



Submission to Canadian Ombudsperson for Responsible Enterprise Review Committee

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Catherine Coumans, Ph.D.

Summary

I submit these comments for [MiningWatch Canada](#) as a participant in the Government of Canada's multi-stakeholder Advisory Group to National Corporate Social Responsibility Roundtables in 2006-2007. The roundtable process identified the need for the creation of an "independent ombudsman" to receive "complaints against Canadian companies."¹ The proposal for an "ombudsman or independent investigative body to address and/or investigate complaints regarding the activities of the Canadian extractive industry in developing countries" was discussed in both Open Sessions and Issue Focus Sessions, where it received "strong support" and was ultimately put forward as a consensus recommendation from the Advisory Group in the March 2007 [Final Report](#).²

MiningWatch also submits these comments as a founding member of the Canadian Network on Corporate Accountability ([CNCA](#)) where we have played a leadership role on the Steering Committee since the CNCA's inception in 2005. CNCA represents more than 40 Canadian organizations representing more than 3 million Canadians from, among others, faith-based, labour, development and human rights sectors.

For over a decade, both MiningWatch Canada and CNCA advocated for the creation of the ombudsperson office; from the time this office was recommended in the 2007 Final Report of the government's multi-stakeholder Advisory Group until the [announcement](#) of the creation of the Canadian Ombudsperson for Responsible Enterprise (CORE) in 2018.

MiningWatch recognizes that the need for the CORE is as great as ever it has been.

However, to be both effective and trusted the CORE must align with the [Venice Principles](#) and the [UN Guiding Principles](#) on Business and Human Rights. In particular it should:

- be granted the investigatory powers to compel documents and witness testimony – as originally committed to by the Government of Canada;
- be independent from government;
- be adequately funded, with funding not subject to arbitrary reduction.

¹ Advisory Group Report. National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries. pp. vi-vii.

https://miningwatch.ca/sites/default/files/RT_Advisory_Group_Report.pdf

² *Ibid.* pp. 20-24.

Context

CSR Counsellor - It took two years before the Government of Canada responded to the CSR Roundtables Final Report recommendation for the creation of an ombudsman. However, rather than an ombudsman, an extractive sector CSR Counsellor was established in 2009. Marketa Evans held the position for four years before resigning suddenly in October 2013. Her weak mandate all but guaranteed her ineffectiveness. The CSR Counsellor was not empowered to investigate complaints, nor to report out on whether or not a company had breached standards set by the Government of Canada in its [CSR Strategy](#) of 2009 (updated in 2014). In response to complaints received, Ms. Evans could only offer dispute mediation, which was contingent on voluntary participation of the company in question.

Companies made use of the voluntary nature of the office to walk away from participation in the process and invitations of mediation with no consequences. Of six complaints filed against mining companies, none resulted in mediation, none addressed the issues raised by mining-affected communities. Three cases ended before they began when mining companies Excellon Resources, McEwen Mining, and Silver Standard Resources turned their backs on the process. In a case brought against First Quantum Minerals' mine in Mauritania, Ms. Evans suggested the complainant use a local project-level grievance mechanism. She closed another case against Golden Arrow Resources, at the end of September 2013, due to communications problems with the Indigenous Argentinean complainants.³

The office remained vacant for over a year until March 2015 when Jeffrey Davidson was appointed. Davidson had a long history of working for mining multinationals. He was never given a new Order in Council mandate. His time in the office was marked by lack of transparency regarding his activities, which appeared to be mainly responsive to requests for assistance from mining companies. A news article of November 2016 noted: "The CSR counsellor's primary responsibility now, as dictated by the government's 2014 Enhanced Corporate Social Responsibility Strategy, is to sit down with extractive company executives and advise them on following the CSR principles outlined in the strategy...The counsellor also serves as an informal mediator when trouble is brewing at a foreign mine, oil, or gas extraction site... Mr. Davidson agreed that his office isn't designed to handle after-the-fact investigations into physical harm that comes from clashes between a community and a company."⁴ There is no evidence that Mr. Davidson addressed any complaints brought by communities. His mandate ended in 2018 when the creation of the CORE was announced.

