Canada's National Contact Point for the OECD Guidelines: An Ineffective Human Rights Mechanism

Catherine Coumans
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Background

All 52[1] governments adhering to the OECD Guidelines for Multinational Enterprises for Responsible Business Conduct (OECD Guidelines) have set up a National Contact Point for Responsible Business Conduct (NCP) where complaints about corporate violations of these OECD Guidelines can be brought. Canada's NCP was established in 2000.

Since 2000, 32 complaints[2] have been brought to the Canadian NCP. Of these 32 complaints 23 were brought against Canadian mining multinationals. This is particularly striking as since March of 2021, the Canadian Ombudsperson for Responsible Enterprise (CORE) also has received complaints against Canadian mining companies. Of the most recent six cases filed with the NCP, four were brought against Canadian mining companies.

Unlike the NCPs of other countries discussed below:

- **Canada's NCP is not independent of Government**. It is housed in Global Affairs Canada (GAC), which also chairs the NCP with Natural Resources Canada as the Vice Chair, and includes six other government departments forming an NCP committee.[3] The Chair is usually a Director General from the International Trade and Investment division of Global Affairs Canada. This is the branch of GAC that is tasked with implementation of Canada's international trade policies and strategies and promoting and protecting Canadian overseas investments.

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[1] These include 38 OECD member countries, plus 14 non-member countries who adhere to the OECD Guidelines.

[2] The Canadian NCP calls these complaints "specific instances" and the party bringing a complaint the "notifier."

[3] NCP committee members are: Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), Environment and Climate Change Canada (ECCC), Employment and Social Development Canada (ESDC), Department of Finance Canada, Innovation Science and Economic Development Canada (ISED), Public Service and Procurement Canada (PSPC).

- **Canada's NCP does not conduct independent investigations of complaints.** Rather, at its discretion, the NCP may choose to offer its "good offices" to help parties resolve disputes through facilitated dialogue or mediation. The NCP says that over half of all cases, in which it offered mediation, resulted in constructive engagement or some form of agreement between the parties. It does not say whether the issues raised by the complainants were addressed or whether alleged harm was remedied.
- **Canada's NCP does not make findings of fact about whether a company has breached the OECD Guidelines.** As the NCP does not conduct independent investigations, it also does not make findings of fact regarding a complainant's charge that a company has breached the OECD Guidelines.
- **Canada's NCP does not make recommendations regarding remedy for harm done.** As the NCP does not conduct independent investigations and does not make findings of fact as to whether or not the company breached the OECD Guidelines, it also does not make recommendations for the provision of remedy for harm endured by the complainants.

It is significant that there is nothing in the OECD Guidelines "Procedures" for NCPs[4] that restrict the Canadian NCP from: being more independent from the Government of Canada; conducting independent investigations into complainants' allegations; making findings of fact; or recommending remedy for harm done. Other NCPs have been showing leadership in these areas as discussed in the next section.

As the NCP is a state-based mechanism, it is a matter of **political choice** that the Canadian NCP has not adopted more effective procedures over its 25-year existence. There have been many opportunities, since 2000, for the NCP to have taken external advice it received from authorities to reform its practices as NCPs in other countries have done (See Appendix).

It is because Canada's NCP has refused steadfastly to reform into a more effective non-judicial mechanism that Canadian civil society organizations, via the Canadian Network on Corporate Accountability,[5] advocated for over 10 years for the creation of the Canadian Ombudsperson for Responsible Enterprise to fulfill the necessary corporate accountability functions not carried out by the NCP.

In addition to the deliberate choice of the Government of Canada not to create a more effective NCP, the NCP has also been **accused of bias against complainants**[6] in its handling of specific cases. This, among other things, has led to a **loss of trust** by Canadian civil society in the NCP.

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[4] See starting on page 58 of the OECD Guidelines. https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf

[5] MiningWatch Canada is a founding member of the CNCA and has served on the Steering Committee since the CNCA was founded in 2005.

[6] For more on this issue see: Statement from OECD Watch and MiningWatch Canada regarding the Canadian NCP's improper handling of the OECD Guidelines specific instance Bruno Manser Fonds vs Sakto Group. July 26, 2018.

Leadership countries create more effective National Contact Points

Various countries have evolved the mandates of their NCPs to address the shortcomings that the Canadian NCP has failed to overcome.

