ABOVE GROUND

Bringing Accountability and Transparency to Export Development Canada's Practices

A submission for Parliament's review of the *Export Development Act*

November 9, 2018

With recommendations for legislative reforms endorsed by

Amnesty International Canada
Association québécoise des organismes de coopération internationale
British Columbia Teachers' Federation
Canadian Network on Corporate Accountability
Committee for Human Rights in Latin America
Friends of the Earth Canada
Inter Pares
Maquila Solidarity Network
Mining Injustice Solidarity Network
MiningWatch Canada
Oxfam Canada
Projet accompagnement Québec-Guatemala
Publish What You Pay Canada
Social Justice Connection
United Church of Canada
United Steelworkers

As Parliament undertakes its review of the *Export Development Act,* we welcome the opportunity to comment on reforms urgently needed to bolster the accountability and transparency of Canada's export credit agency, Export Development Canada (EDC).

Above Ground is a project of Tides Canada, a registered charity. We seek to ensure that companies based in Canada or supported by the Canadian government respect human rights wherever they operate. We advocate for effective accountability mechanisms in Canada to ensure that the victims of corporate abuse can access remedy in this country.

EDC's policies state that it screens and monitors the business it supports for associated social, environmental and business ethics risks. In practice, however, the agency's processes too often fail to achieve their stated aim: to ensure that it does business "the right way – upholding high standards of ethics and integrity, and protecting people and the environment."[1] In fact, we have identified multiple companies that receive support from EDC despite credible or proven allegations involving environmental damage, corruption and human rights violations.[a]

Canadian law grants the agency broad discretion to handle these risks as it sees fit. The *Export Development Act* is silent on human rights and corruption, and does not provide meaningful oversight relating to the environment.[b] Nor does it subject the agency to effective accountability measures in relation to these matters.

EDC's disclosure of information about its human rights, environmental and corruption risk management is minimal, providing the public and members of Parliament little basis for assessing whether the Crown corporation is operating responsibly and in compliance with Canada's legal obligations.

The lack of accountability and transparency surrounding EDC's practices should be a matter of concern for Parliament. The Canadian government has a duty under international law to ensure that its institutions protect against and avoid contributing to human rights abuse by business. What's more, as EDC's sole shareholder, the government received $3.9 billion in dividends from its operations in the last five years.[2] In the absence of strong legislative controls, the Canadian government risks benefiting from the proceeds of corruption, environmental harm and human rights abuse through these payments.

While EDC is currently reviewing its social and environmental risk management policies, the agency's own guidelines must be supported with enforceable legislative provisions. We urge Parliament to bring accountability and transparency to EDC's practices with the following legislative reforms:[c]

- Amend the *Export Development Act* to
    - prohibit EDC from supporting corporate activity that causes or contributes to human

[a] Several examples can be found on pages 7-8 of this submission.

[b] We examine the minimal environmental obligations placed on EDC by the *Export Development Act* on page 5 of this submission.

[c] These recommendations apply both to EDC and its subsidiary Development Finance Institute Canada (FinDev). We have also made a second submission calling for reforms to address the climate impacts of business supported by EDC.

rights violations or significant environmental damage, or that involves corruption;

- require that EDC undertake due diligence to assess the human rights, environmental and corruption risks associated with transactions and companies;
- establish a standard to be used by EDC in its assessment of companies' human rights, environmental and anti-corruption performance;
- require that EDC provide public notice regarding its consideration of transactions and consider submissions from concerned stakeholders;
- require that transactions be approved by EDC's president and chief executive officer;
- make clear that EDC's decisions regarding the prohibition on harmful activity are subject to judicial review;
- make clear that EDC owes a private law duty of care towards those who may be adversely affected by human rights violations or environmental harm linked to transactions;
- require that EDC comply with any recommendations made by the Canadian Ombudsperson for Responsible Enterprise; and
- mandate the Auditor General of Canada to regularly audit the design, implementation and effectiveness of EDC's human rights, environmental and anti-corruption policies, procedures and practices, and their bearing on EDC's decision-making. The Auditor General should report on these questions to the board of EDC, the Minister of International Trade and both houses of Parliament.

- Repeal section 24.3 of the *Export Development Act* and section 18.1 (1) (b) of the *Access to Information Act*, which place unreasonable restrictions on public access to information about EDC's decisions.

These recommendations are examined in detail in the sections that follow.

