Court File Number: T-911-18

FEDERAL COURT

B E T W E E N:

Mirna Montejo Gordillo, José Luis Abarca Montejo, José 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

APPLICANTS' MEMORANDUM OF FACT AND LAW

PART 1: Overview and Nature of Proceedings

1. The instant application for judicial review by the Applicants relates to a decision dated April 5, 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.

2. The Applicants had filed a letter of information or complaint with the Commissioner seeking an investigation into the actions of the Canadian Embassy in Mexico relating to the criminalization and murder of an environmental activist, Mariano Abarca. Mr. Abarca led

public protests against the social and environmental impacts of a Canadian owned barite mine in Chiapas, Mexico.[1] The information letter provided to the Commissioner established that the Embassy had received direct testimony from Mr. Abarca, including allegations of mine employees acting as "thugs" against people participating in protests,[2] and was aware of the detention and abuse of Mr. Abarca.[3] But rather than acting consistently with Canadian government policy by meeting with his family and community and taking steps to ensure his safety, the Embassy sought to publicly downplay its level of knowledge of Mr. Abarca's case and "trouble shoot" for the interests of Blackfire.[4] The Applicants submit that the Embassy was required by the governing code of ethics to avoid taking a partisan position in favour of the mine at meetings with Mexican officials where the Embassy advocated for Blackfire in the face of protests against the mine. The conduct of Embassy officials, it is alleged, increased the risk of danger to Mr. Abarca and constitutes a serious breach of ethical values in the public service.

3. However, the Commissioner declined to initiate an investigation into the actions of the Embassy, based on an erroneously restrictive test for the threshold assessment of whether to initiate an investigation.[5] In the Commissioner's reasons for decision, he also ignored and misinterpreted crucial evidence on the record regarding the conduct and communications of the Embassy which may have endangered Mr. Abarca's life. His review of the information before him was perfunctory, he failed to consult the supporting documents identified in the submission, he selectively chose certain documents to review that were not provided by the Applicants and failed to provide notice to the Applicants regarding documents and policies relied upon by the Commissioner, but not known to the Applicants. The decision, therefore, violated the Applicants' contextual right to procedural fairness and should be set aside on this basis.

4. Moreover, the Commissioner's review and analysis of the information provided by the Applicants was so lopsided and dismissive of the information constituting reasons

---

[1] Applicant's PSIC Form and Complaint Letter dated February 5, 2018, **Applicants' Record ["AR"]**, Vol. 2 Tab 5A and 5B at pages 571-610.
[2] Appendix re: "Dates of Key Events to Applicants' Complaint" **["Appendix"]**, AR, Vol. 2 Tab 5C at page 606.
[3] Appendix, AR, Vol. 2 Tab 5C at page 607.
[4] *Ibid.*
[5] PSIC Decision dated April 5, 2018, AR, Vol. 2 Tab 2 at page 12.

establishing potential wrongdoing that it demonstrates a closed mind. Consistent mischaracterization of the Applicants' information, reliance upon inaccurate facts and failure to consider the evidence on the record are all indicia of a closed mind.

5. The Commissioner's decision was also unreasonable for three reasons. First, the Commissioner misinterpreted s.33 to be a threshold that required him to find that there was a "reason to believe" that a wrongdoing had been established by the applicant, rather than a provision to require him to decide whether there was "reason to believe" that there should be an *investigation* into the alleged wrongdoing,

6. Second, he failed to properly analyze and consider relevant facts under section 8(d) of *the PSDPA* relating to the "substantial and specific danger" to the life and safety of Mr. Abarca caused by the Embassy's advocacy with Mexican government officials on behalf of Blackfire Exploration in the face of protests over the mining project.

7. Third, the Commissioner erred when he decided that policies on Corporate Social Responsibility (CSR), on human rights, on community-company conflict and on corruption, were not policies that fell within the codes of conduct under section 8(e) of the *PSDPA*, even though these policies were published on government websites or discussed extensively in front of a Parliamentary Committee. The consequence of such a finding is that civil servants who act contrary to such publicly disseminated policies would committ no wrongdoing under the *Act*, and the public would have no way of knowing whether any particular civil servant had decided to act consistently with the policy or had decided to ignore the policy.

PART 2: Facts

Background –Abarca's Protest of *Blackfire*

8. 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 Foreign Affairs and International Trade, now 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.[6]

9. A local community leader, Mariano Abarca **("Abarca")**, led peaceful protests against the social and environmental impacts of the mine. Mr. Abarca was a community leader from the town of Chicomuselo in the state of Chiapas, Mexico who expressed concerns about the social and environmental impacts of the Payback Mine, owned by Blackfire Exploration.[7]

Canadian Embassy's Advocacy of *Blackfire*

10. On the basis of information obtained under an Access to Information (ATI) 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.[8] In July 2009, Mr. Abarca made a specific appeal directly to the Canadian Embassy in Mexico about the problems they were facing as a result of Blackfire's operations, including threats from company employees against those speaking out.[9]

11. 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.[10]

12. Mariano Abarca received multiple death threats and was finally murdered in broad daylight in front of his family restaurant on November 27, 2009, seven weeks after a delegation from the Canadian embassy met with officials of the State of Chiapas to "advocate" for Blackfire in the light of community protests that were hindering the operation of the mine.[11] Mr. Abarca is survived by his wife and four children who are co-Applicants in the present Application

---

[6] Applicants' Complaint letter to PSIC dated February 5, 2018 "Complaint Letter", AR Vol. 2 Tab 5B at page 582. NB: consecutive page numbering of AR appears on top right corner of each page of the record.
[7] Complaint Letter, AR, Vol. 2 Tab 5B at pages 583-584.
[8] Complaint Letter, AR, Vol. 2 Tab 5B at pages 590-594.
[9] Appendix, AR, Vol. 2 Tab 5C at page 606.
[10] Appendix, AR, Vol. 2 Tab 5C at page 607.
[11] Complaint Letter, AR, Vol. 2 Tab 5B at page 584; Report from the March 20-27, 2010 fact finding delegation to Chiapas, Mexico ("Delegation Report"), AR Vol. 1 Tab 3B at pages 54-55.

along with five non-governmental organizations from Mexico and Canada.[12]

Embassy's Knowledge of Danger to Abarca

13. The Applicants' complaint provides 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.

14. From March 2008 to May 2009, Blackfire made regular secret payments into the personal bank account of the mayor of the local town of Chicomuselo in order to "keep the peace and prevent local members of the community from taking up arms against the mine."[13] This fact came to public light in Canada in December 2009 when evidence of payments was obtained by The Globe and Mail. However, the payments had been revealed to the Chiapas State Congress by Blackfire itself and reported on in the Chiapas press six months earlier, in June 2009.[14]

15. The mine was shut down for environmental violations in early December 2009, shortly after Mariano Abarca was assassinated.[15] Three individuals associated with Blackfire were arrested for the murder, but all were eventually released or acquitted.[16]

Delegation Efforts to Probe Abarca Murder

16. After his murder, a delegation of Canadians composed of representatives from the United Steelworkers, Common Frontiers and MiningWatch Canada **("the Delegation")** went to Chiapas to learn more about the situation there and to meet with family, friends and neighbours of Mariano Abarca, residents of nearby rural communities where the mine was located, representatives of the local parish church and its human rights committee, Chiapas

---

[12] Complaint Letter, AR, Vol. 2 Tab 5B at page 582.
[13] Complaint Letter, AR, Vol. 2 Tab 5B at pages 583; Greg McArthur, "RCMP raid Calgary miner over bribery allegations" *The Globe and Mail* (29 August 2011), AR Vol. 2 Tab 5C at pages 130-132.
[14] Complaint Letter, AR, Vol. 2 Tab 5B at page 597; Blackfire Exploration, "To: President of the Honourable Congress of the State of Chiapas", (15 June 2009), AR Vol. 2 Tab 5C at pages 397-398.
[15] Complaint Letter, AR, Tab 5B at page 585; ATI excerpt Media Monitoring summary dated December 8, 2009, AR Tab Vol. 2 5C at page 292.
[16] *Ibid.*

government authorities, press, a local civil society organization that was part of the Mexican Network of Mining Affected People (REMA) and the Canadian Embassy in Mexico.