Independence from government - At least 11 NCPs are not housed within a Ministry "focused on economics, trade, or investment to limit risk of real or perceived conflict of interest."[7] For example, the NCPs of Australia, Denmark, Lithuania, The Netherlands and Norway all have independent governance structures; structures involving an independent expert panel, or a roster of individual experts that handle complaints (as in the case of Australia).[8]

Conducting independent investigations - Among other countries, the NCPs of Norway, The Netherlands,[9] the United Kingdom, and Australia may conduct independent investigations of complaints they receive. Note that a flaw these NCPs share with Canada's CORE is that none of these NCP's have formal investigatory powers to compel evidence or witness testimony.

Making findings of fact regarding a breach of the OECD Guidelines - At least 13 NCPs will make determinations that a company has failed to observe specific provisions of the OECD Guidelines.

Making Recommendations regarding remedy for harm done - Many countries, including Canada, will make general recommendations in their final statements. In cases in which a company does not concede voluntarily that it has breached the OECD Guidelines, or agree to provide some form of remedy for harm it has done without conceding a breach of the OECD Guidelines, only those NCPs that have made a finding of fact, or determination, that a company has breached the OECD Guidelines and caused harm, can request that that company provide remedy for the harm done.

Lack of Trust in the Canadian NCP

In 2018, the NCP's ongoing failure to reform itself led the UN Working Group on Business and Human Rights to note in its country report on Canada that the NCP "was perceived by stakeholders as potentially not fully independent given that it was within a ministry that was responsible for promoting overseas trade and investment. Stakeholders also noted that the National Contact Point had no external advisory or oversight body. (...) it was highlighted to the Working Group that the **lack of confidence of**

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7 OECD Watch. 2025. NCP Evaluations. https://www.oecdwatch.org/indicator/

8 Catherine Coumans, Canada's National Contact Point: Long Overdue for an Overhaul. Prepared in the context of 2020-2021 NCP consultations, MiningWatch Canada. October. 2020. https://miningwatch.ca/sites/default/files/brief_on_ncp_reform_october_7_2020.pdf

9 Sander van't Foort, Tineke Lambooy and Aikaterini Argyrou, The effectiveness of the Dutch National Contact Point's specific instance procedure in the context of the OECD Guidelines for Multinational Enterprises, 2020 16-2 *McGill Journal of Sustainable Development Law* 191, 2020 CanLIIDocs 3664, https://canlii.ca/t/t30s.

civil society in the National Contact Point was apparent, which might have limited the number of cases brought before it" (emphasis added).

In 2019, the OECD NCPs' Peer Review of the Canadian NCP found that: "The NCP has been making various efforts to respond to learnings and improve its functioning in recent years. Despite these efforts, there is a **lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders**. Rebuilding this trust and ensuring continued coherence on RBC across the government of Canada will be central to ensuring the effectiveness of the NCP going forward" (emphasis added).

In 2020, MiningWatch Canada made a submission to the NCP noting that "the NCP has ignored repeated requests to include civil society organizations among its "social partners," along with business and labour, as modelled by the OECD Working Party on Responsible Business Conduct, which recognizes three stakeholders: OECD Watch, Business at OECD (BIAC) and the Trade Union Advisory Committee (TUAC). The ongoing exclusion of civil society from the NCP's social partners is an indicator of the troubled relationship that the NCP has with Canadian civil society – one that the NCP again seems uncompelled to repair."[10]

The Sakto Case - A key unresolved factor in the ongoing lack of trust in Canada's NCP is the way the NCP itself directly harmed a complainant, the Swiss-based NGO the Bruno Manser Fonds (BMF). To date the NCP has failed to remedy that harm. In 2021, this case led OECD Watch, with support from MiningWatch Canada, to file a complaint, called a Substantiated Submission, against Canada's NCP with the OECD Investment Committee: only the second time such a complaint had been filed against an NCP. After reviewing the complaint the OECD Investment Committee concluded, in 2022, that the Canadian NCP's handling of the Sakto complaint: lacked transparency and limited its own accountability; was not fully equitable; contributed towards a perception of lack of impartiality; lacked predictability; was not fully compatible with the Procedural Guidance set by the OECD Investment Committee. The Investment Committee also addressed OECD Watch's concern that the NCP's handling of the complaint had caused harm to BMF. The Investment Committee recommended that the Canadian NCP "should follow up with the parties to seek clarity regarding OECD Watch's reports and take any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance." The harm done to the Bruno Manser Fonds has not been addressed by the Canadian NCP.

