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Introduction

I have been asked to provide advice to the Minister for International Trade (Minister) regarding how best to equip the Canadian Ombudsperson for Responsible Enterprise (CORE) with sufficient tools to engage in credible and effective investigations of alleged human rights abuse and to ensure that she has powers to compel witnesses and documents. In this respect, I have been asked to assess the appropriateness of the *Inquiries Act*[1] as a tool to provide the CORE with these powers.

In providing this advice, I have been asked to specifically address the following questions:

a) How do the processes and protections offered by a judicial process compare with a commission of inquiry under the *Inquiries Act*?
b) What are the comparative advantages and disadvantages between a judicial process, a commission of inquiry, and a process based on an alternative dispute mechanism, such as collaborative dispute resolution, including mediation?
c) What provisions exist – in statute or common law – to enable the CORE to protect the privacy and confidentiality of the information that will be received by the CORE in their fact-finding process? Are there any legal constraints?
d) If the CORE was appointed as a Commissioner of inquiry, what sections of the *Charter*[2] could possibly be engaged in their conduct of an inquiry? What would the CORE need to do to ensure that the *Charter* was not infringed and/or that this infringement was justified in the circumstances?

In preparing this advice, I have reviewed outside legal opinions provided to the Minister by counsel to the Canadian Network on Corporate Accountability (CNCA) and by counsel to the Prospectors and Developers Association of Canada (PDAC) and the Mining Association of Canada (MAC), as well as the Mining Association itself, regarding the creation of the CORE. I have also been provided with a letter dated December 22, 2017 from a group of Administrative Law Professors.

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[1] *Inquiries Act*, RSC, 1985, c I-11.
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

I also met with a representative of the CNCA and their counsel on May 15, 2019 and with a representative of the MAC and the PDAC and their counsel on May 28, 2019 in order to listen to their views on the powers that the CORE ought to have and how it ought to be structured.

In addition, and again after consultation with the Minister's office, I have had a general discussion with Ms. Sheri Meyerhoffer, who has been appointed as the CORE in order to understand how she envisages implementing her mandate and what powers she expects to need in doing so.

Summary of Conclusions

Firstly, I am not in a position to give policy advice to the Minister or to the Government. How the CORE is structured and what powers it should have are matters to be determined as a matter of policy, taking into account not only the legal ramifications of various options but also other political considerations. This opinion is directed at the legal factors that may inform the ultimate decision.

Power to Compel

As discussed below, it is my opinion that unless the CORE is created by way of a statute that delineates its mandate and powers, including the power to compel witnesses and documents, or is instead appointed as an ongoing commission of inquiry pursuant to Part I of the *Inquiries Act*, the CORE cannot be invested with the power to compel witnesses and documents.

The best way to ensure that the CORE has the necessary powers to compel witnesses and the production of documents would be to enact legislation to establish the CORE. With legislation, the CORE could be given the necessary powers to mediate, investigate, compel evidence and undertake an education role. In addition, some of the other issues such as confidentiality concerns and immunity from civil action could be addressed.

While the best way to ensure that the CORE has the necessary powers to compel witnesses and the production of documents would be to enact legislation to establish the CORE, appointing the CORE as a commissioner under Part I of the *Inquiries Act* could also achieve that objective, while, at the same time, retaining the overall mandate currently envisaged for the CORE.

If the CORE is structured as an ombudsperson appointed as a Ministerial Advisor, as is currently the case, its effectiveness will be dependent on the cooperation of the complainant and the entity being investigated.

If The CORE Is Appointed As A Commissioner Pursuant To The *Inquiries Act* Could It Exercise The Mandate That It Currently Has?

I am of the view that there is nothing in the *Inquiries Act* that would prevent the Governor in Council crafting terms of reference for a commissioner that instruct the commissioner to investigate complaints but also include the promotional and advisory roles that are found in the CORE's current mandate as well as allowing it to undertake joint fact finding and mediation.

If the CORE were to be appointed as a commissioner, in my view it should only be for a temporary period of time pending the passage of legislation. While, as discussed below, commissions have been created as ongoing entities, it is my understanding that this has been done as a temporary measure and that it was always intended that legislation would follow.

As Structured the CORE does not fit Traditional Ombudsperson Models

The term ombudsperson originally identified a body which was created by government to receive, inquire into, report upon and attempt to resolve complaints about governmental abuses affecting members of the public. In recent years the term has been expanded to cover bodies created to carry out this function i.e. investigate, report upon and attempt to resolve complaints by the public or by customers against quasi-government agencies, private sector industry groups and individual entities. In all cases that I am aware of, the ombudsperson office is created by, or on behalf of, the entity or entities against whom the complaints may be made.

Because the CORE will be dealing with disputes involving non-governmental entities over which the government has no direct control - third parties in the mining, oil and gas and garment sectors and Non-Governmental Organizations (NGOs) - it is actually a slight misnomer to style the CORE as an ombudsperson.

Confidentiality Issues

Without a statutory framework, the CORE will not be able to guarantee the confidentiality of information it receives from third parties. As part of the Department of Global Affairs, the CORE will be subject to the *Access to Information Act* (ATIA)[3] and, subject to exemptions available under that Act, will be required to provide records in its possession in response to a request. Similarly, the CORE will be subject to the *Privacy Act* (PA)[4] and will be required to take appropriate steps to protect personal information that it collects, but will also be required to disclose personal information in accordance with that Act. Specific exemptions under the ATIA and the PA would be required to ensure the necessary confidentiality.

The CORE may also have difficulty enforcing confidentiality obligations as between the parties to a dispute. As a result they may not only be reluctant to provide sensitive information to the CORE without guarantees of confidentiality, but may also refuse to allow information to be exchanged among parties if the CORE cannot ensure the confidentiality of such information.

