
Official interpretations of the “ODA Accountability Act” - one year later

Introduction

The Official Development Assistance (ODA) Accountability Act (ODA Act) came into force on June 28, 2008. This now legally requires Canadian ODA to contribute to poverty reduction, take into account the perspectives of the poor, and be consistent with international human rights standards. Over the past year, the Canadian International Development Agency (CIDA), Foreign Affairs Canada (FAC), and Finance Canada have been developing plans on how to interpret and implement the Act. To date, only Finance Canada has held a consultation on the Act, with neither CIDA nor FAC disclosing its plans. Consultations must be held before September 30, 2009, when CIDA is expected to release the first annual report on the Act.

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Finance Canada - Interpretation of the Act

On the basis of an Access to Information (A to I) request, it seems that Finance has developed “Guidelines for Implementation [of the ODA Act] at Finance” which offer provisions for assessing compliance with the Act, for consultation and reporting, and for deeming what ODA payments the Act covers.

1) Assessing compliance with the Act

In terms of how to apply the ODA criteria, individual Finance officials assess how a specific initiative (e.g., bilateral debt relief vs. Haiti’s debt relief) meets the Act’s three criteria. Following biennial consultations, the respective official adds notes to their assessment on the consultation, a summary of opinions provided, Finance’s reaction to issues raised, any follow-up taken, and any revisions to the assessment deemed necessary. The assessment is then approved by the Branch Chief, and “opinions” on how the initiative complies with the Act form part of the memo to the Minister. How Finance actually assesses whether ODA payments meet the three criteria is not known, since the assessment is based on a legal opinion formulated by Justice Canada and CIDA that was withheld under section 23 of the A to I Act.

2) Consultation

Finance plans to hold consultations every two years, starting fall 2008, with three to four weeks prior notice given. The consultation will be web-based both “to help the department keep full and precise records, including the date, names of participants and the opinions provided” (vs. minutes from a meeting that would need verification by all participants), but also to ensure participation from a broader range of groups than otherwise possible in a meeting. Formal submissions are also deemed necessary in case of legal challenges. The

Department indicated no intention to respond to individual submissions other than to acknowledge receipt.

3) Reporting

The Guidelines outline the various reporting requirements of the Act, and the need to coordinate with CIDA the type of information required.

4) ODA payments

The Guidelines describe Finance's ODA payments this year (see section below), while noting that Act would cover contributions to other entities where they have contributed funds in the past (for example, the IMF's Poverty Reduction Growth Facility and the Exogenous Shocks Facility, capital subscriptions to the World Bank and European Bank for Reconstruction and Development, and the Heavily Indebted Poor Country Trust Fund).

Finance Canada - Implementation of the Act

1) Finance's first consultation

In December, six months after the ODA Act became law, Finance Canada launched its first consultation on the ODA Act. Finance was the first government department to do so, well within the two year timeline required by the Act, and did so because of payments due in January 2009. It sought feedback on how the three areas for which it had provided ODA had met the conditions laid out in the Act, that is, for bilateral debt relief, the multilateral debt relief initiative (MDRI), arrears clearance and contributions to the International Development Association (IDA). It also sought input on how to improve future consultations.

Despite Finance's good faith in holding consultations early, the consultation seemed perfunctory - Finance provided no documents indicating how it had interpreted the Act, few guidelines in terms of providing input, no transparency in terms of who else had participated in the consultation nor what they said, and no indication of what would be done with the comments provided (even though a member of the CIDA Steering Group advised Finance to do so). The consultation was also ill-timed - four weeks in December. That said, Finance considers this first consultation a pilot, with the format possibly evolving over time.

The Halifax Initiative (HI), the Canadian Council for International Co-operation (CCIC), the Association of Canadian Engineering Companies (ACEC), the Social Justice Committee (SJC) and the World Bank all submitted comments through the consultation process. Concerned that the weak process did not allow for meaningful input, the Halifax Initiative and CCIC opted to provide extensive feedback on the consultation process and some broad principles for Finance to consider how Canadian policy at the IFIs through a rights-based approach might be made consistent with the Act. ACEC indicated that project-based funding, in particular for infrastructure investment, should be the sole focus of Canadian aid, and questioned the poverty reduction impacts and degree of accountability of both debt relief and arrears clearance. SJC's argued that some Bank projects are inconsistent with international human rights standards, citing specific cases, and made the case the Bank conducting human rights impact assessments of projects and for giving the Bank's Inspection Panel the authority to remedy violations. Finally, given neither Finance Canada nor the Bank have the appropriate