CORE - Between March of 2007, when the CSR Roundtables Final Report recommended the creation of an ombudsman, and the announcement of the Canadian Ombudsperson for Responsible Enterprise in January 2018, global understanding of the problem of effective impunity of many multinationals – also described as the "governance gap" – had evolved

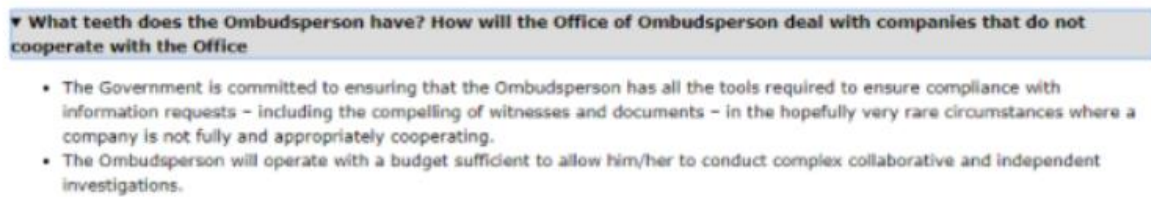
³ Catherine Coumans. *The Federal CSR Counsellor Has Left the Building - Can we now have an effective ombudsman mechanism for the extractive sector?* 1 November 2013. MiningWatch Canada
<https://miningwatch.ca/blog/2013/11/1/federal-csr-counsellor-has-left-building-can-we-now-have-effective-ombudsman>

⁴ Peter Mazereeuw. *Under fire, Canada's CSR counsellor shows his work.* November 9, 2016. The Hill Times.
<https://www.hilltimes.com/story/2016/11/09/canada-csr-counsellor/223007/>

significantly. As had the understanding that states have a duty to protect human rights – including those of global individuals affected by home state-based multinationals⁵ – and corporations have a responsibility to respect human rights.⁶ The role of both judicial and non-judicial avenues to provide access to remedy in the home states of multinationals, for those alleging harm caused by its multinationals overseas, has been more clearly defined in the decade between 2007 and 2018.

Investigatory Power to compel evidence - In the years of advocacy by MiningWatch Canada and the CNCA for the creation of an effective ombudsperson, the requirement that the ombudsperson be empowered to compel evidence, when necessary, in its independent investigations was always at the forefront. Years of experience with Canada’s National Contact Point for the OECD Guidelines (more below) and the CSR Counsellor have made it abundantly clear that if a non-judicial mechanism does not have this investigative power it cannot make substantiated findings of fact that are necessary to move beyond the stalemate created by corporate non-participation in these non-judicial processes, and to move beyond corporate denial of harm done, to arrive at the possibility of remediation of harm.

Before the CORE was announced in January 2018, the Government of Canada had come to understand and agree, both that it was possible to provide the CORE with the power to compel evidence and witness testimony (a power other ombuds offices in Canada enjoy), and that this was necessary. Despite its explicit and public commitment, the government subsequently bowed to industry pressure so that the Order in Council mandate of Sheri Meyerhoffer, appointed to the position in April 2019 as a Special Advisor to the Minister of International Trade Diversification, failed to include the promised powers to compel evidence.



Screenshot taken after the January 2018 announcement of the CORE shows the government’s commitment to provide the office with the power to compel witnesses and documents.⁷

The CNCA has provided useful legal briefs answering questions in regard to: the role of the CORE’s investigatory powers in relation to the Canadian Charter of Rights and Freedoms, and the Powers of Commissioners under the Inquiries Act;⁸ important protections to individuals and

⁵ Catherine Coumans. *Canada’s Mining Dominance and Failure to Protect Environmental and Human Rights Abroad*. 14 February 2023. MiningWatch Canada. pp. 9-10.

