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Sara Seck

Dalhousie University Schulich School of Law

Keith MacMaster

kemacmas@dal.ca

Penelope Simons

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Recommended Citation

Sara Seck, Keith MacMaster & Penelope Simons, "Submission: 2018 Legislative Review of Export Development Canada" (9 November 2018), online (pdf): Dalhousie Schulich School of Law [perma.cc/9QGX-5ZJT].

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Dalhousie University Schulich School of Law

From the Selected Works of Sara L. Seck

November 9, 2018

Submission: 2018 Legislative Review of Export Development Canada

Sara L. Seck, *Dalhousie University Schulich School of Law*

Keith MacMaster

Penelope Simons



Available at: <https://works.bepress.com/sara-seck/68/>

To: EDC Review Team

Date: November 9, 2018

From: Associate Professor Sara L Seck (Schulich School of Law and Marine & Environmental Law Institute, Dalhousie University), Associate Professor Penelope Simons (Faculty of Common Law and Human Rights Research and Education Centre, University of Ottawa), and Keith MacMaster (PhD candidate, Schulich School of Law, Dalhousie University)

RE: 2018 Legislative Review of Export Development Canada (EDC)

Please accept this submission to the 2018 review of Export Development Canada. This submission is informed in part by a conference and policy meeting that we hosted in October 2017 on the subject of extractive industries and the human rights of women and girls, at the Human Rights Resource Education Centre in Ottawa (see <https://cdp-hrc.uottawa.ca/en/october-26-27-2017-conference-resource-extraction-and-human-rights-women-and-girls> and <https://cdp-hrc.uottawa.ca/en/october-28-2017-policy-meeting-resource-extraction-and-human-rights-women-and-girls>). This submission will reflect on some of the insights that emerged from the conference and policy meeting, as well as our own prior and subsequent research.¹

Our submission will focus primarily on Theme 5: Corporate Social Responsibility and Human Rights, which asks whether, in fulfilling its mandate, EDC reflects the expectations of the Government of Canada that all Canadian businesses “respect all applicable laws and international standards” while operating transparently “and in consultation with host governments and locals communities, and to conduct their activities in a socially and environmentally responsible manner.” The description further notes that this theme will “look at how EDC takes into account the impacts, both environmental and social (including human rights), of the businesses and transactions it supports.”

Impacts and benefits of EDC support on the Human Rights of Women and Girls

Our primary contention is that EDC and its clients, especially those in the extractive sector, must take seriously the human rights of women and girls as part of human rights due diligence processes that are essential for environmentally and socially responsible business conduct. To the extent that EDC’s existing policies (and underlying legislative framework) are gender blind, this must be rectified. Moreover, to ensure full consideration of the human rights of women and girls, human rights impact assessment and gender impact assessment as part of human rights due diligence processes must be mandatory. A separate yet related point is that EDC must ensure that it does not inadvertently undermine the ability of host states themselves to realize the human rights of women and girls by supporting and so encouraging irresponsible foreign investment, that then increases

¹ See, for example, forthcoming papers in a special issue of the *Canadian Journal of Women and the Law*, edited by Penelope Simons and Sara Seck; as well as Sara Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls: Policy Recommendations Associated with the Feminist International Assistance Policy” (July 2018); and Sara L Seck and Daniela Chimisso dos Santos, “Export Credits, Sovereign Debt, and Human Rights” in Ilias Bantekas and Cephas Lumina, editors, *Sovereign Debt and Human Rights* (Oxford University Press, forthcoming, 2018).

host state sovereign debt due to host government guarantees, and so undermines regulatory capacity.

Canada is a leader in the global mining industry and home to major oil & gas companies, and federal policy is committed to ensuring corporate social responsibility, respect for human rights, and sustainable development both at home and abroad. Canada is also formally committed to the promotion and protection of women's rights and gender equality, both as a human rights issue and as an essential component of sustainable development, peace and security.² The need to ensure gender equality and to empower the rights of all women and girls in the context of sustainable development has been endorsed by Canada and the international community in Goal 5 of the 2030 Sustainable Development Goals. Yet, to date, and consistent with most global norm development, Canada's commitment to responsible global resource extraction has been largely gender-blind.