17. The Delegation's efforts to meet with the then municipal president, company representatives and local environmental authorities were unsuccessful. The Delegation published a report about its findings entitled, "Report from the March 20-27, 2010 fact-finding delegation to Chiapas, Mexico, to investigate the assassination of Mariano Abarca Roblero and the activities of Blackfire Exploration Ltd.". [17]

18. In late 2010, a request was submitted under the *Access to Information Act* R.S.C., 1985, c. A-1 for records in relation to the Canadian Embassy in Mexico **("the ATI request")**. Between April and June 2012, the government released approximately 1,000 pages of material in response to the ATI request. From 2012 to 2013, this material was analyzed in conjunction with the events known about the case, the findings of the investigation trip in March 2010 and further consultations with the family and local organizations in Chiapas.

19. The resulting report was then released in May 2013 (**"the Abarca Report"**). It describes the opposition to the negative social and environmental impacts of the mine, the statements made by Blackfire Exploration and the role of the Canadian embassy in supporting Blackfire.[18]

20. Following the release of the Abarca Report, the family of Mariano Abarca continued to press the Mexican government for a more thorough investigation of his murder, as well as for a full investigation by the Royal Canadian Mounted Police (RCMP) into evidence of corruption of the municipal president by Blackfire Exploration, as well as an investigation over the responsibility of the Canadian Embassy.[19]

JCAP Filing of Complaint to PSIC

---

[17] The Chiapas Delegation Report, March 2010, AR Vol. 1 Tab 3B at pages 44-45.
[18] United Steelworkers, Common Frontiers, MiningWatch Canada, "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy", (May 2013) **["Abarca Report"]**, AR Vol. 1 Tab 3C at pages 228-265.
[19] Affidavit of Charis Kamphuis sworn July 3, 2018 **["Kamphuis Affidavit"]**, AR, Vol. 1 Tab 3, para. 7 at page 18.

21. In January 2017, the Applicants through the Justice and Corporate Accountability Project (JCAP) began a legal review of the Access to Information disclosures produced from Global Affairs Canada. Based on this review the Applicants decided that there were grounds for an investigation into the conduct of Canadian Embassy officials.[20]

22. Accordingly, on February 5, 2018, they presented an information letter or complaint to the Public Service Integrity Commissioner requesting an investigation into the conduct of Canadian Embassy officials for serious breach of the Values and Ethics Code of the civil service, under section 8 (e) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, and for creating a substantial and specific danger to the life, health and safety of Mariano Abarca, under section 8 (d) of the same Act.[21]

23. The Complaint was filed by JCAP on behalf of family members of Mr. Mariano Abarca, supporting organizations in Mexico, and MiningWatch Canada. The letter of complaint contained 100 footnotes referencing pages from the disclosure, newspaper reports and other documents.[22]

24. On April 17, 2018, the Applicants received the decision of the Commissioner dated April 5, 2018.[23] In his decision, the Commissioner found that an investigation was not necessary because there was, according to him, no wrongdoing that needed to be investigated.

Judicial Review and Limited CTR

25. On or about May 16, 2018, a Notice of Application was filed on behalf of the Abarca family and others.[24]

26. In compliance with Rule 318 of the *Federal Courts Rules*, the Commission produced a Certified Tribunal Record ("CTR"). The CTR dated June 4, 2018 includes a Case Admissibility Analysis dated April 4, 2018, as well as only three of the 79 documents that were mentioned in

[20] Kamphuis Affidavit, AR, Vol. 1 Tab 3, para. 8 at page 19.
[21] Complaint Letter, AR, Tabs Vol. 2 5B and C, pages 580-610.
[22] See: indexed compilation of source documents corresponding to the footnotes referenced in the Complaint Letter as compiled by JCAP, AR Vol. 1 Tab 3C at pages 89-94.
[23] PSIC Decision dated April 5, 2018, AR Vol. 1 Tab 2.
[24] Notice of Application (T-911-18) issued May 16, 2018, AR Vol. 1 Tab 1, pages 1-8.

the footnotes to the complaint letter.

27. There is no other information in the Certified Tribunal Record to indicate the extent to which, if at all, other documents mentioned in the Applicants' footnotes were consulted.[25]

PART 3: Issues Arising on the Present Application

Issue 1: What is the appropriate standard for review?

Issue 2: Was the Commissioner's decision procedurally fair?

Issue 3: Did the Commissioner render an unreasonable decision?

PART 4: Law and Arguments

Issue 1: Standard of Review

28. The standard of review for a decision of the Public Service Integrity Commissioner ("the Commissioner") will generally be reviewed on the standard of reasonableness.[26]

29. Where the Commissioner violates procedural fairness, the standard is correctness and his decision must be set aside.[27]

Issue 2: The Commissioner's decision lacked procedural fairness

A. PSIC "Cherry-picked" and Failed to Read the Entire Evidentiary Record

30. On February 5, 2018, the Applicants presented an information letter or complaint to the Commissioner, which is the subject of the Commissioner's decision in the present application. The letter contained approximately 100 footnotes referencing pages from the disclosure, newspaper reports and other documents.[28]

31. The hundreds of pages of source documents referenced in the footnotes of the Complaint were not provided to the Commission, but were clearly identified for appropriate follow up and

---

[25] Certificate of Record Form for CTR dated June 4, 2018, AR Vol. 2 Tab 4 at pages 567-70.
[26] *Canada (Attorney General) v. Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 (CanLII) at paras 9-10, **Applicants' Book of Authorities ["BOA"]** Tab 3.
[27] *El-Helou v. Courts Administration Service*, 2016 FCA 273 (CanLII) at para. 43, BOA Tab 6.
[28] Index to Source Documents for Footnotes to Complaint Letter, AR Vol. 1 Tab 3C at pages 89-94.

consultation as and when they may be required. Shin Imai, the lawyer for JCAP, offered to provide the Commissioner's office with referenced information in support of the Complaint upon request. However, he was not contacted by anyone from the Commissioner's office for further information or clarification. Additionally, no other person or organization affiliated with the filing of the Complaint was contacted by the Commissioner for comment or to provide further information.[29]

32. Significantly, the Certified Tribunal Record ("CTR"), contains only three documents from the over 79 referenced sources contained in the approximately 100 footnotes to the information letter. These three documents are as follows:[30]

    a) "Conduct Abroad Code" – January 2006 (referenced at footnote 22)
    b) "Report from the March 20-27, 2010 fact-finding delegation to Chiapas, Mexico, to investigate the assassination of Mariano Abarca Roblero and the activities of Blackfire Exploration, Ltd." (referenced at footnotes 8, 13, 14, 17, 49, 69, 74, 79 and the Appendix)
    c) "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy" – May 2013 (referenced at footnotes 9, 61 and 96)

33. Because copies of these materials were not provided by the Applicants as appendices to the information letter, the Commissioner – as a logical inference – obtained them himself. Because none of the other 76 documents referenced in the letter are found in the CTR it is also a logical inference that the Commissioner did not obtain copies and did not consider them in his determination of whether there grounds to believe that wrongdoing had been committed.

