Federal Court Cour fédérale

Date: 20190718

Docket: T-911-18

Citation: 2019 FC 950

Ottawa, Ontario, July 18, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSE MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEDICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) AND MININGWATCH CANADA

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants have applied pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision by the Public Sector Integrity Commissioner of Canada. The Commissioner determined in a letter dated April 5, 2018, that the requirements of subsection 33(1) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the *Act*] had not been met and it was not in the public interest to commence an investigation into alleged wrongdoings at the Canadian Embassy in Mexico [the "Embassy"]. The Applicants seek an order setting aside the Commissioner's decision and remitting the matter back to him based on the reasons and direction of this Court.

[2] The Applicants consist of five non-governmental organizations from Canada and Mexico and several individual Mexican citizens, including family members of Mariano Abarca who was murdered outside his home in November 2009. Their disclosure of wrongdoing to the Commissioner concerning the Embassy [the Disclosure] was contained in a letter dated February 5, 2018, from the Justice and Corporate Accountability Project, a volunteer organization which provides *pro bono* legal assistance to indigenous and peasant farmer communities who are in conflict with mining companies.

[3] The Applicants contend that the Commissioner erred by not initiating an investigation into the Embassy's alleged wrongdoings under the *Act* when it intervened (or, in some cases, failed to intervene) in a dispute between Blackfire Exploration Ltd., a small privately-owned Calgary-based mining company, and members of the local community near Blackfire's mine in

Chiapas, Mexico. According to the Applicants, the Embassy engaged in wrongdoings (as defined in paragraphs 8 (d) and (e) of the *Act*) when it (i) failed to follow policies in relation to human rights defenders and these actions and omissions created danger to the life and safety of Mr. Abarca, a local activist, and (ii) failed to report an act of corruption in a timely manner.

I. Background

[4] In December 2007, Blackfire signed a land-use agreement with the Government of Chiapas, a state in Mexico, on behalf of the community of Ejido Grecia, in the municipality of Chicomuselo. Blackfire constructed a barite mine on the land and operated it for approximately two years before it was closed by Mexican authorities in early December 2009 for environmental violations.

[5] The Embassy assisted Blackfire with various matters. When Blackfire was negotiating land-use agreements in November and December 2007, the Embassy introduced company executives to Mexican government officials. Later, when Blackfire encountered problems obtaining an explosives permit, emails exchanged in September and October 2008 show the Embassy assisted Blackfire in pressuring the Mexican government to issue the permit.

[6] Blackfire's operations stirred public opposition. When the opposition started is unclear, but the Disclosure asserts that, starting in March 2008, Blackfire made payments to the mayor of Chicomuselo to "keep the peace and prevent local members of the community from taking up arms against the mine."

[7] The Disclosure further asserts that, at least as early as 2007, the Embassy was aware of public opposition to the mine. In April 2009, some 3,000 individuals in Chiapas protested against Blackfire's mine, demanding cancellation of its mining permits. Public demonstrations also included a two-month blockade between June and July 2009, interrupting one of Blackfire's transport routes to the mine.

[8] Blackfire filed a complaint with the Chiapas Congress in June 2009, accusing the mayor of Chicomuselo of extortion and requesting his removal from office. Also in that month, a newspaper in Chiapas reported that Blackfire paid money monthly to the mayor and bought airline tickets for his family. The Disclosure alleges that Blackfire started making these monthly payments in March 2008.

[9] In late July 2009, a delegation travelled from Chiapas to the Embassy in Mexico City to protest their discontent. Mr. Abarca delivered a speech outside the Embassy which included allegations that Blackfire had been using workers as thugs. About three weeks after this speech, plain-clothes police officers arrested and detained Mr. Abarca in response to a complaint filed by Blackfire. Following this arrest, the Embassy began asking for clarification from the State of Chiapas about Mr. Abarca's detention. Eight days after his arrest, Mr. Abarca was released without charge.

[10] Blackfire contacted the Embassy in mid-August 2009, claiming it was concerned about its workers due to protests planned for late August. The Embassy indicated to Blackfire it had received approximately 1,400 emails concerning Mr. Abarca's detention. Two days before the

planned protests, the Embassy contacted the Chiapas State government, the Chiapas Human Rights Commission, the federal Economy Ministry, the Canadian Chamber of Commerce, and Blackfire to ascertain more information about the detention. The Embassy knew that Blackfire had pressed the charge which led to Mr. Abarca's arrest.