The relationship between women and resource extraction is complex, yet our research has clearly shown that many women and girls are differentially and disproportionately negatively impacted by mining and oil & gas development in numerous ways, with impacts further differentiated by country and cultural contexts. Environmental and social harms can differentially impact the right to health of women and girls. This may be due to a failure to conduct gender-disaggregated studies of toxic substances used in resource extraction and then to take steps based on such studies to prevent, mitigate and/or redress such harm, and/or due to a failure to consider the cultural intersectional impacts of ecological harm on those (often Indigenous) women who experience harm to land and environment as violence. Women and girls who are marginalized within their own communities are disproportionately vulnerable to violence, including sexual violence, that is exacerbated by the influx of men from outside who are hired to work for extractive companies in various capacities, including as security forces.

At the same time women fail to benefit economically from extractive development to the same degree as men from within the same community. This may be due to a failure to include women in decision-making processes concerning the costs and benefits of proposed projects in accordance with their own cultural traditions, or a failure to equally value women's input when provided. Many women also face challenges in accessing lucrative industry jobs. Women and girls from marginalized communities risk further marginalization and worse, as a result of gender-blind extractive development. Moreover, women who engage in resistance to extractive sector development as environmental human rights defenders may be disproportionately impacted or targeted by violence perpetrated by state and private security forces. Finally, it is well established that many women and girls are differentially and disproportionately impacted by climate change harms. This is a brief and incomplete summary of our findings.

As we have noted in a recent policy paper on Canada's Feminist International Assistance Policy (FIAP), despite the endorsement by states and international institutions of women's and girls' rights under international law, and of the business responsibility to respect human rights, to date most domestic mining, oil & gas laws and international standards providing guidance to extractive

² Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad" (November 2014); Global Affairs Canada, "Feminist International Assistance Policy" (2017); Global Affairs Canada, "Policy on Gender Equality" (December 2016);

companies do not integrate a gender perspective. As a result, there is an ongoing failure to prevent extraction-related violations of the rights of women and girls, a lack of attention to accountability and remedy for past gender-based harms, and a failure to empower women and girls with meaningful choices about their futures. Despite the many positive contributions of the FIAP, the policy overlooks the impact of resource extraction on the rights of women and girls. Specifically, it fails to address the role of investment by Canadian resource extraction companies in propping up structural inequality, and the gendered human rights (including sexual and other gender-based violence), environmental, and humanitarian implications of Canadian resource extraction in the countries to which Canada provides development assistance.

Similarly, while we endorse the good work that EDC has undertaken in supporting women's empowerment and equality rights, it is crucial that EDC at the same time ensures that it does not finance exports, projects and companies that undermine or violate human rights, including the rights of women and girls. For example, we are pleased to see that the percentage of women in leadership roles at EDC has increased, and to see the launch of the Private Sector Gender Equality project. However, we are concerned that EDC has not fully integrated human rights due diligence and a gender perspective into its lending practices, and social and environmental assessments. Entrenched gender bias prevents women from accessing the economic benefits of resource extraction. Gender impact assessments screen projects to identify risk to rights/equality including country risk and sectoral risk and to ensure that environmental and social risk management is informed by gender-based analysis and feminist principles to reduce or eliminate systemic barriers.³ Oxfam notes that EDC needs to strengthen protection of human rights: "EDC's Statement on Human Rights (2008) should be replaced by a robust Human Rights Policy [which covers] all aspects of how EDC understands and operationalizes its human rights obligations".⁴ We completely agree.

EDC's environmental and social risk management policies need to be significantly revised to mandate human rights due diligence, to clarify the methodology by which human rights and environmental risks are assessed and to ensure that such risks are taken into account in, and are a condition of, all decisions to provide support.⁵ EDC should also consider how these due diligence processes could be aligned with a gender based plus analysis (GBA+) in keeping with Canadian government policy.⁶ We note that EDC has failed to intervene with respect to human rights violations in which its client companies have been implicated. It has also advanced funding to, or failed to withdraw funding from, companies involved in serious human rights abuses.⁷ Human

³ Oxfam International, Position Paper on Gender Justice and the Extractive Industries, (March 2017)