34. Three statements made by the Commissioner in relation to three of the policies pertaining to the Embassy illustrate his failure to consult the references contained in the Applicant's information letter. This failure led to an error in deciding that the three policies were not integral components of a code of ethics under section 8(e) of the *Act*.

[29] Notes of conversation created by Chantal Vai, February 8, 2018, AR Vol. 2 Tab 3D at pages 488-491.
[30] Certificate of Record Form for CTR dated June 4, 2018, AR Vol. 2 Tab 4 at page 570.

(i) Information on Corporate Social Responsibility (CSR) Document

35. The "Building the Canadian Advantage" policy pertained to the conduct of Canadian mining companies abroad and the initiatives undertaken by the Canadian government to encourage compliance with international human rights standards. The policy was published on the Department's website. The Commissioner dismissed the document as a "strategy document, written in 2009 and aimed at Canadian extractive sector companies." The Case Admissibility Analysis is more explicit, stating at paragraph 27: "It is important to note that the CSR Strategy does not impose any legal obligation to either the Embassy or Blackfire, including conducting a "violence-related risk assessment" since it is voluntary."[31]

36. However, the website referenced at footnotes 28-31, indicates that the policy set out specific expectations about the conduct of embassies:

- The document includes a number of promises of government actions, including: the creation of a $170,000 CSR fund "to assist Canadian offices abroad and in Canada to engage in CSR-related activities"; that the government will "take steps to ensure that government services align with high standards of corporate social responsibility"; and that the government will undertake activities "to strengthen existing efforts, and to lay the foundations for new approaches, to respond to and mitigate the social and environmental challenges faced by Canadian extractive companies operating abroad."

- The document also included a description of the office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, which existed until May 2018 and was required to receive complaints and produce public reports on its activities in relation to these complaints. It also offered voluntary mediation services to companies and communities who are in conflict and refers to the existence of the Guidelines for Multi-national Enterprises of the Organization of Economic Co-operation and Development. [32]

(ii) Information on the human rights defenders policy

37. The Commissioner in his April 5th decision also dismisses the human rights defenders policy, which obligated the Embassy to take certain steps to protect human rights defenders, as a statement from an "unnamed document written in 2016". However, the access to information disclosures at footnotes 32-34 show that the document was a "Memorandum for Action to the

[31] Case Admissibility Analysis dated April 4, 2018 **["Case Analysis"]**, AR Vol. 2 Tab 3L at page 539.
[32] Global Affairs Canada, "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector", (Ottawa: GAC 22 April 2016), AR Vol. 2 Tab 3C at pages 336-345.

Minister of Foreign Affairs" from the Deputy Minister of Foreign Affairs, with a subject line stating "Recognizing and supporting human rights defenders" and included the statement of the role of embassies in relation to human rights defenders:

> "Canada's network of missions abroad pursues objectives related to the promotion and protection of human rights defenders consistent with our human rights agenda."[33]

(iii) Policy on community-company conflicts

38. The policy on mining company conflicts with communities, stated that the role of the Embassy was to talk to all parties in a conflict, "play a constructive and helpful role" and "facilitate dialogue". The Commissioner dismisses the policy as something that "appears to be an excerpt of a statement the Department of Foreign Affairs and International Trade made to the Toronto Star in December 2009".[34] However, the access to information disclosure at footnote 33 shows that named department officials distributed the policy within the embassy and to the Minister of International Trade.[35] In particular, the statement was made by Department officials from Ottawa, Marcello DiFranco (GNC) and Heather Grant (GND) and copied to many people at the Embassy including the Ambassador. Additionally, there was also a PowerPoint briefing to the Minister of International Trade showing Canada's role as "facilitating dialogue without getting in the middle".[36]

39. If some other documents were reviewed from among the remaining sourced footnotes, there is no transparency in terms of which documents were reviewed and which were not reviewed. This selective review demonstrates a lack of thoroughness in the Commission's threshold analysis. At a threshold stage, in determining whether or not an investigation was warranted, there is no principled basis for omitting to consider the entirety of source documents referenced in the information letter, or where, as here, they are voluminous, at least contacting the Applicants to have them identify specific documents or passages on matters of central importance to the complaint. It is relevant here that the Applicant expressly offered to provide

---

[33] Kamphuis Affidavit, AR Vol. 1 Tab 3 para. 23 at page 24; Global Affairs Canada Memorandum for Action titled "Recognizing and supporting human rights defenders", Exhibit "G" to the Kamphuis Affidavit, AR Vol. 2 Tab 3G at pages 512-515.
[34] PSIC Decision April 5, 2018, AR Vol. 1 Tab 2 at page 10.
[35] ATI disclosure email dated December 11, 2009, AR Vol. 2 Tab 3C at pages 360; see also: Evidence, Standing Committee on Foreign Affairs and International Trade, December 1, 2009, AR Vol. 2 Tab 3I at page 526.
[36] Powerpoint Presentation, AR Vol. 2 Tab 3C at page 362.

such assistance to the PSIC, but it failed to avail of this offer.

B. PSIC Failed to Consider the Potential Relevance of Redacted Portions of Certain Documents in Deciding Whether to Investigate

40. A large portion of the source references for the footnotes in the information letter derive from documents received by the Applicants pursuant to a request under the *Access to Information Act*. As explained at page 3 of the Applicants' February 5th information letter:

> The story is a complex one involving murder, payments to a local mayor "to keep the peace," and the eventual closing of the Canadian mine for breaches of environmental regulations. We rely on documentation released from the Canadian Department of Foreign Affairs and International Trade ("DFAIT") under an access to information request ("ATIP") as well as other information we have been able to find through our research. **As the ATIP material is extensively redacted, we can only glean part of the story concerning the role of Canadian authorities recounted in this submission**. [emphasis added][37]

41. Accordingly, the Commissioner should clearly have been aware of the redactions contained in the material that was being relied upon by the Applicants as a basis for initiating an investigation. These redactions obscured significant parts of the facts giving rise to the complaint.

42. In determining whether there was reason to believe that the disclosure revealed a wrongdoing and merited an investigation, the Commissioner should have adverted to the powers he has to review redacted information once an investigation is commenced.

43. Pursuant to 28 and section 29(1) of the PSPDA, the Commissioner has all the powers to conduct an investigation as set out in Part II of the *Inquiries Act*.[38] His authority includes the power to summon any person and to require that person "...to bring and produce any document, book or paper that the person has in his possession or under his control relative to the subject-matter of the investigation".[39]

44. Accordingly, based on the Commissioner's investigatory powers, and specifically pursuant to section 8(1)(c) of the *Inquiries Act*, he has the legal authority to issue a summons for the interview

[37] Complaint Letter, AR Vol. 2 Tab 5B at page 582.
[38] *Inquiries Act*, R.S.C., 1985, c. I-11, BOA Tab 14.
[39] *Inquiries Act*, section 8(1)(c), BOA Tab 14.

of a representative of DFAIT and to order DFAIT to produce the unredacted versions of the redacted records relied upon by the Applicants in their information letter.