[11] In early October 2009, a delegation from Canada went to Chiapas to meet with senior members of the Chiapas government; these officials provided recommendations to Blackfire to improve its relationship with the local communities, such as increasing its social spending on local communities and improve relations with the mayor of Chicomuselo.

[12] In late November 2009, Mr. Abarca filed an administrative complaint with the Mexican authorities for death threats made against him by two Blackfire employees. Four days after making this complaint, on November 27, 2009, Mr. Abarca was murdered.

[13] In an email dated December 1, 2009, personnel from the Embassy told personnel at the Department of Foreign Affairs and International Trade [the Department] (now known as Global Affairs Canada) to tone down language from "urging" the Mexican government to investigate Mr. Abarca's murder, to saying that: "Canada welcomes the judicial investigation by Mexican authorities to determine facts related to Mr. Abarca's death". The Embassy also learned that the three men detained for Mr. Abarca's murder had ties to Blackfire.

[14] On December 11, 2009, newspapers in Canada reported on payments made by Blackfire to the mayor of Chicomuselo, and four days later the Royal Canadian Mounted Police [the RCMP] began to investigate the Blackfire corruption allegation.

[15] In December, 2009, Blackfire's mine was shut down by the Chiapas' Ministry of the Environment and Housing.

[16] In early January 2010, the Embassy provided Blackfire with contact information for Mexican government officials it should contact to have its mine re-opened. Subsequently, the Embassy contacted the Department to inquire whether someone at the Department could talk to Blackfire about how it could sue the Mexican government under Chapter 11 of the North American Free Trade Agreement.

[17] In mid-January 2010, four Mexican nationals were arrested in connection with Mr. Abarca's death. One of these individuals was convicted for Mr. Abarca's murder but the conviction was overturned on appeal in June 2013.

[18] In early May 2010, Embassy personnel met with the Special Committee to Monitor Mining Conflicts of the Mexican Chamber of Deputies. The Committee informed the Embassy personnel that five Canadian-owned mining projects were on their radar, one of which was Blackfire's. Some two months after this meeting, the Embassy informed Blackfire that the Committee wished to speak with the company and that it had passed along Blackfire's contact information.

[19] In late 2010, a request was submitted under the *Access to Information Act*, RSC 1985, c A-1 [*ATI*] for records in relation to the Embassy. Between April and June 2012, the government released approximately 1,000 pages of material in response to the *ATI* request. This material was analyzed in conjunction with the events known about the case, the findings of the investigation trip, and further consultations with Mr. Abarca's family and local organizations in Chiapas. The resulting report [the Abarca Report] was released in May 2013.

[20] Following release of the Abarca Report, Mr. Abarca's family continued to press the Mexican government for a more thorough investigation of his murder and a full investigation by the RCMP into evidence of corruption of the mayor of Chicomuselo by Blackfire and the Embassy's involvement. The RCMP completed its investigation in mid-February 2015 and concluded that the evidence did not support criminal charges under the *Corruption of Foreign Public Officials Act*, SC 1998, c 34.

II. The Disclosure Letter

[21] The Disclosure submitted that the Embassy engaged in wrongdoings (as defined in paragraphs 8 (d) and (e) of the *Act*) when it (i) failed to follow policies in relation to human rights defenders and these actions and omissions created danger to the life and safety of Mr. Abarca, and (ii) failed to report an act of corruption in a timely manner.

A. *The Embassy failed to follow policies in relation to human rights defenders, and these actions and omissions created danger to the life and safety of Mr. Abarca*

[22] The Disclosure alleged that the Embassy failed to follow three government policies, namely:

1. *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* [Building the Canadian Advantage]
2. The Department's policy as found on its website which stated: "Canada's network of missions abroad pursues objectives related to the promotion and protection of the rights of human rights defenders consistent with our human rights agenda."
3. Specific guidelines on what Canadian embassies should do when there is conflict involving the host state, a Canadian mining company, and a local community.