⁴ Oxfam Canada submission to Export Development Canada on the Review of its Environmental and Social Risk Management Policies (7 September 2018)

⁵ Above Ground, Strengthening Environmental and Human Rights Protect at Export Development Canada (7 September 2018)

⁶ Status of Women Canada, "Action Plan on Gender-Based Analysis (2016-2020)", online: <https://swc-cfc.gc.ca/gba-ac/plan-action-2016-en.html>

⁷ See for example, Above Ground, Ituango dam crisis exposes accountability gap at EDC, (13 July 2018) online at: <https://aboveground.ngo/ituango-dam-crisis-accountability-gap-edc/>; and Above Ground, "EDC must act to address misconduct by client Vedanta" (12 July 2018) Letter to EDC online at: <https://aboveground.ngo/export-development-canada-must-act-misconduct-vedanta/>

rights due diligence is a central requirement of the business responsibility to respect human rights, as set out in the United Nations Guiding Principles on Business and Human Rights, and it is an ongoing obligation that begins at the proposal stage, and continues throughout the lifecycle, of a project.⁸

We note that environmental review and gender-based human rights impact assessment reviews are predominantly undertaken on a project-by-project basis. However, much lending is corporate-based. Therefore, EDC should undertake a review of the track-record of corporations with respect to environmental harm, and human rights violations, including violations of the human rights of women and girls. Similar to the World Bank's List of Ineligible Firms and Individuals, EDC should implement a ban (for a specific time period) on funding corporations that have a history of environmental harm and human rights violations and that are not committed to the protection of human rights. EDC should take into account all recommendations by the CORE in this regard.

We are pleased to learn of the launching of FinDev Canada with its focus on critical areas of sustainable and inclusive local economic growth that incorporates increased women's participation, job creation, and that it is positioned for a low-carbon future.⁹ FinDev Canada's Development Impact Framework also seems better aligned with international standards, explicitly incorporating a focus on gender equality, and the need to adhere to the Sustainable Development Goals and the Paris Agreement, although we believe there should be an equally explicit endorsement of a human rights due diligence approach.¹⁰ EDC currently does not make any explicit mention of the SDGs in its lending mandates and its human rights statement is inadequate. These oversights require urgent correction.

Moreover, FinDev Canada's environmental and social reporting policies are more in line with Canada's international legal obligations and other commitments. This is especially true of FinDev Canada's more transparent and publicly available information disclosures and its policy to publish information before a project is funded. EDC must adopt a more stringent transparency policy, like that of FinDev Canada, to ensure that potentially irresponsible projects are not supported. We note that Canada is an EITI supporting country, is represented on the EITI Board, and is the current Chair of the Validation Committee.¹¹ However, this does not excuse a lack of transparency from EDC itself.

We are also concerned that FinDev Canada, and its \$300 million budget, will be tasked with women's empowerment and green finance, while EDC will remain committed to subsidizing unsustainable and climate-harming businesses such as coal and oil and gas that disproportionately negatively impact the human rights of women and girls. In 2017, EDC supported \$278 million in climate finance transactions in developing countries, and launched two green bonds, one C\$500

⁸ Report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN HRC, 17th Sess, UN Doc A/HRC/17/31 (2011), GPs 15(b) and 17(c).

⁹ FinDev Can, <https://www.findevcanada.ca/en/make-impact/development-impact>

¹⁰ FINDEV, Development Impact Framework, September 2018

¹¹ <https://eiti.org/who-we-are>

million and one US\$500 million and provided a record \$1.5 billion in support for cleantech companies.¹² Yet EDC also provided more than \$10 billion in support to oil and gas businesses.¹³ Measured against FinDev Canada's \$300 million budget, EDC's unsustainable climate-harming projects appear likely to dwarf its sustainable ones.

