

2018 Legislative Review of Export Development Canada

**Submitted to
Global Affairs Canada**

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Introduction

As Canada's largest labour organization, the Canadian Labour Congress (CLC) not only represents 3 million Canadian workers, but is also committed to upholding the fundamental rights of workers around the globe, especially in cases where Canadian agencies or enterprises have caused, contributed to, or are linked to violations of these rights. This means ensuring that Canada's federal and provincial governments, including Crown corporations and agencies, are fulfilling their international commitments to protect human rights and that Canadian enterprises are fulfilling their international commitments to respect human rights.

Since Export Development Canada (EDC or the Agency) was founded in 1944, it has facilitated more than \$1.4 trillion in exports and foreign investment by Canadian companies. In 2017 alone, EDC supported nearly 9,400 Canadian companies that did business in almost every market around the globe. With such a large sphere of influence, comes a great deal of responsibility, not only to the companies, but also to the workers and communities that are impacted by the operations or activities of EDC clients. The CLC believes that EDC is falling behind on its human and labour rights' responsibilities and that more must be done to ensure that Canadian governments, agencies and enterprises are protecting and respecting labour and human rights, regardless of where they operate in the globe. In this spirit, the CLC respectfully submits this written submission to the 2018 Legislative Review of EDC, with particular attention given to *Theme 5: Corporate Social Responsibility and Human Rights*.

Theme 5: Corporate Social Responsibility and Human Rights

The CLC is pleased that corporate social responsibility and human rights has been identified as a pertinent subject for this review. The CLC has a number of concerns that fall within this theme including transparency; risk management and human rights due diligence; and accountability.

Transparency

The Canadian government, through the *Export Development Act* (the Act or EDA), affords EDC vast discretion in its operations. As currently written, the Act is not prescriptive and instead leaves specific details to be established by EDC, giving Agency staff considerable leeway in doing so.

In order to assess whether EDC is exercising its discretion wisely and in a manner that is consistent with Canada's international commitments, the agency's business decisions must be more transparent and publicly available. However, EDC is legally barred from disclosing important information about its business decisions. While Canada's *Access to Information Act (ATI)* bars all government institutions from disclosing certain information, the EDA adds another level of limitations, further adding to the opaqueness and opacity that have come to describe EDC.

Canada's *ATI* bars all government institutions from disclosing certain information provided by a third party including: trade secrets; confidential financial, commercial, scientific or technical information; and any information that "could reasonably be expected to result in material financial loss or gain, or could reasonably be expected to prejudice the competitive position of a third party.

Layering onto limitations under the *ATI*, the EDA further prohibits EDC from releasing any information relating to a client unless the disclosure is made with the written consent of the client for the purpose of administering or enforcing provisions of the EDA or other relevant statutes.

This presents challenges and limits transparency surrounding EDC's risk management and, specifically in regard to CLC's interest, EDC's human rights due diligence, since all documentation developed during the assessment, approval and monitoring phases for a particular transaction will necessarily contain information about the client.

As a result, Canadian trade unions, civil society organizations (CSOs), academics, and human rights advocates face unreasonable and sometimes insurmountable barriers in attempts to access sufficient information needed to examine and analyze the human rights' records of EDC.

The CLC recommends that the EDA be reviewed with particular attention given to loosening provisions that unnecessarily limit transparency of EDC operations to outside stakeholders and human and labour rights advocates. In addition, the EDA should be amended to mandate the Auditor General of Canada (AG) to audit on a regular basis the design, implementation and effectiveness of EDC's practices related to human rights, the environment, and anti-corruption. This should include, as part of the AG's mandate, a requirement to submit reports with results of the audits to EDC's board, the Minister of International Trade Diversification and both houses of Parliament.

Risk Management and Human Rights Due Diligence

The Canadian government affords EDC vast discretion in developing its risk management policies. This is especially concerning given that EDC's risk assessments have repeatedly failed to screen out companies whose operations cause significant human rights harm, significant environmental damage or are linked to corruption. One specific example that is of particular concern to Canadian unions is the case of Frontera Energy (formerly Pacific Exploration and Production (2015-2017), formerly Pacific Rubiales (1982-2015)). Frontera Energy has been linked to the widespread violation of environmental, labour and indigenous rights in Colombia. Some of Frontera's recent labour rights violations are documented in CLC's *2016 Public Submission to the Canadian National Administrative Office under the Canada-Colombia Agreement on Labour Cooperation Concerning the Failure of the Government of Colombia to Comply with the Canada-Colombia Agreement on Labour Cooperation*

(2016 Public Submission). CLC's submission can be made available upon request. The Government of Canada's (Employment and Social Development Canada) review of the submission, which vindicates CLC's concerns, can be found here:

http://publications.gc.ca/collections/collection_2017/edsc-esdc/Em8-26-2017-eng.pdf

CLC's 2016 Public Submission documented the violation of trade union rights, including the right to freedom of association, to organize and to collective bargaining. In 2011, Colombian unions reported that Frontera (Pacific Rubiales at the time) dismissed 1,100 workers for attempting to unionize in order to address health and safety concerns. The complaint also documents reports of Colombia's anti-riot police (ESMAD) being used to intimidate workers and violently suppress pro-union gatherings.

Violations of trade union rights are not uncommon in Colombia. As is documented in CLC's 2016 Public Submission, between 2012 and 2016, workers attempting to exercise their rights have suffered at least 1,466 threats and acts of violence, including: 99 assassinations; 66 attempted murders; 68 arbitrary detentions; 55 cases of forced displacement; 7 forced disappearances; 6 kidnappings; and 6 cases of torture.