[23] The Disclosure stated there were clear grounds to investigate because the Embassy violated paragraphs 8 (d) and (e) of the *Act*, which provide that a "wrongdoing" includes:

(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;	**d)** le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire;
(e) a serious breach of a code of conduct established under section 5 or 6;	**e)** la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;

[24] In the Disclosure, the Applicants argued that the March 2009 policy, Building the Canadian Advantage, required Canadian embassies to promote corporate social responsibility [CSR] and assess possible human rights impacts, including violence. According to the Applicants, the Embassy never investigated the source of the tensions between the community and Blackfire and did not conduct a violence-related risk assessment; nor did it inquire whether Blackfire had conducted such an assessment. The Disclosure noted that, instead of investigating and assessing violence-related risk and determining if Blackfire conformed to international CSR standards, the Embassy consistently advocated for Blackfire and at no time did it attempt to contact the local community.

[25] The Disclosure claimed the Embassy knew Blackfire had pressed charges against Mr. Abarca but failed to consider whether Blackfire was justified in its actions and failed to consider issues relating to human rights defenders. The Disclosure also noted that, while Embassy officials met with Mexican officials to advocate on Blackfire's behalf, there was no indication the Embassy ever raised any concerns with the Mexican government about Mr. Abarca's safety or the importance of respecting democratic values such as free speech.

[26] The Disclosure stated that Embassy personnel had advised the Department to tone down language from urging the Mexican government to investigate the murder, to welcoming the investigation by Mexican authorities. Although the Embassy knew the men charged with Mr. Abarca's murder were associated with Blackfire, Embassy personnel suggested public statements not mention that connection. Also, the Embassy counselled the Governor General to publicly

state: "the Government of Canada had no knowledge of potential acts of violence against Mr. Abarca."

[27] The Disclosure acknowledged that between 2007 and 2009 there was only a general policy in place in relation to human rights defenders and no precise rules on what Canadian Embassy personnel should do to protect human rights defenders. The Disclosure identified a policy released in 2016 - *Voices at Risk* - to suggest measures that could have been taken. The Disclosure urged the Commissioner to investigate because, with or without specific guidelines, the Embassy chose to completely ignore the human rights implications of its actions.

[28] According to the Applicants, all that is required to find a breach of paragraph 8 (d) of the *Act* is to prove there was a substantial and specific danger to the life, health, and safety of Mr. Abarca, and whether the Embassy's acts or omissions created a "specific danger". Specifically, the Disclosure submitted that:

> The Canadian Embassy encouraged the Chiapas government to take measures to stop the blockades and other "challenges" faced by Blackfire. We submit that this advocacy was an action that created "a specific danger" to the life and safety of Mr. Abarca. The Canadian government's failure to raise human rights concerns with Blackfire, and with the government of Chiapas, we submit, was an omission that also created "a specific danger" to the life and safety of Mr. Abarca.

B. *The Embassy failed to report an act of corruption in a timely manner*

[29] The Disclosure also argued that paragraph 8 (e) of the *Act* provides that a "wrongdoing" includes "a serious breach of a code of conduct established under section 5 or 6." In this regard, the Disclosure identified the Department's *Values and Ethics Code*, which makes clear that civil

servants have an obligation to carry out their duties in accordance with Canadian laws and policies.

[30] The Disclosure noted that, while the Embassy had reported the suspected bribery to the RCMP only after newspapers in Canada revealed the issue in December 2009, the payments had been revealed publicly by Blackfire six months earlier in June 2009 through a Chiapas newspaper article. The Disclosure stated that what the Commissioner should investigate was whether the Embassy had knowledge of the payments before December 2009. The Disclosure further noted it was curious the *ATI* response contained no record of Blackfire and the Embassy discussing the payments to the mayor of Chicomuselo, nor the complaint of extortion made to the state assembly of Chiapas.

[31] The Disclosure asserted that the Embassy's obligation to report bribery did not depend on whether bribery charges were brought but rather on whether Canadian officials become aware of allegations of corruption; and that, although the RCMP eventually investigated the payments by Blackfire to the mayor in February 2015, the RCMP decided not to proceed because its assessment of the evidence did not support criminal charges.