In addition, it is not clear to what extent information provided to the CORE, information collected by the CORE or findings made by the CORE would be admissible in a subsequent civil or criminal proceeding (known as derivative use). Statutes creating similar ombudsperson-type offices often include specific provisions that the ombudsperson and his or her staff are not competent or compellable witnesses.

Protection From Civil Liability

Typically, ombudspersons and similar offices created by statute benefit from provisions which protect them from civil liability for acts done by them in fulfilling their mandates. Statutes providing for the creation of commissions of inquiry frequently contain such provisions as well. If, like the federal *Inquiries Act*, they do not, case law suggests that the commissioners benefit from the common law protection of a qualified privilege if not from the absolute privilege accorded to judges.

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[3] *Access to Information Act*, RSC 1985, c A-1.
[4] *Privacy Act*, RSC 1985, c P-21.

Background

Appointment Of The CORE

By Order-in-Council dated April 8, 2019[5], Ms. Meyerhoffer was appointed to the position by way of an appointment as a special adviser to the Minister pursuant to paragraph 127.1 (1) (c) of the *Public Service Employment Act*[6]. The CORE is established with the title of an ombudsperson.

The mandate of the CORE is set out in detail in a second Order-in-Council[7], and generally is as follows:

- The Ombudsperson's mandate is to review complaints related to allegations of human rights abuses arising from a Canadian company's activity abroad in the mining, oil and gas and garment sectors.
- The Ombudsperson will undertake joint fact-finding and independent fact-finding, make recommendations, follow-up on the implementation of those recommendations, and report publicly throughout the process.
- The Ombudsperson will also promote the implementation of the *United Nation Guiding Principles on Business and Human Rights*[8] and the *OECD Guidelines for Multinational Enterprises*[9] on responsible business conduct, and advise Canadian companies on best practices.

As a special advisor, the CORE has no power or authority to compel the production of documents or to compel individuals or corporations or other entities to cooperate with a review of a complaint or any fact-finding inquiry that might be undertaken. The CORE will have to rely solely on the voluntary cooperation of the complainant and entity being investigated. Accordingly, although the decision was taken to appoint the CORE as a special advisor to the

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[5] PC 2019-0300, (2019-04-08) C Gaz.
[6] *Public Service Employment Act*, s 127.1 (1) (c), SC 2003, c 22, ss 12, 13.
[7] PC 2019-0299, (2019-04-08) C Gaz.
[8] Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHR, 2011, HR/PUB/11/04.
[9] Organisation for Economic Co-operation and Development, "Guidelines" (2019), online, *Organisation for Economic Co-operation and Development* <http://mneguidelines.oecd.org/guidelines/>.

Minister, the Minister has now undertaken to obtain independent legal advice on how best to give the CORE the power to make companies disclose documents and answer questions.

Models Available For The Creation Of The CORE

In my view, while there are a number of ways in which the CORE could have been created, there are three models which I have considered for the purposes of this opinion.

- The appointment of the CORE as a special advisor, as has been done;
- By way of a statute creating the CORE as an ombudsperson and providing for its mandate and powers, which in my view would be the best choice; and
- By way of the appointment of the CORE as a commissioner under the authority of Part I of the *Inquiries Act* as an alternative to legislation;

For the purpose of providing advice on the matters that I have been requested to address, it is useful to review the basic nature of each of these models.

Ombudsperson Models

Introduction

> *The Ombudsman (in original form "jusitieom-budsman", a Swedish word meaning "Procurator for Civil Affairs", but translated loosely as "citizens' defender") is an office typically provided for by a legislative body and headed by an independent public official with power to receive complaints about, inquire into, and report upon, governmental abuses affecting members of the public. Any analysis of the proper investigatory role the Ombudsman is to fulfil must be animated by an awareness of this broad remedial purpose for which the office has traditionally been created.*[10]

There are several different ombudsperson models which are commonly used in both the public and the private sectors. A brief overview of how some of those models operate is warranted. The model that is chosen in any particular circumstance will depend on the requirements of the situation and, frequently, the degree of government involvement. Typically, the ombudsperson

[10] *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 SCR 447 at 450, 14 DLR (4th) 129, Dickson J.

model used in government settings includes the power to compel the production of documents and testimony. The model used in the private sector by industry usually depends on the voluntary cooperation of the entities whose activities are to be examined by the ombudsperson. In the traditional model, whether statutory or voluntary, the ombudsperson has the power to make recommendations but does not have the power to issue binding or enforceable orders. More recently, some ombudsperson-like schemes do involve the power to make binding orders.[11]

A useful overview of the ombudsperson model is found on the website of the Forum of Canadian Ombudsman:

> "An Ombudsman/Ombudsperson assists with the fair and expeditious resolution of complaints in an **impartial, confidential** and **independent** manner. Services are free of charge and the Ombudsman/person is not a representative of the person raising the complaint or the organization being complained about. Depending on how it is has been established, Ombudsman/person roles include:
>
> - The use of informal resolutions for complaints using tools like mediation, negotiation and shuttle diplomacy.
>
> - The use of Inquiries and structured investigations to determine whether a complaint is founded along with the ability to make recommendations to correct unfair situations, both in individual cases and to address systemic issues.
>
> - Assistance with resolving complaints through advice, referral and discussion and by exploring available options.
>
> - Looking for trends and patterns in complaints to identify and make recommendations to address potential systemic issues and seek system-wide improvements to influence positive changes.