We are also greatly concerned that EDC continues to finance coal-based initiatives. Coal should be phased out of all of EDC's lending practices. Pure CCS research could continue, but the financing of coal-fired generating electricity plants must stop. Climate change mitigation and adaptation should be a centerpiece of EDC's financing and funding mandates. The Intergovernmental Panel on Climate change (IPCC) notes that dramatic and fundamental changes are required to keep the Earth's temperature increase below 1.5 °C. Canada, with its heavy reliance on the oil and gas sector, has much work to do to transition to a low carbon sustainable economy. EDC's environment and climate policies are not sufficiently stringent. For example, while EDC tracks its environmental footprint, it does not have any specific commitments to reduce its operational footprint, or of the footprint of the companies it finances. EDC must adopt enhanced environmental due diligence processes, and commit to reducing the GHG emissions of the companies it finances, while also providing explanations of decisions on whether or not to fund a particular project. Company consent to publishing these decisions and due diligence reports should be a requirement of financial assistance and such reports should be made public. Moreover, climate risk models need to be updated to incorporate a much broader range of ESG issues. To receive funding, companies should be obligated to provide data on ESG, such as the CDP, or disclose such data in compliance with the Global Reporting Initiative reporting guidance and indicators, including sector supplements, as part of the CSR reports they submit.

However, climate change is not simply about environmental rights, it is also about human rights. Women of the global South are disproportionately disadvantaged by climate change. Making progress on women's rights and environmental sustainability are two critical pillars as the world transitions to a carbon free environment. Given the urgent need to address climate change, Canada's commitments under the Paris Agreement, and the human rights consequences of failing to act, it is unacceptable that business and human rights issues at EDC are treated as if they are entirely divorced from conversations about climate change.¹⁴ The United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) has noted that oil and gas exploitation has a disproportionate impact on women who are reliant on natural resources while living in poverty.¹⁵ CEDAW has also called on states to "[t]ake effective steps to equitably manage shared natural resources, particularly water, and limit carbon emissions, fossil fuel use, ... and all

¹² 2017 CSR Highlights, <http://www1.edc.ca/publications/2018/2017csr/en/our-performance.html#start>

¹³ Above Ground, "The 10-billion dollar elephant in the room" (8 June 2018), online: <https://aboveground.ngo/10-billion-dollar-elephant-export-credit-support-for-fossil-fuels/>

¹⁴ Sara Seck, "Reflections on Business, Human Rights, the Environment, and Climate Justice" (December 4, 2017) blog, online at: <https://blogs.dal.ca/melaw/author/sr546535/>

¹⁵ CEDAW Committee, Concluding observations on the ninth periodic report of Norway, CEDAW/C/NOR/CO/9 (22 November 2017).

other environmental, technological and biological hazards and risks that contribute to climate change and natural disasters which tend to disproportionately affect women and girls”.¹⁶

We also suggest that EDC could learn lessons from approaches adopted by Canada’s Business Development Corporation (BDC). We note that BDC has placed strong emphasis on Aboriginal/Indigenous entrepreneurs, and is researching the needs of Indigenous women entrepreneurs.¹⁷ We note that EDC does not have any explicit policies or goals as it relates to Indigenous women entrepreneurs. EDC should have a separate category of lending and financing specifically tailored to Indigenous exporting entrepreneurs.

This leads to another concern, that G7 and non-G7 countries are treated differently in EDC’s environmental and social risk assessment policies, with public release of environmental impact information only required of projects in non-G7 countries.¹⁸ However, there are still many instances of marginalization of women and Indigenous peoples within the G7 context. This includes instances of gender based violence in British Columbia and North Dakota.¹⁹ It is incumbent, therefore, upon Crown Corporations such as EDC to fill in the gap by honouring Canada’s international commitments to promote human rights and prevent environmental and social harms by requiring much more stringent disclosure by applicant companies and denying funding to all companies which create unacceptable environmental and human rights risks, including those that disproportionately affect women.

We therefore recommend the following:

1. The Export Development Canada Act be amended to require not only an environmental and social review, but also a human rights impact assessment both of which must include a gender perspective. This could be accomplished either by adding a section 10.2 to the EDC Act, or amending s. 10.1 to include environmental, human rights and gender impact assessments. S. 24.1 of the EDC Act must be updated to bring it into line with the new Federal Impact Assessment Act, which as currently drafted requires consideration of the intersection of sex and gender with other identity factors and the consistent use of gender-based analyses.²⁰

¹⁶ CEDAW, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37 (7 February 2018) para 46(a).

