

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

November 6, 2022

The Public Sector Integrity Commissioner was asked to review the conduct of the Canadian embassy in Mexico after community leader Mariano Abarca was murdered in broad daylight. The murder came seven weeks after senior Canadian diplomats met with Chiapas State officials to “advocate” for Canadian mining company Blackfire Exploration.

The Commissioner refused to commence an investigation. His decision was upheld by the Federal Court and the Federal Court of Appeal. A leave to appeal has been filed with the Supreme Court of Canada.

Two issues in a nutshell

1. Important issue of 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 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? If the Blackfire case is a precedent, PSIC will not investigate.

In our case, a senior government official tells a Parliamentary Committee that Canadian embassy have a certain procedure to follow when there is a conflict between Canadian mining company and local communities – to “facilitate dialogue” and “help the various players reach a consensus on a way forward.” However, the Embassy 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 embassy contact with Mr. Abarca was in July 2009, at a protest outside of the Embassy, where Mr. Abarca was not permitted to enter the embassy, but met outside by a junior official. Instead of “facilitating dialogue” the Canadian embassy went to Mexican government officials to “advocate” for Blackfire Exploration, and to end the protests.

PSIC refused to investigate the case because they said that the procedures explained in extensive testimony before a Parliamentary committee were not procedures 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? 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. There are no formal requirements about how to submit a complaint. Instead, there is an online form to fill out, which says:

Using your own words, while keeping in mind the definition of the wrong-doing above, please describe the situation.

In terms of what information to submit, the website says:

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.” (see screen shot below)

We submitted a 30-page [detailed complaint](#) with almost 100 footnotes that referred to a 982-page [access to information disclosure](#).

JCAP offered to physically submit the access to information disclosures, and also said that the documents were available from the Information and Privacy Commissioner. The PSIC office informed JCAP that it was not necessary to submit the documents, but they did not say that failure to submit the documents would mean that the PSIC would ignore the information contained in those documents.

The PSIC did not discuss the file with JCAP. Instead the Commissioner refused to even commence an investigation. He said that that the disclosers had failed to prove that applicability of the policies that had been cited in relation to how to address conflicts between Canadian and local communities. The documents that PSIC refused to read contained some of the proof, but because they had not read the materials, their decision contained material factual errors.

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 in order to commence an investigation. 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.

The issue was judicially reviewed by the Federal Court, which decided that the PSIC *had* read the documents and therefore the PSIC came to a reasonable decision not to commence an investigation. On appeal to the Federal Court of Appeal, it was decided that the PSIC *had not* read the documents, but was not *required* to read the documents because the documents had not been physically submitted.

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Timeline

1. December 2007 – early 2008

Blackfire Exploration of Calgary succeeded in opening a bauxite mine in the State of Chiapas, in southern Mexico after the Canadian Ambassador visited Chiapas to intervene on behalf of the mine.

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.

4. October, 5, 2009

After receiving complaints about protests around the Blackfire 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”.

5. November 27, 2009

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

6. December 1, 2009

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, 40th 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.

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

7. February – April 2018

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

In April the Commissioner [turns 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

JCAP asked the Federal Court to review the decision of the Commissioner. In July 2019, the court found that the Commissioner *had read* the Access to Information report, and 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

JCAP filed an appeal to the Federal Court of Appeal. 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.

10. February 9, 2022

The Federal Court of Appeal finds against the Abarca family and upholds the decision of the Commissioner. The Federal Court found that the Commissioner *had not read* the Access to Information disclosure, but was not required to do so because the documents were not physically delivered to the Commissioner.