Growing public concern about EDC's practices

Every ten years Parliament reviews EDC's enabling legislation, *The Export Development Act*, to assess EDC's mandate, activities and governance.[3] The current review comes amidst growing public concern about the types of business supported by EDC.

Over the past year, a succession of major news outlets — including *The Washington Post*, *The Globe & Mail*, *Toronto Star*, *The Walrus*, *La Presse*, *Le Devoir* and *Le Journal de Montréal* — have published articles questioning EDC's screening and disclosure practices.[4] Much of this coverage has focused on EDC's support for companies accused of corruption, such as a firm owned by South Africa's infamous Gupta family. That particular case prompted some members of Parliament to call in March 2018 for a review of how EDC makes investment decisions.[5]

In April, the Auditor General released a pointed indictment of EDC's policy framework for managing risk. The report states that EDC's risk management practices suffer from "a number of weaknesses"

which, combined, amount to "a significant deficiency."[6] Some of the weaknesses noted in the report were identified nearly a decade ago in a 2009 audit.

In June, the Senate Committee on Human Rights warned that Crown corporations including EDC aren't doing enough to comply with international human rights standards, and called for changes to the *Export Development Act* to require that EDC perform human rights due diligence.[7] The committee's report came on the heels of recommendations from a UN working group that EDC improve its processes and include human rights as a core pillar of its objectives.[8]

The Minister of International Trade Diversification has also signalled concern about EDC's human rights performance. In September, the minister tasked the agency's directors with conducting a "thorough review" of its risk management practices to ensure that "human rights, transparency and responsible business conduct are core guiding principles for EDC."[9]

At that point, EDC had begun a review of its social and environmental risk management policies, which is ongoing.[10] More than a dozen civil society organizations joined Above Ground in calling for extensive policy reforms within the context of that review.[d] However, any reforms made by EDC must be backed with enforceable legal obligations. Effective legislative oversight will ensure that EDC is held accountable for its decisions, and for harm caused by its clients.

Gaps in accountability

In its submission to the current legislative review, EDC describes its approach to "social and environmental responsibility" thus:

> When EDC is part of a transaction, we want our financial partners and customers to know that best commercial practices are being upheld. This cannot always mean saying "no" to transactions and leaving opportunities for Canada behind. Sometimes it means being a force of positive influence for the companies we work with, and helping our customers achieve long-term responsible business success. It also means making responsible choices and occasionally declining transactions that do not meet, or that are unlikely to achieve, our high standards.[11]

In other words, the commercial imperative may override other considerations at EDC: transactions are approved even when companies fail to demonstrate responsible business practice, and those that fail or are unlikely to meet EDC's standards are only occasionally declined. EDC explains that it leverages its relationships with clients to promote responsible business success over the long-term.

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[d] See our September 2018 submissions to EDC: *Strengthening Environmental and Human Rights Protection at Export Development Canada* (aboveground.ngo/strengthen-edc-protection-environment-and-human-rights/) and *Bringing Export Development Canada's Climate Change Policy in Line with Canada's Commitments* (aboveground.ngo/export-development-canada-climate-policy-submission/). Our recommendations for changes to EDC's corruption risk management policies are outlined in our April 2018 report *Anti-Corruption and Export Development Canada* (aboveground.ngo/anti-corruption-and-export-development-canada/).

However, we've observed cases where EDC repeatedly approves support for a company, sometimes over several years, despite ongoing human rights, environmental or corruption concerns.[e]

The *Export Development Act* enables this approach by granting EDC broad discretion in the development of its portfolio. Below we examine the accountability deficits in EDC's legislative framework in detail.

Environment

The *Export Development Act*'s provisions relating to the environment are weak and apply to only a small fraction of EDC's business portfolio: the support it provides to "projects."[f] In 2017, this accounted for just three percent of its portfolio.[12] The act states that EDC must determine, when considering supporting a project, whether it is "likely to have adverse environmental effects despite the implementation of mitigation measures" and if so, "whether [it] is justified in entering into the transaction."[13] The statute grants EDC wholesale discretion in making these determinations, instructing it to define key concepts such as "transaction," "project," "adverse environmental effects," and "mitigation measures." The statute places no limits on the environmental risk the agency may legally assume.

It is within this weak legislative context that EDC adopted an environmental review policy in 2001, and that it assesses the environmental impacts of projects it may support. The agency later amended its policy by adding social considerations to its project reviews.