In Canada, ombudsman/person [offices] generally operate under three types of mandates:

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[11] Occasionally, Officers of Parliament or a Legislature such as the Access to Information and Privacy Commissioners in Ontario, British Columbia and Alberta are given the power to make binding orders regarding the matters within their mandate. At the Federal level, Bill C-58, which is currently before Parliament, would give the Information Commissioner the power to make binding orders in respect of request for information under the *Access to Information Act*. These offices are not typical of the traditional Ombudsperson model.

Ombudsman/person established by provincial, territorial or federal legislation with strong powers of investigation and structural independence. [Example: provincial and territorial ombudsman/person, some federal ombudsman/person offices].

Ombudsman/person established by policy or terms of reference by both private and public sector organizations. They primarily use various forms of early resolution methods but may also have the power to investigate and the authority to publish annual and special reports. [Example: ombudsman/ombudsperson in universities and colleges, banks, utilities].

Ombudsman/person established by corporate or organizational policy or terms of reference which generally use only facilitative methods for assisting with the resolution of complaints. [Example: employee ombudsman for banks and some federal agencies]".[12]

An ombudsperson that is not created by statute is generally limited to the voluntary cooperation of complainants and those against whom complaints have been made. Participation may be mandated by a regulatory body. An example is the Commission for Complaints for Telecom-Television Services. The Canadian Radio-television Telecommunications Commission has issued regulatory decisions mandating which regulated organizations must be members.[13]

Statutory ombudsperson offices are typically created in order to receive and investigate complaints about the operations of government entities. They typically do not have order making powers.[14] They are confined to reporting on the activities of government and making recommendations, through reports, on individual investigations and annual reports relating to their activities. They may be created to receive and review complaints about government action generally or their mandate may be confined to a single department.

At the federal level, the approach has been to appoint individual ombudspersons for individual departments. An example is the office of the Correctional Investigator, created pursuant to the

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[12] Forum of Canadian Ombudsman, "What is an Ombudsman/Ombudsperson?" (2017), online: *Forum of Canadian Ombudsman* <http://www.ombudsmanforum.ca/en/?page_id=172/>.

[13] Commission for Complaints for Telecom-television Services, "Regulatory and corporate history" (2019), online: *Commission for Complaints for Telecom-television Services* <https://www.ccts-cprst.ca/about-ccts/governance/regulatory-and-corporate-history/>.

[14] But note the comment above at footnote 11.

Corrections and Conditional Release Act[15] with the mandate "to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group".[16] Another example would be the Office of the Commissioner of Official Languages, created pursuant to the *Official Languages Act*.[17] While the Commissioner's mandate is not limited to a specific department, it is directed to matters related to the use of Canada's official languages and includes the investigation of complaints regarding the status of an official language *inter alia* in the administration of the affairs of any federal institution.[18]

Typically, ombudspersons created by statute such as these two examples do have the power to compel the production of documents and to examine witnesses under oath. For instance, during the conduct of an investigation, the Office of the Correctional Investigator has the powers to require the production of documents and to require persons to testify under oath.[19] Similar powers are found in the *Official Languages Act*.[20]

The National Defence and Canadian Forces Ombudsman is not created by statute, but does have quasi-legislative authority underpinning its establishment. According to its website, [21] "The Ombudsman is independent of the military chain of command and senior civilian management, reporting directly to the Minister of National Defence. The Office itself derives its authority from Ministerial Directives[22] and their accompanying Defence Administrative Orders and Directives."[23] The relevant Ministerial Directive contains a provision that no employee shall refuse or fail to assist the Ombudsman. The Ombudsman makes recommendations, which are not binding.

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[15] *Corrections and Conditional Release Act*, SC 1992, c 20.
[16] *Ibid* at s 167 (1).
[17] *Official Languages Act*, RSC 1985, c 31 (4th Supp).
[18] *Idid* at s 58.
[19] *Corrections and Conditional Release Act, supra* note 15 at s 172, 173.
[20] *Official Languages Act, supra* note 17 at s 62.
[21] Canada, National Defence and Canadian Forces Ombudsman, *ANNUAL REPORT 2017-2018*, <http://www.ombudsman.forces.gc.ca/en/ombudsman-reports-stats-reports/2017-2018-annual-report.page>.
[22] National Defence and Canadian Forces Ombudsman, "Ministerial Directives" (2016), online: *National Defence and Canadian Forces Ombudsman* <http://www.ombudsman.forces.gc.ca/en/ombudsman-about-us/ministerial-directives.page>.
[23] National Defence and Canadian Forces Ombudsman, "Defence Administrative Orders and Directives (DAOD)" (2013), online: *National Defence and Canadian Forces Ombudsman* <http://www.ombudsman.forces.gc.ca/en/ombudsman-about-us/defence-admin-orders-directives.page>.

Provincially, the trend has been to appoint an ombudsperson who has a general mandate to receive and investigate complaints about government action, conduct investigations on his or her own motion, make recommendations on specific complaints and report at least annually to the legislature. Such ombudspersons have the power to compel the production of documents, to compel testimony and to examine witnesses under oath. Examples of ombudspersons with this broader mandate can be found in Ontario[24] and in British Columbia.[25]

Summary

The CORE does not fit neatly into any of the models outlined above. While established by government, the CORE does not deal with disputes involving the government. Its mandate is the resolution of disputes involving two parties which are not connected to the government. As such, there is no legislative, quasi-legislative (regulatory) or contractual underpinning for the CORE's authority. It will have to rely solely on the voluntary cooperation of stakeholders, whether industry or NGOs. The CORE does not even have the authority vis-à-vis industry that an internal ombudsperson established by policy or terms of reference would have within that organization.