45. On page 3 of his April 5th decision, the Commissioner dismisses information about the Embassy's potential knowledge of corruption stating:

> Although you provided your beliefs surrounding what the Embassy may or should have known or done and when, the information provided in this regard appears speculative.[40]

46. However, the Applicants' complaint summarizes available public evidence about the close working relationship between the Canadian embassy and Blackfire Exploration between 2007 and 2010 that gave rise to concerns about what the Embassy may have known or may have done and when.[41] The string of meetings between Canadian embassy officials and Blackfire Exploration and Mexican officials as documented in the ATI disclosure is heavily redacted and no person will know what Canadian officials knew, until an investigation is undertaken, as part of which the disclosures could be un-redacted and the individuals involved interviewed.

47. In this regard, in his threshold assessment of whether or not to commence an investigation, the Commissioner made two related procedural errors. Firstly, the Commissioner failed to request from the Applicants copies of all of their ATI materials, or to identify those of most relevance to his mandate or otherwise seek the Applicant's assistance in identifying documents of greatest potential relevance at this initial stage. Secondly, and as a corollary to the first error, he failed to inquire into or turn his mind to whether unredacted material may provide a reason to commence an investigation that could reveal relevant evidence relating to the nature and scope of communications between the staff of Canada's embassy in Mexico and Blackfire and/or relevant third parties.

C. PSIC Failed to Provide the Applicants with an Opportunity to Respond to Commissioner's Conclusions about the Evidence

48. It is submitted that it is permissible on judicial review to file material that was not before the

[40] PSIC decision dated April 5, 2018, AR Vol. 1 Tab 2 at page 11.
[41] Complaint Letter, AR Vol. 2 Tab 5B, pages 590-594.

decision-maker, where the information would have been supplied but for a procedural violation in the investigation which relates to a crucial witness or evidence[42] and/or that the information being tendered to the Court should have been before the decision-maker at the time of making his decision.[43]

49. In his April 5th decision, the Commissioner made certain conclusions with respect to the breach of a code of conduct in discussing the status of the three policies cited in the Applicants' information letter without consulting with the Applicants. We have already pointed out that it appears that the Commissioner failed to look at information contained in the Applicants' letter of complaint. In addition, the Applicants were prepared to have provided relevant and crucial information had the Commissioner sought to consult with them or seek clarification.

(i) Additional Information on Corporate Social Responsibility (CSR) Website

50. The Commissioner failed to ask JCAP or any party advancing the Complaint for further details about the "Building the Canadian Advantage" policy for encouraging Canadian companies abroad to adhere to international standards of conduct. Had the Applicants been permitted to respond to the Commissioner's assessment, they would have indicated that this document was released by the government as a response to a recommendation by a Parliamentary Committee and a tripartite stakeholder roundtable that recommended that the government enact policies to address human rights abuses associated with Canadian mining companies operating abroad.[44] While the policy established voluntary standards for companies (i.e. there was no effective enforcement mechanism), it does not follow from this that the statement of government commitments was voluntary for civil servants. To the contrary, the policy set out a number of government initiatives and commitments.

(ii) Additional Information on the human rights defenders policy

51. The Commissioner failed to ask any party to the Complaint for further details on the human rights defenders policy, which obligated the Embassy to take certain steps to protect human

[42] *Grover v. National Research Council of Canada*, 2001 FCT 687 (CanLII) at paras. 66-67, BOA Tab 8; *Biles v. Canada (Attorney General)*, 2017 FC 1159 (CanLII) at paras. 54-55, BOA Tab 2.
[43] *Canada (Attorney General) v. Telbani,* 2014 FC 1050 (CanLII) at para. 40, BOA Tab 4.
[44] Kamphuis Affidavit, AR Vol. 1 Tab 3 para. 16 at pages 21-22.

rights defenders. Had the Applicants been permitted to respond to the Commissioner's assessment, they would have indicated that Professor Charis Kamphuis had additional information substantiating that in July, 2016, she saw the following statement on the website of the Department of Foreign Affairs, Trade and Development:

> Canada values the role of human rights defenders and the work they perform. It encourages foreign governments to do the same. Canada is concerned about the vulnerability of human rights defenders. [45]

While this statement was seen in July 2016, there is no reason to believe that the policy it refers to, or a policy of this nature, has not been in force since the signing of the United Nations' *Declaration on Human Rights Defenders* which was adopted by the General Assembly in 1999, as indicated in footnote number 34 of the complaint. This statement is confirmed by the note from the Deputy Minister to the Minister, referred to in paragraph 36, and shows that the government expected that its embassies were acting consistently with the policy.

(iii) Policy on community-company conflicts

52. The Commissioner also failed to ask any party to the Complaint further details on the policy on community-company conflicts. Had the Applicants been permitted to respond to the Commissioner's assessment, they would have indicated that the policy was explained in an extensive hearing before a Parliamentary Committee by a senior government official, including the following observations:[46]

- On December 1, 2009, shortly after the murder of Mr. Abarca, Mr. Grant Manuge (Director General, Trade Commissioner Service, Operations, Department of Foreign Affairs and International Trade) told the Standing Committee on Foreign Affairs and International Development (Number 043, Second Session, 40th Parliament);

> "It may be helpful to review the current practice of the department when DFAIT officials are presented with allegations of wrongdoing by a Canadian company abroad. When the department learns of such allegations, we take these very seriously and try to play a constructive and helpful role. Our heads of missions and foreign service officers in Canada and abroad

[45] Kamphuis Affidavit, AR Vol. 1 Tab 3 paras.19 and 20 at page 23; "A human rights policy for Canadian embassies is long overdue", Hill Times, August 31, 2016, AR Tab 3E at pages 493-496.
[46] Kamphuis Affidavit, AR Vol. 1 Tab 3, para 26 at page 25.

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 do not have the authority to undertake formal investigations abroad. We do not have the authority to establish who is at fault in situations like this. When I mentioned that we lend our offices to open dialogue with a view to seeking results oriented, constructive solutions, that's exactly what we do. We seek to help the various players reach a consensus on a way forward. [47]

These statements show that the government expected that its embassies were acting consistently with these policies.

(iv) Commissioner introduced new evidence and did not give an opportunity to the applicants to address the new evidence

53. The Commissioner introduced an 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 and the Commissioner introduced an undefined 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.

54. The Commissioner on page 2 of his April 5 response says that "Recognizing that the Embassy's mandate in general appears to include providing assistance to Canadian companies abroad interested in expanding and succeeding in the international market".[48] However, the Applicants did not cite any policy related to the Embassy's mandate in this regard. The Commissioner must have relied on some other document that defines "official "government policy" or the mandate of the embassy to provide assistance to Canadian companies, but did not disclose the source of information to the applicants nor did he provide the applicants with an opportunity to comment.

[47] Evidence, Standing Committee on Foreign Affairs and International Trade, December 1, 2009, AR Vol. 2 Tab 3I at page 526.
[48] PSIC decision dated April 5, 2018, AR Vol. 1 Tab 2 at page 10.

