *Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Convention No. 98)* to support prompt action in negotiations.⁶⁶ With respect to *Convention No. 98*, the International Labour Council states:

The principle of negotiation in good faith, which is derived from Article 4 of the Convention, takes the form, in practice, of various obligations on the parties involved, namely... avoiding unjustified delays in negotiation.⁶⁷

As a Canadian federal government entity, the CORE has a responsibility to uphold Canada’s international obligations under *Convention No. 98* and should thus expand its good faith requirement to prohibit parties to a complaint from unjustifiably delaying the CORE process.

In addition, the requirement to act in a timely manner should extend to the CORE itself. Specifically, the CORE should be required to adhere to the timelines established in its *Operating Procedures*⁶⁸ to recognize the principle of timely action as a component of good faith conduct and acknowledge the damaging impact to complainants of delays in the CORE process given their

⁶³ Wallace at 91.

⁶⁴ *Non-Marine Underwriters* at para 27. See also *Fidler* at para 63.

⁶⁵ See *Non-Marine Underwriters* at paras 27-9; *UN Guiding Principles* at 35.

⁶⁶ See International Labour Organisation (ILO), 1 July 1949, 32 ILC (entered into force 18 July 1951, ratification by Canada 14 June 2017) [C098].

⁶⁷ International Labour Organisation, “Report III(1B): Giving Globalization a Human Face (General Survey on the Fundamental Conventions)” (2012) at para 208, online (pdf): *International Labour Organisation* <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf> [*ILO General Survey on Fundamental Conventions*].

⁶⁸ See for example *CORE Operating Procedures* at ss 5.9, 5.10, 5.17, 8.6, 10.2, and 11.9.

vulnerable position.⁶⁹ If the CORE does not meet the timelines established in its *Operating Procedures*, including those pertaining to the acknowledgement of the receipt of a complaint, intake of a complaint, and/or initial assessment of a complaint,⁷⁰ complainants should be provided with the reasons for the delay and an updated timeline. As noted in the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* ("*OECD Guidelines for Multinational Enterprises*"), "[w]henver delays are to be expected or experienced in the handling of a specific instance, the NCP⁷¹ should keep the parties informed in a timely manner, so that the proceedings remain predictable."⁷² This recommendation pertains to "specific instances" that are directly relevant to the CORE process, including the initial assessment and conclusion of proceedings.⁷³

In expanding its good faith requirement to include an obligation for corporations and the CORE to act "promptly and fairly"⁷⁴ in the CORE process, the CORE could seek guidance from the outlined analysis of relevant legal sources in section A.⁷⁵

Categorize "Abusive Clauses" as Contrary to Good Faith

The CORE should expand its description of bad faith conduct to include the use of "abusive clauses"⁷⁶ by corporations involved in the CORE process. Corporations engaging with the CORE hold the power to further exploit complainants' rights by requiring them to sign lengthy and expansive confidentiality agreements to participate in the CORE process. The CORE should articulate a clear standard for when a confidentiality clause becomes "abusive"⁷⁷ and thus contrary to good faith. Specifically, limits should be placed on the length of time for which confidentiality agreements may apply and on the scope of restrictions imposed by these agreements. Article 1437 of the *CCQ* and the judicial analysis of this Article in *Kabakian-Kechichian* provide standards for defining and measuring whether a clause is "abusive."⁷⁸ As emphasized in *Kabakian-Kechichian*, the categorization of abusive clauses as violating the requirement of good faith reflects the central purpose of ensuring that contracts of adhesion are not used by stronger parties to take advantage

⁶⁹ See *Non-Marine Underwriters* at paras 27-29; *UN Guiding Principles* at 35.

⁷⁰ See the *CORE Operating Procedures* at ss 5.9, 5.10, 5.17, and 8.6.

⁷¹ The term "NCP" refers to the National Contact Point for Responsible Business Conduct. As noted in the *OECD Guidelines for Multinational Enterprises*, NCPs are established by governments to enhance the effectiveness of the *Guidelines*. See *OECD Guidelines for Multinational Enterprises* at 3.

⁷² *OECD Guidelines for Multinational Enterprises* at 73.

⁷³ *OECD Guidelines for Multinational Enterprises* at 73. As previously outlined, the CORE is mandated under section 1.1 of the *CORE Operating Procedures* to promote the implementation of the *OECD Guidelines for Multinational Enterprises*.

