

# Imai v. Canada: Access-to-information lawsuit concerning Canada's intervention in human rights case against Goldcorp in Guatemala

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## Overview

On March 2, 2021, the Federal Court of Canada will hear arguments in a lawsuit that seeks information about the Canadian government's response to a human rights case concerning a Canadian-owned mine in Guatemala. The suit was brought by York University law professor and co-founder of the Justice & Corporate Accountability Project (JCAP), Shin Imai, who first sought the information through access-to-information requests in 2014.

The documents released to date, though redacted, show that Canadian officials engaged on Goldcorp's behalf with decision-makers in Guatemala and Washington after the Organization of American States' human rights commission called for a suspension of operations at the company's Marlin mine in 2010. The Guatemalan government ultimately denied the commission's request, which was meant to protect the rights of Indigenous communities, and the commission retracted it in 2011.

The lawsuit contends that Global Affairs Canada<sup>1</sup> improperly withheld information from public disclosure, and that the Office of the Information Commissioner erred when it reviewed the case and found the redactions were justified under the *Access to Information Act*. Professor Imai is asking the court to order the disclosure of further details that could clarify the extent to which Canada pressed the human rights commission and the Guatemalan government to act in Goldcorp's interest, without due regard for the concerns of Indigenous communities. In doing so, Canada may have run afoul of its international obligations.

Mr. Imai's legal challenge was developed by JCAP and is supported by the following civil society groups: Above Ground, Amnesty International, the Canadian Network on Corporate Accountability, Inter Pares, MiningWatch Canada and the Steelworkers Humanity Fund.

## Timeline of key events

2007: Thirteen Indigenous communities near the mine [petition](#) the Inter-American Commission on Human Rights (IACHR) to intervene to protect their rights.

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<sup>1</sup> Global Affairs Canada (GAC) was given its current name in 2015. From 2013 to 2015, it was named the Department of Foreign Affairs, Trade and Development (DFATD). Prior to that (1995 to 2013), it was the Department of Foreign Affairs and International Trade (DFAIT). In the interests of clarity, we have applied the current name throughout this document.

May 20, 2010: The IACHR requests, through its precautionary measures mechanism,<sup>2</sup> that Guatemala suspend operations at the mine within 20 days due to alleged human rights abuses, environmental damages and health impacts.

May 2010 - Sept 2011: Canadian ambassadors, cabinet ministers and other officials engage with the Guatemalan government and IACHR officials in a series of phone calls, meetings, letters and emails that focus on the IACHR request and Marlin mine.

Jun 23, 2010: Guatemala announces it may comply with the request to suspend the mine, but does not follow through.

Oct 25, 2010: The IACHR holds a hearing to further consider the case.

Dec 2011: The IACHR amends its requested precautionary measures to no longer include suspending mining operations.

2014-2015: Professor Imai files an access-to-information request, and later a complaint with the Office of the Information Commissioner regarding Global Affairs Canada's handling of the request.

June 2019: The Office of the Information Commissioner finds that Global Affairs Canada's decision to redact certain portions of the records complies with the *Access to Information Act*.

July 2019: Professor Imai [applies](#) to the Federal Court of Canada for a judicial review of Canada's decision to withhold the information.

## **The Marlin mine and its near suspension**

The Marlin mine operated in northwestern Guatemala from 2005 to 2017. Goldcorp acquired the project in 2006. The mine's operations impacted two municipalities that include hundreds of villages populated overwhelmingly by Indigenous people.

The IACHR urged Guatemala in May 2010 to suspend the company's activities in response to a petition from 13 of these communities. The [petition](#) alleged that the communities were not consulted before mining concessions were granted, and that mining activities were depleting and contaminating their water resources and harming the health of local residents. The commission [ordered](#) the shutdown as an urgent precautionary measure while it further considered the case. It also requested that Guatemala take all necessary measures to "guarantee the life and physical integrity" of the affected Indigenous communities, in particular by decontaminating their water sources and ensuring access to potable water and to medical attention, as appropriate.