55. Based on the foregoing, it is submitted that the Commissioner's threshold inquiry into the Applicant's complaint lacked rigour and was perfunctory. The Commissioner's failure to consult the references supplied by the Applicant and the failure to advise and receive submissions on new material relied upon by the Commissioner led to incorrect and incomplete characterizations of the relevant policies identified by the Applicants that were allegedly breached by the Embassy.

E. Reasonable Apprehension of Bias / Closed Mind

(i) Legal Test for Assessment of a Closed Mind

56. The Commissioner also 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*. The test adopted by this court for assessment of bias/closed mind for an investigative function of a tribunal or commission is set out in *Bell Canada*,[49] is as follows:

> The standard of conduct which is applicable to those performing an adjudicative function is different from those performing a purely administrative or investigative function. In the case of an administrative or investigative function, the standard is not whether there is a reasonable apprehension of bias on the part of the investigator, but rather whether the investigator maintained an open mind, that is whether the investigator has not predetermined the issue. [emphasis added]

57. However, it behooves the investigator or administrative decision-maker at a threshold stage when deciding whether to embark upon an investigation to take a hard look at the evidence, for which a negative decision would completely extinguish a complainant's chance to be heard.[50] The assessment of the record by the decision-maker in exercising his gatekeeping function must

---

[49] *Bell Canada v Communications, Energy and Paperworks Union*, [1997] FCJ No 207, 1997 CarswellNat 347 at para 31 (FCTD), BOA Tab 1.

[50] Hallmarks of closed mindedness in investigations are discussed in: *Shoan v. Canada (Attorney General)*, 2016 FC 1003 (CanLII) at paras. 51-54, BOA Tab 11, *Sketchley v. Canada (Attorney General)*, [2006] 3 FCR 392, 2005 FCA 404 (CanLII) at paras. 79-80, BOA Tab 12; and *Gravelle v. Canada (Attorney General)*, 2006 FC 251 (CanLII) at para. 39, BOA Tab 7.[51] PSIC Decision dated February 5, 2018, AR Vol. 1, Tab 2.

not prematurely or preemptively disqualify information from forming the subject of an investigation.

(ii) Reasons for Decision Demonstrate Closed Mind

58. The Applicants submit that the Commissioner's decision is replete with examples that demonstrate a closed mind to a reasonable consideration of the Applicants' allegations, including the following:[51]

    a) The Commissioner based his decision on an undefined requirement that a breach of the code of conduct must be a breach of "official Government of Canada policies", a term that that does not appear in the Values and Ethics Code nor in the legislation
    b) The Commissioner 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) The Commissioner 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 likely in existence at that time
    d) The Commissioner 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"

59. It is submitted that in each of the above ways on its own, or cumulatively, the Commissioner based his decision upon a standard that was not defined in his decision and is not defined elsewhere by statute.

(iii) Mischaracterizations and Arbitrary Conclusions Demonstrate Closed Mind

[51] PSIC Decision dated February 5, 2018, AR Vol. 1, Tab 2.

60. The Commissioner's Case Admissibility Analysis,[52] which appears to be adopted by him in its results, also provides evidence of a closed mind in respect of its treatment of the information presented to the Commissioner by the Applicants. There are several instances in which the analyst misstates and distorts the information provided in the Applicants' information letter.

61. At paragraph 49 of the Case Admissibility Analysis,[53] for example, the analyst states that "the Embassy was not a party to the land-use agreement between Blackfire and the Government of Chiapas and, as such, would have been limited with respect to actions that could have taken *[sic]* in relation to the operations of the mine on the land." Here, the analyst mischaracterizes the Applicants' information about the land use agreements as an expectation that the Embassy be involved in negotiations. The Applicants did not suggest that the Canadian Embassy should intervene in the land-use agreements, butrather it questioned how the embassy used its influence with respect to conflicts between communities and mining companies. In this regard, facts concerning the extent and effectiveness of the Embassy's involvement in facilitating the company's operations in Chiapas, including helping it obtain an explosives permit that the company was not able to obtain on its own, are notably omitted from the analyst's Case Admissibility Analysis.

62. Similarly, at paragraph 27 (and later at paragraph 50) of the Case Admissibility Analysis, the analyst states that the "CSR Strategy ... does not impose any legal obligation on either the Embassy or Blackfire, including conducting a "violence- related risk assessment" since it is voluntary."[54] This assertion, as stated previously, is not supported by fact or any information from the record. The fact that Corporate Social Responsibility is voluntary for companies does not make the encouragement of the adoption of CSR voluntary for public servants.

63. At paragraph 51 of the Case Admissibility Analysis, the analyst states that "The Embassy had no jurisdiction in relation to that local [Chiapas] investigation." However, the information letter did not suggest that the Embassy had jurisdiction, nor does it suggest that the Embassy should have carried out the investigation of the murder. Rather, it provided information about the Canadian Embassy's reaction to the murder of Mr. Abarca, in order to contrast it with the

[52] Exhibit "L" to the Kamphuis Affidavit, ["Case Analysis"]
[53] Case Analysis, para. 49, AR Vol. 2 Tab 3L at page 544.
[54] Case Analysis, paras. 27 and 50, AR Vol. 2 Tab 3L at pages 539 and 544.

active interventions made by the Embassy with Mexican authorities to "trouble shoot" problems faced by Blackfire Exploration when it met with officials of the state of Chiapas to relay Blackfire's concerns with the community protests. In other words, the point is not whether the Embassy had jurisdiction to investigate. Rather, the facts set out in the Complaint demonstrate that there are reasons to believe that the Embassy had used its influence with Mexican officials to affect how the authorities dealt with the protests.[55] The concern raised in the information letter is that the Embassy's interventions and influence may have further endangered Mr. Abarca and that the Embassy failed to use its influence to try to protect him even though it knew he was in danger.

(iv) Systematic Omission of Information as Evidence of Closed Mind

64. Similarly, the Case Admissibility Analysis' systematic omission of information provided by the Applicants that places the Embassy in a negative light is a further indication of a closed mind. It appears that the Commissioner constructed a narrative that falsely establishes an appearance of diligence and genuine concern on the part of the Embassy prior to and following Mr. Abarca's death.

65. For example, at paragraph 15, the analyst describes a meeting between Embassy officials and a senior member of the Chiapas government on October 5, 2009, stating as follows:

> According to the discloser, the Embassy's goal "was to advocate greater attention by Chiapas to try to resolve the challenges that Blackfire was facing"[56]

The phrasing by the analyst suggests that this statement was merely the Applicant's interpretation of the objectives of the Embassy: however, in fact, it is a verbatim quote from an email written by an Embassy official, and is referenced in footnote 68 in the Complaint letter. However, the relevant source document to footnote 68 was not requested by the Commissioner.[57]

66. At paragraph 18, the analyst states "...the Embassy commented publicly that "Canada welcomes the judicial investigation by Mexican authorities to determine the facts related to

[55] Complaint Letter, AR Vol. 2 Tab 5B at pages 590-594.
[56] Case Analysis, para. 15, AR Vol. 2 Tab 3L at page 538.
[57] Kamphuis Affidavit, Exhibit "O", AR Vol. 2 Tab3O at pages 561-562.