¹⁷ BDC, Corporate Plan Summary 2018-19 – 2022-23, online at https://www.bdc.ca/en/Documents/doc_corpo/corporate_plan_summary.pdf, see also https://www.bdc.ca/en/i_am/aboriginal_entrepreneur/pages/default.aspx FINDEV, Interim Disclosure Policy January 22, 2018

¹⁸ EDC, Reporting on Transactions, online at: <https://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/default.aspx>

¹⁹ Penelope Simons, “Unsustainable International Law: Transnational Resource Extraction and Violence Against Women” (2017) 26:415 *Transnational law and contemporary problems*, 415 at 416

²⁰ Impact Assessment Act, Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, First Session, Forty-second Parliament, 64-65-66-67 Elizabeth II, 2015-2016-2017-2018, s. 22(1)(s)

2. EDC's Human Rights Statement should be modified to clearly articulate the methodology for human rights impact assessments and to require implementation of a gender impact assessment as part of human rights due diligence for each of the projects submitted for funding. This statement, as with all of EDC's policies, should be aligned with international human rights standards.
3. Consistent with the UN Guiding Principles on Business and Human Rights, human rights due diligence by clients is an ongoing obligation and should continue throughout the life of the project. Clients should be required to continuously report on this process and EDC should continuously monitor and reassess the adequacy of such due diligence, and of any preventative or mitigation measures.
4. EDC's Environmental and Social Risk Management Policy, the Environmental and Social Review Directive (ERD), and the Human Rights Statement, should be amended to require EDC to refuse funding or to withdraw funding in situations where a client is currently complicit or has a history of complicity in human rights violations or a project cannot be undertaken without the risk of human rights violations, including violations of women's human rights.
5. EDC should comply with all recommendations of the Canadian Ombudsperson for Responsible Enterprise and Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises and ensure that all projects funded conform to international norms and standards.
6. Policy changes should mitigate the potential for tokenism. It seems that FinDev Canada may be solely responsible for advancing human rights, women's empowerment and climate change, leaving EDC to fund unsustainable and damaging projects. EDC's policies should be directly linked to and in line with the SDGs, similar to the FinDev Canada policies.
7. All funding for coal-based projects, whether accompanied by CCS or not should be prohibited and funding for oil & gas projects or oil & gas companies should be phased out within six months.
8. EDC's climate policy should reflect a commitment to reduce EDC's operational footprint, and the operational footprint of projects that receive funding. Companies receiving funding should be required to provide specific metrics. A simple estimate of a project's GHG emissions is insufficient. Such companies should also be required to illustrate how EDC funding will be used to prevent or minimize emissions.
9. All information about the environmental or human rights impacts of a proposed project should be publicly released whether the project is in a G7 or a non-G7 country. Indigenous peoples and indigenous women and girls as well as other racialized women and girls experience colonialism and marginalization in both global north and global south.
10. EDC's disclosure policy should be amended
 - a. to state that all environmental, human rights and other social impact assessment and information is material.
 - b. to require all companies or other business entities receiving funding to consent to the publication of environmental, human rights and other social impact

assessment reports and EDC's decision-making process (regardless of whether they are Category A or Category B or Category C recipients, and regardless of whether such projects are located in a G7 or non-G7 country).

- c. to require EDC to disclose the type of impact assessment(s) undertaken, and the reasons based on such impact assessment(s) for providing or refusing funding.
- d. to require EDC to periodically report on its compliance with its own policies and its monitoring and verification of clients and projects to ensure that such clients engage in ongoing human rights due diligence, comply with the domestic law of the host state and comply international human rights norms.

We thank you for the opportunity to make this submission.

Sincerely,

Sara Seck

Penelope Simons

Keith MacMaster

Sara L. Seck, Associate Professor of Law
Keith MacMaster, PhD Candidate
Schulich School of Law and Marine & Environmental Law Institute
Dalhousie University
Halifax, NS Canada
sara.seck@dal.ca

Penelope Simons, Associate Professor of Law
Faculty of Common Law and Human Rights Research & Education Centre
University of Ottawa
Ottawa, ON, Canada
psimons@uottawa.ca