Commissions Of Inquiry

Introduction

> *Commissions of inquiry are typically created by government to, "make inquiries and report to the government its finding and any related recommendations. The subject of it inquiries and report are established by the government and described in its terms of reference. It has power to carry out its inquiries by requiring persons to testify before the commission and to produce any relevant document. It may only report and recommend. It cannot adjudicate disputes or determine rights".*[26]

At the federal level, the creation of commissions of inquiry is governed by the *Inquiries Act*. Typically a commission of inquiry is created on a case by case basis to inquire into and report on a specific incident of public concern and importance. The inquiry may be advisory in that it is to

[24] *Ombudsman Act*, RSO 1990, c O6.
[25] *Ombudsperson Act*, RSBC 1996 C 340.
[26] Ed Ratushny, *The Conduct of Public inquiries: Law, Policy, and Practice*, Irwin Law Inc, 2009 at 11.

address report on and make recommendations on a policy issue. An example would be the Royal Commission on Bilingualism and Biculturalism in 1967. The inquiry may be investigative in that it is to determine facts and report on a specific incident. An example would be the Air India Inquiry in 2008. In many cases, the inquiry will carry out both functions in that an investigative inquiry is intended not only to address the problem under investigation but also to make recommendations to avoid future problems. Inquiries usually, but not always, address an issue involving government policy or action.

Part I Of The *Inquiries Act*

General

Part I provides that, "The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."[27]

Commissioners have the power to summon witnesses and to require them to give evidence, orally or in writing, on oath or affirmation; and to produce "such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine."[28]

Application To The CORE

The use of coercive powers by a federal commissioner of inquiry as against companies that may for the most part be provincially-regulated does raise a potential constitutional division of powers issue. Counsel for industry stakeholders has certainly expressed that view.[29] Despite the possible risk of challenge, I am of the view however that a commissioner could be appointed under Part 1 of the *Inquiries Act* while respecting the division of legislative powers on the basis that the activities of Canadian companies operating overseas, including those that are provincially-regulated, either relate to human rights and Canada's international commitments in that regard, would exceed the provinces' legislative powers which are territorially-limited, or

[27] *Inquiries Act*, *supra* note 1 at s 2.
[28] *Ibid* at s 4.
[29] Memorandum from Fasken Martineau DuMoulin LLP date December 20, 2018.

would otherwise fall under the general rubric of "the good government of Canada or the conduct of any part of the public business thereof."

On balance, I am of the view that a Court would uphold the jurisdiction of a commission of inquiry created to undertake the mandate currently assigned to the CORE. Care would need to be taken in the drafting of the Order-in-Council appointing the CORE as a commissioner of inquiry.

However, it needs to be recognized that the creation of a commission of inquiry under Part I of the *Inquiries Act* to fulfil the mandate currently assigned to the CORE would be unique. The CORE as a commissioner of inquiry would have an ongoing primary mandate to investigate incidents as they are brought to its attention either by way of a specific complaint or as a result of other information coming to its attention that leads it determine that it is appropriate to initiate an investigation on its own initiative. Commissions of inquiry under Part I are typically time limited with a mandate to investigate and report on a specific incident or series of incidents. As earlier stated, a commission of inquiry would only be a temporary measure pending the passage of legislation.

The one exception that I am aware of was the original Indian Specific Claims Commission which was created in 1991, as an interim measure, as a commission of inquiry under the *Inquiries Act*.[30] The Commission was subsequently given a legislative mandate.[31] At best, that Commission provides an imperfect analogy to the CORE. Its mandate was clearly within federal jurisdiction under section 91 of the *Constitution Act, 1867* and the federal government's exclusive jurisdiction over "Indians, and Lands reserved for the Indians".[32] The jurisdiction of the Commission was tied to the federal government's Specific Claims Policy (1982) and the Commission could only consider matters related to a dispute submitted to it. It did not have a mandate equivalent to the broad pro-active mandate that the CORE has, as currently constituted, to review alleged human rights abuse on its own initiative.

The *Inquiries Act* does not put any limitations on the terms of reference that may be given to a commission of inquiry other than the fact that the inquiry must relate to, "any matter connected

[30] PC 1991-1329, (1991-07-15) C Gaz.
[31] *Specific Claims Resolution Act*, SC 2003, c 23, now the *Specific Claims Tribunal Act*, SC, 2008, c 22.
[32] *Constitution Act*, 1982, s 91.24, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

with the good government of Canada or the conduct of any part of the public business thereof." As Professor Ratushny points out,

> The *Inquiries Act* "delegates" to the government the power to define a commission's jurisdiction through an order in council. This enables the government to give each commission a different mandate tailored to the specific problem to be addressed. This elaboration on the powers granted by the Act has legal effect in specifying the jurisdiction of the commission.[33]

The mandate to review complaints or to initiate complaints as set out in paragraphs (c) through (e) of the current Order-in-Council falls within the inquiry terminology of the *Inquiries Act*. The mediation mandate in paragraph (f) is not inconsistent with an inquiry. Mediation and joint fact finding address methods by which the inquiry may be undertaken. Indeed, the one example of an ongoing inquiry under Part I of the *Inquiries* Act, namely the original Indian Specific Claims Commission discussed above was specifically given two functions: the conduct of public inquiries and the provisions of mediation services to resolve disputes. In my view, in addition to a mandate to review complaints or initiate complaints, a commission could also be instructed, as an ancillary mandate, to fulfil the mandates in paragraphs (a) and (b) of the current Order-in-Council to "promote the implementation of the *UN Guiding Principles* and the *OECD Guidelines*"; and "advise Canadian companies on their practices and policies with regard to responsible business conduct".

