Court File No.: A-290-19

FEDERAL COURT OF APPEAL

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

Appellants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

AMNESTY INTERNATIONAL CANADA and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC and the CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY

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INDEX

PAGE NO.:

PART I – STATEMENT OF FACTS 1

A. Overview 1

B. Factual Background 3

PART II – ISSUES 6

PART III – ARGUMENT 7

PART IV – ORDER SOUGHT 15

PART V – LIST OF AUTHORITIES 16

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B E T W E E N

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Appellants

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AMNESTY INTERNATIONAL CANADA and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC and the CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY

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MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY

PART I – STATEMENT OF FACTS

A. Overview

1. The Centre for Free Expression at Ryerson University (“CFE”) intervenes in this appeal to make submissions respecting the standard by which the Public Sector Integrity Commissioner (“PSIC”) must decide whether, as a result of disclosure of wrongdoing by a member of the public, pursuant to subsection 33(1) of the *Public Servants Disclosure Protection Act* (the “*Act*”), he has “reason to believe” that a wrongdoing has been committed. This requires interpretation of paragraph 8(e), which defines wrongdoing as “a serious breach of a code of conduct established under [the *Act*.]” These provisions must be interpreted, within their total context, in a manner that achieves, rather than frustrates, the purpose of the *Act*.

2. First, there is a low threshold for the PSIC to decide that he has “reason to believe” a wrongdoing has been committed. At this prescreening stage, provided there is information that, if believed, could substantiate the alleged wrongdoing, there is “reason to believe” it was committed. The PSIC should then proceed to decide whether to exercise his discretion to commence an investigation.

3. This is a lower standard than is applicable at the prescreening stage for disclosures of wrongdoing by public servants where, pursuant to section 22 of the *Act*, the PSIC must decide whether there are “sufficient grounds” for investigation. By using different language, Parliament has indicated the PSIC is to apply a different, lower standard for determining the admissibility of disclosures of wrongdoing by persons other than public servants. This does not mean the person making the disclosure can rely on bald allegations or mere speculation of wrongdoing to meet that lower threshold, but neither is the person required to marshal all the evidence required to substantiate that wrongdoing occurred. That is the PSIC’s role in the investigation, if he decides to exercise his discretion to commence one.

4. Second, codes of conduct established under the *Act* stipulate core values to which public servants must adhere, rather than identify specific actions they must or must not take. What constitutes a breach of a code of conduct is, therefore, specific to the context in which the alleged wrongdoing was committed, as informed by any information relevant to the standard of expected behaviour in the circumstances. The PSIC must, therefore, examine the entire context of the alleged wrongdoing to determine whether it breached an applicable code of conduct.

5. The interpretation of these provisions is relevant beyond the present appeal, as they engage the PSIC’s process of prescreening disclosures of wrongdoing, *before* he has decided whether to exercise his discretion to commence an investigation. If the PSC improperly interprets and applies these provisions, wrongdoing may go unchecked. This would defeat the purpose of the *Act*, to bring wrongdoing to light and take corrective measures to ensure there is no recurrence, the fulfillment of which requires an effective disclosure procedure.

B. Factual Background

Disclosure of Wrongdoings

6. The disclosure of wrongdoing in issue, presented to the PSIC on February 5, 2018, maintains that:[1]

- In 2007, Blackfire Exploration, a Calgary-based mining company, signed a land-use agreement with the government of Chiapas, Mexico. The Canadian Embassy assisted with negotiations. It introduced company executives to Mexican officials.
- There was public opposition to the mine and the Embassy was aware of this opposition as early as 2007.
- In March 2008, Blackfire started making payments to the mayor of Chicomuselo, Chiapas, to suppress public opposition to the mine.
- In July 2008, Mariano Abarca Roblero, a community leader who led protests against the social and environmental impacts of the mine, was arrested after making allegations against Blackfire in a speech to the local community.
- Emails exchanged in September and October 2008 show that when Blackfire encountered problems obtaining an explosives permit, the Embassy pressured the Mexican government to issues the permit.
- In April 2009, some 3,000 people in Chiapas protested against Blackfire's mine, demanding its mining permits be cancelled.
- In June 2009, Blackfire made a complaint to the Chiapas Congress accusing the mayor of Chicomuselo of extortion and requesting his removal from office.

