



Background: Judicial Review of the Public Sector Integrity Commissioner's Refusal to Investigate the Canadian Embassy in Mexico

March 22, 2019

On February 5, 2018, the son of murdered Mexican community leader Mariano Abarca and supporters filed a submission to the Canadian Public Sector Integrity Commissioner (PSIC) calling for an investigation into the Canadian Embassy in Mexico and its support for Canadian mining company Blackfire Exploration's operations in Chiapas. The submission asserts that the acts and omissions of the Canadian Embassy may have contributed to putting Mariano's life in danger and that the Embassy may not have followed policy regarding reporting suspected corruption. This is the first time, to our knowledge, that the failure of the Canadian embassy to follow policy guidelines is subject of a complaint to the Commissioner.

On April 17, 2018, the complainants received notice that the Commissioner refuses to investigate the complaint. In response, they filed for judicial review with the Federal Court of Canada on May 16, 2018. They argue that the decision of the Commissioner is based on a narrow interpretation of his mandate, an erroneous and poorly argued conclusion that there were no policies that the Embassy should have been following other than to lobby on Blackfire's behalf, and that it should have considered whether the actions and omissions of the Canadian Embassy endangered the life of Mr. Abarca.

In its Memorandum of Fact and Law to the Federal Court in December, the Attorney General's office reiterates the Commissioner's claim that government documents and public statements did not constitute "official policy" and therefore civil servants were not required to follow them. It also fails to explain why the Commissioner did not consider the public interest of investigating this case, despite the distrust it engenders in the role of Canadian diplomats and trade commissioners where there are conflicts with Canadian mining companies.

A public hearing has been scheduled at the Federal Court of Canada for March 25, 2019 at 9:30 am. The complainants hope to ascertain if it is true that Canadian embassies have no other obligation than to promote Canadian mining companies' interests no matter the cost to people in Mexico and around the world. They also hope that the court will order the PSIC to investigate the acts and omissions of

the Canadian Embassy in Mexico that they believe contributed to putting Mariano in greater danger ahead of his murder.

Overview

Mariano Abarca was a highly-respected community member who spoke out and led protests against the social and environmental impacts of Blackfire's barite mine in Chicomuselo, Chiapas. He was beaten by mine employees, detained at the company's behest, threatened and finally assassinated on November 27, 2009. Three people associated with Blackfire were detained and charged immediately following his murder, but all were later acquitted and released. The investigation remains open.

Until it dissolved August 2017, Blackfire Exploration was a privately-traded company based in Calgary that operated the Payback barite mine in Chicomuselo, Chiapas from late 2007 until shortly after Mr. Abarca's murder, when the Chiapas environmental authority shuttered the mine. In December 2009, the Globe and Mail reported that the company had been making payments to the personal bank account of the local municipal president from March 2008 to May 2009 "to keep the peace and prevent local members of the community from taking up arms against the mine." This led to an RCMP investigation that was closed in 2015 without charges being laid.

Since this time, on the basis of information obtained under an Access to Information request, it has come to light that the Canadian Embassy in Mexico actively advocated on Blackfire's behalf with federal and Chiapas state authorities from before Blackfire's mine went into operation until months after Mr. Abarca's murder. The nature of this relationship is described in further detail below with regard to the principal claims made in the submission.

Application Signatories

Mr. Abarca's wife and children have made the request for judicial review along with the Mariano Abarca Environmental Foundation (FAMA by its initials in Spanish), Otros Mundos Chiapas, the Human Rights Centre of the Faculty of Law at the Autonomous University of Chiapas, the Mexican Network of Mining-Affected Peoples (REMA by its initials in Spanish) and MiningWatch Canada.

The Justice and Corporate Accountability Project (JCAP) based at Osgoode Hall Law School and Thompson Rivers Law School is legal counsel to the complainants. Yavar Hameed, an Ottawa-based human rights lawyer, will present the judicial review on behalf of JCAP.

Principal Claims in the Submission to the PSIC

The submission alleges that the Canadian Embassy in Mexico should be investigated under Section 8 of the *Public Servants Disclosure Protection Act*:

I. For having created "a substantial and specific danger to the life, health or safety" of Mariano Abarca and other local residents concerned about Blackfire's mine:

A. The Embassy failed to follow the 2009 *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, including by not assessing possible human rights impacts:

- The Canadian Embassy in Mexico had significant information about conflict over Blackfire's operations in Chicomuselo from late 2007 onward as a result of its close contact with

Blackfire, local media reports about growing protests that it monitored, and other information it received about local opposition to the mine.

- The Embassy heard direct testimony from Mr. Abarca in July 2009 that Blackfire was using its employees as thugs against community members who were opposed to the mine. Weeks later when Mr. Abarca was detained at the behest of Blackfire when the Embassy received 1,400 emails from people expressing concern for his well being.
- Nonetheless the Embassy did not investigate or assess the potential for violence, nor question whether the company had done so.