EDC reports that it also assesses the environmental and social risks associated with companies seeking other forms of support, such as loans for general corporate purposes. These review processes are of crucial importance, given that non-project support accounts for the vast majority of EDC's business. However, they aren't described in any detail by EDC. As a result, it remains unclear how the agency screens the vast majority of potential clients for environmental and social risks, how it determines whether to support a company despite those risks and what preventive measures, if any, it will insist on as a condition for support.

It's important to note that EDC clients receiving general corporate loans or other forms of non-project support could use the funds to support operations in high-risk industries. By focusing exclusively on the environmental effects of EDC's project support, the *Export Development Act* fails to consider the grave environmental (and social) harms that may result from business supported through other EDC products.

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[e] See for example our publication on EDC loans to Kinross, *Swept Aside: An Investigation into Human Rights Abuse at Kinross Gold's Morro do Ouro Mine* (aboveground.ngo/swept-aside-report-kinross-gold-morro-ouro/).

[f] EDC defines a project as either a new industrial, commercial or infrastructure-related physical development, or a major expansion or transformation of such a development. It defines project *support* as support "for which the repayment term or coverage period is two years or more" and either the support requested is CAD $18.4 million or more, or the project is "located in or near a sensitive area." (See p. 4 of EDC's *Environmental and Social Review Directive:* www.edc.ca/EN/About-Us/Corporate-SocialResponsibility/Environment/Documents/environment-social-review-directive.pdf.)

Human rights

The *Export Development Act* does not subject EDC to any requirements relating to human rights. This is a glaring omission, given that EDC is bound by Canada's international legal obligation to prevent human rights abuse.[g] The UN working group on business and human rights has made clear that, to meet this obligation, all states "should make government support for trade and investment, such as export credits, conditional on corporate respect for human rights."[14]

The UN Guiding Principles on Business and Human Rights (UNGPs) stress that a *mandatory* requirement for human rights due diligence by export credit agencies is appropriate "where the nature of business operations or operating contexts pose significant risk to human rights."[15]

In 2017 nearly a quarter of EDC's business was in the extractive sector.[16] The agency supports mining and oil companies in countries where extractive projects are often associated with credible reports of serious human rights violations, such as Colombia. John Ruggie, author of the UNGPs, has noted that the extractive sector "is unique because no other has as enormous and as intrusive a social and environmental footprint."[17] In 2016-17, amongst the hundreds of attacks on human rights defenders that were tracked by the international Business and Human Rights Resource Centre, the greatest number were linked to mining projects.[18] Aside from local impacts caused by oil, gas and coal projects, the fossil fuel industries pose further risks to human rights on a global scale, through their direct contribution to the climate crisis.

EDC reports that it undertakes human rights risk assessments on business it considers supporting. The agency's sole policy document on human rights is the one-page *EDC Statement on Human Rights*. It indicates that the agency "routinely conducts country- and project-level political risk assessments" that take into account human rights, and that it carries out an "additional layer of due diligence" for investment projects and countries that have "a higher potential for human rights issues."[19] It is not clear what this due diligence consists of, how EDC ensures that its clients respect human rights, and what consequences it will impose if they do not.

Corruption

EDC also engages in sectors with serious corruption problems. According to Transparency International, the highest-risk sector for corruption is construction, including that related to the mining, oil and gas sectors.[20]

Canada lacks legislative provisions that prohibit EDC from supporting companies engaged in bribery. Unlike most other financial institutions in Canada, EDC is not subject to the *Proceeds of Crime*

[g] According to former UN independent expert Cephas Lumina, "[w]hen a Government, directly or through its export credit agency, fails to exercise due diligence to protect human rights from the potentially harmful behaviour of non-State actors, it is in breach of its obligations under international human rights law." UN General Assembly, 66th Session. *Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights,* 5 Aug 2011 (A/66/271), para 23.

(Money Laundering) and Terrorist Financing Act (PCMLTFA),[h] nor does the *Export Development Act* address the issue of corruption. EDC is subject to the *Corruption of Foreign Public Officials Act* (CFPOA), to the extent that it would be a criminal offence for an EDC employee to engage in bribery-related offences. However, the act does not prohibit EDC from supporting business activities tainted by corruption.