Locals had also expressed opposition to the mine through referenda, blockades and marches, including one that brought hundreds of protestors to the Canadian embassy in Guatemala City

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<sup>2</sup> The [precautionary measures](#) mechanism is intended to ensure a rapid response in urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons.

in 2010. Between 2005 and 2011 several people who spoke out against the mine were beaten, injured, shot or killed.

At first it appeared that Guatemala might comply with the IACHR's request to shut down the mine. The government announced in June 2010 that it would begin an administrative process to suspend operations. Then in July 2011 it reported that its administrative process had not identified sufficient evidence to support the suspension.

The IACHR then modified its request, urging the government to "take the necessary measures" to ensure the communities' water was not contaminated by the mine, but no longer calling for its suspension.

The mine continued to operate up to 2017, when it reached the end of its commercial viability.

Impacted communities continue to raise serious concerns about the ongoing impacts of the mine. These concerns relate to contamination, damage to local buildings and lack of access to potable water. Community members also raise grievances about Goldcorp's local "development" projects and their failure to yield long-term benefits. Finally, local residents express concerns about whether the mine will be closed safely and how they will access remedy for the mine's adverse impacts.

## **What Canada's disclosure revealed**

Professor Imai made two access-to-information requests in 2014, seeking disclosure of communications between Canadian government officials, the Canadian embassy in Guatemala, Goldcorp, the IACHR and Guatemalan authorities between 2010 and 2011.

Global Affairs Canada provided five different release packages to Mr. Imai following his requests and his subsequent complaint to the Office of the Information Commissioner. While many of the key details they contain are blacked out, the emails, meeting notes, talking points and other documents obtained show that Canadian officials undertook extensive lobbying of Guatemalan and IACHR decision-makers, and assisted Goldcorp in doing likewise.

### ***The Canadian government did not want to "be seen" to be interfering in the case***

Canada is bound by the Charter of the Organization of American States not to intervene in the affairs of other member states or put political pressure on them. It must also respect the independence of the IACHR and promote the protection of human rights. Canadian officials were reminded of the importance of non-interference in briefing notes and talking points provided prior to their discussions with Guatemalan and IACHR officials. Even the head of the IACHR [appears to caution](#) Canada not to interfere in the proceedings.

The Canadian government's primary concern, however, was to maintain the *appearance* of non-interference. For instance, Canada's ambassador to the OAS [wrote](#) to colleagues that "it

would not be appropriate for us to be seen to be lobbying the IACHR on behalf of Gold Corp [sic].” [Briefing notes](#) prepared for Trade Minister Peter Van Loan stated that “it is neither in Canada’s interest to be publically [sic] perceived as interfering in the operations of the Commission or promoting non-compliance with its rulings.”

### ***Cabinet members lobbied Guatemalan government and IACHR officials***

The Canadian ambassador to Guatemala, Leeann McKechnie, learned of the IACHR’s request on May 22 and held an “[emergency meeting](#)” with Guatemalan government officials the same day. She wrote to Ottawa the following day. Canadian officials then engaged in a flurry of communications with Guatemalan and IACHR decision-makers, with intense bouts of activity in the weeks, days and even hours leading up to Guatemala’s interim response to the IACHR’s request in June 2010, and in advance of a hearing the IACHR held in October 2010 to consider the case. Canadian officials had 17 documented communications on this issue with Guatemalan government contacts between May 2010 and September 2011.

The week before Guatemala issued its interim response, Trade Minister Peter Van Loan met with Goldcorp’s lawyer and wrote to the Guatemalan president and vice-president about the case. Ambassador McKechnie and the minister of state of foreign affairs, Peter Kent, held an emergency call with Guatemala’s vice-president hours before the Guatemalan government issued its response because, [according](#) to the ambassador, “nothing is final until announced.”

During this time Canadian officials also communicated with the IACHR’s executive secretary, who was the top decision-maker considering the case, and Minister Kent was briefed to discuss the case in a meeting with OAS officials in Washington not long before the IACHR hearing.