⁷⁴ *Non-Marine Underwriters* at para 27.

⁷⁵ See *Non-Marine Underwriters* at para 27; *Fidler* at para 63.

⁷⁶ Art 1437 *CCQ*.

⁷⁷ Art 1437 *CCQ*.

⁷⁸ Art 1437 *CCQ*; *Kabakian-Kechichian* at paras 49-58.

of weaker parties.⁷⁹ This central purpose is directly in line with the CORE's specified commitment to a "dispute resolution processes that address power imbalances."⁸⁰

Additionally, when considering whether a clause is "abusive"⁸¹ and assessing the CORE's requirement of confidentiality,⁸² attention should not solely be directed at keeping "personal and business sensitive information confidential."⁸³ Emphasis must also be placed on the right of complainants to express their opinions publicly, as this value is enshrined in Canada's constitutional⁸⁴ and international commitments.

Specifically, section 2(b) of the *Canadian Charter of Rights and Freedoms* provides that everyone has the fundamental freedom of "...thought, belief, opinion and expression, including freedom of press and other media of communication."⁸⁵ As stressed by the SCC, "...the freedom to express oneself openly and fully is of crucial importance in a free and democratic society..." and represents an "essential value" of Canadian democracy.⁸⁶ The SCC has further identified three principles underpinning and "fueling" the constitutionally protected value of freedom of expression:

(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.⁸⁷

Thus, section 2(b) of the *Canadian Charter of Rights and Freedoms* and the SCC's analysis of this provision accentuate the profound importance of freedom of expression in Canada and its deep connection to the values of truth, social and political participation, and self-fulfillment.

Regarding Canada's international commitments, the ILO's Committee on Freedom of Association states:

The right of workers' and employers' organizations to express their opinions through the press or other social communication media is a fundamental element of freedom of association and the authorities should abstain from

⁷⁹ See *Kabakian-Kechichian* at para 53.

⁸⁰ *CORE Operating Procedures* at s 3.6.

⁸¹ Art 1437 CCQ.

⁸² See *CORE Operating Procedures* at s 12.2.

⁸³ *CORE Operating Procedures* at s 12.2.

⁸⁴ See *Canadian Charter of Rights and Freedoms* at s 2(b).

⁸⁵ *Canadian Charter of Rights and Freedoms* at s 2(b). Under s 1 of the *Canadian Charter of Rights and Freedoms*, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

⁸⁶ *R v Keegstra*, [1990] 3 SCR 697 at 726, 11 WCB (2nd) 352 [*Keegstra*].

⁸⁷ *Keegstra* at 727-728.

unduly impeding its lawful exercise and should fully guarantee freedom of expression in general⁸⁸

The principles of freedom of association and the effective recognition of the right to collective bargaining are captured in the *Constitution of the ILO*, the *Declaration of Philadelphia*, and the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87)*.⁸⁹ Canada is a member of the ILO and has ratified *Convention No. 87*, thus demonstrating its commitment to recognizing the values enshrined in these central instruments of the ILO.⁹⁰

Likewise, article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*, binding on Canada since 1976, protects the right to freedom of expression.⁹¹ As per *General Comment No. 34*, which interprets article 19 of the *ICCPR*, “[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”⁹² The fulfillment of *ICCPR* article 19 is thus highly pertinent to the CORE process, which is mandated to support the protection of human rights against corporate abuse and promote a transparent dispute-resolution mechanism.⁹³

As a government entity, the CORE has a responsibility to actively uphold Canada’s domestic and international commitments to freedom of association and expression. Certainly, the CORE’s good faith requirement should in no way weaken the ability of complainants to express their opinions through the press and other forms of media. Rather, in balancing the values of transparency and confidentiality, the CORE should prioritize facilitating and protecting the ability of complainants to publicly express their opinions. Indeed, such expression is afforded critical importance and protection under the *Canadian Charter*,⁹⁴ as it is deeply connected to the values of truth, democracy and self-fulfillment,⁹⁵ and holds a foundational role in the protection of human rights.⁹⁶

⁸⁸ International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at para 242.

⁸⁹ See International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at 1; International Labour Organization (ILO), 9 July 1948, 31 ILC (entered into force 4 July 1950, ratification by Canada 23 March 1972) [C087].