Despite the widespread abuse of human and labour rights in Colombia, and the specific violations associated with Frontera, EDC has repeatedly failed to screen out Frontera and other Canadian-owned companies that operate in Colombia. For example, in 2014 EDC provided a loan to Pacific Exploration and Production (now Frontera), specifically for its Colombian operations.

This is merely one example of EDC's failure to screen out companies that are allegedly engaged in severe human rights' violations. EDC's lack of effective due diligence regarding human and labour rights, environmental rights, and anti-corruption, is inexcusable, especially given the level of international attention given to this subject in the past decade and the recent guidelines and common approaches that have been developed and made available.

The CLC recommends that the EDA be amended to require EDC to engage in the process of human rights due diligence (HRDD) with every client and throughout the entire cycle of their business relationship, with special attention given to human and labour rights, environmental rights, and anti-corruption.

The EDA provision on HRDD should specifically refer to the relevant international principles, guidelines and declarations, including the *United Nations (UN) Guiding Principles on Business and Human Rights*, the *Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*, and the *International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.

EDC's process for HRDD should be guided by international common approaches and guidance, including the *OECD Due Diligence Guidance for Responsible Business Conduct* and the OECD's guidance on *Responsible business conduct for institutional investors*.

As is outlined in these international principles and guidelines, EDC must develop effective policies and processes to identify, prevent, mitigate and account for how it addresses adverse impacts. The HRDD process must include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. EDC's HRDD must be on-going, proactive and reactive, process-oriented, and should be carried out throughout the entire life-cycle of its business relationships.

In addition to EDC's own failure to screen out companies that have caused, or contributed to, human and labour rights abuses, which points to an insufficient HRDD process within EDC itself, there is also a lack of clarity as to how EDC coordinates with other government departments and agencies surrounding business and human rights. In particular, there is a lack of clarity surrounding the relationship between EDC and Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (NCP).

For example, the NCP's website reads

"There are consequences if Canadian companies do not participate, or do not engage in good faith and constructively, in the NCP dispute resolution process. Consequences are withdrawal of Government of Canada trade advocacy support abroad. Further, non-participation or the lack of good-faith participation will also be taken into account in the Corporate Social Responsibility-related and due diligence conducted by the Government of Canada's financing crown corporation, Export Development Canada, in its consideration of the availability of financing or other support."

There is no publicly available information on a reporting relationship between the NCP and EDC or to a process by which EDC incorporates NCP recommendations into its due diligence process or financing decisions. The CLC recommends that the EDA should be amended to require that EDC comply with any recommendations made by Canada's National Contact Point.

Related to the topic of coordination and policy coherence between government departments and agencies, in January 2017, Canada announced that it will be creating a Canadian Ombudsperson for Responsible Enterprise (the Ombudsperson). Although the Order in Council that will outline the mandate and associated responsibilities of the Ombudsperson has yet to be tabled, the "Questions and Answers" published on Global Affairs Canada website provide key details about the Ombudsperson and its

relationship to EDC. In particular, it is stated that “The Ombudsperson can recommend sanctions, which include the withdrawal of certain Government services, such as trade advocacy and future Export Development Canada support, for companies found to be involved in wrongdoing.” The CLC recommends that the EDA should be amended to require that EDC comply with any recommendations made by the Ombudsperson.

Accountability

There are no apparent mechanisms in place to hold EDC accountable for its decisions to support companies that violate human and labour rights. Under the “Protect, Respect and Remedy” Framework outlined in the UN Guiding Principles for Business and Human Rights, governments and their agencies are not only responsible for protecting against human rights abuses by all third parties including business enterprises, but the Framework also highlights the need for access to state and non-state remedy when this duty or responsibility is breached. The Framework suggests each pillar is an equal, essential and interrelated component of a system of both preventive and remedial measures.

The CLC recommends that the EDA be amended to prohibit EDC from supporting any corporate entity whose activities cause or contribute to human or labour rights violations. To ensure the effectiveness of such a prohibition to prevent the violation of human and labour rights, should be in effect for the entire duration of EDC’s relationship with the client.

The EDC should not only take measures to prevent its involvement with clients who cause or contribute to human and labour rights abuses but more must be done to ensure remedy to victims of human and labour rights violations that were caused by the activities of EDC clients. As such, the EDA should be amended to clarify that EDC owes a private law duty of care towards those who may be adversely affected by its failure to fulfil such obligations.

Summary of Recommendations

1. The EDA be reviewed with particular attention given to loosening provisions that unnecessarily limit transparency of EDC operations to outside stakeholders and human and labour rights advocates.
2. The EDA should be amended to mandate the AG to audit the design, implementation and effectiveness of EDC’s practices related to human rights, the environment, and anti-corruption. AG audits of EDC should be conducted on a regular basis and should include, as part of the AG’s mandate, a requirement to submit reports with results of the audits to EDC’s board, the Minister of International Trade Diversification and both houses of Parliament.

3. The EDA should be amended to require EDC to engage in a process of HRDD with every client and throughout the entire cycle of their business relationship, with special attention given to human and labour rights, environmental rights, and anti-corruption. The EDA should specifically refer to the relevant international principles, guidelines and declarations.
4. EDC's process for HRDD should be guided by international common approaches and guidance and should include effective policies and processes to identify, prevent, mitigate and account for how it addresses adverse impacts. This includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.
5. The EDA should be amended to require that EDC comply with any recommendations made by Canada's National Contact Point.
6. The EDA should be amended to require that EDC comply with any recommendations made by the Canadian Ombudsperson for Responsible Business Enterprise.
7. The EDA should be amended to prohibit EDC from supporting any corporate entity whose activities cause or contribute to human or labour rights violations. This prohibition should be in effect for the entire duration of EDC's relationship with the client.
8. The EDA should be amended to clarify that EDC owes a private law duty of care towards those who may be adversely affected by its failure to fulfil such obligations.

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