EDC's own policy[21] includes broad discretion regarding the measures used to screen, monitor and sanction clients for corruption. The agency's anti-corruption due diligence process is a highly flexible internal assessment about which the agency discloses very little information. EDC does not report how it undertakes "enhanced" due diligence reviews in cases of suspected corruption, when it imposes the adoption of anti-corruption measures as a condition for support, or how it monitors compliance in such cases. The policy focuses on preventing the agency's involvement in corrupt *transactions*, stating that EDC "will not support a transaction that involves the offer or giving of a bribe."[22] However, the policy does not require that EDC avoid supporting a company facing credible or proven allegations of corruption unrelated to the EDC-supported activity. In fact, the agency has provided support to companies in these very circumstances.

Weak oversight leads to problematic outcomes

In recent years EDC has repeatedly supported companies associated with high risks of human rights abuse, environmental harm and/or corruption. Below are several examples that illustrate the range of harms involved.

[The examples were removed at the request of Global Affairs Canada. They can be found on Above Ground's website:
http://aboveground.ngo/wp-content/uploads/2018/11/LR_outcomes_26Nov2018-1.pdf]

Recommendations for accountability

The *Export Development Act* (EDA) should be amended to create an effective, transparent governance framework for EDC that would prohibit the agency from supporting harmful corporate activity, require that EDC exercise due diligence to assess human rights, environmental and corruption risks, and establish a standard to be used by EDC in assessing risk of harm. As part of its due diligence process, EDC should be required to notify the public of transactions under review and consider input from stakeholders. The law should also require that EDC transactions be approved by the agency's president and CEO. Each of these elements is described in further detail below.

[h] EDC is not subject to the PCMLTFA's provisions related to money laundering because it does not accept deposits (i.e. flow-through transactions) from clients, which largely eliminates the risk of its direct participation in money laundering. However, the statute also contains provisions aimed at preventing financial institutions' participation in other crimes including corruption.

1. The *Export Development Act* should bar EDC from supporting corporate activity that causes or contributes to human rights violations or significant environmental damage, or that involves corruption.[i]

    - Compliance with the prohibition would require that EDC refrain from supporting corporate activity at risk of causing or contributing to human rights harm or significant environmental damage, or involving corruption.
    - The prohibition would apply for the duration of EDC's contractual relationship with each client. The ongoing nature of the prohibition would require that EDC adopt effective mechanisms to monitor client compliance and to terminate contracts in case of non-compliance.
    - Former EDC clients whose activities were found to cause or contribute to human rights violations or significant environmental damage, or to have involved corruption, and whose contracts were terminated by EDC, would be ineligible for support absent evidence of significant, effective management reform.

2. The *Export Development Act* should establish a standard to be used by EDC in its assessment of companies' human rights, environmental and anti-corruption performance.

    - The standard should ensure respect for internationally protected human rights, with particular emphasis on the rights of workers and vulnerable groups such as women, indigenous people and human rights defenders.[j]
    - To avoid environmental damage, companies should be expected to comply with the International Finance Corporation's Performance Standards.
    - In regards to corruption, the standard should preclude a company directly or indirectly giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind to a public official or to any person for the benefit of a public official
        - as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
        - to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.[k]

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[i] This model is used in the international assistance context. The *Official Development Assistance Accountability Act*, legislation adopted by Parliament in 2008, mandates that development assistance may only be provided if the competent minister is of the opinion that it is consistent with international human rights standards.

[j] The *Official Development Assistance Accountability Act* uses the following definition: "standards that are based on international human rights conventions to which Canada is a party and on international customary law."

[k] The standard should also specify that the risk of corruption is too high for corporations

- involved in legal proceedings concerning corruption-related offences in any country;
- convicted on corruption-related charges in any country within the last five years;
- that have settled an action regarding corruption-related charges in any country within the last five years;
- named on the debarment list of the World Bank Group, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development or the Inter-American Development Bank; or

3. The *Export Development Act* should require that EDC exercise due diligence to assess the human rights, environmental and corruption risks associated with business activity it may support. This due diligence would guide the agency's decision-making regarding proposed transactions.