⁹⁰ See C087.

⁹¹ See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 19 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

⁹² Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of Opinion and Expression* (102nd session, 2011), CCPR/C/GC/34 at para 3 [General Comment No. 34].

⁹³ See *CORE Operating Procedures* at s 1.1. See also *UN Guiding Principles* at principle 31.

⁹⁴ See *Keegstra* at 726-728.

⁹⁵ See *Keegstra* at 726-728.

⁹⁶ See *General Comment No. 34* at para 3.

C. Impact on the Effectiveness of the CORE

Adopting the outlined recommendations would increase the effectiveness of the CORE in several ways. First, advancing a good faith standard built upon a recognition of power imbalances would enhance the “legitimacy” of the CORE process by building trust with complainants.⁹⁷ As noted in Principle 31 of the *UN Guiding Principles*: “Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust.”⁹⁸ The recommendations in this report to categorize “abusive clauses”⁹⁹ as contrary to good faith and prohibit corporations from unduly lengthening negotiations seek to ensure that corporations cannot interfere with the fairness of the CORE process by exploiting the vulnerable position of complainants. Accordingly, adopting these recommendations would help foster stakeholder trust.¹⁰⁰

Second, adopting a standard of good faith that acknowledges the power differential between parties to a complaint would enhance the “predictability” of the CORE process.¹⁰¹ The outlined recommendations are grounded in widely recognized principles of Canadian law and provide clarity as to the specific requirements of good faith conduct.

Third, expanding the CORE’s good faith requirement to acknowledge power asymmetries would render the CORE more “rights compatible.”¹⁰² As noted in the *UN Guiding Principles*:

Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights.¹⁰³

Adopting the proposed recommendation to protect the ability of complainants to publicly express their opinions would advance the internationally recognized rights to freedom of expression and association and uphold Canada’s international obligations associated with these rights under *Convention No. 87* and the *ICCPR*.¹⁰⁴

⁹⁷ “Legitimacy” is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

⁹⁸ *UN Guiding Principles* at 34.

⁹⁹ Art 1437 CCQ.

¹⁰⁰ See *UN Guiding Principles* at Principle 31.

¹⁰¹ “Predictability” is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

¹⁰² “Rights-compatible” is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

¹⁰³ *UN Guiding Principles* at 35.

¹⁰⁴ See *C087*. See also Art 19 *ICCPR*.

Lastly, enhancing the CORE's good faith requirement to account for power imbalances is crucial to advancing the "equity" of the CORE process¹⁰⁵ and supporting the fulfillment of the CORE's commitment to addressing power imbalances.¹⁰⁶ As noted in the *UN Guiding Principles*, non-judicial grievance mechanisms should be equitable by working to ensure that complainants have "...reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms."¹⁰⁷ The *OECD Guidelines for Multinational Enterprises* also stress the importance of striving to ensure that imbalances in power and resources do not "...prevent the parties from effectively engaging in the process."¹⁰⁸ The recommendations in this report advance a standard of good faith that addresses the disparities in access to resources faced by CORE complainants. As clearly stated in Principle 31 of the *UN Guiding Principles*, a failure to address power imbalances in non-judicial grievance mechanisms can hinder "...both the achievement and perception of a fair process and make it harder to arrive at durable solutions."¹⁰⁹ Accordingly, the effectiveness of the CORE process and the achievement of its mandate to promote the implementation of the *UN Guiding Principles* and *OECD Guidelines for Multinational Enterprises* are difficult to imagine absent a standard of good faith that evens the playing field and corrects for power imbalances.¹¹⁰

III. Cooperation and Genuine Participation

Another central principle reflected in the Canadian law of good faith and Canada's international obligations is the importance of genuine and cooperative conduct during negotiations. Specifically, this principle is reflected in the *CCQ*, British Columbia (BC) *Labour Relations Code*,¹¹¹ and *Convention No. 98*. This report's exploration of good faith obligations in the collective bargaining process are not direct analogies to the CORE process. Rather, we include a discussion of collective bargaining standards to inform the CORE's good faith requirement through an illustration of key principles found in Canadian and international legal sources. Further, the principle of good faith in collective bargaining directly pertains to the processes of negotiation and dispute-resolution and is thus highly relevant to the CORE process.