[1] These facts are reproduced from the Disclosure of Wrongdoing by the Justice and Corporate Accountability Project, February 5, 2018 [Disclosure], Appeal Book [AB], Vol 3, Tab 7(b) and cross-referenced to *Gordillo v Canada v Canada (Attorney General*), 2019 FC 950 [FC Decision] at paras 4-8, 13; the Appellants' Memorandum of Fact and Law, February 3, 2020 [Appellants' Factum] at paras 8-9, 11-12, 14-17; and the Respondent's Memorandum of Fact and Law, August 4, 2020 [Respondent's Factum] at para 8.

- In July 2009, a delegation travelled from Chiapas to the Canadian Embassy in Mexico City to protest Blackfire's operations. Mr. Abarca delivered a speech outside the Embassy alleging Blackfire had used workers as thugs.
- About three weeks later, in August 2009 Mr. Abarca was arrested by plain-clothes officers as a result of a complaint by Blackfire. The Embassy asked the state of Chiapas for clarification about Mr. Abarca's detention. He was released eight days later without charge. During this time the Embassy received about 1,400 emails concerning Mr. Abarca's detention.
- In October 2009, Canadian officials traveled to Chiapas to meet with senior members of the Chiapas government to help resolve Blackfire's challenges.
- In late November 2009, Mr. Abarca filed a complaint with the Mexican authorities after receiving death threats from two Blackfire employees. Four days later, Mr. Abarca was murdered.
- In an email dated December 1, 2009, Embassy personnel told departmental personnel to refrain from "urging" the Mexican government to investigate the murder and instead say "Canada welcomes the judicial investigation by Mexican authorities to determine facts related to Mr. Abarca's death." The Embassy knew that three men associated with Mr. Abarca's murder had ties to Blackfire.
- In December 2009, Mexican authorities closed Blackfire's mine for environmental violations. The same month, the RCMP began investigating allegations of corruption against Blackfire, after Canadian newspapers reported on Blackfire's payments to the mayor of Chicomuselo, and eventually concluding that the evidence did not support criminal charges.
- Between 2007 and 2010, the Embassy Communicated with Blackfire more than 30 times.[2]

[2] See Decision of Joe Friday, Public Sector Integrity Commissioner, April 5, 2018 [PSIC Decision], AB, Vol 1, Tab 4.

Alleged Wrongdoings

7. Five non-governmental organizations from Canada and Mexico and several Mexican citizens, including family members of Mr. Abarca, presented the disclosure of wrongdoing in issue.[3] By this disclosure, they maintained, among other things, that Embassy personnel committed wrongdoing as defined in paragraph 8(e) of the *Act*. In particular, they maintained that the Embassy personnel acted contrary to the then Department of Foreign Affairs, Trade and Development Canada's *Values and Ethics Code*[4] and its *Conduct Abroad Code: Code of Conduct for Canadian Representatives Abroad*,[5] by failing to follow policies and other guidelines of expected behaviour in protecting human rights defenders.[6]

8. The *Values and Ethics Code* references values by which public servants must carry out their work, including respect for the rule of law and the requirement to carry out their duties in accordance with legislation, policies and directives. They must uphold the "highest ethical standards" and act at all times in a manner that will bear the closest public scrutiny, an obligation that is not fully satisfied by simply acting within the law."[7]

9. The *Conduct Abroad Code* further obliged the Head of Mission to create and maintain a good impression of Canada and manage Embassy operations in adherence to values and ethics of the public service, which "maintain and enhance public confidence in the integrity" of the public service and strengthen respect for the role of the public service within Canadian democracy.[8]

PSIC Decision

10. On April 25, 2018, the PSIC decided to dismiss the disclosure of wrongdoing without an investigation, finding that he was not given reason to believe that a wrongdoing was committed by the Embassy.[9] The PSIC found there was no breach of a

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[3] Disclosure, AB, Vol 3, Tab 7(b).
[4] AB, Vol 3, Tab 8 at 710-751.
[5] AB, Vol 1, Tab 5(c) at 140.
[6] FC Decision at para 22; Appellants' Factum at paras 24; and Respondent's Factum at para 9.
[7] AB, Vol 3, Tab 8 at 710-751, s 6.3.
[8] *Supra* note 5.
[9] PSIC Decision, AB, Vol 1, Tab 4.

code of conduct, as defined in paragraph 8(e) of the *Act*, in part, because the documents referenced by the disclosers were not "official Government of Canada policies" that "prescribe specific actions" the Embassy should have taken.[10] In so finding, the PSIC emphasized that "the Embassy's mandate, in general, appears to be providing assistance to Canadian companies abroad interested in expanding and succeeding in the international market" and that "it does not appear that the Embassy was obliged to mediate the dispute between Blackfire and its opponents."