Mr. Abarca's death".[58] However, the analyst omits to mention other pieces of information included in the Applicants' letter that showed how the Embassy was trying to downplay the connection to the company. For example, as indicated in Footnote 54,[59] Embassy personnel suggested that public statements not mention that the three men charged were associated with Blackfire.

67. Additionally, as referenced in Footnote 55,[60] in a briefing note for the Governor General, Embassy personnel counselled the Governor General to publicly state that"...the Government of Canada had no knowledge of potential acts of violence against Mr. Abarca", while refusing to meet with organizations in Chiapas that accompany the Abarca family. Contrary to the assessment of the case analyst, it is evident based on the record that the Embassy was actively attempting to downplay its knowledge and awareness of danger to Mr. Abarca's life.

68. The above examples demonstrate that the Commissioner held a closed mind to the concerns being raised by the Applicants.

Issue 3: The Commissioner's Decision was Unreasonable

A. Commissioner adopted the incorrect threshold for investigation

69. The PSIC Commissioner may initiate an investigation when information comes to his attention, pursuant to section 33(1) of the *Public Servants Disclosure Protection Act* ("PSDPA")[61]:

> Power to investigate other wrongdoings
>
> 33 (1) If, during the course of an investigation or 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 another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.

70. Effectively, the decision whether to investigate under section 33 is to be made in light of three constitutive considerations, only the first of which was relied upon by the Commissioner in

---

[58] Case Analysis, para. 18, AR Vol. 2 Tab 3L at page 538.
[59] Kamphuis Affidavit, Exhibit "P", AR Vol. 2 Tab 3P at page 564.
[60] Kamphuis Affidavit, Exhibit "Q", AR Vol. 2 Tab 3Q at page 566.
[61] *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46) ["PSDPA"], section 33(1), BOA Tab 16.

refusing the Applicant's disclosure.

> 1. The Commissioner must determine whether there are "reasons to believe" that there is a need to investigate.
>
> 2. Despite the existence of reasons to believe that an investigation should proceed, the Commissioner will determine whether there is a reason under section 23 or 24 to refuse to investigate.
>
> 3. In the event that there are reasons to believe an investigation should proceed that is not prohibited by sections 23 and/or 24 of the Act, the Commissioner must finally determine on reasonable grounds that the public interest requires an investigation.

71. The Commissioner based his decision on the first criterion – that there was no wrongdoing that has been committed within the meaning of sections 8(d) and 8(e) of *the Act*. Consequently, he does not address possible reasons for not investigating outlined in section 23 or 24 of the *Act* nor whether he "believes on reasonable grounds that the public interest requires an investigation." Significantly, the Commissioner states that his refusal to investigate does not "take away from the seriousness or importance of the situation."[62]

72. Based on the language of the statute, it is important to note that the "reasons to believe" threshold applies to whether or not to conduct an investigation, not whether a wrongdoing has been committed. Once the Commissioner has found "reasons to believe" that may support a finding of wrongdoing, he must then assess whether there are reasons to refuse an inquiry and then to conduct an inquiry if it is in the public interest based on a reasonable grounds test.

73. The "reasons to believe" threshold to commence an investigation is a lower standard than the threshold of "reasonable grounds to believe" associated with the public interest in the language of section 33(1). The higher "reasonable grounds to believe" threshold has been articulated by the Supreme Court of Canada as follows:

> … the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: Sivakumar v. Canada (Minister of Employment and Immigration), 1993 CanLII 3012 (FCA), [1994] 1 F.C. 433 (C.A.), at p. 445; Chiau v. Canada (Minister of Citizenship and Immigration), 2000 CanLII 16793 (FCA), [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for

[62] PSIC decision dated April 5, 2018, AR Vol. 1 Tab 2 at page 12.

the belief which is based on compelling and credible information: Sabour v. Canada (Minister of Citizenship & Immigration) (2000), 2000 CanLII 16300 (FC), 9 Imm. L.R. (3d) 61 (F.C.T.D.).[63]

74. Parliament in drafting the *PSDPA* specifically distinguished the low threshold for the Commissioner to identify some reasons or grounds to believe that a wrongdoing has occurred from the higher standard applicable to determining whether the public interest requires an investigation.

75. It is submitted that having regard to the important public policy at issue in these matters, the initial threshold is met if there exists a "mere possibility" of wrongdoing, on the spectrum of evidentiary standards of inquiry as defined by the Court of Appeal as being "...mere possibility, reasonable chance, balance of probabilities and highly probable".[64]

76. This is the first of three statutory criteria. If it is met, then the PSIC is directed to consider the specific statutory bars in s. 23 and ss. 24(2) and (3), the six discretionary bars in ss. 24(1) and then to apply the public interest test set out in s. 33 itself. It follows that Parliament's intent was to make the first criterion a low bar, a mere or real possibility; otherwise the other criteria would serve no legislative purpose.

77. This view is supported by reading the criterion in its purposive context, which is to advance public confidence in the integrity of the public service. A threshold that bars credible disclosures without even a consideration of the discretionary bars or the public interest test cannot be said to support bringing forward alleged wrongdoings, as Parliament clearly intended.

78. In the result, a credible possibility that the disclosure reveals wrongdoing should be enough to move the inquiry to the next criteria. Accordingly, the Commissioner erred when he dismissed the complaint on the basis of the first criterion alone, since the disclosure here manifestly raises a real possibility that a wrongdoing occurred

<u>B. Unjustifiable and Unintelligible Conclusion relating to Wrongdoing under section 8(d) – Danger to Health and Life</u>

---

[63] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII) at para. 114, BOA Tab 10.

[64] *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (CanLII) at para. 25, BOA Tab 9.

79. The Commissioner's decision was unjustified, 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 Mr. Abarca's life under section 8 (d) of *the Act*. In particular, at page 3 of his decision, the Commissioner concludes that "it also appears that the Embassy did not ignore the human rights concerns raised, as alleged."

80. Neither the Commissioner nor the case analyst mentions the danger faced by human rights defenders, such as Mr. Abarca, in Mexico at that time. This context is important for judging the actions of the Embassy, The Applicants' letter included this quote from the United States State Department:

> The UN and NGOs reported harassment of human rights defenders. According to a November update by the Office of the UN High Commissioner on Human Rights (OHCHR), from September 2009 to October 2010, there were 37 attacks against human rights activists but only three prosecutions. The report criticized government authorities for the lack of comprehensive policies to reduce and eliminate the risks faced by human rights activists and recommended that the government establish a national mechanism for protection of human rights defenders.[65]

81. In view of the above, it is evident that the Commissioner entirely omitted to consider the Embassy's interventions on behalf of Blackfire and the failure of the Embassy to consider the situation of Mr. Abarca, as an act or omission that "...creates a substantial and specific danger to the life, health or safety of persons" as required by section 8(d) of *the Act*. In contrast with section 8(e) of *the Act*, there is no requirement that there be breach of a code of conduct prior to assessing whether the act or omission of the Embassy created a substantial danger to Mr. Abarca's life in respect of a section 8(d) wrongdoing.