Granted, the mandate would be unique, but given the broad discretion given to the Governor in Council, I see no need to restrict the mandate to investigations only, although investigations would be the primary purpose of the appointment. A mediation or joint fact finding approach to the settlement of disputes is not inconsistent with anything in the *Inquiries* Act and could form part of an ancillary or accessory mandate. The proactive and advisory roles are not inconsistent with anything in the *Inquiries Act*. They are all consistent with promoting Canada's and Canadian companies' companies adherence to international standards of responsible business conduct and Canada's commitments in that regard. Care would have to be taken in drafting the terms of reference set out in the Order-in-council, but, in my view, appointing the CORE as a

[33] *Ratushny, supra* note 26 at 24.

commissioner under the *Inquiries Act* with a mandate similar to the one it now has is legally feasible.

Part II of The *Inquiries Act*

Part II provides that the minister presiding over a department, "may appoint, under the authority of the Governor in Council, a commissioner or commissioners to investigate and report on the state and management of the business, or any part of the business, of the department, either in the inside or outside service thereof, and the conduct of any person in that service, so far as the same relates to the official duties of the person."[34]

It is my view that Part II could have no application to the appointment of the CORE, which does not have any mandate to investigate or report on the states and management of the business or Global Affairs or any other department. However, it is worth noting that in at least two instances, ongoing ombudsperson-like positions were created by way of appointments under Part II. I refer to the Correctional Investigator, who was appointed under successive renewals by way of Orders-in-counsel under Part II prior to the statutory provisions creating the office. Similarly, the Communications Security Establishment Commissioner was originally created as an ongoing Part II commission until amendments to the *National Defence Act* were enacted to create the office.[35]

Summary

As noted above, it would be a unique inquiry in terms of its general and ongoing mandate. Care would have to be taken to ensure that the Order-in-Council creating it sets out a solid jurisdictional foundation so as to tie the commission to Canada's signing of the OECD *Declaration on International Investment and Multination Enterprises*[36] and its commitment to

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[34] *Inquiries Act*, *supra* note 1 at s 6.

[35] PC 1973-1431, (1973) C Gaz, appointing Inger Hansen as Correctional Investigator. These appointments were successively renewed until the *Corrections and conditional Release Act* was amended in 2001 to create a permanent office; PC 1996-899, (1996-06-19) C Gaz, appointing the Honourable Claude Bisson as CSE Commissioner. Part II appointments continued until the *National Defence Act* was amended in 2001.

[36] Organisation for Economic Co-operation and Development, "Text of the OECD Declaration on International Investment and Multinational Enterprises" (25 May 2011), online: *Organisation for Economic Co-operation and Development* <http://www.oecd.org/investment/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>.

promote the associated OECD *Guidelines for Multinational Enterprises* as well as its commitment to the United Nations *Guiding Principles on Business and Human Rights*.

As a commission of inquiry, the CORE would have the power to summon witnesses and require the production of documents. It would be confined by the territorial limitations on its jurisdiction both in domestic law (by the fact that the *Inquiries Act* does not have extraterritorial scope) and at international law, but overall it would be a more effective body than the CORE as currently constituted, if there is a question that parties will not fully participate in the process without these coercive powers.

As noted above, it is also my view that, in addition to a primary mandate to review complaints or initiate complaints, a commission could also be instructed to fulfil the mandates in paragraphs (a), (b) and (f) of the current Order-in-Council to "promote the implementation of the *UN Guiding Principles* and the *OECD Guidelines*"; and "advise Canadian companies on their practices and policies with regard to responsible business conduct" as an accessory mandate.

The best way to ensure that the CORE has the necessary powers to compel witnesses and the production of documents would be to enact legislation to establish the CORE. Appointing the CORE as a commissioner under Part I of the *Inquiries Act* could also achieve that objective, while, at the same time, retaining the overall mandate currently envisaged for the CORE.

Discussion Of The Specific Questions To Be Commented On

How Do The Processes And Protections Offered By A Judicial Process Compare With A Commission Of Inquiry Under The *Inquiries Act*?

A commission of inquiry does not adjudicate the rights of the parties before it in the way that a judicial process does. That having been said, a commission of inquiry that is mandated to make findings of fact, including findings of misconduct, is clearly required to act fairly. The closer its mandate resembles that of a Court, the greater the degree of formal procedural protections it is required to afford participants. Given the mandate of the CORE, if it were to be created as a commission of inquiry, it would, in my view, fall on the higher end of the spectrum when conducting an investigation and it would be required to afford participants a full opportunity to

know any allegations made against them and a full opportunity to respond to those allegations and to be heard.[37]

Indeed, sections 12 and 13 of the *Inquiries Act* specifically provide for procedural safeguards for persons whose conduct is in issue.

> *Parties may employ counsel*
>
> **12** The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.
>
> *Notice to persons charged*
>
> **13** No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

In the end, the degree of procedural fairness and the way in which is achieved will depend very much on the nature of the inquiry and the nature of any allegations of misconduct. To quote from Professor Ratushny,

> *The reality is that when reputation is at stake, the principles of fairness results in a hearing that is indistinguishable from a judicial hearing. Also a "finding" of misconduct affecting reputation really amounts to adjudication about conducts, quite apart from any recommendations.*[38]

In my view, whether the CORE is a special advisor, acting as an ombudsperson or as a commission of inquiry, if the end result of an investigation will be a finding of misconduct, the CORE will be held to a high standard of procedural fairness and will have to provide any person whose reputation may be affected a full opportunity to know all of the allegations against them and the evidence supporting those allegations. They must be afforded a full opportunity to answer the allegations. Section 16 of the CORE's mandate requires her to consult with persons that may be adversely affected by her reports prior to these being published, so that they may be given the opportunity to comment, and her reports must contain a summary of their comments.

