

**EXPORT DEVELOPMENT CANADA****LEGISLATIVE REVIEW****AMNESTY INTERNATIONAL CANADA'S SUBMISSION****NOVEMBER 8, 2018**

Global Affairs Canada and International Financial Consulting Ltd. have invited interested parties to participate in the EDC Review 2018 by way of written submissions. In response, Amnesty Canada respectfully makes this Submission, focusing on our primary area of concern, that of protection for human rights.

The 2008 Legislative Review

Amnesty Canada was one of two NGOs that made a submission for the 2008 EDC Legislative Review. The Submission, dated June 10, 2008, was a fairly extensive one and, hence, it is not easily summarized. However, the overriding theme and guiding principle were:

Amnesty believes that mandatory, not voluntary, rules are required to ensure that Canadian companies and investments meet the highest human rights and environmental standards and benchmarks wherever they operate.

The Submission noted that the *Export Development Act*, EDC's governing legislation, had no provisions for ensuring compliance with human rights standards and, as a result, EDC was seeking to address human rights concerns with what we called "a loose and uncoordinated collection of directives and voluntary policies." Moreover, the key changes recommended for EDC in the *Advisory Group Report* of March 27, 2007, following the *National Roundtables on Corporate Social Responsibility*, were never adopted. This was particularly regrettable for Amnesty Canada as we had strongly supported the *Advisory Group's* recommended process for investigations and discipline of EDC-supported companies that abused human rights, together with a recommended compliance management process, but only "as a first step". Much more would be needed in Amnesty Canada's view, yet we were left with nothing to build upon.

There followed our analysis of the various codes and principles that endeavoured to protect human rights (e.g. the *OECD Guidelines on Multinational Enterprises*, the *Voluntary Principles on Security and*

Human Rights, the International Finance Corporation Performance Standards). Overall these codes, in our view, by lacking mandatory language offered too much discretion to businesses and failed to provide the necessary adjudication by independent third parties. These deficiencies led to our recommendation for legislative amendment:

A human rights framework for Export Development Canada will require binding legislation making financing depend on compliance with human rights norms and giving a clear mandate to the organization to incorporate human rights and sustainability based development.

We thereafter listed seven components that we considered would be required for a comprehensive human rights framework for EDC. We shall return to these components later in the Submission.

The 2008-2018 period

None of Amnesty Canada's recommendations resulted in any amendment of the *Export Development Act*.

The Legislative Review of Export Development Canada, December 2008, the report of Review consultants International Financial Consulting Ltd., stated:

We would caution against applying unilateral requirements on EDC in the area of human rights protection. A better approach would likely be to encourage more broad-based engagement internationally on these issues, such as via the OECD or among international financial institutions. Once the objectives in this area had been defined by Government, then EDC could no doubt play a legitimate and important role in this regard, given its status and recognition among stakeholders internationally.

International Financial Consulting Ltd. concluded with this Recommendation:

We recommend EDC maintains its active engagement and policy development in this area. Care should be taken that any changes are not unilaterally imposed on EDC in such a way as to put Canadian exporters at a disadvantage. Therefore, continued efforts at the OECD by EDC to establish common approaches on the full range of civil society issues should be encouraged.

The "status and recognition" of EDC among ECAs cannot be doubted. Only this year it received the "Export Credit Agency of the Year" award at the Trade & Export Finance Conference. Unfortunately, EDC does not appear to be using this prestige to blaze a path towards better human rights practices. Instead, it maintains an approach that parallels those of the other ECAs.

It might be argued that the *EDC Statement on Human Rights* reflects a bolder approach. It starts with the reassuring statement: "EDC values human rights and provides its financing and insurance services with a view to the promotion and protection of internationally-recognized human rights." More specifically, under the heading "Identifying Best Practices for Financial Institutions", the one page *Statement* concludes:

EDC recognizes the evolutionary nature of corporate social responsibility (CSR) and actively monitors the international discussion of human rights issues.... EDC is committed to working with the Government of Canada and other stakeholders to identify emerging best practices and to incorporate into its due diligence those practices that are relevant to the mandate of a financial institution.