11. The PSIC further emphasized that, while it was not clear the 2010 policy was in place at the time, the Embassy reported the corruption after it was reported in the Canadian news. It was relevant to the PSIC that the RCMP investigation found the evidence did not support criminal charges.

Judicial Review

12. The Federal Court dismissed the Appellants' application for judicial review of the PSIC's decision. According to the Court, the PSIC reasonably found no breach of a code of conduct, because, "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."[11] The Court concluded that, although "the Applicants would have liked the Embassy to have acted in a certain way, and perhaps Mr. Abarca would not have been murdered," the PSIC's decision to dismiss the disclosure without investigation was reasonable.[12]

PART II – ISSUES

13. The present appeal concerns the reasonableness of the PSIC's decision to dismiss the Appellants' disclosure of wrongdoing. This decision required the PSIC to interpret and apply the definition of wrongdoings in paragraph 8(e) of the *Act* to the facts presented, in assessing whether, pursuant to subsection 33(1), there was reason to believe a wrongdoing has occurred. In doing so, in the CFE's respectful submission, the

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[10] *Ibid*.
[11] FC Decision at para 66.
[12] *Ibid.*

PSIC failed to have proper regard for the text, context and purpose of the provisions in issue and the *Act* as a whole.

PART III – ARGUMENT

Remedial Legislation Demands a Large and Liberal Interpretation

14. The "modern principle" of statutory interpretation holds that the words of a statute "are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[13] The words used by Parliament must be viewed in their total context, and in particular the purpose of the legislative enactment, "no matter how plain the disposition may seem upon initial reading."[14]

15. A statute should not be read so narrowly as to defeat its legislative intent or frustrate its remedial purpose. Section 12 of the *Interpretation Act* confirms, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[15]

16. Parliament may declare its legislative purpose in the text of the statute itself, including in its preamble, which "often provides insight into the statute's purpose or goal that can be helpful to a court in interpreting it."[16] Indeed, section 13 of the federal *Interpretation Act* confirms that the preamble is to "be read as part of the enactment intended to assist in explaining its purport and object."[17]

The *Public Servants Disclosure Protection Act* Is Significant Remedial Legislation

17. The *Act* does more than create "a safe haven for public servants so that they can disclose wrongdoing a be protected from reprisal,"[18] as its short tile may otherwise

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[13] R. Sullivan, *Sullivan on the Construction Statutes*, 5th ed. (LexisNexis Canada Inc., 2008) [Sullivan] at 1-4; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at 26; *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paras 117-118.
[14] *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 48.
[15] RSC, 1985, c I-21.
[16] *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 101; Sullivan, *supra* at 87.
[17] RSC, 1985, c I-21.
[18] *El-Helou v Courts Administration Service*, 2011 CanLII 93945 at para 2.

suggest. The long title is indicative of a much broader scope: "An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings."[19]

18. The preamble leaves no doubt as to the significance of this legislation to Canadian Parliamentary democracy:

> the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;
>
> it is in the public interest to maintain and enhance public confidence in the integrity of public servants;
>
> confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;
>
> …

19. The Federal Court has found that the scheme of the *Act* "underscores the importance an ethical public sector,"[20] by establishing "a disclosure regime designed to ensure that Canadians are protected by a lawful, transparent and uncorrupted public service."[21] This Court has found that the purpose of this disclosure regime is "to denounce and punish wrongdoings in the in the public sector and, ultimately, build public confidence in the integrity of federal public servants."[22]

20. The preamble reinforces the scheme and purpose of the *Act*, by declaring that "it is in the public interest to maintain and enhance public confidence in the integrity of public servants" and that "confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings …."[23] In other words, the proper functioning of the disclosure process, which the PSIC is entrusted to

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[19] SC 2005, c 46 (underline added); Sullivan, *supra* at 376-81.
[20] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at para 79.
[21] *Swarath v Canada (Attorney General)*, 2015 FC 963 at para 1.
[22] *Agnaou v Canada (Attorney General)*, 2015 FCA 29 at para 60.
[23] *Ibid.*

administer, is essential to the protection and promotion of Canadian parliamentary democracy itself.