C. *The Commissioner can investigate these matters*

[32] The Disclosure outlined the legislative framework, noting subsection 33(1) of the *Act*, which provides in relevant part:

33 (1) If… as a result of any information provided to the Commissioner by a person	**33 (1)** Si… ou après avoir pris connaissance de renseignements lui ayant été

who is not a public servant, the Commissioner has reason to believe that … a wrongdoing… 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.	communiqués par une personne autre qu'un fonctionnaire, le commissaire a des motifs de croire qu'un acte répréhensible … a été commis, il peut, s'il est d'avis sur le fondement de motifs raisonnables, que l'intérêt public le commande, faire enquête sur celui-ci, sous réserve des articles 23 et 24; les dispositions de la présente loi applicables aux enquêtes qui font suite à une divulgation s'appliquent aux enquêtes menées en vertu du présent article.

[33] The Disclosure also noted subsection 24(1), which provides in relevant part:

24 (1) The Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that	**24 (1)** Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas :
…	[…]
(b) the subject-matter of the disclosure or the investigation is not sufficiently important;	**b)** que l'objet de la divulgation ou de l'enquête n'est pas suffisamment important;
…	[…]
(d) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;…	**d)** que cela serait inutile en raison de la période écoulée depuis le moment où les actes visés par la divulgation ou l'enquête ont été commis;…

or

(f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.	**f)** que cela est opportun pour tout autre motif justifié.

[34] The Disclosure asserted that there were very strong public interest reasons for the Commissioner to investigate, not the least of which were Mr. Abarca's murder and Canada's international human rights obligations. The Disclosure stated that, although eight years had passed since the events had occurred, the length of time in which a complaint must be launched is not specified in the *Act*; and considering the circumstances, the time delay on its own was insufficient not to conduct an investigation.

III. The Commissioner's Decision

[35] In a letter dated April 5, 2018, the Commissioner responded to the Disclosure. The Commissioner found there was no breach of a code of conduct since the three "policies" referenced in the Disclosure were not official Government of Canada policies and they did not prescribe specific actions that should have been taken or not taken by the Embassy. The Commissioner also found no wrongdoing had been committed by the Embassy in its interactions with Blackfire in view of its mandate to assist Canadian companies abroad.

[36] As to the Embassy's interactions with individuals opposed to Blackfire's mine, the Commissioner determined that the Embassy was not obligated to mediate the dispute between Blackfire and its opponents. In the Commissioner's view, the Embassy's actions or inactions

regarding the difficulties between Blackfire and the local community did not constitute wrongdoing as defined by the *Act*.

[37] The Commissioner found the Embassy had not ignored human rights concerns, noting that 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, the Canadian Chamber of Commerce, and from Blackfire. In response to the complaint that the Embassy distanced itself after Mr. Abarca's death when it should have taken a more active role in urging a full and impartial investigation, the Commissioner observed that an investigation was conducted by the Mexican authorities, arrests were made, and one individual was, at the trial level, found guilty of Mr. Abarca's death.

[38] As to the complaint the Embassy should have intervened earlier or made further efforts, the Commissioner found the information provided about its alleged failure to follow the "policies" did not suggest wrongdoing had occured pursuant to paragraphs 8(d) and (e) of the *Act*.

[39] The Commissioner then turned to address allegations concerning the Embassy's alleged duty to report bribery and corruption. The Commissioner noted the bribery allegations became public in the Mexican press in June 2009 and that the Embassy reported the allegations in December 2009 following Canadian news coverage of the matter. The Commissioner found the information provided about what the Embassy may or should have known or done, and when, was speculative and not sufficient to establish wrongdoing on the part of Embassy officials.

[40] The Commissioner further noted that an investigation by the RCMP had been conducted into the bribery and corruption allegations and, subsequently, it was determined the evidence did not support criminal charges. In the Commissioner's view, the information in the Disclosure about the Embassy's alleged failure to report bribery and corruption did not suggest that wrongdoing had been committed pursuant to paragraphs 8(d) and (e) of the *Act*.

[41] The Commissioner concluded by stating:

> … the information provided … does not give me reason to believe that wrongdoing was committed by the Embassy as defined at paragraphs 8(d) and (e) of the Act. As such, the requirements of subsection 33(1) of the Act have not been met and it is not in the public interest to commence an investigation.