82. In the case at bar, it is also clear that the Commissioner omitted the consideration of "...crucial evidence [and] made findings entirely at odds with the evidence before him."[66] The Case Admissibility Analysis that informs the Commissioner's decision offers no further intelligibility

---

[65] US Department of State, Bureau of Democracy, Human Rights, and Labor, *2010 Country Reports on Human Rights Practices*, (8 April 2011), Kamphuis Affidavit, Exhibit "C", AR Vol 2 Tab 3C at page 365.
[66] *Swarath v. Canada (Attorney General)*, 2015 FC 963 (CanLII) at para. 52, BOA Tab 13; see also: *Delios v. Canada (Attorney General)*, 2015 FCA 117 (CanLII) at para. 27, BOA Tab 5.

as to the basis upon which the Commissioner assessed the acts of the Embassy that may have heightened the danger Mr. Abarca faced or the omission of the Embassy to have taken steps that may have assisted or prevented harm to Mr. Abarca. Relevant facts omitted by the analyst include those related to internal Embassy discussions about: how to tone down its language in its public communications in order to obscure information about the connection between suspects in the murder and the company; its decision to refuse the Abarca family and accompanying organizations a meeting with the Governor General and the fact that people were protesting the Embassy during the weeks after Abarca's murder. Neither does the analyst mention the supports that the Embassy continued to provide to the company after the murder.[67]

83. At paragraph 52 of the Case Admissibility Analysis, the analyst notes, "the Embassy met with a senior member of the Government of Chiapas in an effort to improve relations between the community and Blackfire".[68] This statement suggests that the Embassy's objective was to get advice on how to "improve relations" between Blackfire and the community.

84. However, the information provided to the Commissioner does not support such a conclusion. The disclosure from the ATI reveals that the Embassy met with the Chiapas government in order to "advocate" for Blackfire's interests to resolve Blackfire's challenges given "problems caused by 'lengthy blockades'", and that it saw its role as "troubleshooting" for the company. This information was documented at footnote 21 to the Complaint, which references page 39 of ATI return A-2010-00758/RF1.[69] What exactly happened at those meetings was reported by the Embassy to Blackfire, but the content of the meetings is redacted from the disclosure supplied to the Applicants.

85. Additionally, regarding the potential influence that the Embassy may have had on Chiapas government officials, neither the Commissioner's letter nor the Case Admissibility Analysis reference information relating to September 2008 events regarding key Embassy support to enable company's explosives permit, including the company's quote thanking the Embassy for

[67] Kamphuis Affidavit, Exhibit "N", AR Vol. 2 Tab 3N at pages 553-559.
[68] Case Analysis, para. 52 AR Vol. 2 Tab 3L at page 545.
[69] Kamphuis Affidavit, Exhibit "M", AR Vol. 2 Tab 3M at pages 549-550.

its essential support to getting the mine up and running.[70]

86. Regarding the suspected involvement of Chiapas state officials in the targeting of Mariano Abarca, neither the Commissioner's letter nor the Case Admissibility Analysis references that "Horacio Culebro Borrayas, who was a lawyer for Blackfire for 3 months, made a declaration on March 3, 2010, saying that he was in a meeting with Director General of Blackfire, Artemio Avila Cervera and Subsecretary of State for Chiapas, Nemesio Ponce Sánchez. At the meeting, Ponce Sanchez demanded payment of almost $1 million pesos ($65,000) for some members of one of the ejidos and purportedly said that Abarca would be "eliminated".[71]

87. In summary, there are several reasons to believe that there should be an investigation into the role of the Embassy in relation to the danger that was faced by Mr. Abarca pursuant to section 8(d) of *the Act*. The Commissioner's decision cannot be justified with respect to his section 8(d) analysis because the analysis hinges entirely upon his assessment of whether there was a violation of a related policy, as opposed to evaluating the evidence on the Embassy's acts and omissions.

88. That the Commissioner (and the case analysis) identify facts that show the Embassy's support for a Mexican investigation after the fact of Mr. Abarca's death wholly ignores an assessment of whether the Embassy's assistance to Blackfire in relation to combatting environmental activism influenced the safety of Mr. Abarca, who was killed for his environmental activism against Blackfire.

89. Not only did the Commissioner fail to turn his mind to the correct threshold to apply in relation to the question of whether a section 8(d) consideration should prompt an investigation, he omitted to consider the statutory language in any meaningful, transparent or justifiable way to explain how the threshold had not been met. To the contrary, within the allowable outcomes based on the facts and the law, the Commissioner's decision in relation to the section 8(d) of *the Act* is entirely indefensible and therefore unreasonable. On this basis alone, the

[70] Appendix re: Dates of Key Events for Applicants' Complaint "Sept 11, 2008" ["Appendix"], AR Vol. 2 Tab 5C at page 605.
[71] Appendix, "August 2009", AR Vol. 2 Tab 5C at page 607.

Commissioner's decision must be set aside.

C. Decision not supported by the record of evidence before the Commissioner

90. Additionally, there are several instances where the conclusions reached by the Commissioner were not supported by the record of information before him.[72]

(i) No Mandate of Embassy to assist Canadian companies

91. On page 2 of his decision of April 5, 2018, the Commissioner states,

> "Recognizing the Embassy's mandate in general appears to include providing assistance to Canadian companies abroad interested in expanding and succeeding in the international market, it does not appear that these actions were contrary to the above-noted documents."[73]

92. However, the record of information before the Commissioner contained no information on the Embassy's mandate to provide assistance to Canadian companies abroad. While, the Complaint letter did refer to the Embassy's mandate to promote "democracy, human rights, rule of law and environmental stewardship,"[74] there is absolutely no evidence of any policy on the record regarding "...providing assistance to Canadian companies".

(ii) Canadian Embassy not obligated to mediate disputes

93. On page 2 of his decision, the Commissioner states, "Based on the information provided, it does not appear that the Embassy was obligated to mediate the dispute between Blackfire and its opponents. ..."[75]

94. However, nowhere in the letter of information provided by the Applicants (or elsewhere on the record) is it stated that the Embassy was obligated to mediate a dispute. Rather, the Applicants identified the Embassy's stated policy toward company-community conflict, which stated that "Our officials in Canada and abroad consult and work closely with companies and the affected communities.... to facilitate an open and informed dialogue

[72] *Swarath*, supra at para. 27, BOA Tab 13.
[73] PSIC Decision dated April 5, 2018, AR Vol. 1 Tab 2 at page 10.
[74] "Values and Ethics Code", AR Vol. 1 Tab 3C at page 103.
[75] PSIC Decision dated April 5, 2018, AR Vol. 1 Tab 2 at page 10.

between the parties."[76]

(iii) Canadian Embassy "did not ignore the human rights concerns"

95. At page 3 of the Commissioner's decision he states:

> It also appears that the Embassy did not ignore the human rights concerns raised, as alleged. In particular, according to the information provided, after Mr. Abarca was detained in 2009, the Embassy sought information about his detention from the Government of Chiapas, the Chiapas Human Rights Commission, the federal Economy Ministry and the Canadian Chamber of Commerce, and from Blackfire. (emphasis added)[77]

96. However, the Applicants stated in their information letter that based on available information, the Embassy responded to Mr. Abarca's detention by looking into, in the Embassy's own words, the "challenges that Blackfire [was] facing".[78] As summarized in the information letter before the Commissioner, there is no evidence that the Embassy raised concerns about Mr. Abarca's detention. The record demonstrates that the contact was made by the Canadian embassy soon after Abarca's arrest on August 17 in order "...to signal [the Embassy's] concern with relevant authorities and players about any allegation of illegal activity surrounding Canadian investments in Mexico." [79] The Canadian Embassy never contacted Mr. Abarca or other community members, nor is there anything in the disclosed record that shows the Embassy had any concern for the health and safety of Mr. Abarca.

