

## Blackfire Exploration, Mariano Abarca and the Canadian Embassy in Mexico: An Update

April 2021

In February 2018, the Public Sector Integrity Commissioner (PSIC) was asked to investigate the conduct of the Canadian embassy in Mexico in light of the murder of community leader Mariano Abarca in broad daylight on November 27, 2009. The murder came seven weeks after senior Canadian diplomats met with Chiapas State officials to “advocate” for Canadian mining company Blackfire Exploration. The complaint to PSIC asserted that the acts and omissions of the Canadian Embassy may have contributed to putting Mariano Abarca’s life in danger and that the Embassy may not have followed policy regarding reporting suspected corruption.

The Commissioner refused to commence an investigation in April 2018, and the matter is now before the Federal Court of Appeal. We are currently awaiting a hearing date, which could be announced at anytime.

In addition, three groups have successfully sought to submit interventions and make oral presentations to the court that we believe are helpful to the Abarca family’s case. These include Amnesty International Canada, Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic, and the Centre for Free Expression at Ryerson University.

Below, we outline two main issues in dispute before the Federal Court of Appeal, provide a short summary of the three written submissions that the groups above have made and the Canadian government’s written response, as well as recounting a short timeline of events in this case.

## ***Two issues in a nutshell***

1. Canadian government accountability
2. PSIC places impossible burden on whistleblowers

### **1. Important issue of government accountability**

If the Canadian government makes public declarations on procedures that civil servants are supposed to follow, are civil servants expected to follow those procedures?

For example, let us say that the government announces that COVID vaccines are to be distributed on a per capita proportional basis to the provinces, but civil servants decide to ignore that procedure and send more of the vaccine to Ontario and Quebec. Will PSIC investigate information from a whistleblower about misdirecting vaccines? If the Blackfire case is a precedent, PSIC will not investigate.

In Blackfire case, a senior government official tells a Parliamentary Committee that Canadian embassies have certain procedures to follow when there is a conflict between Canadian mining companies and local communities – to “facilitate dialogue” and to “help the various players reach a consensus on a way forward.” However, the Embassy in Mexico did none of those things. Our review of the access to information disclosures shows that there were over 30 contacts between Blackfire and the Embassy between 2007 and 2010. The only time the Canadian Embassy met with Mr. Abarca and members of the community was in July 2009, at a protest outside of the Embassy. An Embassy official did not speak with the Abarca family and supporting organizations until two months after his murder, despite attempts to get Canadian officials’ attention immediately after this crime occurred.

PSIC refused to investigate the case because they said that the procedures explained in extensive testimony before a Parliamentary Committee or posted on a government website were not ones that civil servants needed to follow.

This is very problematic. If civil servants do not need to follow these policies, then how can Canadians or even Members of Parliament know what is actually going to happen when a policy is announced? Did the senior civil servant mislead the Parliamentary Committee? Or did officials at the Canadian Embassy in Mexico act in defiance of government policy? Or does announcement of government policy mean nothing because no one is responsible for implementing them? Something is not right here, and one would have thought that this is the exact type of issue that PSIC should investigate.

## 2. PSIC places impossible burden on whistleblowers

The PSIC [site](#) makes it seem like sending them information is very informal and that they will contact you if more information is necessary.

There is no need to look for additional information yourself, only to provide us with whatever you already have in your possession. You will have an opportunity to discuss the file with an analyst to provide further information and clarification if need be.

JCAP submitted a 30-page [detailed complaint](#) with almost 100 footnotes that referred to a 982-page [access to information disclosure](#). Counsel for JCAP told PSIC that they could have the full package if they wanted. They did not ask for the package and, because they did not refer to the supporting materials, they made a number of serious factual errors in their analysis and decision.

When JCAP brought this case to the Federal Court, the Canadian government argued that JCAP should have provided the supporting documents (over 1000 pages) right at the beginning. As well, based on the text of the complaint (ignoring the footnoted documentation) JCAP had failed to prove that wrongs had been committed. The guidance on the website certainly does not seem to require that the whistleblower provide all the evidence necessary to prove that a wrong had been committed. And in most cases, it would be impossible for the whistleblower to access incriminating evidence. That is why the PSIC has the power to conduct an investigation.

### ***Summary of interventions to the Federal Court of Appeal***

#### *1. Amnesty International Canada*

[Amnesty focuses](#) on how Canada's international human rights obligations should be taken into consideration when evaluating how reasonable the Commissioner's decision was to refuse an investigation. They argue that Canada must provide victims of serious human rights violations with **effective remedy** and that Canada has a **duty to investigate such harms**, such as through the PSIC office.

[Government of Canada response:](#) Canada does not have a duty to investigate nor an obligation to provide an effective remedy to persons who may have been victims of human rights violations resulting from the operation of Canadian-based businesses abroad.

## 2. *Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic*

These [interveners submit](#) that the integrity of Canada’s public service requires “[investigating], wrongdoing not only at home, but also abroad. Such integrity cannot ignore pervasive disregard for international human rights, often by transnational corporate activity originating in the global north.” In their view, the “allegations plainly implicate the integrity of the Canadian public service... when the Canadian public service turns a blind eye to—indeed, exacerbates—known and foreseeable human rights abuses, for the sake of promoting Canada’s commercial interests abroad.”