IV. The Parties' Submissions

A. *The Applicants*

[42] The Applicants contend that the certified tribunal record [CTR], by including only three of the dozens of reference source materials in the footnotes to the Disclosure, shows the Commissioner did not review all the source documentation when making his decision. Although these three documents were not provided to the Commissioner, the Applicants say they were offered and clearly identified for appropriate follow up and consultation. Because copies of these materials were not provided by the Applicants as appendices to the Disclosure, the Commissioner - as a logical inference - obtained them. Because none of the other 76 documents referenced in the Disclosure 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 were grounds to believe that wrongdoing had been committed.

[43] The Applicants note that a large portion of the source documents for the footnotes in the Disclosure derive from documents received by the *ATI* request. If the Commissioner had decided to investigate, the Applicants say he would have had all powers under the *Inquiries Act*, RSC 1985, c I-11, including the power under paragraph 8(l) (c) to summons any 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." According to the Applicants, this would allow the Commissioner to order production of the unredacted versions of the redacted records relied upon by the Applicants in their Disclosure.

[44] The Applicants say the Commissioner introduced an undefined requirement that a breach of a code of conduct must be a breach of "official Government of Canada policies," something which is not required by the *Act*. The Applicants also say the Commissioner's statement that it is the Embassy's mandate to assist Canadian businesses operating abroad was made with no document or official policy referenced to support this statement. In both of these instances, the Applicants complain that the Commissioner did not provide them with an opportunity to comment.

[45] The Applicants assert that the Commissioner demonstrated a closed mind in dismissing information which supports a threshold determination of a reason to believe there was wrongdoing pursuant to section 8 of the *Act*. In their view, the case admissibility analysis which preceded the Commissioner's decision indicates a closed mind since there were systematic omissions and mischaracterizations of the evidence presented.

[46] According to the Applicants, the Commissioner misinterpreted subsection 33(1) of the *Act* to be a threshold which required a finding that there was a "reason to believe" a wrongdoing had been established, rather than a provision requiring him to decide whether there was reason to believe there should be an investigation into the alleged wrongdoing. In the Applicants' view, once the Commissioner has found a reason to believe that may support a finding of wrongdoing he must then assess whether there are reasons to refuse an inquiry, and then conduct an inquiry if it is in the public interest based on a reasonable grounds test. The Applicants say the "reason to believe" threshold to commence an investigation is a lower standard than the threshold of "reasonable grounds to believe" associated with the public interest.

[47] The Applicants argue the Commissioner failed to properly analyze and consider relevant facts under paragraph 8(d) of the *Act* 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 in the face of protests over the mining project.

[48] The Commissioner's reasons are unreasonable, the Applicants say, because there are several instances where his conclusions were not supported by the information before him. For example, the Applicants point out that there was no evidence of any policy stating the Embassy had a mandate to assist Canadian companies. According to the Applicants, the Commissioner mischaracterized the Embassy's contact after Mr. Abarca's detention as one of concern for his health and safety, when instead it was framed around a concern for Canadian investments in Mexico.

[49] The Applicants say the Commissioner erred when he decided that policies on corporate social responsibility, human rights, community-company conflict, and corruption were not codes of conduct under paragraph 8(e) of the *Act*, even though these policies were published on government websites or discussed extensively in front of a Parliamentary Committee. According to the Applicants, the consequence of this finding is that civil servants who act contrary to such publicly disseminated policies would commit 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.

B. *The Respondent*

[50] The Respondent maintains that the Commissioner carefully considered the Applicants' disclosure of wrongdoing and reasonably concluded that he had no reason to believe that any wrongdoing had been committed within the meaning of section 8 of the *Act*.

[51] In the Respondent's view, decisions surrounding the formulation and structure of a disclosure under the *Act* are those of a discloser, including whether to include certain documents or simply describe their contents and reference them in footnotes. Once made, the Respondent says it is neither a breach of procedural fairness nor unreasonable for the Commissioner to decide not to investigate a wrongdoing disclosure based on the material provided by a discloser.

[52] The issue of what the Commissioner did or did not do is a matter of record, and according to the Respondent, his decision cannot be supplemented through affidavit evidence unless that evidence falls within the recognized exceptions to the general rule that only evidence before the

decision-maker can be considered on judicial review. In the Respondent's view, the Applicants' affidavit highlights what the Commissioner said about each of his findings and then explains what the Applicants would have said to him in response and what additional information and documents they would have provided. In style and substance, the Respondent says the Applicants' affidavit reads more like a legal brief than an affidavit and those paragraphs of the affidavit which constitute argument and not evidence should be inadmissible.