¹⁰⁵ "Equity" is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

¹⁰⁶ See *CORE Operating Procedures* at s. 3.6 and s. 9.1.1.

¹⁰⁷ *UN Guiding Principles* at 33.

¹⁰⁸ *OECD Guidelines for Multinational Enterprises* at 65-66.

¹⁰⁹ *UN Guiding Principles* at 35.

¹¹⁰ See *CORE Operating Procedures* at s 1.1.

¹¹¹ *Labour Relations Code*, RSBC 1996, c 224, s 11 [*BC Labour Relations Code*].

A. Summary of Relevant Legal Sources

Civil Code of Québec

The requirement of good faith contained in the *CCQ*¹¹² encompasses a duty of cooperation.¹¹³ This duty of cooperation requires parties to take “...proactive steps to accommodate the interests and fair expectations of the other contracting party.”¹¹⁴

British Columbia Labour Relations Code

The obligation of good faith contained in the *BC Labour Relations Code* requires parties to a dispute to sincerely engage in collective bargaining.¹¹⁵ Specifically, section 1 of the *BC Labour Relations Code* defines “collective bargaining” as “negotiating in good faith with a view to the conclusion of a collective agreement...”¹¹⁶ The BC Labour Relations Board has clarified that the *BC Labour Relations Code* requires unions and employers engaged in collective bargaining to “...make a sincere attempt to reach an agreement.”¹¹⁷ Parties involved in collective bargaining are permitted to oppose proposals made by the other party and take a strong stance in negotiations, however, “...adopting a deliberate strategy to prevent reaching agreement could be a breach of the duty to bargain good faith.”¹¹⁸

International Labour Organization Convention No. 98

ILO *Convention No. 98* supports that genuine cooperation in negotiations is a component of good faith conduct. In relation to *Convention No. 98*, the ILO notes:

The principle of negotiation in good faith, which is derived from Article 4 of the Convention, takes the form, in practice, of various obligations on the parties involved, namely: (i) recognizing representative organizations; (ii) endeavouring to reach agreement; (iii) engaging in real and constructive negotiations...¹¹⁹

Convention No. 98 highlights Canada’s obligation to advance a standard of good faith that requires parties to genuinely participate in negotiations and strive to reach agreement.

¹¹² See Arts 6, 7, 1375 *CCQ*.

¹¹³ See *Construction Kiewit cie c Hydro-Québec*, 2014 QCCA 947 at paras 83, 90-92; *Churchill Falls (Labrador) Corp. v Hydro-Québec*, 2018 SCC 46 at para 177[*Churchill Falls*].

¹¹⁴ *Churchill Falls* para 177.

¹¹⁵ See *BC Labour Relations Code* at s 11.

¹¹⁶ *BC Labour Relations Code* at s 1.

¹¹⁷ British Columbia Labour Relations Board, “Duty to Bargain in Good Faith” (2023), online: *British Columbia Labour Relations Board* < <https://www.lrb.bc.ca/duty-bargain-good-faith#:~:text=They%20must%20make%20a%20sincere,duty%20to%20bargain%20good%20faith>> [*BC Labour Relations Board*].

¹¹⁸ *BC Labour Relations Board*.

¹¹⁹ *ILO General Survey on Fundamental Conventions* at para 208.

B. Recommendations to the CORE

Adopt a Duty of Cooperation and Genuine Participation

Currently, the CORE’s good faith requirement notes that a party to a review who does not “actively participate in the review without reasonable explanation” may be considered as not acting in good faith.¹²⁰ The CORE should expand the definition of “actively participate” contained in this good faith requirement to include a duty of cooperation and genuine participation for parties participating in the CORE process.¹²¹ The outlined provisions in the *CCQ*, *BC Labour Relations Code*, and *Convention No. 98* demonstrate that cooperation and genuine participation are central components of good faith conduct in negotiations. The CORE should draw upon these legal sources to shape its duty of cooperation and genuine participation. Specifically, in assessing whether parties to a complaint are acting in good faith, the CORE should assess whether they are engaging in “real and constructive negotiations.”¹²² Parties to a complaint should be required to sincerely engage in the process of seeking an agreement.¹²³ As such, engaging in conduct to intentionally prevent an agreement from being reached, or simply participating in the CORE process without making efforts to seek an agreement should be categorized as bad faith conduct.¹²⁴ Further, a requirement of cooperation and genuine participation should be adopted in the CORE’s good faith requirement to uphold Canada’s obligations under *Convention No. 98*.