21. This is the context in which the provisions of the *Act* concerning the PSIC's disclosure process, and the decisions he makes in respect to the disclosures of wrongdoing he receives, is to be examined. The PSIC is obligated to interpret and apply these provisions, including the definition of wrongdoings covered by the *Act*, in a manner that achieves remedial purpose of the *Act*. He is obligated to decide whether he has reason to believe that a wrongdoing has been committed and, therefore, whether to exercise his discretion to commence an investigation, in a manner that achieves its remedial purpose.

The Threshold for Admissibility of Disclosures by the Public Is a Low One

22. To achieve its purpose, the *Act* contemplates disclosures of wrongdoing from both public servants and persons who are not public servants. In doing so, Parliament set a lower threshold for the PSIC to determine whether to investigate disclosures of wrongdoing from the public than for alleged wrongdoing disclosed by public servants.

23. When the PSIC receives a disclosure from a public servant, pursuant to section 13 of the *Act*, he has a duty, pursuant to paragraph 22(b), to decide whether "there are sufficient grounds for further action," including whether there are sufficient grounds to investigate the alleged wrongdoing.[24]

24. Subsection 33(1) of the *Act* provides a different mechanism by which the PSIC may receive and investigate disclosures of wrongdoing from members of the public:

> **33** (1) If … 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 … 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. ...

[24] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at para 2.

25. There are two parts to this provision. The PSIC is first to decide whether, based on the information received, he has "reason to believe" a wrongdoing, as defined in the *Act*, has been committed; if not, that ends the process. If, after this preliminary screening, the PSIC has reason to believe that wrongdoing has been committed, he must then decide whether to exercise his discretion, pursuant to subsection 24(1), to commence an investigation.

26. The legal test applied by the PSIC's in the first part, to determine whether he has "reason to believe" a wrongdoing has been committed, is extremely important. It is what triggers his decision, in the second part, whether to use his discretion to commence an investigation into the alleged wrongdoing. The higher the standard the PSIC applies in the first part, to determine he has "reason to believe" wrongdoing has been committed, the less likely he is to investigate and uncover actual wrongdoing. If the PSIC applies an unnecessarily high standard, wrongdoing for which there is reason to believe was committed by public servants may go unchecked. This would impede the fulfillment of both the PSIC's mandate and the objectives of the *Act*.

27. It is important to remember that, at this stage in the process, the PSIC's role is not to determine whether an actual wrongdoing has been committed — that is the obvious purpose of an investigation, as subsection 26(1) of the *Act* makes clear. His role is simply to decide whether he has "reason to believe" wrongdoing, as defined in section 8 of the *Act*, has been committed. This is not a high standard to meet. It is lower than the standard in paragraph 22(b), which requires "sufficient grounds" for further action. It is even lower than the standard in second part of subsection 33(1) that the PSIC is to apply in determining whether to use his discretion to investigate the disclosure, which requires him to have "reasonable grounds."

28. The term "reasonable grounds" is used in other sections of the *Act*[25] and in other federal legislation, notably in the *Canadian Human Rights Act*,[26] to which the *Act* has

[25] See s 16(1), 19.1, 20.4(3), 35(1) and 51.1(1).
[26] RSC, 1985, c H-6, s 40.

been compared and contrasted.[27] In the federal human rights regime, there is a requirement that, for a complaint to proceed, the complainant must have "reasonable grounds" for believing that a discriminatory practice has occurred. By that standard, complainants need not prove the truth of their allegations, they need only "allege facts that, if believed, would establish a link to a prohibited ground of discrimination."[28]

29. When Parliament uses different words in relation to the same subject matter, it intends a different meaning.[29] By the use of different terminology in both parts of subsection 33(1) — that if the PSIC has "reason to believe" a wrongdoing has been committed, then he "may" exercise his discretion to investigate the disclosure if he "believes on reasonable grounds" the public interest requires it — Parliament intended different meanings. It is indicative of a lower standard at the first part of subsection 33(1) analysis, the preliminary prescreening of the disclosure.