    - The nature and rigour of the due diligence required would vary with the value and scope of a transaction, and the severity and reach of its potential impacts.
    - As part of its risk analysis, EDC would be required to consider the human rights, environmental and corruption performance of the applicant company in its global operations.[I] This analysis should consider credible assessments, investigations and proceedings involving the company, including but not limited to the following:
        - civil law proceedings and/or criminal prosecution
        - regulatory sanction
        - debarment by the government of Canada, other governments or lenders
        - international litigation (e.g. before the Inter-American Court of Human Rights)
        - international petitions (e.g. before the Inter-American Commission on Human Rights)
        - complaints before non-judicial grievance mechanisms (such as the forthcoming Canadian Ombudsperson for Responsible Enterprise, the World Bank Compliance Advisor/Ombudsman, etc.)
        - assessments by bodies such as the Norwegian Council on Ethics for the Government Pension Fund Global
    - For transactions that call for more comprehensive and rigorous due diligence, EDC should be required to solicit, accept and consider input from stakeholders during its review process prior to making a decision.
        - It is particularly important that the individuals and communities at risk of suffering harm in relation to each transaction be given this opportunity. Particular emphasis should be placed on facilitating the input of workers and vulnerable groups such as women, indigenous people and human rights defenders.
        - EDC should also be required to accept and consider input from stakeholders following the approval of a transaction regarding a client's ongoing human rights, environmental and anti-corruption performance.

As a result of the provisions described above, EDC would effectively be barred from supporting any transaction for which it lacks complete information regarding the nature of the activity involved or the associated risks. In the case of general corporate loans, EDC would require clarity on the precise

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- listed on the Canadian government's ineligible and suspended suppliers list under the Integrity Regime.

[I] Where relevant, the performance of corporate subsidiaries and suppliers should also be considered.

nature of all activities supported by each loan. These provisions would also affect EDC support for financial intermediaries such as banks,[m] venture funds and "streaming" companies where the ultimate use of the funds provided by EDC are unknown.

4. The *Export Development Act* should require that EDC notify the public prior to making a decision regarding each transaction.

5. The *Export Development Act* should require that EDC's president and chief executive officer approve or deny each transaction, informed by a recommendation made by EDC staff at the conclusion of its review process.
    - The statute should specify that the president and CEO (or her/his delegate)[n] is responsible for making the decision to approve or deny each transaction.
    - EDC staff would also be required to issue recommendations regarding the withdrawal of support when, as part of its ongoing due diligence regarding corporate activities supported by EDC, it discovers cases of companies' non-compliance with the standard described above.
    - The statute should specify that the president and CEO (or her/his delegate) is responsible for making the decision whether to withdraw support, post approval.
    - The decision to withdraw support from an EDC client on the basis of non-compliance should be promptly published by EDC in an accessible location on its website.

6. The *Export Development Act* should be amended to include a provision that sets out the scope and procedures for judicial review of EDC decisions in respect of the prohibition on harmful activity, and the procedures and requirements relating to that prohibition.

Judicial review is the power of a court to determine, on the application of an affected party, whether a government actor's decision was made in accordance with the law. This includes whether the decision-maker properly considered all relevant factors and reached a conclusion that was justified on the law and the facts. If the court determines that it did not, it may send the matter back to the decision-maker for reconsideration, or in limited circumstances, substitute its own decision.

Under the statutory amendments described above, the decision made by EDC's president and CEO to approve, deny or continue support to a particular client would be subject to judicial review. The proposed framework makes clear that EDC must have due regard to the human rights and environmental impacts of each transaction it considers, as well as the risk of corruption. EDC's decision about each transaction would be subject to judicial review on this basis. The framework also requires that EDC provide appropriate public notice about transactions under review and that for certain transactions, it effectively solicit, receive and consider input from stakeholders. EDC's exercise of these duties would also be subject to judicial review.

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[m] For example, EDC currently provides financing to several of the Bank of Nova Scotia's foreign subsidiaries.

[n] The statute should specify that for practicable purposes, the decision to approve, deny or withdraw support may be delegated by the president and CEO to a member of EDC's senior management.

As the legislation currently stands, it would be difficult to challenge EDC decision-making through judicial review. The statute does not require that EDC take human rights or corruption considerations into account when considering proposed transactions. As a result, EDC is likely protected from legal challenge on this basis. While the *Export Development Act* does instruct EDC to consider the adverse environmental effects of a small subset of the transactions it supports, the agency is granted broad discretion in carrying out this assessment and is explicitly authorized to approve transactions that will cause adverse environmental effects when it considers this to be justified. Given the broad discretion afforded EDC by the legislature on this front, its decision-making about individual transactions will be entitled to a high level of deference by the courts.