97. The pages from the ATI disclosure cited in the preceding paragraph were footnoted in the information letter and were readily available to the Commissioner. The other facts mentioned in the paragraph above were laid out in the body of the information letter.

98. Based on the foregoing, the Commissioner's decision did not meet the standard of reasonableness as its key findings are directly contradicted by the evidence on the record before the Commissioner.

---

[76] AR, Vol. 2 Tab 3J at pages 530-531.
[77] PSIC Decision dated April 5, 2018, AR Vol. 1 Tab 2.
[78] Complaint Letter, AR Tab 5B at page 591; ATI reference, AR Vol. 1 Tab 3C at page 302.
[79] Kamphuis Affidavit, Exhibit "K"; ATI (no. A-2010-00758/RF1) email from Political Commissioner Douglas Challborn to Trade Commissioner Paul Connors on August 25, 2009, AR Vol. 2 Tab 3K at page 533.

D. PSIC error in interpreting section 8(e) of the Act – Serious Threat to Public Confidence in the Integrity of the Public Service

99. The Commissioner also erred in law in concluding, under section 8(e) of *the Act*, that a public servant's failure to follow government policies and directives as set out in codes of conduct could not constitute wrongdoing under *the Act*. Section 8(e) of the Act references "...a serious breach of a code of conduct established under section 5 or 6."[80]

100. In this connection, the Commissioner erred by considering the relevant policies invoked by the Applicants as if they were freestanding elements of wrongdoing under *the Act*, instead of analyzing them within the codes of conduct of which they are integral parts. He also erred 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*.[81]

101. It is submitted that the four policies at issue, namely (i) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) strategy for the Canadian International Extractive Sector (March, 2009); (ii) the human rights defenders policy predating "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders" (December 2016); (iii) policy on community-company conflicts and (iv) the policy on corruption of foreign public officials all reflect important public service values.

102. Three of the policies appeared on government of Canada websites. The fourth policy on community – company conflict was the subject of extensive testimony by a senior government official in front of a Parliamentary Committee. The Commissioner's decision would mean that it will be up to individual civil servants to decide whether or not they act consistently with these publicly declared policies. It is submitted that such a result would pose a serious threat to public confidence in the integrity of the public service.

103. The Federal Court has described the nature of wrongdoings within the meaning of *the Act* as

[80] PSDPA, section 8(e), BOA Tab 16.
[81] See : also PSIC, "Serious Breach of a Code of Conduct" <online: https://www.psic-ispc.gc.ca/sites/default/files/seriousbreach2.pdf>, BOA Tab 15.

being of "...an order of magnitude that could shake public confidence if not reported and corrected".[82] The wrongdoings alleged by the Applicants, as conceded by the Commissioner, relate to matters of a serious and important nature The Applicants provided evidence on the following:

- the impact of a breach of the code on Canada's reputation as a country that encourages corporate social responsibility and fights corruption
- the impact of the breach of the code on the communities affected by Canadian mining projects
- the fact that the breaches continued throughout the time of the dispute from 2006-2010
- the fact that the Ambassador knew about, and condoned the breaches of the code
- that the breaches were willful and blatant, in that there is no evidence that the Embassy followed any of the three policies dealing with community-company conflict, and did not follow the policy on corruption of foreign public officials until the matter was reported to the press in Canada

104. Based on the foregoing, it is submitted that the norms referenced in the four documents cited by the Applicants constitute policies or are otherwise binding ethical values that must be followed by public servants as part of the *Code of Values and Ethics*.

105. The Commissioner's decision, in failing to consider the breach of the policies invoked by the Applicants is non-transparent and cannot be justified within the legislative context of serious breaches that require investigation. Accordingly, the Commissioner's refusal to investigate based on a threshold determination that there was no reason to believe that the Embassy had committed a serious breach of a code of conduct is unreasonable.

Conclusion

106. The Commissioner's decision must be set aside on the basis of multiple and serious violations of procedural fairness in his threshold investigation, which omitted consideration of crucial evidence and adopted the wrong approach and standard for assessment of evidence. Indeed, the Commissioner's review of the evidence was so lopsided, incomplete and lacking in rigour that it demonstrates a closed mind on the part of the Commissioner.

---

[82] *Canada (Attorney General) v. Canada (Public Sector Integrity Commissioner),* [2017] 2 FCR 165, 2016 FC 886 (CanLII) at para. 106, BOA Tab 3.

107. The Commissioner's decision is also unreasonable. It is evident on the facts and the law that the Commissioner failed to address the Embassy's omission of early intervention as contributing to danger to Mr. Abarca pursuant to section 8(d) of *the Act*. And finally, the Commissioner's treatment of the policies cited by the Applicants is arbitrary, unintelligible and inconsistent with both the purpose of *the Act* and PSIC's own policy relating to the assessment of serious breaches. The complete absence of consideration of the allegations raised by the Applicants in the context of the *Values and Ethics Code* is both inexplicable and necessarily raises problems of transparency and intelligibility of the decision, for which it must be set aside.

PART 5: Order Sought

108. The Applicants seek the following remedy:

(a) an order setting aside the decision of the Commissioner dated April 5, 2018 and remitting the matter back to the Commissioner based on the reasons and direction of this Court;

(b) Costs of the present Application;

(c) Such further and other relief as counsel may advise and this Honorable Court may permit.

ALL OF WHICH IS SUBMITTED this 12th day of October 2018

HAMEED LAW
43 Florence Street
Ottawa, ON
K2P 0W6

Per: Yavar Hameed
Tel: (613) 627-2974
Fax: (613) 232-2680
Solicitor for the Applicants

Schedule A – List of Authorities

1. *Bell Canada v Communications, Energy and Paperworks Union*, [1997] FCJ No 207, 1997 CarswellNat 347
2. *Biles v. Canada (Attorney General)*, 2017 FC 1159 (CanLII)
3. *Canada (Attorney General) v. Canada (Public Sector Integrity Commissioner)*, [2017] 2 FCR 165, 2016 FC 886 (CanLII)
4. *Canada (Attorney General) v. Telbani*, 2014 FC 1050 (CanLII)
5. *Delios v. Canada (Attorney General)*, 2015 FCA 117 (CanLII)
6. *El-Helou v. Courts Administration Service*, 2016 FCA 273 (CanLII)
7. *Gravelle v. Canada (Attorney General),* 2006 FC 251 (CanLII)
8. *Grover v. National Research Council of Canada*, 2001 FCT 687 (CanLII)
9. *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (CanLII)
10. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII)
11. *Shoan v. Canada (Attorney General)*, 2016 FC 1003 (CanLII)
12. *Sketchley v. Canada (Attorney General),* [2006] 3 FCR 392, 2005 FCA 404 (CanLII)
13. *Swarath v. Canada (Attorney General)*, 2015 FC 963 (CanLII)

Schedule B – List of Statutes and Regulations

14. *Inquiries Act*, R.S.C., 1985, c. I-11
15. Public Sector Integrity Commissioner, "Serious Breach of a Code of Conduct" <online: https://www.psic-ispc.gc.ca/sites/default/files/seriousbreach2.pdf>
16. *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46
17. *Values and Ethics Code for the Public Service*, 2003