30. The French version of subsection 33(1) confirms this interpretation. It, too, contains the distinctive wording suggestive of a two-part test. The initial threshold is met where the PSIC has "des motifs de croire q'un acte reprehensible … a été commis." The PSIC may begin an investigation where, "il est d'avis sur le fondement de motifs raisonnables, que l'intérêt public le commande."

31. This interpretation is confirmed by the use of the term "reason to believe" in subsection 33(1) for disclosure of wrongdoing from the public and the use of different words in section 22: that there be "sufficient grounds" to investigate the disclosure. Had Parliament intended the same standard to apply, it would have used the same words. The use of different terminology signifies different standards are applicable to the preliminary screening of disclosures of wrongdoing by public servants and by members of the public. What this means is that the standard applicable to disclosures of wrongdoing by members of the public at the PSIC's prescreening stage is lower than the standard applicable to public servants. This makes practical sense, as members of

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[27] See, e.g. this Court's decision in *Agnaou v Canada (Attorney General)*, 2015 FCA 29 and *Agnaou v Canada (Attorney General)*, 2015 FCA 30.
[28] *Love v Office of the Privacy Commissioner of Canada*, 2014 FC 643 at para 69.
[29] *Nova Tube Inc. v Conares Metal Supply Ltd.*, 2019 FCA 52 at para 40.

the public will likely have less access to information than public servants to show that wrongdoing has been committed.

32. Provided there is information disclosed that, if believed, could substantiate the allegations, there is "reason to believe" wrongdoing was committed, and the PSIC must then decide whether to exercise his discretion to investigate the disclosure. The person making the disclosure cannot rely on bald allegations, or mere suspicion, of wrongdoing to meet that threshold. Neither is the person required to prove the truth of the allegations or marshal all the evidence in support of the allegations. That is the point of the investigation, if the PSIC decides to commence one.[30] At this point, provided there is some credible evidence the alleged wrongdoing was committed, the PSIC will have "reason to believe" it occurred and should then proceed to decide whether to exercise his discretion to investigate the disclosure of wrongdoing.

There Are No Closed Categories of Conduct That May Constitute Wrongdoing

33. The definition of wrongdoings in section 8 needs to be interpreted purposively to meet the objectives of the *Act*. The PSIC derives his jurisdiction from actions or inactions by public servants that he has reason to believe fall within the definition. If it is narrowly construed, wrongdoings in or relating to the public sector may, contrary to the remedial purpose of the *Act*, have gone unchecked.

34. Paragraph 8(e) defines wrongdoing as "a serious breach of a code of conduct established under section 5 or 6." Section 5 obliges the Treasury Board, the legal employer of the core public service,[31] to establish a code of conduct for the public sector. Section 6 obliges chief executives to establish a code of conduct, consistent with the Treasury Board's, for the portion of the public service for which they are responsible.

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[30] The role of a Human Rights Commission is analogous, it preforms both screening and investigation functions: See *Syndicat des employés de production du Québec et de l'Acadie v Canadian Human Rights Commission,* [1989] 2 SCR 879 at 897-98; *Sketchley v Canada (Attorney General),* 2005 FCA 404 at para 112; *Hebert v Canada (Attorney General),* 2008 FC 969 at para 16-18.

[31] *Financial Administration Act*, RSC, 1985, c F-11, s 7, 11, 11.1.

35. The range of conduct that may constitute a serious breach a code of conduct is informed by the purpose of the legislation. As the Federal Court has commented, the *Act* "addresses wrongdoing of an order and magnitude that could shake public confidence if not reported and corrected" and an alleged wrongdoing, pursuant to the *Act*, "is something that, if proven, involves a serious threat to the integrity of the public service."[32] Any conduct that a reasonably well-informed person would believe poses a threat to the integrity of the public service would be sufficient to meet that threshold.

In This Case, the PSIC Improperly Interpreted and Applied These Provisions

36. In dismissing the Appellants' disclosure of wrongdoing, the PSIC decision demonstrates that he did not apply the "reason to believe" standard applicable to the first part of subsection 33(1) of the *Act*. In doing so, he interpreted the definition of wrongdoing in paragraph 8(e) as excluding the conduct that formed the subject of the Appellants' disclosure.