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[37] In fact, even as currently constituted, if the CORE is conducting an investigation and is likely to make adverse findings against any party, it would likely be held to a high standard of procedural fairness.

[38] *Ratushny*, *supra* note 26 at 288.

What Are The Comparative Advantages And Disadvantages Between A Judicial Process, A Commission Of Inquiry, And A Process Based On An Alternative Dispute Mechanism, Such As Collaborative Dispute Resolution, Including Mediation?

Judicial Process

A judicial proceeding, whether a criminal proceeding or a civil proceeding, is designed to adjudicate rights as between parties – the state and the accused in the case of a criminal proceeding and one or more parties in the case of a civil proceeding. At the conclusion of the proceeding the Court makes a determination and finds either criminal or civil liability. The Court may then order the appropriate sanction, either a criminal sanction or an order binding on the parties to a proceeding.

The Court does not take an active role in the proceedings in the sense that it is up to the parties to present they case as they see fit. In a civil proceeding the plaintiff must prove its case on a balance of probabilities. While the costs of the Court and related support mechanisms are borne by the state, the parties must bear their own costs and may be required, if they are unsuccessful, to reimburse all or part of the costs of the other party.

Commission Of Inquiry

A public inquiry, on the other hand, cannot make findings of criminal or civil liability, but may make findings of misconduct or a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability.[39]

Neither can public inquiries make binding orders. Typically, as discussed above, their final goal is to make recommendations.

Accordingly, if the CORE were constituted as a public inquiry with a mandate similar to that set out in the current Order-in-Council, it could make findings of fact to the effect that a particular

[39] *Canada (AG) v Canada (Commission of Inquiry on the Blood system)*, [1997] 3 SCR 440, 1997 CanLII 323 (SCC).

company acted in a certain manner in its operations and that the way it acted did not respect the internationally recognized human rights of those affected by the activity. The CORE could then conclude that such activity did not respect one or more of the General Policies set out in the *OECD Guidelines for Multinational Enterprises*. As a result, the CORE could make recommendations to the company that it pay compensation to any victims, issue an apology and/or change its practices or take steps to rectify any deficiencies. These would be recommendations only. The CORE would have no power to enforce the recommendations and the victims would have no recourse to enforce the recommendations other than to start a Court proceeding against the company.

Any such proceeding would be a new one in which evidence would have to be led. The findings of CORE would not be binding on the Court and likely would not be admissible evidence, as they would constitute either opinion evidence or hearsay. As noted below, if the CORE were to be created by statute, a provision could be included to specifically provide that the CORE is not a competent or compellable witness.

Unlike a Court, a commission of inquiry can play a more active role in the fact finding process. It can call its own witnesses and undertake its own inquiries. It may be a more cost effective process, for the participants, to the extent that the Commission itself can take on the role of marshalling the evidence, contacting witnesses and seeking out any expert views or opinions that might be needed.

Alternative Dispute Mechanisms

General

Alternative dispute mechanisms are very different from a judicial proceeding or even from a commission of inquiry. Typically they are consensual processes by which the parties agree, by way of a contract, to enter into a process, whether a mediation process or an arbitration process in order to settle a dispute between them The process, if an arbitration, may be governed by a

statute such as the federal *Commercial Arbitration Act*[40] or an equivalent provincial statute such as the Ontario *Arbitration Act, 1991*.[41]

Mediation

Mediation is an attempt to settle a dispute through the active participation of a third party mediator who works with the parties to find points of agreement and assist the parties to enter into an agreement to settle the dispute. The mediator does not impose a solution on the parties, but facilitates an agreement between the parties. Typically there will be a mediation agreement among the parties and the mediator setting out the terms of the mediation and the responsibilities of the parties during the mediation. Settlement is not always reached, in which case the matter may proceed to arbitration or to Court. If a settlement is reached, it is typically reduced to writing and signed by both parties. It then may become a binding agreement between them.

An example of a mediation mechanism that is similar in objective to the current mediation mandate of the CORE would be the IFC/MIGA Compliance Advisor/Ombudsman (CAO).[42] The CAO is the independent recourse mechanism of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) for environmental and social concerns. The CAO is an independent post that reports directly to the President of the World Bank Group. "The mandate of the CAO is: To assist IFC and MIGA in addressing complaints by people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective, and constructive, and to enhance the social and environmental outcomes of IFC/MIGA projects (or projects in which those organizations play a role)."[43] Any individual, group, community, entity, or other party that believes it is affected, or will potentially be affected, by the social and/or environmental impacts of an IFC/MIGA project may make a complaint to the CAO Ombudsman. The CAO does not conduct independent investigations. It receives complaints and acts only in response to a complaint. The CAO does not have the power

[40] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).
[41] *Arbitration Act*, 1991, SO 1991, C 17.
[42] The Office of the Compliance Advisor/Ombudsman, "*How We Work : Ombudsman*" (2009), online: *The Office of the Compliance Advisor/Ombudsman* <http://www.cao-ombudsman.org/howwework/ombudsman/>.
[43] The Office of the Compliance Advisor/Ombudsman, "Operational Guidelines" (April 2007), online (pdf): *The Office of the Compliance Advisor/Ombudsman* <http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

to compel participation in its processes. Participation is voluntary. If an entity refuses to participate the CAO cannot proceed.

Arbitration

Arbitration is a more formal process and is more akin to a Court proceeding. It is the submission of a dispute to an unbiased third party who has been designated by the parties. It is a consensual process. The parties may have agreed ahead of time, for instance in a contract, that any dispute arising under the contract will be resolved by arbitration, or they may agree to enter into an arbitration agreement in order to settle a dispute when it arises. The parties agree to be bound by the decision of the arbitrator.