[53] The Respondent notes that the Applicants contend that the "policies" they claim the Embassy breached constitute policies established under section 5 or 6 of the *Act*, and that they acknowledge that the alleged policies on which they rely to establish wrongdoing under paragraph 8 (e) of the *Act* do not prescribe any specific duties or requirements for the protection of human rights defenders. In the Respondent's view, the Commissioner reasonably concluded that no basis existed to believe that any type of wrongdoing had been committed under paragraph 8 (e) of the *Act*.

[54] The Respondent says the Applicants' attempt to refashion alleged errors of fact and law by the Commissioner in deciding not to investigate, into evidence of a closed mind and bias, is misplaced. In the Respondent's view, the Applicants have presented no evidence to show that the Commissioner prejudged the issue of whether to investigate or that he was in any way prejudiced against them. The actual basis of the Applicants' claim is their disagreement with how he handled and weighed the facts and evidence presented

V. Analysis

A. *Standard of Review*

[55] The standard of review for a decision by the Commissioner not to investigate a disclosure of wrongdoing is reasonableness (*Agnaou v Canada (Attorney General)*, 2015 FCA 29 at paras 31 and 32; *Gupta v Canada (Attorney General)*, 2016 FCA 50 at para 4). The Commissioner's determination of what constitutes a wrongdoing under section 8 of the *Act* is subject to deference on judicial review because the Commissioner is interpreting his "home" statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34).

[56] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para16).

[57] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the

circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[58] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[59] The degree of procedural fairness to which disclosers under the *Act* are entitled at the stage of the Commissioner's decision whether to investigate is at the lower end of the fairness spectrum. In this regard, Justice Laskin stated in *Gupta v Canada (Attorney General)*, 2017 FCA 211:

> [31] The parties here agree that the procedural fairness to which persons making disclosures are entitled at the stage of the Commissioner's decision whether to investigate the disclosure is at the lower end of the spectrum. In my view, their agreement faithfully reflects the *Baker* factors, including, in particular, the extent to which the process provided for approximates the judicial process and the nature and terms of the statutory scheme. In giving the Commissioner the discretion whether to conduct, or refuse to conduct, an investigation of a disclosure, Parliament chose not to provide for an adjudicative, adversarial process, or a scheme resembling the judicial process in any other respect. Instead, the scheme that it put in place is limited and investigatory in nature: all that it appears to contemplate is that the discloser will submit

> information and supporting documentation that he or she believes establishes wrongdoing that warrants investigation by the Commissioner, and that the Commissioner will evaluate that information and documentation and decide whether to investigate. Even if the decision is made to investigate, subsection 19.7(2) requires … that the investigation "be conducted as informally and expeditiously as possible." It is logical therefore that any procedures preceding the decision whether to investigate should be at least as informal and expeditious.

B. *Is the Applicants' affidavit admissible?*

[60] The Respondent says the Commissioner's decision cannot be supplemented through affidavit evidence unless that evidence falls within the recognized exceptions to the general rule that only the evidence before a decision-maker can be considered on judicial review. In the Respondent's view, the Applicants' affidavit highlights what the Commissioner said about each of his findings, and then goes on to explain what they would have said in response and what additional information they would have provided, if given an opportunity to do so. The Respondent contends that the Applicants' affidavit, in style and substance, reads more like a legal brief than an affidavit and those paragraphs of the affidavit which constitute legal argument and not evidence should be inadmissible.

[61] In *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19 and 20 [*Assn. of Universities*], the Federal Court of Appeal recognized three exceptions to the general rule that the evidentiary record on judicial review should be the same as that before the administrative decision-maker. The exceptions are: where the affidavit provides general background to assist in understanding the issues; where it is necessary to bring

procedural defects to the attention of the Court because they cannot be found in the evidentiary record; and, to highlight the complete absence of evidence before the decision-maker when it made a particular finding.

