Contemporary Forms of Slavery and the Canadian Mining Industry: Canada's Failure to Eliminate Slavery in Overseas Mining Operations

Brief prepared for the country visit of
UN Special Rapporteur on Contemporary Forms of Slavery,
Professor Tomoya Obokata
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MiningWatch Canada: MiningWatch Canada works in solidarity with Indigenous peoples, non-Indigenous communities, and workers who are dealing with environmental and human rights impacts of potential or actual industrial mining operations across Canada, and by Canadian companies operating internationally. Given our organizational mandate, the use of slave labour in the operations of Canadian mining companies, or in the operations of their subsidiaries or contractors, is a serious concern for MiningWatch Canada. **We briefly outline our concerns and provide recommendations at the end of this brief.**

Contemporary Forms of Slavery and the Canadian Mining Industry: In brief, Canadian governments have consistently failed to prevent the use of slave labour at Canadian mining operations overseas, let alone mandate the elimination of forced labour at Canadian mine sites overseas. In recent years, the use of slave labour has been alleged in the operations of Canadian mining companies, their subsidiaries or contractors – for instance, in Eritrea, in the case of the company Nevsun Resources Ltd., and in Xinjiang, China, in the cases of alleged use of slave labour by Uyghurs by the mining companies GobiMin and Dynasty Gold Corp. The use of slave labour is also a possibility in other high risk areas where Canadian mining companies operate or have operated, such as Tibet and the Democratic Republic of the Congo. Furthermore, common practices by Canadian mining companies operating overseas[1] that lead to permanent displacement of marginal communities and Indigenous peoples from their lands, such as through forced evictions[2] and contamination of agricultural land and water, also makes communities and Indigenous peoples more vulnerable to forms of modern slavery by pushing agricultural people into cities and making women and girls vulnerable to sexual exploitation.[3]

[1] See the 2023 brief prepared by MiningWatch Canada for The House of Commons' Standing Committee on International Trade (CIIT) on human rights and environmental abuses by Canadian mining companies operating overseas. https://miningwatch.ca/sites/default/files/backgroundbriefcanadasroleinminingabuseabroadfebruary142023.pdf

[2] See also letter exchange between MiningWatch Canada and Barrick Gold's CEO regarding the consequences of forced evictions at the North Mara Gold Mine in Tanzania. https://www.barrickontrial.ca/letters/

[3] Based on our work in Latin America, Africa and Asia-Pacific, MiningWatch Canada can provide many more examples of ways in which common mining practices at Canadian owned and run mines lead to increased risk of modern slavery for peoples who lose access to their traditional lands. We will be happy to provide these upon request.

Canada's Inadequate Response to Modern Slavery in regard to the Canadian Mining Industry:

Recent responses in Canada to allegations of slave labour in Canadian mining operations have been after the fact, rather than preventative. The Government of Canada does not have mechanisms or regulations in place that require that companies eliminate slave labour from their operations and supply chains.

Canadian Ombudsperson for Responsible Enterprise:

In the case of recent allegations of slave labour in regard to the mining company GobiMin in Xinjiang, the Canadian Ombudsperson for Responsible Enterprise (CORE), a non-judicial and voluntary mechanism, decided this month "to provide recommendations to GobiMin on their responsible business conduct abroad." And in the case of allegations of slave labour in regard to the operations of Dynasty Gold Corp. in Xinjiang, the Ombudsperson "has decided to launch an investigation using independent fact-finding."

Efforts by the Ombudsperson to investigate allegations of modern slavery brought before it are hampered by the fact that when the current Ombudsperson, Sheri Meyerhoffer was installed in 2019, she was not provided the investigatory powers to compel documents and witness testimony, which the Government of Canada had committed to provide the office a year earlier.[4] Furthermore, the Ombudsperson does not have the power to require that a Canadian mining company remove forced labour from its operations or supply chain, or even to impose a fine, in case the Ombudsperson were to determine that slave labour has been identified at a company's operations or in its supply chain.

National Contact Point:

The consistently weakest non-judicial and voluntary mechanism in Canada for holding companies to account for human rights abuses overseas is Canada's National Contact Point for the OECD Guidelines on Multinational Enterprises. Since its inception in 2000, allegations of abuse by Canadian mining companies operating overseas, at 19 cases, have dominated the 26 cases finalized by the NCP. MiningWatch Canada brought or supported seven of these mining cases, until 2012, when it became clear that participating in these cases contributed to deepened harm experienced by the complainants. Most mining cases brought before the NCP are dismissed, none have resulted in access to remedy, and MiningWatch is unaware that any have resulted in outcomes that were satisfactory to the complainants.