37. As the PSIC decided the "disclosure does not give me reason to believe that wrongdoing was committed by the Embassy,"[33] he did not have to decide whether to use his discretion to commence an investigation. If there was no reason to believe a wrongdoing was committed, there was no basis for an investigation, notwithstanding the PSIC added it was "not in the public interest to commence an investigation." Section 24 of the *Act,* which gives the PSIC "very broad discretion to decide not to deal with a disclosure or not to investigate," was not engaged in the decision-making process, as the PSIC rested his decision on the first part of the subsection 33(1) analysis.[34]

38. This is, therefore, not a case where the PSIC used his broad discretionary powers to dismiss a disclosure that he otherwise believed would satisfy the definition of wrongdoing.[35] The PSIC concluded that the "disclosure does not give me reason to

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[32] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at para 106.
[33] PSIC Decision, Appeal Book, Vol 1, Tab 4 (underline added).
[34] *Agnaou v Canada (Attorney General)*, 2015 FCA 29 at para 60; *Agnaou v Canada (Attorney General)*, 2015 FCA 30 at para 70.
[35] See *Burlacu v Canada (Attorney General)*, 2019 FC 1215 at para 42.

believe wrongdoing was committed by the Embassy" and it followed, as a matter of course, that there was no public interest in investigating. He did not weigh whether he had "reasonable grounds" that the public interest required an investigation.

39. At the first part of the subsection 33(1) analysis, the PSIC was, in CFE's view, required to determine whether, based on any information the Appellants provided, he had reason to believe the Embassy committed a wrongdoing. That is, whether there was any information that, if believed, substantiated the allegation the Embassy personnel breached a code of conduct. This required the PSIC to examine the codes of conduct, which identify core values public servants are to uphold rather than proscribe any particular behaviour, and information provided by the Appellants to determine whether, if proven, seriously threatened the integrity of the public service.

40. Instead, the PSIC apparently decided whether the "policy" documents provided by the Appellants were official government policies that prescribed specific actions to Embassy personnel, without making any reference whatsoever to the applicable codes of conduct. Whether the documents were "aspirational" or "were later put in place," as the Federal Court emphasized, was not relevant to the analysis.[36] The documents merely illustrated the kinds of obligations that provide context to, and inform, the standards by which Embassy personnel, as public servants, could have breached the values identified in the applicable codes of conduct.

41. Having decided the documents were non-binding, the PSIC purportedly compared the conduct of the Embassy's personnel to the policies and found it did "not appear" contrary to the documents. In doing so, the PSIC asked himself the wrong questions. Whether the Embassy had a mandate to help Canadian companies abroad, like Blackfire, and that it did not appear to the PSIC that the Embassy was obliged to mediate Blackfire's dispute with human rights defenders, was also not relevant at the analysis. For that matter, it would make no difference that it did not appear to the PSIC that the Embassy ignored the protesters' human rights concerns.

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[36] FC Decision at para 66.

42. From CFE's reading of it, the Appellants' disclosure did not allege that the Embassy had no mandate to help Blackfire, that it should have intervened in the dispute with the human rights defenders or that the Embassy completely ignored human rights issues. They alleged that, by their actions and inactions in the course of the dispute between Blackfire and the human rights defenders, including favouring Blackfire's business interests over the interests of human rights defenders, Embassy personnel committed a serious breach of a code of conduct.

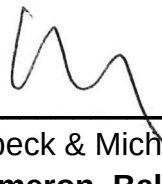
43. Accordingly, and with great respect, in the CFE's view, the PSIC did not decide that issue in accordance the requirements of subsection 33(1) of the *Act*, nor with proper regard for the definition of wrongdoing in paragraph 8(e). While the CFE takes no position on the reasonableness of the PSIC's decision, the proper interpretation and application of these provisions is relevant generally to the effectiveness of the disclosure procedures established pursuant to the *Act*, and the Court's disposition will likely have broader impact than the present case.

PART IV – ORDER SOUGHT

44. The CFE requests these submissions to be considered in the disposition of the present appeal but take no position in its outcome. The CFE does not seek costs and requests that no order as to costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, ON, this 4th day of December, 2020.



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PART V – LIST OF AUTHORITIES

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