



State Duty to Protect Human Rights: How Canada's Embassy Staff and Trade Commissioners Are Not Fulfilling Their Duty

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Introduction

Canada has a state duty to protect human rights

Since at least 2002, UN bodies have repeatedly and explicitly emphasized that Canada's duty to protect extends to Canada's obligation to protect against human rights abuses caused, or contributed to, by Canadian corporations operating overseas.¹

Canadian missions overseas, Embassies and High Commissions, are the face of Canada, the most visible presence of Canadian state agency, abroad.

While there is ample evidence of the role that Canadian missions, in particular Ambassadors and trade commissioners, play in promoting and protecting the interests of Canadian companies operating overseas, the track record in regard to protecting people who have been harmed by Canadian companies, or who find themselves threatened because of their opposition to activities by Canadian companies, is at least as problematic.

The role of Canada's embassy staff in regard to Canadian mining companies

In meetings with Ambassadors and embassy staff, to discuss human rights concerns related to Canadian companies, MiningWatch Canada and other Canadian NGOs have explicitly been told of the Embassy's mandate to "promote and protect" the interests of Canadian mining companies operating in the countries in question.

And indeed, there is ample evidence of the very active role Canadian Ambassadors and embassy staff play globally in advocating for specific Canadian corporate interests.

For example, according to documents MiningWatch Canada has received, when the Government of Zambia sought to raise the Mineral Royalty Tax for open pit mines to 20%, the Canadian embassy intervened, together with Canadian mining companies Barrick Gold and First Quantum Minerals, to negotiate the tax down to 9% for both open pit and underground mines. Later, Canadian High Commissioner Myles met with Zambian officials, upon the request of First Quantum minerals and – subsequent to meeting with both Barrick Gold and First Quantum Minerals – advocated on a range of issues of concern to the companies including taxation, costs related to electricity needs, and policy concerns.

Scholar Anthony Bebbington and others have published on the role of Canadian Embassies in Ecuador and Honduras in “facilitating a neoliberalized expansion of mining”² and in testimony³ before a Canadian parliamentary committee Professor Bebbington paraphrased a quote from a Latin American Sub-secretary of Energy and Mines thus: “as far as I can tell the Canadian Ambassador here is a representative for Canadian mining companies.”

In 12 documented cases,⁴ embassy interventions on behalf of Canadian mining projects took place in a context of intense local level conflict and opposition to the projects, including in Spain, Greece, Guatemala, Mexico, Honduras, the Philippines, Costa Rico, Ecuador and Tanzania.⁵

Particularly troubling are cases where human rights defenders have raised concerns about abuses related to a Canadian mining project with the relevant Canadian Embassy, only to have those concerns ignored or even negated.

When filmmaker Steven Schnoor documented the violent eviction of Mayan subsistence farmers from their homes in Guatemala to make room for a Skye Resources project, then Canadian Ambassador Cook accused Schnoor of having produced a fraudulent video and he accused one of the Mayans villagers in the video of having been paid to act. Schnoor successfully sued Ambassador Cook and the Canadian Government for libel and slander and in 2010 won damages for behaviour described as reckless, spiteful and oppressive. Schnoor testified at trial that the Ambassador’s comments served to undermine the credibility of the people in the video “To me, this is a very big problem – it’s not just about me and one particular video. I am concerned that this is an example of how the Government of Canada is quick to discount the voices of people who are harmed by Canadian mining companies.”⁶

Innovative responses to the problem

Schnoor’s case is an early attempt to hold Canadian Embassy officials to account.

On November 27, 2009, Mariano Abarca was murdered after protesting the negative impacts of Canada’s Blackfire Exploration’s barite mine in Chiapas, Mexico. He was murdered after high profile and public community blockades and protests, including one protest at the Canadian Embassy, and after receiving death threats. Even as community opposition to Blackfire’s operations was ongoing, access to information documents show that the Canadian Embassy was actively advocating on behalf of the company, including by travelling to Chiapas after receiving a complaint about community protests from Blackfire.⁷

Based on the federal Values and Ethics Code, which requires civil servants to carry out their duties “in accordance with legislation, policies and directives,” the family of Mariano Abarca asked the Public Sector Integrity Commissioner (PSIC) to investigate their complaint that embassy employees had not acted in accordance with Canadian guidance as set out in, for example, the 2009 federal CSR Strategy for the International Extractive Sector.

The PSIC declined to investigate stating that embassy officials could not have erred, since he concluded that government statements regarding corporate social responsibility and statements regarding the embassy’s role in mining conflicts that were posted by the government online and that were cited by a senior Global Affairs Canada official in testimony to parliament - all of these were not “official.”

This year the Abarca family filed for a judicial review of the PSIC decision to the Federal Court where lawyers for the attorney general argued on March 25 that policies for Canadian embassies meant to address conflict between Canadian mining companies and communities are not “official policies,” but rather are voluntary and non-binding, meaning that embassy officials can act as if these policies do not exist. The government’s lawyer noted a lack of any binding legal framework to cover this area. We await the outcome of this judicial review.