C. Impact on the Effectiveness of the CORE

Expanding the CORE’s good faith requirement to include a duty of cooperation and genuine participation would enhance the effectiveness of the CORE. Specifically, categorizing as bad faith the acts of intentionally preventing an agreement from being reached and failing to genuinely participate in seeking an agreement would boost the CORE’s “legitimacy” by building confidence among complainants that the CORE exists to facilitate genuine negotiations.¹²⁵

IV. Unilateral Action as Contrary to Good Faith

Another key principle reflected in Canada’s international commitments is that certain forms of unilateral action during the negotiation process are contrary to good faith.

¹²⁰ *CORE Operating Procedures* at s 12.4.

¹²¹ *CORE Operating Procedures* at s 12.4.

¹²² *ILO General Survey on Fundamental Conventions* at para 208.

¹²³ See *BC Labour Relations Code* at ss 1, 11; *ILO General Survey on Fundamental Conventions* at para 208.

¹²⁴ See *BC Labour Relations Code* at ss 1, 11; *BC Labour Relations Board*; *ILO General Survey on Fundamental Conventions* at para 208.

¹²⁵ “Legitimacy” is included in Principle 31 of the *UN Guiding Principles* as a feature of effective non-judicial grievance mechanisms.

A. Summary of Relevant Legal Sources

International Labour Organization

The ILO's enshrined principles of freedom of association and the effective recognition of the right to collective bargaining support that certain forms of unilateral action contradict the principle of bargaining in good faith.¹²⁶ Specifically, in elaborating upon the principle of bargaining in good faith, the ILO's Committee on Freedom of Association (CFA) states:

The act of postponing or arranging negotiation meetings unilaterally at the last minute and without prior warning, if it occurs without good reason, is a practice that is harmful to the development of normal and healthy labour relations.¹²⁷

This articulation of the principle of good faith highlights that engaging in unilateral action during negotiations without notice to the other negotiating party constitutes conduct that is contrary to good faith. Additionally, in its analysis of good faith conduct, the CFA notes:

A legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining.¹²⁸

This description of bargaining in good faith supports the notion that a system which affords employers the power to unilaterally re-open concluded agreements violates the principle of good faith.

B. Recommendations to the CORE

Prohibit Unfair Unilateral Action

In line with the foundational principles of good faith bargaining identified by the CFA, the CORE should categorize as bad faith conduct forms of unilateral action that deviate from the procedures set out by the CORE without good reason and prior notice to all parties to the complaint. Such forms of unilateral action should include postponing the provision of documents or information required by the CORE, postponing or extending negotiations, and re-opening a phase in the CORE process that has already concluded. The CORE should take an active role in prohibiting such forms of unilateral action to ensure that freedom of association is upheld in the CORE process. As previously outlined, the principle of freedom of association is encompassed in Canada's

¹²⁶ See International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at paras 1332, 1338.

¹²⁷ International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at para 1332.

¹²⁸ International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at para 1338.

international commitments, particularly under *Convention No. 87*.¹²⁹ Accordingly, the CORE process should reflect Canada's commitment to freedom of association.

C. Impact on the Effectiveness of the CORE

Expanding bad faith conduct to encompass the outlined forms of unilateral action is necessary to advance the CORE's effectiveness. As stated in the *UN Guiding Principles*, parties to a complaint should be provided with a "clear and known procedure" and should be kept informed about the negotiation process.¹³⁰ Thus, prohibiting a party to a complaint from taking unilateral action without good reason and providing adequate notice to the other party is instrumental to advancing the "transparency" and "predictability" of the CORE process.¹³¹

V. Procedural Fairness of the CORE

As outlined in the previous sections of this report, the proposed recommendations to expand the CORE's good faith requirement are central to supporting the CORE's alignment with widely recognized principles of Canadian law, enhancing the CORE's effectiveness, and upholding its mandate and commitments. The recommendations outlined in this report are also vital to advancing the procedural fairness of the CORE process. This section outlines the relevant Canadian law pertaining to procedural fairness and recommends that the CORE be subject to a duty of procedural fairness.