Several ways in which the National Contact Point has mishandled cases over the years were recently exemplified in the Bruno Manser Fonds vs Sakto Group case. This case was so egregiously mishandled – in ways that continue to harm the Bruno Manser Fonds (BMF) – that this case was brought before the OECD Investment Committee by OECD Watch. It was only the second complaint filed before the committee against an NCP for mishandling a case. In this case, the Ottawa-based and politically well-connected company, Sakto, not only breached confidentiality but also brought direct political pressure to bear on the NCP. After the NCP had initially assessed the case as worthy of its good offices, the NCP abruptly reversed itself and dismissed the case. Subsequently, the NCP complied with apparent demands by the company's legal team to remove a final statement in the case, which had been posted to the NCP's site for 10 months and which exposed some of the transgressive behaviours of the company. These included, from the NCP's final statement of June 2017: "Sakto involving a Member of Parliament during the confidential NCP assessment process; (…) Sakto's aggressive challenge of the NCP's jurisdiction; (…) Sakto's legal counsel making submissions to the Government of

[4] For more on this see: https://cnca-rcrce.ca/2023/08/24/core-investigations-will-likely-yield-few-results/

Canada's Deputy Minister of Justice…." The new, final statement posted May 2018 was revised to include no mention of the company or its tactics. Instead, blame is placed on the complainant, who became a whistle blower in this case, for breaching confidentiality.

The OECD Investment Committee found that the 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 OECD Investment Committee took seriously OECD Watch's concern that Canada's biased handling of the Sakto complaint may have resulted in harm to Bruno Manser Fonds. The committee recommended that the Canadian Government address this concern by following up with the parties and taking: "any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance [complaint]."

To date the Canadian NCP has not communicated with BMF, nor has it changed its harmful Final Statement on the case of May 2018 to remove its blatant bias against BMF.[5]

S-211:

The recent passage of Canada's S-211 reporting law (Fighting Against Forced Labour and Child Labour in Supply Chains Act) is woefully inadequate as it does not require that companies eliminate the use of forced labour in their operations or supply chains, or require that they ensure remedy or compensation for those whose labour was provided under conditions of slavery. It is a reporting bill. If companies report that they have not assessed their operations or supply chains for possible slave labour, they will be in compliance with the law. If companies report that they have found slave labour in their operations or supply chains, but have not done anything to eliminate it, or provide remedy for those harmed, they will be in compliance with the law.

Legal Action:

While the Government of Canada has failed to address meaningfully the issue of forced labour in the operations and supply chains of Canadian companies, the courts have addressed this issue. A significant recent legal case in regard to the use of slave labour by a Canadian mining company is the case of Nevsun Resources Ltd. v. Araya. MiningWatch Canada was an intervenor in this case.

In 2014, three Eritreans refugees living in Canada filed a claim against Nevsun Resources, a Canadian mining company headquartered in Vancouver. They alleged the company was complicit in the use of forced labour at the Bisha mine in Eritrea by Nevsun's local sub-contractor, Segen Construction. Segen Construction was owned by Eritrea's ruling party. The plaintiffs alleged that they were indefinitely conscripted, under Eritrea's National Service Program, into working at the Bisha Mine. The plaintiffs also claimed breaches of customary international law for forced labour, torture, slavery, crimes against humanity, and cruel, inhuman, or degrading treatment. Nevsun denied the allegations and asked for the lawsuit to be dismissed, arguing that Eritrea was a more appropriate forum to litigate the case than Canada. In 2020, the Supreme Court of Canada dismissed Nevsun's claim. The divided court affirmed, in a 5-4 decision, that customary international law can bind corporations and is actionable in Canada. Under the doctrine of adoption, customary international law is directly

[5] For more on the history of the NCP in Canada see Annex A, which is a brief presentation by MiningWatch Canada on the issue made earlier this year.

incorporated into the Canadian common law. Previous to the Nevsun case, however, Canadian courts had not yet upheld a private right of action for violations of customary international law. A larger majority of the court (7–2) also ruled that there was no bar to the plaintiff's claims being heard in a Canadian court. In late October 2020, the parties reached a confidential settlement.

