

FEDERAL COURT

B E T W E E N:

Mirna Montejo Gordillo, José Luis Abarca Montejo, Jose Mariano Abarca Montejo, Dora Mabely Abarca Montejo, Bertha Johana Abarca Montejo, Fundación Ambiental Mariano Abarca (Mariano Abarca Environmental Foundation or FAMA), Otros Mundos, A.C., Chiapas, El Centro de Derecho Humanos de la Facultad de Derecho de la Universidad Autónoma de Chiapas (the Human Rights Centre of the Faculty of Law at the Autonomous University of Chiapas), La Red Mexicana de Afectados por la Minería (Mexican Network of Mining Affected People or REMA) and MiningWatch Canada

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION
(Pursuant to section 18.1 of the *Federal Courts Act*)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal*

Courts Rules and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 16, 2018

Issued by: _____
(Registry Officer)

Federal Court of Canada
90 Sparks Street
Ottawa, Ontario K1A 0H9
Tel: 613-992-4238
Fax: 613-947-2141

TO: Nathalie Drouin
Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

AND TO: **Public Sector Integrity Commissioner**
60 Queen Street, 7th Floor
Ottawa ON K1P 5Y7

APPLICATION

The instant application for judicial review by the Applicants relates to a decision dated April 5, 2018 (received by the Applicants on April 17, 2018) pursuant to subsection 33(1) of the *Public Servants Disclosure Protection Act* (**PSDPA** or “**the Act**”), whereby the Public Sector Integrity Commissioner (“**the Commissioner**” or “**PSIC**”) dismissed the Applicants’ request for an investigation in File No. PSIC-2017-D-0413. The Commissioner based his decision on his view that there was no wrongdoing under sections 8(d) or 8(e) of the *Act* and concluded that no investigation under section 33(1) would be conducted.

The Applicants’ complaint to the Commissioner alleged potential wrongdoing in respect of the conduct of the Canadian Embassy in Mexico (operating under the Department of Global Affairs Canada) in relation to a conflict that developed between a Canadian mining company, Blackfire Exploration (“**Blackfire**”), and members of a local community near the mine. Blackfire is publicly alleged to have paid bribes to a local mayor so that people would not “take up arms” against its mining project. In the face of pressure from the mayor and Blackfire, which enjoyed longstanding support from the Canadian Embassy in Mexico, a local community leader, Mariano Abarca (“**Abarca**”), led peaceful protests against the social and environmental impacts of the mine. As a consequence of his actions, he and other family members were beaten by employees of the company in 2008 and then detained for eight days without charge at Blackfire’s behest in 2009. Abarca received multiple death threats and was finally murdered in broad daylight in front of his family restaurant on November 27, 2009. He is survived by his wife and four children who are co-Applicants in the present Application along with five non-governmental organizations from Mexico and Canada.

On the basis of information obtained under an Access to Information request, it is known 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 Abarca’s murder. During a crucial moment, at the time of Abarca’s detention in August 2009, the Canadian Embassy received 1,400 emails expressing concerns for Mr.

Abarca's safety and the safety of other community members who were also speaking out about the social and environmental impacts of Blackfire's 'Payback' barite mine in Chicomuselo, Chiapas. The Applicants' complaint provides reasonable grounds to indicate that the Canadian Embassy was aware that Mr. Abarca's life and safety were in danger, including that Blackfire had filed the accusations leading to his detention. Nonetheless, the Embassy ignored these warnings, while actively advocating on Blackfire's behalf with the government of the State of Chiapas to quell protests over the company's operations in the weeks before Mr. Abarca's murder. The Applicants' complaint also raises the concern that the Canadian Embassy knew about and/or failed to inquire into and report in a timely way, suspicious payments made by Blackfire into the personal bank account of the mayor of the town.

In response to the Applicants' complaint, the Commissioner failed to consider whether the actions or inactions of the Canadian Embassy endangered the life of Abarca. He also unreasonably and arbitrarily concluded that three documents cited by the Applicants do not constitute ethically binding policies upon the Embassy such that there was no possibility that a wrongdoing could have occurred.

The Applicant makes application for:

- (a) An order setting aside the April 5, 2018 decision of the Commissioner dismissing the Applicants' complaint and remitting it back to the Commissioner for further investigation in accordance with directions of this Court;
- (b) Costs of this application; and
- (c) Such further and other relief as counsel may request and this Honourable Court may permit.