### ***Canadian officials presented arguments which seemed to exclusively favour Goldcorp’s position***

Talking points [prepared](#) for Minister Kent’s call with Guatemala’s vice-president, for instance, proclaimed that “responsible Canadian mining companies, such as Goldcorp, operate in foreign jurisdictions in compliance not only with local laws and regulations but with internationally recognized standards.”

Notes [provided to](#) Minister Kent for his meeting with the IACHR in Washington indicated that the “significant investment made in the Goldcorp Marlin mine” was “positively impacting Guatemalans” and lauded Goldcorp’s “regular environmental monitoring.” The unredacted portions make no mention of factors that would favour Guatemala complying with the request, such as a [criminal complaint](#) filed at the time by Guatemala’s environment minister against Goldcorp’s subsidiary over unauthorized wastewater discharge. Contrary to its stated policies, nowhere in the unredacted portions of the documents does Canada consider how it might engage with affected communities to understand their concerns and to verify whether international standards are being met.

## ***Canadian officials strategized with Goldcorp to facilitate its lobbying efforts***

Canadian officials communicated with Goldcorp about the IACHR request at least 37 times between May 2010, when the request was issued, and September 2011, before the hearing took place. For example, they aided the company in its lobbying efforts by providing Goldcorp with information and strategic contacts within the Guatemalan government. Ambassador McKechnie sought these contacts despite concerns expressed by embassy staff regarding the “odd” nature of the request.

Although Goldcorp and Canada were not parties in the case before the IACHR, Canadian officials worked to connect the company with IACHR decision-makers. For example, officials investigated whether Goldcorp could submit an amicus brief to the IACHR, a process through which third parties participate in legal proceedings. Goldcorp representatives also met with at least one of the IACHR commissioners in an “[unofficial](#),” private meeting that took place the same day as the formal hearing.

## **What Canada concealed**

The government refuses to disclose redacted information on 20 pages of documents. It claims that the information is exempt from release under the *Access to Information Act* because

- it was obtained in confidence from the government of Guatemala or the IACHR;
- its release would result in probable harm to Canada’s international relations or to Goldcorp’s competitive position; or
- its release would undermine the neutrality of the public service and its ability to provide frank advice to government.

The documents include records of communications with Goldcorp, with Guatemalan and IACHR officials, and between Canadian diplomats and embassy staff, as well as notes from a meeting between the Canadian ambassador to the Organization of American States and Goldcorp’s vice-president.

In many cases Global Affairs Canada cannot explain how it satisfied established legal tests to justify the exemptions it claims. For example, it is unable to say what factors it considered in determining that disclosure would harm Goldcorp. It made this assessment without consulting the company, and continued to provide this justification even after the mine had closed and after Goldcorp was purchased by an American company.

## **Why this case matters**

Mr. Imai’s [lawsuit argues](#) that there is a clear public interest in disclosing the records. The public must be able to scrutinize the extent to which the Canadian government acted in the service of Goldcorp’s interests, while undermining Indigenous communities’ efforts to defend their rights. This disclosure would inform broader public debates regarding mining industry

influence over Canadian foreign policy and the government's compliance with its own policies and international human rights law.

The case also highlights broader concerns regarding Canada's access-to-information system, notably the broad use of exemptions to avoid accountability, competence and timeliness in government responses to requests, and the Office of the Information Commissioner's effectiveness in guaranteeing the public's right to access information. The current [review](#) of the *Access to Information Act* must address these concerns.

## **Hearing details**

The court will hear the case remotely on March 2, 2021 at 9:30 a.m. CST (10:30 a.m. EST). The court file number is T-1170-19 and the style of cause is Shin Imai v. Canada (Minister of Foreign Affairs). Members of the media wishing to obtain a court document should email [FC\\_Reception\\_CF@cas-satj.gc.ca](mailto:FC_Reception_CF@cas-satj.gc.ca).