Lack of transparency

Another issue being addressed in a novel way is the increasing lack of transparency about what Canadian embassies are doing in support of companies, and in response to concerns raised by land and human rights defenders. Access to Information requests are increasingly coming back with pages of blacked out text.

A consortium of Canadian NGOs has retained legal counsel and we are exploring a judicial review application to challenge Global Affairs Canada's insistence on redacting key parts of its communications with Canadian mining company Goldcorp and with the Inter-American Commission on Human Rights (IACHR) in relation to a “precautionary order” by the IACHR in regard to Goldcorp’s Marlin mine in Guatemala. We will argue that the redactions are not supported by the Act or by case law.

Deficiencies of policies

The above accounts raise serious questions about the accountability of Canadian consular officials and Global Affairs Canada staff in regard to their duty, as Canadian civil servants, to ensure Canada lives up to its state duty to protect human rights.

The relevant statements in place, be they the Government of Canada’s updated 2014 CSR Strategy for the extractive sector abroad (soon to be revised again) or its Voices at Risk guidance on supporting human rights defenders, appear to be argued by the Government of Canada to be entirely non-binding and not subject to the federal Values and Ethics Code.⁸

What does seem to be robustly in play is Canada’s “Economic Diplomacy” model, launched in 2013 under the Harper government that aims to ensure all diplomatic assets promote Canadian business. Ed Fast, then-Canada’s Minister of International Trade, said the Plan “represents a sea change in the way Canada’s diplomatic assets are deployed around the world.”⁹ This policy seems to be solidly followed by Canada’s global embassies today.

And then there is the “integrity agreement” that Trade Commissioner Services asks companies to sign that would minimally commit them to avoid bribery and corrupt practices on pain of possibly losing diplomatic and financial support from the Government of Canada. Unfortunately, when MiningWatch inquired from one embassy whether a particular company had signed this integrity agreement, a company that was clearly receiving support from the Canadian Ambassador posted there, we were told this was secret information.¹⁰

Recommendations

It is clear there is a need for binding human rights due diligence guidelines for Canadian public servants to ensure that they indeed uphold Canada’s duty to respect and protect human rights, both in Canada and through Canadian posts and agencies overseas.

Additionally, if Canada had an ombudsperson with independence from the government and from industry, with the investigatory powers to make robust findings of fact, in other words with the powers to compel documents and witness if necessary, this body would be able to recommend the withdrawal of government services, including Ambassadorial and trade commissioner support, to Canadian companies implicated in human rights abuses overseas.

¹ 2002, UN Special Rapporteur on Toxic Waste; 2007, Committee on the Elimination of Racial Discrimination (CERD); 2012, Committee on the Elimination of Racial Discrimination (CERD); 2012, Committee on the Rights of the Child; 2016, Committee on the Elimination of Discrimination against Women (CEDAW); 2017, Committee on the Elimination of Racial Discrimination (CERD).

² See Anthony Bebbington, Leonith Hinojosa, Denise Humphreys Bebbington, Maria Luisa Burneo and Ximena Warnars. 2008. *Contention and Ambiguity: Mining and the Possibilities of Development*.

³ See: https://miningwatch.ca/sites/default/files/bebbington_testimony_scfaae_29feb12.pdf

⁴ *MiningWatch Canada*. 2013. Backgrounder: A Dozen Examples of Canadian Mining Diplomacy. <https://miningwatch.ca/blog/2013/10/8/backgrounder-dozen-examples-canadian-mining-diplomacy>

⁵ *MiningWatch Canada*. 2017. Anger Boils Over at North Mara Mine – Barrick/Acacia Leave Human Rights Abuses Unaddressed.

⁶ For a synopsis of the legal case, see law firm Klippensteins’ website: <http://www.schnoorversuscanada.ca>. See also a synopsis by Voices-Voix here: <http://voices-voix.ca/en/facts/profile/steven-schnoor>

⁷ See: *MiningWatch Canada*. Ground-Breaking Federal Court Hearing over Canadian Mining Diplomacy and Assassination of Mexican Community Leader, <https://miningwatch.ca/news/2019/3/26/ground-breaking-federal-court-hearing-over-canadian-mining-diplomacy-and> ; *Hill Times*. Can Canadian embassies ignore government rules on human rights? <https://www.hilltimes.com/2019/03/22/can-canadian-embassies-ignore-government-rules-on-human-rights/193730> ; *Toronto Star*. Osgoode Hall professor will argue Canada should investigate assassination of Mexican activist.

<https://www.thestar.com/business/opinion/2019/03/24/osgoode-hall-professor-will-argue-canada-should-investigate-assassination-of-mexican-activist.html>

⁸ See: <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/frequently-asked-questions.html>

⁹ See: <https://www.opencanada.org/features/economic-diplomacy-time-to-get-down-to-business/>

¹⁰ See: <https://www.tradecommissioner.gc.ca/how-tcs-can-help-comment-sdc-peut-aider.aspx?lang=eng>