The grounds for the application are:

1. The Commissioner erred in law in finding that there was no basis to conclude that there was a wrongdoing within the meaning of sections 8 (d) and (e) of the *Public Servants Disclosure Protection Act* (“**the Act**”).
2. The Commissioner’s decision was unreasonable, unintelligible and/or failed to provide reasons why, based on the record of evidence adduced by the Applicants, the actions or inactions of the Canadian Embassy could not have contributed to “substantial and specific danger” to Abarca’s life under section 8 (d) of *the Act*.
3. The Commissioner erred in law in failing to take into account the broad remedial purposes of *the Act* including “the public interest to maintain and enhance public confidence in the integrity of public servants” in interpreting his mandate under section 33 (1) of *the Act* to conduct investigations.
4. The Commissioner rendered an unreasonable decision, inconsistent with his statutory powers under *the Act* to review information that was redacted or otherwise unavailable to the Applicants.
5. The Commissioner erred in placing an impossible burden on the Applicants, at a threshold stage, to produce information that was hidden from them, either in internal government documents, or in redacted parts of an Access to Information return presented to the Commissioner.
6. The Commissioner erred in law in concluding, under section 8(e) of *the Act*, that a public servant’s failure to follow government policies and directives set out in codes of conduct could not constitute wrongdoing under *the Act*. In this connection, the Commissioner erred in law:
 - a) By considering the relevant policies as if they were freestanding elements of wrongdoings under *the Act*, instead of analyzing them within the codes of conduct of which they are integral parts; and

- b) By failing to give effect to Parliament's determination that serious breaches of any elements of a relevant code of conduct, including policies forming parts of such codes, are wrongdoings for the purposes of *the Act*.
7. The Commissioner erred in finding that there was no basis to investigate whether there had been one or more serious breaches of the *Values and Ethics Code*, which provides that public servants are to carry out their duties "in accordance with legislation, policies, and directives".
8. The Commissioner erred in refusing to investigate whether there had been breaches of the following important policies or directives:
- (a) The 2009 "Building the Canadian Advantage" policy even though it was listed on the Respondent Department's website;
 - (b) The policy with respect to human rights defenders even though it was listed on the Respondent's website and involved Canadian international obligations;
 - (c) The policy with respect to the embassy's role when there was conflict between Canadian mining companies and communities abroad, even though senior department officials publicly described the embassy's role as "facilitating dialogue";
 - (d) The policy with respect to the obligation of the Embassy to report "allegations of bribery and corruption" which was important for fulfilling Canada's international obligations under the *Corruption of Foreign Public Officials Act*
9. The Commissioner erred in law by using the wrong test for determining the obligations of Embassy officials to report possible corruption in a timely manner.
10. The Commissioner demonstrated a closed mind in dismissing information that supports a threshold determination of a reason to believe that there was wrongdoing pursuant to section 8 of *the Act*, which includes the following considerations:
- (a) He based his decision on an arbitrary and undefined requirement that a breach of the code of conduct must be a breach of "official Government of Canada policies", a term that does not appear in the *Values and Ethics Code* nor in the legislation

- (b) He based his decision on an arbitrary requirement that policies “prescribe specific actions” a term that the Commissioner does not define, and does not appear in the Values and Ethics Code nor in the legislation;
- (c) He unreasonably rejected the information on the existence of the policies by failing to take any steps to determine whether there existed an extant predecessor policy to “Voices at Risk” policy in 2009, and an extant policy on reporting corruption, despite the Applicants’ indication that such a policy was in existence at that time
- (d) He arbitrarily dismissed information filed by the Applicants as “speculative” rather than determining whether there was a “reason to believe” that a wrongdoing had been committed, taking into account the overall purpose of *the Act* to “maintain and enhance public confidence in the integrity of public servants”
11. The Commissioner erred in law in finding that an investigation was not in the public interest, which includes a failure to consider whether “public confidence in the integrity of public servants” would be shaken if public servants were not required to follow government declarations set out on government websites and espoused by senior officials in the department.
12. *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 ;
13. *Federal Courts Act*, R.S.C., 1985, c. F-7;
14. Such other grounds as counsel may advise and this Honourable Court may permit.

Pursuant to Rule 317, the Applicant requests the following:

The record of all information considered by the Commissioner in reaching his decision of April 5, 2018.

All correspondence, memos to file, notes and records relating to the investigation of the Applicants’ complaint.

The application will be supported by the following material:

- (a) The affidavit of Jennifer Moore and/or other supporting affidavits; and
- (b) Such further and other materials as counsel may advise and this Honourable Court may permit.

May 16, 2018

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