The Supreme Court ruling was significant and may have a wider positive effect of causing some mining companies to avoid operating in regions where their operations are likely to be implicated in the use of forced labour, or to be more aware of the exposure to the use of slave labour in their supply chains.

Canada's Duty to Protect Human Rights – Recommendations:

UN officials and treaty bodies have repeatedly focussed specifically on harms caused by Canadian mining companies and have reminded Canada of its duty to protect human rights – including when rights are harmed by Canadian mining companies operating overseas.

In 2016, the International Committee on the Elimination of Discrimination Against Women (CERD) expressed concern about violations of the rights of women and girls by Canadian mining companies operating abroad.[6] In 2015, the International Covenant on Civil and Political Rights noted that "The State party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad...develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad."[7] In 2007 and 2012, the CERD highlighted concerns about the role of Canadian mining activities abroad and recommended that Canada "take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of Indigenous peoples outside Canada, and hold them accountable."[8]

Recommendations

1) Canada must pass comprehensive mandatory Human Rights Due Diligence legislation. Private member's bill Bill-262[9] tabled in Parliament has the support of MiningWatch Canada and all of the 40-plus member organizations of the Canadian Network on Corporate Accountability.

2) Strengthen the mandate of the Canadian Ombudsperson for Responsible Enterprise (CORE) by providing the Ombudsperson with the investigatory powers to summon witnesses and require companies to hand over documents, as originally committed to by the Government of Canada. This can be done in ways outlined in a June 2021 parliamentary report that looked into this issue.[10] We recommend that the Prime Minister's cabinet appoint the CORE as a Commissioner under the Inquiries Act by an Order in Council.

3) Request that the National Contact Point follow up on the advice of the OECD Investment Committee by contacting the parties to the BMF vs Sakto complaint and taking "any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance [complaint]." The NCP must

[6] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/03/PDF/N1640203.pdf?OpenElement
[7] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCAN%2FCO%2F6&Lang=en
[8] https://cnca-rcrce.ca/2022/06/11/united-nations-commentary-calls-on-canada-to-facilitate-access-to-remedy/
[9] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-262/first-reading#:~:text=An%20Act%20respecting%20the%20corporate,to%20business%20activities%20conducted%20abroad
[10] https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/report-8

revise its Final Statement so that it no longer singles out the complainant, BMF, alone as having breached confidentiality in the handling of this complaint.

ANNEX A

Presentation for Institute for Policy Studies on Canada's National Contact Point
June 27, 2023
Catherine Coumans

Thank you for inviting me to present on MiningWatch Canada's experience with Canada's NCP.

Summary

By way of a bit of background, Canada's National Contact Point (NCP) was established in 2000.

Since then, 19 of 26 cases brought to the NCP have been against Canadian mining companies. There were five cases brought against Canadian mining companies – just in 2022.

Between 2001 and 2012, MiningWatch Canada brought and supported seven cases against Canadian mining companies.

After the final case we brought in 2012, we made a definitive decision not to support any more mining cases through the Canadian NCP, primarily because we had become convinced that bringing a case to the Canadian NCP was very likely to deepen the harm experienced by the complainants. I will return to this point in my conclusions.

Although we have not brought any more cases since 2012, we have continued to assess and comment on the NCP, among others:

- We have provided briefs recommending reforms in every internal review process of the Canadian NCP where feedback was invited, including the most recent one in 2022;
- We provided a brief and played an active role in the Peer review process of the NCP in 2018;
- And in 2021, we supported a Substantiated Submission complaint brought by OECD Watch against the Canadian NCP to the Investment Committee of the OECD. This was only the second such complaint made against an NCP.

In summary we have found that the NCP, among others:

- is not independent of political interference.
- is not independent of bias in favour of corporate interests.
- is protective of corporate reputations, but not those of notifiers.
- does not carry out investigations.
- does not make findings of fact – although appears to in ways that harm notifiers.
- does not ensure the provision of remedy for those harmed.
- can offer its good offices for mediation – but more often dismisses cases.
- has largely been considered harmful by communities who have attempted to use this office.

Several missed opportunities for meaningful reform

Over the 23 years of its operations, there have been many missed opportunities for the Canadian NCP to reform itself meaningfully. I'll mention just a few here.

2005
By 2005, there had been seven cases brought to the NCP. Five of these seven cases were against mining companies. Four of these five were dismissed by the NCP, and none resulted in remedy for those who had been harmed.