The rules of the arbitration are determined by an agreement which may involve reference to an arbitration statute, as referred to above. Evidence is usually given, either orally or in writing and the Arbitrator issues a binding decision. Details of the process can be tailored by the parties to suit their needs, but have to be agreed on.

What Provisions Exist – In Statute Or Common Law – To Enable To The CORE To Protect The Privacy And Confidentiality Of The Information That Will Be Received By The CORE In Their Fact-Finding Process? Are There Any Legal Constraints?

As currently constituted, the CORE has a limited ability to promise confidentiality to participants to any inquiry or mediation that it might undertake. This is the case whether the CORE is constituted as a special advisor to the Minister or if the CORE were to be constituted as a commission of inquiry.

As currently constituted, the CORE is part of Global Affairs and would be subject to the provisions of the ATIA[44] and the PA.[45] Any records that it has, whether given to it or created by it, would be subject to disclosure under those Acts, subject to the exemptions that are available. Whether a particular exemption would apply to any particular information would depend very much on the facts of the case. Third Party information, that is information the CORE might receive from a complainant or a party against which a complaint is made, might be exempt

[44] *Access to Information Act*, *supra* note 3.
[45] *Privacy Act*, *supra* note 4.

pursuant to section 20[46] of the ATIA. However, no guarantees can be made and the Third Party is typically required to justify that the information it has provided meets the test set out in this section. Also, subsection 20 (6)[47] provides for exceptions to the prohibition against disclosure in some circumstances that might well apply in situations being dealt with by the CORE.

If the CORE were constituted as a commission of inquiry, it is my understanding that it would be under the auspices of the Privy Council Office. I understand that a commission of inquiry is not subject to the ATIA or PA until after it has completed its work, but once it does, its documents and records go to the Privy Council Office and would be subject to both the ATIA and the PA.

The provisions of the PA would limit the CORE as currently constituted to collecting personal information that relates directly to the inquiry that it is conducting and would limit its use to that purpose. The PA would also require it to protect any personal information and ensure that it is only disclosed on consent or in circumstances that would comply with section 8. Some of these

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[46] 20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[47] (6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if

(a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

issues regarding disclosure could be handled by way of an agreement with the parties involved in the process.

The ATIA is the more problematic issue for the CORE. Unless information clearly falls within the parameters of one or more exemptions, it would have to be disclosed in response to a request under the ATIA. Any refusal to disclose information would be subject to a complaint to the Information Commissioner. The Information Commissioner could then recommend that the record be released and, if it is not, the requestor could bring an application to the Federal Court seeking an order that it be released. If Bill C-58[48] is passed and proclaimed, the Information Commissioner will be able to order the disclosure of the record (proposed section 36.1).

The CORE would not be able to contract out of obligations under either the ATIA or the PA and could not assure participants in any proceeding that it would be able to protect information that they provide to it from disclosure. Any attempt as assurance would always have to be subject to the fact that the ATIA of PA would ultimately take precedence.

Perhaps this could be addressed by enacting amendments to the ATIA such as those found in sections 16.1 through 16.6 which protect information obtained or created during an investigation by a number of statutory bodies as well as by the Secretariat of the National Security and Intelligence Committee of Parliamentarians.[49]

If the CORE were to be created by way of statute, provisions could be included in that statute to exclude information relating directly to an investigation or, at least, to restrict the access to it in order to protect the confidentiality of the process and information received by the CORE.

In addition, statutes creating ombudspersons frequently contain additional provisions mandating that any investigation be carried out in private and that the ombudsperson is only permitted to disclose information in specific circumstances. For instance, subsection 18 (2) of the Ontario *Ombudsman Act* provides that, "Every investigation by the Ombudsman under this Act shall be conducted in private." Section 7.3 requires the Ombudsman to take an oath of secrecy. At the

[48] Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2015-2016-2017 (as passed by the House of Commons December 6, 2017).
[49] Similar provisions are found in sections 22.1 – 22.4 of the *Privacy Act*.

federal level, a typical clause is the one found in subsection 35 (1) of the ATIA which provides, "Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private". In section 62 of the ATIA there is a specific admonition framed as follows: "Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act." Exceptions are made to allow the ombudsperson the discretion to disclose information which he or she deems necessary to carry out the investigation or to make a final report.

Finally, it is not completely clear to what extent information provided to the CORE and the CORE's findings and recommendations would be admissible in any subsequent Court proceeding. For instance, if a community affected by the operations of a Canadian mining company in a foreign territory were to sue that company in Canada, while it is likely that any report of the CORE or evidence from the CORE or CORE staff would be inadmissible as either hearsay evidence or opinion evidence, it is not completely clear what the situation would be. Admissibility would depend very much on the circumstances. It is for this reason that statutes creating ombudsperson offices typically contain clauses similar to that found in section 65 of the ATIA, "The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom."

In the same vein, a statute creating an ombudsperson usually contains a provision similar to sections 66 and 67 of the ATIA:

Protection of Information Commissioner

> 66 (1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance

or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

(2) For the purposes of any law relating to libel or slander,

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged; and

(b) any report made in good faith by the Information Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

Given the nature of the issues that the CORE may be called on to deal with, it would seem to be important to provide it with similar protections.

If The CORE Was Appointed As A Commissioner Of Inquiry, What Sections Of The *Charter* Could Possibly Be Engaged In Their Conduct Of An Inquiry? What Would The CORE Need To Do To Ensure That The *Charter* Was Not Infringed And/Or That This Infringement Was Justified In The Circumstances?