<https://miningwatch.ca/sites/default/files/backgroundbriefcanadasroleinminingabuseabroadfebruary142023.pdf>

⁶ United Nations. *Guiding Principles on Business and Human Rights*. 2011.

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁷ Canadian Network on Corporate Accountability. *A brief history of the Canadian Ombudsperson for Responsible Enterprise (CORE)*. 23 March 2020.

⁸ Law Offices of Erin Simpson. *The Canadian Ombudsperson for Responsible Enterprise, the Canadian Charter of Rights and Freedoms, and the Powers of Commissioners under the Inquiries Act*. 31 October 2018. <https://cnca-rcrce.ca/wp-content/uploads/2020/03/QA-1-The-CORE-the-Inquiries-Act-and-the-Charter.-31oct2018.pdf>

companies against infringements on their rights by all laws or government action, including the CORE;⁹ the Canadian Ombudsperson for Responsible Enterprise and investigative powers.¹⁰

In the years since the appointment of Ms. Meyerhoffer as ombudsperson, there have been numerous statements, including from UN bodies,¹¹ regarding both the desirability and the feasibility of providing the CORE with the necessary investigatory powers to compel evidence. See, among others:

- 10 September 2019 – [Minister Carr](#) in a letter to CNCA:
“I have concluded that the most effective way to ensure the Ombudsperson has the tools they need would be to enact a stand-alone framework for the office, including stipulating its powers to compel documents, witnesses, and other key testimony. To this end I have asked my officials to begin the work required to pursue such a legal framework.”
- 2019 – Independent legal report, [the McIsaac Report](#), commissioned by Minister Carr:
“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...*it is fair to say that without a way to compel the cooperation of the entities against which a complaint is made or others who may hold relevant information, the CORE’s effectiveness may be compromised.*” (emphasis added) Pp 4-5, 28.
- June 2021 - a majority of the members of the [Subcommittee on International Human Rights](#) recommended that the CORE be given the power to compel witnesses and documents:
“That the Governor in Council appoint the Canadian Ombudsperson for Responsible Enterprise as a commissioner pursuant to Part I of the Inquiries Act. The Subcommittee recommends this appointment remain in place until legislation establishing the Canadian Ombudsperson for Responsible Enterprise with the power to compel witnesses and documents has been adopted by the Parliament of Canada.” p. 3.
- 24 May 2023 – Expert opinion from [Dr. Chris Gill](#) in regard to alignment of the CORE’s mandate with the [Venice Principles](#) on the protection and promotion of ombuds offices:

⁹ Law Offices of Erin Simpson. *The Canadian Ombudsperson for Responsible Enterprise and Particular Provisions of the Charter*. 31 October 2018. <https://cnca-rcrce.ca/wp-content/uploads/2020/03/QA-2-Particular-Charter-provisions-and-the-CORE.pdf>

¹⁰ Law Offices of Erin Simpson. *The Canadian Ombudsperson for Responsible Enterprise and investigative powers*. 31 October 2018. <https://cnca-rcrce.ca/wp-content/uploads/2020/03/QA-3-The-CORE-and-Investigative-Powers.pdf>

¹¹ See for example the 2023 [statement](#) of UN Special Rapporteur, Tomoya Obokata.

“The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential.” Venice Principle 16, set out under 4.11 of Gill’s report.