policies to assess the Bank’s compliance with the Act, SJC recommended the department establish a policy and the capacity to assess the human rights implications of Bank projects. Finally, the World Bank submitted comments identifying how Canada’s ODA contributions to the Bank satisfied all three criteria: IDA credits and grants allow low-income countries to achieve the Millennium Development Goals and manage for development results; the Bank’s Country Assistance Strategy and Community Driven Development program allows for the perspectives of the poor to be reflected; and, while the Bank has no explicit human rights policies, it contributes to the promotion of human rights through its programs.

These consultations formed the basis of the first “opinion” sent in the memo to the Minister for the approval of payments to IDA and the MDRI. Regrettably, their assessment of the issues raised, follow-up taken and revisions to their assessment deemed necessary - 11 pages in all - was redacted in the A to I request we received under section 21 (1)(a) of the A to I Act.

2) Annual report to Parliament on the Bretton Woods Institutions

The next point of reference during which Finance Canada could have given some indication of their interpretation of the Act was during their Annual Report to Parliament on the Bretton Woods Institutions. A section dedicated to the Act provides an overview of the provisions of the Act, indicates how the feedback on the consultation process had been shared with other departments, and indicates that the substantive input received would inform Finance’s contribution to the new ODA Annual Report.

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Foreign Affairs - Interpretation of the Act

An A to I request submitted to FAC on their interpretation of the Act has revealed little information. With the exception of one letter, all information indicating the Department’s interpretation of the Act and its impacts on the Department was redacted in the A to I request. The one letter from FAC Deputy Minister Leonard Edwards to CIDA President Margaret Biggs simply indicates the completion of an interim implementation plan in June 2008, and that as of February 2009, the department is “well-advanced in finalizing a long-term strategy for ensuring that DFAIT remains compliant with the Act”. This includes “examining options for forming the Ministerial opinion on which programming activities constitute ODA, identifying measures that meet the consultative requirement, and compiling DFAIT ODA statistics for the interdepartmental reporting processes”.

Foreign Affairs- Implementation of the Act

To date, we have no sense of how Foreign Affairs will implement their obligations under the Act. FAC has yet to hold any consultations on the Act, although it seems likely that FAC’s interpretation and implementation will closely follow that developed by CIDA (see below).

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CIDA - Interpretation of the Act

An Access of Information (A to I) request submitted to CIDA has revealed a great deal of detail

with respect to their interpretations of their obligations under the Act and the process they intend to pursue to achieve this (as of February 2009). CIDA has established a high level cross-Agency ODA Accountability Act Implementing Steering Committee, chaired by the CIDA Vice-President for Policy Branch, which has been meeting since July 2008. As the lead agency responsible for the Act, CIDA has five primary preoccupations with respect to interpreting and implementing that Act: 1) recording and supporting the ministerial opinion; 2) interpreting the three tests of the Act; 3) enhancing consultations and record keeping; 4) how to define and report on ODA in the Statistical Summary; and 5) enhancing internal and external communications.

1) Recording and supporting the “Ministerial Opinion”

The A to I reveals substantial CIDA discussion and concern about making certain that the Ministerial opinion on the Act is publicly expressed in numerous places in order to ensure, from both a compliance and communications perspective, that the provisions of the Act are being met.

The Steering Group responsible for implementing the Act concluded that this opinion needed to be stated in two sets of documents: 1) those tabled before Parliament (annual Reports on CIDA Plans and Priorities, CIDA Departmental Performance Reports, the Summary Report due in September 2009 and the Statistical Report due in March 2010) and 2) a suite of high-level strategic documents and policies. At the same time, there was some concern that the Minister not be presented with a ‘tyranny of documents’ on which to give her opinion, but rather these two sets of documents become the building blocks for forming this opinion, while also clearly communicating that CIDA is thinking about its requirements.