Section 7 of the *Charter* provides that, everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. While a commission of inquiry cannot deprive an individual of their life or liberty, it can make findings of misconduct which may amount to interference with security of the person.[50] Regardless of whether section 7 applies or not, as discussed above, such a Commission will be held to the highest standards of procedural fairness. This really is the equivalent to the protections afforded by section 7.[51]

Section 8, guaranteeing right to be secure against unreasonable search or seizure would apply to the CORE as a commission of inquiry. It does not have the power to search, but if the CORE were to issue a summons, either to compel testimony or to compel the production of documents, the person to whom the summons is directed could move to quash it on the basis that the request is unreasonable. The general power of a commission of inquiry to issue a summons is not

[50] *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 where the majority held that reputation represents an underlying value protected by the *Charter* but that an intrusion on reputation would not generate the protection of section 7.

[51] *Ratushny*, *supra* note 26 at 267-269. Professor Ratushny has a lengthy discussion of the application of section 7 to Commissions of inquiry and concludes that it has very limited application.

contrary to section 8.[52] A particular summons in particular circumstances may be contrary to section 8, depending on the circumstance. However, counsel for the MAC and the PDAC has raised the question of whether, in the circumstances, a summons issued by the CORE might engage section 8. They refer to the Supreme Court of Canada decision in *British Columbia Securities Commission v. Branch*[53] in which the Court found that Section 128(1) of the *Securities Act* did not violate s. 8 of the *Charter* because the Act is essentially regulatory legislation designed to protect the public and discourage detrimental forms of commercial behaviour. It found that, "persons involved in the securities market, a highly regulated industry, do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation". Can the same be said for the underlying mandate of the CORE if it were constituted as a commission of inquiry or even as a legislative body? A full analysis of this concern is beyond the scope of this opinion, but on balance, it is my view that the issue is closely intertwined with the jurisdiction of the federal government to establish the CORE.

Section 13, which guarantees that a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence, would clearly apply to the CORE as a commission of inquiry or as a statutory body. In addition to the *Charter* protection afforded a witness, if the CORE were to be constituted by statute, a provision similar to subsection 36 (3) of the ATIA, which provides, "Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a Court or in any other proceedings."

[52] In *Del Zotto v Canada*, [1999] 1 SCR 3, the Supreme Court of Canada considered section 231.4 of the *Income Tax Act*, RSC 1985, c. I which provides that a hearing officer appointed under that section has all the powers conferred on a commissioner by sections 4 and 5 of the *Inquiries Act* and that may be conferred on a commissioner under section 11 thereof. The Court found that section 231.4 did not violate sections 7 and 8 of the *Charter*.
[53] *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3, 1995 CanLII 142 (SCC).

Conclusions

Whether the CORE should have the power to compel witnesses or documents is a question of policy. However, it is fair to say that without a way to compel the cooperation of entities against which a complaint is made or others who may hold relevant information, the CORE's effectivenessmay be compromised. On the other hand, a process which includes powers to compel runs the risk of becoming overly confrontational and caught up in procedural wrangling and Court challenges.

Based on the discussions during my meetings with representatives of industry and NGOs it is obvious that they have very different visions of how the CORE should be constituted. Industry will be unhappy if the CORE is given the power to compel witnesses and evidence and the NGOs are equally unhappy with the current structure and mandate of the CORE.

What struck me most from the discussions that I did have with representatives of industry and the NGOs is that they were both focussed on the outcomes. There was a consistent view that the most important consideration should be that, at the end of the day, the process used and the work of the CORE should result in real change on the ground and an outcome that would be sustainable and promote long term compliance with the *UN Guiding Principles* and *OECD Guidelines*. They differed on how that would best be achieved.

The industry representatives were concerned that a formal investigative process with powers to compel the production of documents and witnesses would make the process overly legalistic and divide the parties, so that collaborative solutions would be much harder to achieve. Counsel for MAC and PDAC also reiterated the legal concerns which they set out in the correspondence noted above. They again expressed the view that there would be powerful reputational interests at stake that would cause an entity being investigated to cooperate with the CORE in order to mitigate those reputational risks. They were also concerned that having an oversight body with the powers of compulsion could compromise their relations with foreign governments and entities and in fact make their dealings with them more difficult.

The CNCA and its counsel reiterated their view that the CORE should be created by way of legislation with the powers and protections that are typically afforded to statutory ombudspersons. They also reviewed the various reasons why they are of the view that the CORE

could also be appointed as an ongoing commission under the *Inquiries Act*. While they agreed that it would usually be in the interests of a party being investigated to cooperate with the CORE, they were of the view that the effectiveness of the CORE would be compromised if it did not have the option of compulsion at its disposal.

Frankly, it is my view that all of the concerns expressed by industry and the NGOs are valid concerns. The CORE will be a unique entity undertaking a unique role and mandate and it may well take some time and experience to determine the approach that will best achieve the objectives of the government is creating the CORE.

My mandate is to provide advice to the Minister regarding how best to equip the CORE with sufficient tools to engage in credible and effective investigations of alleged human rights abuse and to ensure that she has powers to compel witnesses and documents.

In my view, it is clear that the only ways to vest the CORE with the power to compel witnesses and documents is to either create it by statute or to appoint the CORE as a Commissioner under the *Inquiries Act*. From a legal standpoint, it is my view that a body created by statute would be the preferable of the two approaches. The statute would create permanence and many of the issues regarding confidentiality, immunity, use of evidence in other proceedings and details regarding powers and procedures could be more easily delineated than in an Order-in-Council appointing a Commissioner. As I have already stated, any commission of inquiry should only be a temporary measure pending legislation.

I thank you for the opportunity to assist the Minister and Global Affairs with this matter. I am available to discuss this opinion, elaborate on any points and answer questions.

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