What does this amount to in practice? In its own *Submission to the 2018 Legislative Review of Export Development Canada*, October 2018, EDC explained its practices in terms of its social and environmental responsibility and for the protection of human rights. For the former, it pointed out the underpinning of its work by the OECD Common Approaches, the UN Guiding Principles on Business and Human Rights, "various other international agreements and standards", and the Equator Principles. For the latter, it commented:

EDC considers it our responsibility to understand the actual and potential risks and impacts on human rights of any business we support and to ensure that our decisions and actions respect internationally recognized human rights. In 2015, EDC implemented a strategy based on UN Guiding Principles on Business and Human Rights (UNGPs). This strategy saw EDC adjust country-based thresholds for human rights due diligence and establish an internal committee that has sharpened EDC's due diligence tools. We continually track developments in this area and work to align our approach with the UNGPs, the authoritative global standard on business and human rights.

At first blush this seems to be laudable enough but, upon analysis, we suggest that concerns remain. These concerns are to do with the conflict between "work to align our approach with the UNGPs" and the aspiration to be a global leader in best practices, an aspiration urged by Amnesty Canada and, even more critically, the difference between voluntary compliance and mandatory requirement. These concerns were highlighted by the following comment in EDC's *Submission to the 2018 Legislative Review*:

While there are surely some effective best practices that ECAs should work towards, there is no "best" (or even "typical") ECA model that others can benchmark and aspire to.

In fact, what we are calling for is for EDC to become the global leader in establishing "effective best practices", without waiting to see how other ECAs would respond. An essential part of this, in our view, is for adherence to the effective best practices to be mandated by the *Export Development Act* pursuant to amendments by the Government of Canada.

Arguments for change

It might seem that we are being impractical and aiming too high in advocating for EDC to become the global leader in best practices for human rights protection. But the Honourable Jim Carr, Minister of International Trade Diversification, had himself written to EDC's Board of Directors on September 24, 2018, taking a similar position. The Minister wrote:

The Government of Canada is committed to ensuring that all segments of society benefit from the opportunities that flow from trade and investment. Trade and investment are essential vehicles for improving the quality of life of citizens. Inherent in this approach is the imperative that we hold ourselves to a higher standard—and show leadership on the issue of responsible business conduct and respect for human rights. To this end...I ask that you undertake a thorough review of EDC's ongoing risk assessments and transaction due diligence, to ensure that human rights, transparency and responsible business conduct are core guiding principles for EDC. This should include and build on your planned public consultations related to environmental and social risk management framework. It is my expectation that EDC's policies and procedures in these areas would be best-in-class among its peers.

(emphasis added)

We are engulfed on a daily basis with horror stories of human rights abuses throughout the world. Brave individuals and committed NGOs resist as much as they possibly can. But the world really does need more human rights beacons to emerge from the ranks of governments and their institutions. Instead of merely maintaining pace with its peer group, we do see that, as put forward by Minister Carr, EDC has a real opportunity to become a global leader in best practices. Why should Canadians settle for anything less?

What it will take

The Recommendations set forth in our 2008 Submission remain, in our opinion, applicable and valid if EDC is to establish a comprehensive and effective human rights framework. Although we recognize that, in the intervening ten years, EDC has adopted various pertinent principles and agreements, these do not appear to constitute a definitive framework and, in any event, are entirely voluntary. If we are to strive for best practices, it seems incontestable that they should be mandated practices, not ones that can be adopted (and unadopted?) at will. We thus cite in full from our 2008 Submission the components of a comprehensive rights framework (that have really not progressed in a decade):

- a) Reflect and incorporate the full range of internationally-guaranteed human rights standards and the corresponding obligations of states and non-state actors to respect the human rights of individuals and communities, including the internationally-recognized principle of free, prior and informed consent for Indigenous peoples;
- b) require EDC to conduct due diligence on the human rights impacts of all its activities, including understanding country specific human rights contexts, human rights assessments as a condition precedent to funding projects, and in general ascertaining whether it might contribute to abuse through the relationships connected with the provision of financial services;
- c) set out clear standard and procedures for operation, including the human rights standards to which clients will need to conform, the information clients will need to provide to do business with the institution, and the types of activities that the financial organization will not support;