- 25 May 2023 – Expert opinion from [Dr. Jennifer Zerk](#) in regard to alignment of the CORE’s mandate with provisions regarding independence of State-based non-judicial grievance mechanisms under “Pillar 3” of the UN Guiding Principles on Business and Human Rights:

“Established through secondary (or “delegated”) legislation, the office of the CORE is more vulnerable to alteration or cancellation – for instance, as a result of a change of government or changing political priorities – than would be the case had it been created through primary legislation. (...) There is potential for tension between (a) the CORE’s role as part of a government department focussed on trade promotion, and (b) its role as guardian of international standards on responsible business and as a grievance mechanism for business-related human rights abuses, which may prove difficult to navigate in practice. (...) The CORE’s lack of binding powers of investigation increases its reliance on other sources of information, including governmental sources, with obvious implications for its ability to act on its own initiative. (...)The CORE’s ability to only make recommendations, as opposed to binding directions (e.g. with respect to a company’s eligibility for future trade services and support), further erodes its leverage with respect to both government and business actors...” 3.1.1 Foundational issues.

- 26 March 2024 – After five years of experience the [ombudsperson](#) herself made a strong statement regarding the office’s need for powers to compel evidence:

“Government can and should better equip the CORE to fulfill its mandate to promote and ensure responsible enterprise on the part of Canadian companies operating outside of Canada. In particular, the CORE should be granted the ability to compel documents and testimony from the companies it investigates.” (emphasis added).

Trust in the Ombudsperson – There is a direct correlation between the CORE’s mandate – for example its degree of independence and the powers and funding it is granted to carry out its duties effectively – and public trust in this office. The omission of the powers to compel evidence from the Order in Council mandate of the CORE, as well as its lack of independence from the Government of Canada, created a significant trust deficit from the moment the first ombudsperson was installed. This lack of public trust, reflected in the CNCA’s “[Approach with Caution](#)” document, contributed to a significant lag in the submission of complaints.

However, the content of the CORE’s public Initial Assessment reports, the CORE’s initiation of some eight independent investigations, the completion and publication of the CORE’s only, but strong, final report based on an independent investigation, as well as the CORE’s strong public statement in regard to the need for powers to compel evidence, were all positive signs of the

ombudsperson's commitment to her mandate as a human rights ombudsperson in regard to the extractive and garment sectors.

For that reason, the sudden removal of the ombudsperson, Sheri Meyerhoffer, from her position – the non-renewal of her contract – is a serious reason for concern. The fact that this happened without any prior communication from her, or from the Minister for International Trade, even with parties who had complaints filed with the CORE at various stages of assessment, is troubling.

National Contact Point (NCP) for the OECD Guidelines – In 2007, when the Advisory Group to the CRS Roundtables came to the unanimous decision to call for the creation of an ombudsman to receive and investigate complaints in regard to Canadian extractive sector companies' activities overseas, the NCP had been operational for seven years. The decision to recommend the creation of an ombudsman office came out of discussions that acknowledged the existence of the NCP, but also noted its lack of effectiveness.

Unlike some other NCPs, the Canadian NCP does not provide independent investigations of complaints and does not make determinations about whether companies have violated the OECD Guidelines. Over its 24-year history, the NCP has failed to take advantage of numerous opportunities to reform itself into a more effective mechanism. As early as 2005, a report from the Standing Committee on Foreign Affairs and International Trade (SCFAIT), endorsed by all parties, chastised the NCP for failing 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.”¹² In the two decades since the SCFAIT report, the NCP has repeatedly ignored constructive criticism from NGOs,¹³ from peer reviewers,¹⁴ and from UN agencies.¹⁵ Even the least consequential recommendation made to the NCP – a request to include civil society (NGOs) as a social partner alongside industry and labour – has not been followed up on by the NCP.