B. The Embassy failed to follow policy regarding identifying and providing support to human rights defenders:

- Despite Embassy knowledge about serious community opposition to Blackfire's operations, it made no effort to reach out to the community.
- Furthermore, when Mr. Abarca was detained in August 2009, the Embassy knew Blackfire had filed accusations against him, but did not consider whether the company was justified in its actions nor the danger this signified for Mr. Abarca, who was released after eight days for lack of evidence.
- The Embassy also advocated *against* the community and urged the state government to deal with the protests to protect Blackfire. In an October 2009 meeting with the Secretary General of the State of Chiapas, the Embassy urged state authorities to resolve Blackfire's troubles, specifically mentioning community protests. There is no evidence the Embassy expressed concern about the danger Mr. Abarca or others were in.
- Interventions made to the government of Chiapas on Blackfire's behalf contrast starkly with the Embassy's position on Mr. Abarca's murder. The Embassy distanced itself from any involvement after his murder, including to counsel a Canadian official to deny Canada had prior knowledge of potential violence against Mr. Abarca.
- In light of well-known dangers to human rights defenders in Mexico, the Embassy's choice to ignore the human rights implications of its actions merits investigation.

C. The Embassy failed to "play a constructive and helpful role" or "to *facilitate an open and informed dialogue* between all parties" as it publicly claimed to do:

- The Canadian Embassy had a very close and supportive relationship with Blackfire Exploration from 2007 through 2010.
- Access to information disclosures show that there were over 30 contacts between Blackfire and the Embassy between 2007 and 2010 and multiple interventions with Mexican authorities on Blackfire's behalf.
- Immediately after Mr. Abarca's murder, the Canadian Embassy and Canadian government officials shied away from urging a full and impartial investigation, and sought to distance the Embassy from the proceedings.
- Two months later, the Embassy provided information to Blackfire about how to sue the state of Chiapas under NAFTA.
- Contrary to playing a helpful role or facilitating dialogue, the Embassy sought to ensure Mexican officials would act to resolve Blackfire's problems, which could have been interpreted as coded instruction to make the problem go away.
- While no one from the government of Chiapas has yet been investigated with Abarca's murder, there are allegations of its involvement and the family is still pressing the public prosecutor to pursue this.

The submission asserts that the Embassy's advocacy on Blackfire's behalf and against community protests was an *action* that created "a specific danger" to the life and safety of Mr. Abarca. The Canadian government's failure to raise human rights concerns with Blackfire, and with the government of Chiapas, was an *omission* that also created "a specific danger" to the life and safety of Mr. Abarca for which the Embassy should be investigated.

Should the Commissioner find that there was no breach of the code of conduct because the Canadian Embassy was under specific instructions to act the way that it did – to advocate for Blackfire, to ignore concerns about human rights defenders and *not* to engage with the communities around the mine and *not* to foster open dialogue, the submission calls for an investigation into the *other* public servants who made erroneous and misleading statements about government policy in this regard.

II. For "serious breach of a code of conduct" concerning the Embassy's duty to report suspected corruption of a foreign public official:

Under the 2010 *Policy and Procedures for Reporting Allegations of Bribery Abroad by Canadians or Canadian Companies*, public officials are to report suspected bribery to their headquarters in Ottawa if they become aware of such allegations of Canadian individuals or companies.

- Blackfire complained to the Chiapas State Congress in June 2009 about the payments, revealing that the company had also provided airline tickets to the mayor and his family but that the latest demand for an erotic encounter with an actress was unreasonable and constituted extortion. This came out in the Chiapas press in June 2009.
- The embassy did not report the suspicious payments until after the payments were reported in the press in Canada.
- Given the Embassy's close working relationship with Blackfire, its monitoring of the local conflict through the media and meetings with Chiapas state officials, the submission questions whether the Embassy had knowledge of payments that Blackfire was making to the personal bank account of the municipal president of Chicomuselo, Chiapas before they were reported on in the Canadian press in December 2009.
- Further considering the high levels of corruption in Mexico, the submission asks the Commissioner to investigate if the Embassy had information about Blackfire's payments before this was reported in Canada and whether the Embassy reported this to the RCMP immediately.

The Public Service Integrity Commissioner (PSIC) process

While the *Public Servants Disclosure Protection Act* is principally meant to protect whistle-blowers in the public service, Section 33(1) provides the opportunity for an investigation "*as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that ... a wrongdoing ... has been committed*" if the PSIC believes it is in the public interest. If the Commissioner investigates and finds that there was a breach of a law or code of conduct, he may reprimand those involved and make recommendations for change.

Why is an investigation by the PSIC important and in the public interest?

The criminalization and subsequent murder of an activist who pleaded with the Canadian Embassy for assistance is a serious matter, if the Canadian Embassy acted in a way that exacerbated the dangers to the individual or failed to act within its means to diminish those dangers. Furthermore, the murder of

Mr. Abarca has not yet been resolved, and the role – then and now – of the Canadian Embassy continues to rankle his family and supporters who live or work in mining-affected communities in Mexico where Canadian interests are involved.

Additionally, resolution of this matter is of public interest for it affects public confidence in the integrity of public servants. First, the public would intuitively believe that public servants would be obligated to follow policies and directives that are posted on government websites or announced by public servants themselves. Second, on a larger scale, failure to follow the policies cited would detrimentally impact the stated objective of Global Affairs Canada to advance democracy, human rights, the rule of law, and environmental stewardship; to fulfil Canada's international human rights obligations; and fulfil obligations to the Organization for Economic Co-operation and Development (OECD) to control corruption. An investigation by the Public Sector Integrity Commissioner would provide greater clarity on Canada's commitment to the values espoused, and some closure for the family and supporters, who continue to seek justice for Mr. Abarca's assassination.

Judicial Review Process

It is not known how soon the federal court might decide on this case after the hearing. If the decision is favourable, the PSIC will be ordered to open an investigation. If not, it may be appealed to the Federal Court of Appeal.