- d) utilize an independent oversight mechanism such as an ombudsman to ensure that companies and projects that EDC finances and supports comply with human rights standards and the complaints and victims' grievances can be heard;
- e) ensure that, where EDC has financed companies and projects, victims receive full reparations, restitution, compensation and rehabilitation for past and ongoing abuses of human rights, including damage done to health and the environment;
- f) include an accountability framework, including requirements for disclosure that guarantee rights of access to information, provide project-specific information on impact assessments, community consultations, and how human rights considerations were included in particular decision-making, and monitoring and auditing processes so that EDC staff, Canada's Parliament, independent oversight agencies and the general public can track ongoing developments and performance on human rights; and
- g) contain provisions for ongoing monitoring of, and incorporation of safeguards for, emergent human rights and business concerns, such as the trade in conflict resources such as diamonds and coltan....

The required update to this list is the recent reality of a Canadian Ombudsperson (item (d) above) with whom Minister Carr has asked EDC to "actively consult". We would go further and propose that EDC should be obligated to comply with the Ombudsperson's recommendations.

We would also add three additional items:

- h) prohibit EDC from supporting companies and projects that are complicit in human rights abuses;
- i) define EDC's duty of care towards people who have been harmed by EDC-supported companies and projects so that the opportunity for redress, described in item (e) above, can be clarified and enhanced;

- j) assemble the points listed in item (f) above under the more contemporary rubric of transparency so that what we are calling for will be clearer.

Ultimately, it seems that EDC faces the same choice that it did in 2008. It can turn its back on legislative reform and, instead, proceed by staying in step with the other ECAs, adopting voluntarily such human rights standards as it might deem to be appropriate, failing to provide transparency in its decision-making and sitting back to await the 2028 Review. Or it can approach the Government of Canada for legislative change, clearly the better choice in our view. This is a fundamental issue of approach. Amnesty Canada failed to persuade in 2008 but, with the increasingly strife-ridden and tumultuous events of recent years, we submit again our closing statement from before, hoping that best practices and mandatory requirements will now find that their time has come:

Governments have the primary obligation to secure universal enjoyment of human rights and this includes an obligation to protect all individuals from the harmful actions of others, including companies. Voluntarism can never be a substitute for global standards requiring businesses' mandatory compliance with human rights. These global standards should address the human rights responsibilities and obligations of both states and companies. As a minimum requirement, all companies should respect all human rights, regardless of the sector, country or context in which they operate. The Canadian government, through the *Export Development Act*... should strive to be a leader to ensure that Canada's commercial activities protect, promote and respect human rights throughout the world.

If Minister Carr fully subscribes to this position, which, judging from his letter of September 24, 2018, he appears to do, then we would commend to him the following considerations:

- i) In our opinion, the only definitive way by which EDC can become “best-in-class among its peers” is for the Government of Canada to amend the *Export Development Act* accordingly, to provide for a mandatory comprehensive human rights regime for EDC;
- ii) One of the principal constituents of the required legislative amendments is the need for transparency in EDC’s actions affecting human rights. For example, Amnesty Canada had an Urgent Action this year concerning the disturbing stories emerging from construction of the Hidroituango dam being

built by EPM Huango in Columbia. Environmental human rights defenders opposed to the dam were being killed. It is our understanding that \$ 300 million of EDC financing was involved in this dam but, due to EDC's lack of transparency, we cannot be sure. This is clearly a glaring deficiency for any objective review of EDC's activities and a potential embarrassment for Canada if EDC's human rights assessment procedures are failing this badly;

- iii) Various UN bodies and experts (such as UN Working Group on Business and Human Rights) and treaty bodies (such as the UN Human Rights Committee, UN Committee on Elimination of Discrimination against Women, UN Committee on the Rights of Children and UN Committee on Elimination of Racial Discrimination) have all made recommendations to Canada about ensuring greater human rights protection in the overseas operations of Canadian companies and in Canadian trade policy and agreements. Even if these recommendations did not specifically address EDC, the Government of Canada should surely recognize their importance in applying to all of its agencies and departments (including EDC).