A. Summary of Relevant Legal Sources

As noted by the SCC, administrative decisions that affect "the rights, privileges or interests of an individual" are subject to a procedural duty of fairness.¹³² The SCC states: "If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness."¹³³ This analysis considers the "...promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure..."¹³⁴

¹²⁹ See International Labour Organisation, *Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association*, 6th ed (Geneva: International Labour Office, 2018) at paras 1, 1332, 1338.

¹³⁰ *UN Guiding Principles* at 33.

¹³¹ "Transparency" and "predictability" are included in Principle 31 of the *UN Guiding Principles* as features of effective non-judicial grievance mechanisms. Additionally, "transparency" and "predictability" are listed as central to the effectiveness of NCPs in the *OECD Guidelines for Multinational Enterprises* at pages 65-66.

¹³² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20, 174 DLR (4th) 193 [*Baker*].

¹³³ *Baker* at para 26.

¹³⁴ *Baker* at para 26.

B. Recommendations to the CORE

Adopt of a Procedural Duty of Fairness

While the CORE is not an administrative body, a duty of procedural fairness should apply to the CORE, given this duty's high degree of applicability to the CORE process. The CORE is a government entity that holds the ability to make decisions that significantly affect the rights and interests of human rights complainants.¹³⁵ In addition, the CORE has created a "legitimate expectation" among complainants that power imbalances will be addressed in the CORE process.¹³⁶ As previously mentioned, the CORE's *Operating Procedures* outline its commitment to addressing power imbalances during the dispute resolution process.¹³⁷ The *Operating Procedures* also identify the CORE's intention to acknowledge power imbalances by helping complainants access legal representation.¹³⁸ The CORE's *Order in Council* and *Operating Procedures* further establish that the CORE's mandate is to "promote the implementation of the UN Guiding Principles and OECD Guidelines."¹³⁹ Each of these guiding instruments acknowledges the importance of addressing power imbalances in dispute resolution.¹⁴⁰ Accordingly, as the CORE has established the legitimate expectation that power imbalances will be addressed in the CORE process, it should thus hold a duty to fulfill this expectation to uphold procedural fairness.

Additionally, the CORE's *Operating Procedures* set out the process through which complaints will be addressed.¹⁴¹ Consequently, the CORE has created a legitimate expectation among parties to a complaint that these processes will be followed, and the CORE should be responsible to fulfill this expectation to support procedural fairness.¹⁴² The recommendations in this report are pertinent to promoting the procedural fairness of the CORE by outlining a standard of good faith that addresses power imbalances and is based upon transparency and predictability. Indeed, as per the SCC, procedural fairness functions to uphold a "fair and open" process.¹⁴³

Conclusion

This report offers several recommendations to make the CORE process more effective through an expansion of its good faith requirement. These recommendations are based upon central principles of Canadian contract law, employment law, insurance law, constitutional law, labour

¹³⁵ See *Baker* at para 20.

¹³⁶ *Baker* at para 26.

¹³⁷ See *CORE Operating Procedures* at ss 3.6 and 9.1.1.

¹³⁸ See *CORE Operating Procedures* at s 9.1.1.

¹³⁹ *Order in Council* at s 4(a); *CORE Operating Procedures* at s 1.1.

¹⁴⁰ See *UN Guiding Principles* at 35; *OECD Guidelines for Multinational Enterprises* at 66.

¹⁴¹ See *CORE Operating Procedures* at ss 4-18.

¹⁴² See *Baker* at para 26.

¹⁴³ *Baker* at para 22.

relations law and the *CCQ*. Additionally, the recommendations in this report were influenced by Canada's international commitments, the *UN Guiding Principles*, and the *OECD Guidelines for Multinational Enterprises*. From these sources, we conclude that the CORE's good faith requirement should include a duty of honesty, require parties to act in a timely manner, prohibit the use of abusive clauses, impose a duty of cooperation and genuine participation on parties engaging in the CORE process, and prohibit certain forms of unfair unilateral action. We also conclude that the CORE itself should be subject to a duty of procedural fairness. The implementation of the recommendations outlined in this report is central to the CORE upholding its commitment to addressing power imbalances, and crucial to enhancing the transparency, predictability and fairness of the CORE process.¹⁴⁴

¹⁴⁴ See *Order in Council* at s 4(a); *CORE Operating Procedures* at s 1.1.