**Government of Canada response:** Canada does not have any obligation to ensure that Canadian corporations operating abroad act consistently with Canadian human rights law.

## 3. *Centre for Free Expression at Ryerson University*

[This submission focuses](#) on the overall spirit of the act and consideration for how and why it was written in the Commissioner’s decision. In particular, a central goal of the Act is to “maintain and enhance public confidence in the integrity of public servants,” which “is essential to the protection and promotion of Canadian parliamentary democracy itself.” In this context, any possible breach of a code of conduct should be based on how it might influence public confidence in the public service. Furthermore, the threshold for complaints made by the public is lower than when complaints are made by public servants themselves, since the public cannot be expected to have access to the same degree of information.

**Government of Canada response:** The Commissioner respected the low threshold for admitting complaints from the public for investigation, he simply did not agree with our interpretation of the facts.

## **Short Timeline**

A detailed factual recounting of the events leading to the murder of Mariano Abarca is contained in a [report](#) by MiningWatch Canada, Common Frontiers and the United Steelworkers of Canada, *Corruption, Murder and Canadian Mining in Mexico*.

### 1. December 2007 – September 2008

Blackfire Exploration of Calgary succeeded in opening a barite mine in the State of Chiapas, in southern Mexico after the Canadian Ambassador visited Chiapas to intervene on behalf of the mine, including to provide essential support to the company to obtain an explosives permit.

### 2. March 2008 – June 2009

Blackfire made secret payments directly into the bank account of the mayor so that the local people would not “take up arms” against the project.

3. July, 2009

Members of the community travel to Mexico City to inform the Canadian embassy that they have been beaten and threatened by thugs for the company. They are not permitted inside the embassy, but instead speak with an embassy official outside of the building.

4. August, 2009

Mariano Abarca is detained off the street by plain-clothes police who act on false accusations made by the company. Over 1,400 emails are sent to the Canadian embassy expressing concern for the wellbeing of Mariano. The Embassy knew that Blackfire had made the accusations against Mariano, but did not question whether the company was justified in its actions nor demonstrate concern over the danger Abarca was in, who was released after eight days for lack of evidence.

4. October, 5, 2009

After receiving complaints from Blackfire about protests around the mine, a high-level delegation from the embassy meets with the Secretary General of the state of Chiapas in order “to advocate for greater attention by Chiapas to try to resolve challenges that Blackfire is facing,” specifically mentioning community protests. There is no evidence the Embassy expressed concern about the danger Abarca or others were in.

5. November 27, 2009

Mariano Abarca is assassinated while sitting in his truck outside his restaurant.

6. December, 2009

The Canadian Embassy and Canadian government officials backed away from urging a full and impartial investigation, and sought to distance the Embassy from the proceedings. The mine was shuttered days later for environmental violations, vindicating the struggle of Mariano and others. Two months later, the Embassy provided information to Blackfire about how to sue Mexico under NAFTA.

Meanwhile in Ottawa, on December 1, 2009, shortly after the murder of Mr. Abarca, Mr. Grant Manuge (Director General, Trade Commissioner Sector, Operations, Department of Foreign Affairs and International Trade) told the Standing Committee on Foreign Affairs and International Development (Number 043, Second Session, 40<sup>th</sup> Parliament):

Our heads of missions and foreign Sector officers in Canada and abroad consult and work closely with companies and the affected communities, and with governments, indigenous peoples, and civil society organizations to facilitate an open and informed dialogue among all

parties.

In an answer to a question from a member of the Committee, Mr. Manuge elaborated:

We seek to help the various players reach a consensus on a way forward.<sup>1</sup>

#### 7. February – April 2018

The [Justice and Corporate Accountability Project](#) filed a [complaint](#) to the Public Sector Integrity Commissioner in February on behalf of the Abarca family and supporters, including Otros Mundos and the Mexican Network of Mining Affected People (REMA), and MiningWatch Canada.

In April, the Commissioner [turned down](#) the request investigate the case because the policies cited by JCAP, including policies on government websites and testimony before a Parliamentary Committee, were not policies that needed to be followed by civil servants.

... [they] are not official Government of Canada policies and they do not appear to prescribe specific actions that should have been taken or not taken by the Embassy at the relevant time.

#### 8. July 2019 – Federal Court decision

JCAP asked the Federal Court to review the decision of the Commissioner. Paragraphs 35-39 of our [factum](#) outlined the three errors made by the PSIC in evaluating the three key documents in the case. In July 2019, the [court upheld](#) the decision of the Commissioner not to investigate, saying that we had “not identified anything which created a legal obligation upon the Embassy to act or not to act in a certain manner.” The judge did note, however, that “perhaps Mariano Abarca would not have been murdered” if the Canadian embassy in Mexico “[had] acted in a certain way....”

#### 9. August 2019 – Pending appeal to Federal Court of Appeal

In August 2019, JCAP filed an appeal to the Federal Court of Appeal, and is awaiting a hearing date. Four organizations have been granted leave to [intervene](#) in the case: Amnesty International, the Centre for Free Expression at Ryerson University, the Canadian Lawyers Association for International Human Rights and the Allard International Justice and Human Rights Clinic.

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<sup>1</sup> Evidence, Standing Committee on Foreign Affairs and International Trade, December 1, 2009, AR Vol. 2 Tab 3I at page 526.