CIDA points out that no guidance is given in the Act as to how the Ministerial Opinion should be formed, leaving some discretion to the Agency. To help support CIDA staff, a ‘Guidelines’ document is being developed to give explicit direction to staff about what high-level policies and strategies documents (including country level strategies) are to be used to record the Minister’s opinion, and how this opinion should be further reiterated in project approval documents. One member of the CIDA committee pointed out that “the Act’s objective is not a mechanical reproduction of the Minister’s opinion, but a demonstration that CIDA is thinking about the requirements of the Act and using them to guide and direct the Agency’s programming”.

2) Interpreting the three tests of the Act - “Drastic changes not envisioned”

For the most part, CIDA believes that it is already meeting the three tests. CIDA takes a comprehensive approach to addressing poverty reduction through economic development, environmental sustainability, freedom, rights and democracy, rule of law and human security and in its programming around basic human needs, women in development, infrastructure, the environment, human rights, democracy and good governance, and private sector development. The perspectives of the poor are a central element to delivering Canadian aid. And finally, the Act entrenches in law the CIDA corporate attitude that lasting and effective development is not possible without the respect and advancement of human rights.

Unlike the CCIC interpretation of the Act requiring human rights to inform all three tests, CIDA’s approach is to treat each test as a separate area of compliance. From a technical standpoint, CIDA will demonstrate it is meeting the first two tests by formally expressing and

explaining its approach to poverty reduction in high-level documents, policies and strategies (“the Minister’s opinion”), documenting the perspectives of the poor more systematically at the program and project level when it conducts site visits, meetings with experts and consultations (see below), and by including more language in CIDA documents that reference these perspectives. In the discussion of the Steering Committee, “the Act offers an opportunity to remind staff about the importance of the perspectives of the poor, emphasizing that the Act has changed how business is done”. There may also be a review and update of the 1996 CIDA policy on Poverty Reduction, with a view to getting it approved by the Minister. CIDA has discussed how the perspectives of the poor can be most efficiently demonstrated in Country strategies and project approval documents.

In terms of human rights, the Steering Group believes that CIDA programming is already consistent with international human rights standards (governance, equality between men and women, and participation are central elements of the Agency’s practice). That said, there was also a recognition of responding to the Act, and the Group opted for a ‘do no harm’ approach “rather than a complex integrated human rights style of development policy making”, which they believe will meet with the provisions of the Act. CIDA will adopt a legal interpretation guided by this principle. CIDA has also developed a short paper for the Minister setting out what a rights-based approach to ODA might look like, including interpretations of how this might impact CIDA programming, and are examining how the promotion of human rights as a central guiding principle in poverty reduction strategies can be made a formal part of CIDA policy-making processes.

While there did seem to be some appetite to develop a larger stand-alone Agency policy on human rights and development programming, there was also significant resistance against using the Act to entrench a human rights approach to international cooperation. In Committee discussion, the latter approach was seen to expose the Agency to two major risks: “distracting attention away from the accountability imperatives of the Act” and “diluting the importance of human rights considerations by subsuming them to discussions of other, unrelated issues”.

Finally, the human rights issue is largely seen to be less as a challenge of compliance than one of communications. CIDA must clearly demonstrate to the public that it is actively complying with the Act (and is not taking the easy route), but also demonstrate that compliance is an ongoing task. To this end, its messaging will show that continued compliance should not be taken for granted, steps should be taken to ensure human rights standards are being respected when designing ODA programs, and a ‘do no harm’ approach should be “employed as an intuitive benchmark for incorporating human rights concerns into program planning”.

3) Enhancing consultations - “Opportunity to refresh some policies and revitalize consultation processes”

For the most part, CIDA already feels it is meeting the consultation requirements under the Act - CIDA carries out its International Co-operation Days, and consults with civil society groups, governments and partners in the South on a regular (albeit *ad hoc* basis). The Steering Committee suggests that where it falls short is in the tracking, reporting and publicizing of their consultation activities.

Given that these consultations are a legal requirement, the Agency plans to instigate a number of changes to existing practices to “refresh some policies and revitalize consultation processes”. Earlier in 2009 it hired a consultant to review its current consultation policies and practices. CIDA has a 1993 policy on consulting with civil society, which was reviewed in 2001 but stalled, and was never formally adopted. As such the Agency lacks any current policy. This has led to some confusion with the informal nature of existing consultations - there is no formal definition of consultation, no systematic tracking of ongoing consultations (with governments, civil society, the poor, etc.), no documentation of past and current consultations, and a lack of clarity about what advanced preparation is needed.