7. The *Export Development Act* should be amended to provide parties who are harmed by the activities of EDC clients access to an effective remedy in Canada. To that end, the act should make clear that EDC owes a private law duty of care towards those who may be adversely affected by its failure to fulfill the obligations described above.

A duty of care is a legal obligation to conduct oneself in a manner that avoids causing foreseeable harm to the person to whom the duty is owed. For example, the occupier of a building owes a duty to take reasonable care to ensure that third parties entering the building are reasonably safe while on the premises. The occupier is legally responsible for injury to a third party that results from a failure to discharge this duty.

Similarly, EDC would be liable to compensate any affected parties for any human rights violations or environmental harms arising out of a failure to discharge its obligations.

8. The *Export Development Act* should require that EDC comply with any recommendations made by the Canadian Ombudsperson for Responsible Enterprise.

9. Finally, the *Export Development Act* should mandate the Auditor General of Canada to regularly audit the design, implementation and effectiveness of EDC's human rights, environmental and anti-corruption policies, procedures and practices, and their bearing on EDC decision-making. The Auditor General should report on these questions to the board of EDC, the Minister of International Trade and both houses of Parliament with the results of those audits.

Bringing transparency to EDC's practices

To enhance accountability, legislators must address the systemic deficiencies in transparency that shield EDC from public scrutiny. The agency discloses very little information about the environmental, human rights and corruption due diligence practices it follows for the vast majority of its business. It discloses even less information about how it applies its policies in relation to any specific company. In cases where allegations of wrongdoing by an EDC client have emerged, the agency has declined to provide meaningful information about how it assessed the company, what

mitigation measures (if any) it imposed as a condition for support, or how it monitors the company to ensure its compliance with relevant laws, standards and contractual obligations.[o]

Legislative provisions that require or allow EDC to withhold information are so sweeping that they effectively thwart the application of the *Access to Information Act* to EDC.[p] These provisions run contrary to fundamental principles set out in the act: "that government information should be available to the public, [and] that necessary exceptions to the right of access should be limited and specific."[23] The laws governing EDC's public disclosure do not strike an appropriate balance between ensuring public access to important information and protecting EDC and its clients from the release of sensitive commercial information. As a result, the public and members of Parliament cannot access the information they need to assess whether EDC is operating responsibly and in compliance with Canada's legal obligations.

Provisions shielding client-specific information from public scrutiny

Section 20 (1) of the *Access to Information Act* (ATIA) bars all government institutions from disclosing a range of information provided by third parties. This provision prohibits EDC from releasing the following information provided by its clients:

(a) trade secrets;

(b) "financial, commercial, scientific or technical information that is confidential" or "consistently treated in a confidential manner by the third party";

(c) any information that "could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party";

(d) any information that "could reasonably be expected to interfere with contractual or other negotiations of a third party."

These are mandatory exemptions: EDC cannot disclose such information except in limited circumstances.[q] Section 20 (1) employs expansive language that covers a wide range of records, providing robust protections for third-party commercial interests. In the case of EDC, the provision protects the interests of its clients. In fact, by including all information that a third party "treats as confidential," section 20 (1) arguably goes *too* far, restricting access to information provided by a company even when its disclosure would not harm the company's commercial interests.

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[o] See, for instance, EDC's correspondence with Above Ground regarding Petrobras, Brookfield and Kinross at http://aboveground.ngo/edc-clients-investigated-for-corruption; and regarding Ecopetrol and Pacific E&P (now Frontera Energy) at http://aboveground.ngo/edcs-response-alleged-abuse-colombian-oilfields-highlights-deficits-due-diligence.

[p] The coming into effect of the *Federal Accountability Act* in 2007 made EDC subject to the *Access to Information Act* while simultaneously amending the *Export Development Act* to severely restrict EDC's ability to disclose information about its clients. We examine this restriction further below.

[q] For example, section 20 (6) grants a government institution the discretion to make public interest disclosures of commercial information other than a trade secret. Such disclosure must relate to public health, public safety or protection of the environment. It must also clearly outweigh any financial loss or gain to a third party, any prejudice to its competitive position, security, or systems, or any interference with its negotiations — a high standard to meet.