[62] On this issue, I agree with Respondent. The Applicants' affidavit does not fall squarely within the exceptions noted in *Assn. of Universities*. It is replete with legal arguments and contains information not directly before the Commissioner. In some instances, a paragraph in the affidavit is repeated almost verbatim in the Applicants' memorandum of fact and law. For example:

Affidavit	**Memorandum of Fact and Law**
15. The Commissioner dismissed the "Building the Canadian Advantage" 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."	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 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."
16. However, the Commissioner failed to ask JCAP or any party advancing the the Complaint for further details about the "Building the Canadian Advantage" document. Had I or any contributor to the Complaint been asked for further information about this document we would have indicated the following: ….	36. However, the website referenced at footnotes 28-31, indicates that the policy set out specific expectations about the conduct of embassies:
• The document itself includes a number of promises of government actions, including: the	• The document includes a number of promises of government actions, including: the creation

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."	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."
17. The Commissioner in his April 5th decision also dismisses the human rights defenders policy as a statement from an "unnamed document written in 2016". 18. However, the Commissioner failed to ask any party to the Complaint for further details on the human rights defenders policy. Had I or any contributor to the Complaint been asked for further information about this document we would have indicated the following: • The disclosure was a "Memorandum for Action to the Minister of Foreign Affairs" from the Deputy Minister of Foreign Affairs, with a subject line stating "Recognizing and supporting human rights defenders". • It includes the statement "Canada's network of missions abroad pursues objectives related to the promotion and protection of human rights defenders consistent with our human rights agenda." …	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 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."
25. The Commissioner's decision of April 5th also dismisses the policy on mining company conflicts with communities 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".	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

26. The Commissioner failed to ask any party to the Complaint for further details on the policy on company-community conflicts. Had JCAP or any contributor to the Complaint been asked for further information about this document we would have indicated the following: …	December 2009". … 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. ….. It is relevant here that the Applicant expressly offered to provide such assistance to the PSIC, but it failed to avail of this offer.

[63] In my view, the Applicants confuse the purpose of their affidavit with the submissions they are entitled to make in support of their application (*Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 3). The affidavit cannot improve upon the position of the Applicants. Anything not conveyed in the Disclosure could have been provided; indeed, the Applicants offered to provide the documentation referenced in the footnotes, but they were not asked for additional documentation. In rendering its judgment, the Court has disregarded and not considered those portions of the Applicants' affidavit containing legal argument or information not directly before the Commissioner.

C. *Was the Commissioner's decision not to investigate reasonable?*

[64] The Applicants contend that the CTR, by including only three of the reference source materials in the footnotes to the Disclosure, shows the Commissioner did not review all the source documentation when making his decision. Although these documents were not provided to the Commissioner, the Applicants say he must have obtained these three documents himself. According to the Applicants, because none of the other documents referenced in the Disclosure letter are found in the CTR, it is logical to infer that the Commissioner did not obtain copies and

did not consider them in his determination of whether there were grounds to believe that wrongdoing had been committed.

[65] I disagree with the Applicants in this regard. Nothing in the CTR indicates that the Commissioner (or the case admissibility analyst) may not have examined the documents for which online references were provided in the footnotes to the Disclosure. It is not logical or reasonable to infer that the Commissioner did not consider these documents in making his decision not to investigate. It is possible that these documents were reviewed online and determined to be not sufficiently relevant or probative to warrant making paper copies which would have found their way into the CTR.

[66] It was reasonable for the Commissioner to find the Embassy had broken no code of conduct. Although the Applicants point to aspirational documents and policies which were later put in place, they have not identified anything which created a legal obligation upon the Embassy to act or not to act in a certain manner. Undoubtedly, the Applicants would have liked the Embassy to have acted in a certain way, and perhaps Mr. Abarca would not have been murdered. However, the Commissioner’s decision not to investigate was, in my view, reasonable and constitutes an acceptable outcome defensible in respect of the facts and law.

VI. Conclusion

[67] The Applicants’ application for judicial review is dismissed.

[68] The Respondent is entitled to costs fixed at a lump sum amount of $1,000 as per the parties’ agreement in this regard.

JUDGMENT in T-911-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and the Applicant shall pay costs to the Respondent in a lump sum amount of $1,000 within 30 days of the date of this judgment.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-911-18
STYLE OF CAUSE:	MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSE MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEDICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) AND MININGWATCH CANADA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 25, 2019
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 18, 2019

APPEARANCES:

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