Accordingly, the Steering Committee has proposed to do the following: update its Policy on Consultation with Civil Society; generate new guidelines on consultations (it is not clear whether this is separate to the Policy); keep much more rigorous records of Ministerial and high-level meetings; possibly establish a new role for the Parliamentary Secretary; and develop a new central tracking and monitoring system to record consultations. The latter would be an internal web-based data entry system that would generate statistics for the annual report and help staff track and identify consultation processes and practices. This portal would also act as a mechanism to allow “all levels of the Agency [to] explicitly document how perspectives of the poor were obtained and considered in ODA program/project design and implementation”.

From a less technical standpoint, there is also a clear sense that despite these internal improvements, expectations have been heightened and CIDA consultations must also be perceived to have improved. The notes of the Steering Committee reference CCIC proposals for more in-depth sectoral consultations. CIDA seems conscious that CSOs expect to be more involved in the consultations and the policy process, for these consultations to cover broader strategic issues (probably through a sectoral focus), and for the process to provide advance information, substantive discussion and feedback. On the plus side for the government, this was seen to be an opportunity to use the consultations to emphasize government messages to key stakeholders and strengthen policy. In light of this, the idea of a web-reliant approach (which Finance chose) was summarily dismissed in favour of an approach that generally strengthens current practices and is more consultative in practice.

Finally, CIDA is also conscious of presenting a common approach to these consultations across all government departments, so it is likely that they will encourage FAC to adopt a similar process. While the first annual ODA Report to Parliament is due to be released by September 30, 2009, neither CIDA nor FAC are legally required to hold a consultation before then.

4) *Defining and reporting on ODA in the Statistical Summary.*

The Agency has spent considerable time assessing the implications of the vague definition of ODA in the Act against the rules-based interpretation of ODA by the Organization for Economic Co-operation and Development - Development Assistance Committee (DAC). The latter allows comparability between donors. There is a great preoccupation by CIDA officials that any interpretations of ODA set out the Statistical Report be as consistent as possible with OECD-DAC definitions, such that there is only a minimal discrepancy between the numbers

that the Report publishes and what DAC publishes. CIDA has therefore made some efforts to seek clear rationales for reporting ODA consistent with the Act's three tests from all of the different departments responsible for reporting on the ODA. Upon review, under their interpretation of the impact of the Act on reportable ODA, the following items will be excluded from the Statistical Report: provincial and municipal aid expenditures and imputed foreign student costs (the Act limits CIDA to report federal ODA expenditures). Refugee settlement costs and debt relief payments will likely be included, although the Committee has sought a rationale for including first year refugee costs from the Department of Citizenship and Immigration against the three tests of the Act because the Act does not limit ODA to the DAC list of eligible countries,

CIDA suggests that its Statistical Report could include aid to Russia and Eastern Europe, although it proposes not to do so to remain consistent with the DAC criteria. Expanding the definition of ODA to include peacekeeping and other military-delivered assistance has been discussed at the DAC. While this discussion has been suspended due to a lack of consensus, Canada has been in favour of such a broadening of the definition. Committee discussions suggest that the Act would not necessarily exclude such expenditures as ODA. But as of the February 2009 documents, there was no decision on peacekeeping and other military-delivered forms of ODA to be reported in the Statistical Report. However, whatever decision is taken, there has been a consistent approach to ensure that the Statistical Report clearly sets out Canadian ODA in a way that is consistent with the DAC agreements and definitions.

Finally, the documents propose that CIDA examine the possibility of a web-based statistical reporting system that would allow for uploading of aid information on a much more timely basis, indicating where data might not yet be firmly verified. Currently the published Statistical Report is only available when all data has been verified and when all multilateral institutions have reported. This results in significant delays.

5) Enhancing internal and external communications

The Agency is also developing a comprehensive communications strategy directed towards Agency staff, other government departments, the Canadian public and NGOs. This will seek to ensure that the Government puts forward a common interpretation and application of the Act.

The internal communications strategy will build staff capacity about the Act and how to implement its provisions, build a section on the Act on the CIDA web site, and start including language from the Act in the Minister's speeches. The external strategy will ensure public and civil society awareness of how CIDA is implementing the Act.



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