Section 24.3 of the *Export Development Act* (EDA) goes even further. It prohibits EDC from releasing *any* information relating to a client unless the disclosure is made with the written consent of the client or for the purpose of administering or enforcing provisions of the EDA or other statutes.[24] This provision unreasonably curtails public access to EDC records. It shields from public scrutiny any information about EDC's assessment, approval and monitoring if a company won't consent to its disclosure, or if EDC chooses not to seek its consent. In fact, we have been informed that when EDC receives information requests under the ATIA about a particular company, its standard procedure is *not* to seek the company's consent, but to simply exempt the information from disclosure.[25]

The rationale for placing such sweeping restrictions on the disclosure of information about EDC clients is unclear. The ATIA provides ample protection for clients' commercially confidential information. Legislatures in Alberta, British Columbia, Ontario and Quebec, all of which have provincial Crown corporations with financing mandates similar to that of EDC,[r] have not placed blanket prohibitions on the disclosure of information about those corporations' clients. Instead, they include exemptions for third-party commercial information that are similar to those found in section 20 (1) of the ATIA, and the provincial Crown corporations are required to disclose, upon request, records that are not protected by such exemptions.

Recommendations

10. Parliament should repeal section 24.3 of the *Export Development Act*, as section 20 (1) of the *Access to Information Act* provides ample protection for clients' commercially confidential information.

11. Parliament should promptly review section 20 (1) (b) of the *Access to Information Act,* which prohibits the disclosure of information that is "consistently treated in a confidential manner by the third party." This provision is overly broad and could be used to unreasonably restrict access to information the disclosure of which is in the public interest.

Provisions shielding information about EDC from public scrutiny

Section 18 of the *Access to Information Act* seeks to protect the Canadian government's economic interests. It allows any government institution, including Crown corporations like EDC, to refuse to disclose

(a) "trade secrets or financial, commercial, scientific or technical information" that belongs to the government and has or is likely to have substantial value,

(b) information "the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution," and

(c) information "the disclosure of which could reasonably be expected to be materially injurious

[r] The Ontario Capital Growth Corporation, Investissement Québec, the BC Investment Management Corporation and the Alberta Investment Management Corporation.

to the financial interests of a government institution."

Section 18.1 of the act seeks to further protect the economic interests of four specific Crown corporations, among them EDC. It allows each of these entities to refuse to disclose financial, commercial, scientific or technical information that "belongs to and has consistently been treated as confidential by" the corporation, unless it relates to "the general administration" of the corporation. This additional exemption is unnecessarily broad; section 18 of the *Access to Information Act* already allows the corporations to withhold information if needed to protect their competitive position or financial interests.

We are also concerned that section 18 (a), which allows EDC to withhold technical information, could be used by the agency as justification for withholding details about its due diligence methodologies, despite their disclosure being in the public interest.

In its submission to the current legislative review, EDC reports that improved disclosure practices, including outreach to non-governmental organizations, have increased stakeholders' understanding of what it does, and how it analyzes issues prior to deciding to support Canadian exporters and investors. While Above Ground has sought information, in correspondence with EDC, about precisely these questions, that engagement has failed to provide us with a clear understanding of the agency's decision-making process.[s]

Recommendations

12. Parliament should repeal section 18.1 (1) (b) of the *Access to Information Act*, thereby removing EDC from the list of Crown corporations permitted to withhold information merely on the grounds that they consider it to be confidential.

13. Parliament should promptly review section 18 (a) of the *Access to Information Act*, which allows government institutions to withhold technical information.

Endorsing organizations

The recommendations made in this submission are endorsed by

- Amnesty International Canada
- Association québécoise des organismes de coopération internationale
- British Columbia Teachers' Federation
- Canadian Network on Corporate Accountability)
- Committee for Human Rights in Latin America

[s] See, for example, correspondence on EDC clients Pacific E&P and Ecopetrol in 2017 (https://aboveground.ngo/wp-content/uploads/2017/06/Letter-to-EDC-Ecopetrol-Pacific-Jun2017.pdf), Kinross in 2018 (https://aboveground.ngo/wp-content/uploads/2018/03/Swept-Aside-Response.pdf), and Petrobras and Brookfield Asset Management in 2015 (https://aboveground.ngo/halifax-initiative-query-regarding-edc-anti-corruption-measures/).

- Friends of the Earth Canada
- Inter Pares
- Maquila Solidarity Network
- Mining Injustice Solidarity Network
- MiningWatch Canada
- Oxfam Canada
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