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[10] OECD Watch and MiningWatch Canada. 2022. Proposed Revisions to National Contact Point Procedures Again Fall Short of Necessary Reforms: Response by MiningWatch Canada and the OECD Watch to Proposed Revisions of NCP Procedures. Catherine Coumans and Marian Ingrams. May. https://miningwatch.ca/sites/default/files/feedbackncpproposedrevisedproceduresmay2020220_0.pdf

Appendix: A Long History of the NCP's Resistance to Recommendations to Reform[11]

2005 - In 2005, the parliamentary Standing Committee on Foreign Affairs and International Trade observed that "the government must clarify, formalize and strengthen the rules and the mandate of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and increase the resources available to the NCP to enable it **to respond to complaints promptly**, to **undertake proper investigations**, and **to recommend appropriate measures against companies** found to be acting in violation of the OECD Guidelines" (emphasis added).

2007 - In 2007, noting the failure of the NCP to adequately address complaints against Canadian extractive companies, particularly in regard to fact-finding and investigations "in line with the approach utilized by several other OECD countries,"[12] civil society and industry participants on a Government of Canada's Advisory Group aligned "on the need for an ombudsman to be established."[13] "The Advisory Group was strongly of the view that the ombudsman model discussed in the recommendation - "an independent ombudsman office, mandated to provide advisory, fact-finding and reporting functions" - was the best way to advance CSR compliance in the extractive sector."[14]

2016 - In 2016, OECD Watch, MiningWatch Canada and Above Ground issued a **report** on the 15th anniversary of Canada's NCP listing the NCP's continued failings, namely that: "The NCP lacks independence; The NCP is opaque; The process involves unjustified delays; The NCP applies a high threshold for accepting complaints; The NCP does not make findings on whether companies have breached the Guidelines; The government penalty for companies that don't participate has proven to be ineffective in promoting compliance with the OECD Guidelines for Multinational Enterprises; The process rarely concludes with an agreement or recommendations and there are no effective follow-up procedures in place; In over fifteen years of existence, the NCP has consistently failed to provide notifiers with effective remedy."

2018 - The NCP's ongoing failure to reform itself may have led the **UN Working Group on Business and Human Rights** to note in its country report on Canada that the NCP "was perceived by stakeholders as potentially not fully independent given that it was within a ministry that was responsible for promoting overseas trade and investment. Stakeholders also noted that the National Contact Point had no external advisory or oversight body. (...) it was highlighted to the Working Group that the lack of confidence of civil society in the National Contact Point was apparent, which might have limited the number of cases brought before it."

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[11] *Ibid.*

[12] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report. 29 March 2007. p. 22. https://miningwatch.ca/sites/default/files/rt_advisory_group_report.pdf

[13] *Ibid*. p. 23.

[14] *Ibid.*

2019 - The **OECD NCPs' Peer Review** of the Canadian NCP found that: "The NCP has been making various efforts to respond to learnings and improve its functioning in recent years. Despite these efforts, there is a lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders. Rebuilding this trust and ensuring continued coherence on RBC across the government of Canada will be central to ensuring the effectiveness of the NCP going forward." The peer review highlighted concerns raised about the Sakto case in particular, but situated the failures in a broader context, noting that "[s]ome stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCPs application of the initial assessment criteria was onerous. In this respect stakeholders referenced various cases not accepted for further examination at the initial assessment stage for reasons they believed to be outside the scope of the initial assessment criteria." The peer reviewers also found that: "A lack of formal involvement of social partners and external stakeholders in the NCP's governance arrangements contributes to the perception of lack impartiality with respect to the NCP." Civil society is not among the NCP's social partners, and despite numerous requests that this be remedied, the NCP has to date not created a formal role for civil society partners.

2021 - MiningWatch supported OECD Watch in filing a Substantiated Submission with the OECD Investment Committee regarding the case of Bruno Manser Fonds vs. Sakto. The Substantiated Submission is only the second filed against an NCP. It maintains that the Canadian NCP's handling of the complaint from 2016 to 2018 was highly irregular in ways contrary to the OECD Guidelines' "guiding principles for specific instances" and core criteria for NCPs, and was prejudicial to the civil society notifier in ways that continue to harm the notifier.

2022 - After reviewing the complaint brought by OECD Watch in 2021, the OECD Investment Committee concluded, in 2022, that the Canadian NCP's handling of the Sakto complaint: Lacked transparency and limited its own accountability; Was not fully equitable; Contributed towards a perception of lack of impartiality; Lacked predictability; Was not fully compatible with the Procedural Guidance set by the OECD Investment Committee. The Investment Committee also addressed OECD Watch's concern that the NCP's handling of the complaint had caused harm to the Bruno Manser Fonds. The Investment Committee recommended that the Canadian NCP "should follow up with the parties to seek clarity regarding OECD Watch's reports and take any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance." The harm done to the Bruno Manser Fonds remains unaddressed by the Canadian NCP.