Canada's NCP is one of only two against which a formal complaint was filed by OECD Watch with the OECD Investment Committee for serious mishandling of a complaint and harming the

¹² House of Commons. Canada. 2005. *Mining in Developing Countries: Corporate Social Responsibility*. Standing Committee on Foreign Affairs and International Trade, 14th Report. 38th Parliament, 1st Session. <https://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14/>

¹³ Coumans, Catherine, and Marian Ingrams. 2022. “2022 Proposed Revisions to National Contact Point Procedures Again Fall Short of Necessary Reforms.” *MiningWatch Canada and OECD Watch* (blog.), May 22, 2022. <https://www.miningwatch.ca/blog/2022/5/20/proposed-revisions-national-contact-point-again-fall-short-necessary-reforms>; Above Ground, MiningWatch Canada, OECD Watch. 2016. ‘Canada is back.’ *But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprise*. MiningWatch Canada. https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf

¹⁴ OECD. 2019. *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: CANADA*. <https://mneguidelines.oecd.org/Canada-NCP-Peer-Review-2019.pdf>

¹⁵ UN Working Group on Business and Human Rights. 2017. *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights*. United Nations Media Center, June 1, 2017. <https://www.ohchr.org/en/statements/2017/06/statement-end-visit-canada-united-nations-working-group-business-and-human?LangID=E&NewsID=21680>

interests of the complainant in the process.¹⁶ In September 2022, the OECD Investment Committee found that:

“certain actions of the Canadian NCP lacked transparency and limited its accountability...In certain steps of the specific instance process, the Canadian NCP did not ensure a fully equitable process and contributed towards a perception of a lack of impartiality...The handling of the specific instance by the Canadian NCP lacked predictability in some respects...Some aspects of the handling of the specific instance by the Canadian NCP were not fully compatible with the Procedural Guidance.”¹⁷

The Committee also noted “with concern the reports by OECD Watch that the Notifier is facing hardship that may result from this specific instance and the way it was handled” and 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.”¹⁸ To MiningWatch’s knowledge, the complainant was never contacted by the NCP in regard to this recommendation.

About two thirds of complaints brought to the NCP since 2000 concern allegations of harm caused by Canadian mining companies operating overseas. To our knowledge, none of these cases have resulted in meaningful relief for the complainants (notifiers). MiningWatch has brought, or supported, seven cases. Given the NCP’s resistance to necessary reform of its procedures, MiningWatch has not brought any more cases since 2011 and will not do so as we believe the NCP process and outcomes are more likely to deepen harm to the complainants than to address their concerns.

Conclusions

In line with Canada’s endorsement of the UN Guiding Principles on Business and Human Rights, Canada should provide an effective and independent non-judicial mechanism that, at minimum,¹⁹ is prepared to: accept complaints about alleged human rights harms caused by Canadian companies operating overseas; independently investigate those complaints, including, when necessary, by compelling documents or testimony; make findings of fact about whether harm has been done; report out on these findings; and, where required, provide avenues for remedy.

¹⁶ MiningWatch Canada. *MiningWatch Supports Complaint Filed with OECD Against Canada’s National Contact Point for OECD Guidelines for Multinational Enterprises*. 7 October 2021.

<https://miningwatch.ca/news/2021/10/7/miningwatch-supports-complaint-filed-oecd-against-canada-s-national-contact-point>

¹⁷ OECD Investment Committee. *Response by the Investment Committee to the substantiated submission by OECD Watch regarding the Canadian National Contact Point for Responsible Business Conduct*. 5 September 2022. p. 18.

https://miningwatch.ca/sites/default/files/oecd_statement_2022_09_09.pdf

¹⁸ *Ibid.* p. 18

¹⁹ The CORE provides additional functions and opportunities, such as the possibility of joint-fact finding, mediation, and the option of recommending sanctions on non-compliant companies, such as withdrawal of Government of Canada financial or political support.

The CORE currently falls short in a number of regards, including: it does not have the necessary investigatory power to compel documents and witness testimony; it is not independent of the Government of Canada; it does not have secure and adequate funding; it does not yet cover all sectors.

In order to meet Canada's human rights obligations, the CORE needs to be maintained and improved to align with the [Venice Principles](#) and the [UN Guiding Principles](#) on Business and Human Rights.

MiningWatch Canada will gladly answer any questions you may have in regard to this submission.

Catherine Coumans, Ph.D.
catherine@miningwatch.ca