In 2005, a parliamentary committee reviewed the operations of Canada's NCP in the context of a review of mechanisms in Canada to hold Canadian mining companies to account for harm done overseas. The committee concluded that there was a need to, "strengthen the rules and the mandate of the Canadian National Contact Point (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."

These reforms did not take place.

2016
In 2016, MiningWatch, OECD Watch and Above Ground published a report on Canada's NCP focussing on its handling of extractive sector cases and concluded:

- 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 15 years of existence, the NCP has consistently failed to provide complainants with effective remedy.

2018
In 2018, the NCP was reviewed in a review process by its peers – NCPs from other countries – and was also commented on briefly in a country report by the United Nations Working Group on Business and Human Rights.

That report concluded 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."

In the 2019 peer review report on Canada's NCP, the NCPs peers 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 report made a pretty basic recommendation that the Canadian NCP include civil society as a "social partner" along with the social partners it has long had, representing the business community and labour. The NCP has not yet responded to this most simple recommendation.

Sakto case

I want to conclude by spending a bit more time on a signature case that really exemplifies the ongoing problems with our NCP and – most egregious among these from my point of view – the way the NCP's industry bias and inequitable process actually deepens harm to complainants and to the efforts of communities and victims of Canadian companies to prevent or remedy harm they endure.

This case that was brought as a Substantiated Submission complaint to the OECD Investment Committee.

In 2016, Bruno Manser Fonds (BMF), an NGO based in Switzerland, filed a complaint regarding lack of financial transparency with the Canadian NCP against the Ottawa-based Sakto group, a real estate and investment holding company with close ties to the family of Sarawak Governor and former Chief Minister Abdul Taib Mahmud. The principles of the Sakto group also have strong political ties in Ottawa where they are based.

In October of 2016, the Canadian NCP produced a detailed draft Initial Assessment in which it proposed to accept the case for "good offices," finding the issues material and substantiated and meriting further examination. BMF gave its approval of the Initial Assessment and agreed to participate in the NCP's good offices. "Good offices" means the NCP will offer mediation between the disputing parties.

However, after providing that draft initial assessment, the NCP became unresponsive to BMF for many months, finally notifying both parties in March of 2017 that it intended to close the case – without providing any reasons. Shortly thereafter, BMF went public with the case for the first time. In July of 2017, without consulting BMF, the NCP published a Final Statement that placed blame for closing the case on both BMF (for allegedly breaching confidentiality) and the Sakto Group. The NCP's statement revealed what BMF had surmised, namely it complained of: "Sakto involving a Member of Parliament during the confidential NCP assessment process; (…) Sakto's aggressive challenge of the NCP's jurisdiction; (…) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice…"

Ten months after this July 2017 Final Statement was posted to the NCP's website, on 11 May 2018, without consultation or notification of BMF, the Canadian NCP removed the July 2017 Final Statement and replaced it with a new one. The May 2018 Final Statement removes all mention of the breach of confidentiality and the pressure exerted on the NCP by Sakto and its lawyers and political allies. It does mention, however, what the NCP calls a breach of confidentiality by BMF and implies that this is the sole reason for rejecting the complaint.

The OECD Investment Committee found that the 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 response also took seriously OECD Watch's concern that Canada's biased handling of the Sakto complaint may have resulted in harm to Bruno Manser Fonds. The committee recommended that the Canadian Government address this concern by following up with the parties and taking: "any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance [complaint]."

To date, the Canadian NCP has not communicated with BMF, nor has it changed its May 2018 Final Statement on the case to remove its blatant bias against BMF.

Clearly, this case exemplifies how engaging the Canadian NCP can harm a complainant. But it is not the only such case. In MiningWatch's engagement with the NCP, over seven cases, we repeatedly noticed how complainants would have been better off not to have brought a case at all, as the NCP's dismissal of most cases was widely interpreted (for example by media and by socially responsible investors) as evidence that there was no substance to the complaint itself. This interpretation was enhanced by the way the NCP would draft final statements in such a way to make it appear as though it had investigated the case and reached a conclusion of fact leading to its dismissal – when in fact, the NCP does not independently investigate cases and is explicit that it does not make statements of fact about whether the guidelines have been breached.

There are other ways in which participation in the NCP process has proven to be harmful to many complainants, but I'll leave it at this for now and am happy to expand on this in the question period.

Thank you.