BILL C-31, AN ACT TO AMEND THE EXPORT DEVELOPMENT ACT

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I INTRODUCTION — WEST COAST ENVIRONMENTAL LAW ASSOCIATION

West Coast Environmental Law Association (WCELA or West Coast) is a non-profit society that provides legal services for the protection of the environment. (See West Coast's website at http://www.wcel.org) Since its formation in 1974, WCELA has been extensively involved in the development and implementation of environmental law at both the provincial and federal levels in Canada.

West Coast has a history of involvement with law and policy related to the incorporation of environmental standards into the operations of the Export Development Corporation of Canada (EDC). The author is a member of the Coordinating Committee of the NGO Working Group on the Export Development Corporation, a coalition of Canadian NGOs that advocate applying basic environmental, human rights, sustainable development and transparency standards to all export credit agencies-supported projects. The author's publications on this topic include *Exporting Good Practices: Environmental Standards and the Export Development Corporation of Canada*, vol. 10, no.3 Journal of Environmental Law and Policy, Sept.2001, *Environmental Standards and the Export Development Corporation*, Submission of West Coast Environmental Law to the Minister of International Trade on the Legislative Review of the *Export Development Act* (WCELA, 1999) and *Comments on the Export Development Corporation's Environmental Review Framework* (WCELA, October 2001).

West Coast Environmental Law Association welcomes Bill C-31, An Act to Amend the Export Development Act as a positive new legal tool with the potential to improve the environmental performance of the Corporation and its clients. This brief focuses on ways to:

- strengthen the Bill's sections on the environmental directive to be issued by the Corporation and other ways to improve the EDC's environmental performance,
- remedy a key omission from the Bill and include disclosure and public participation obligations as a critical part of the environmental directive, and
- eliminate a troubling and unnecessary section of the Bill — the creation of the offence of using the Corporation's name without written permission.

II LEGISLATIVE OBLIGATIONS TO PROTECT THE ENVIRONMENT NEED STRENGTHENING

> If we are looking for drivers to push forward sustainable development and environmental considerations in both this country and abroad, export credit agencies have some of the most important roles to play. Until recently, we have underplayed the issue but that is changing dramatically.
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> – Hon. Michael Meacher, UK Minister for the Environment, **House of Commons Hansard Debates for 11 Jul 2001**

Environmental, human rights and other social concerns have played a major role in the legislative review of the *Export Development Act* since it began in 1999. Now at the final stage of this review, it is critical for the government to ensure that both the changes underway in other similar institutions around the world and the lessons learned from the review are fully incorporated into new amendments to the EDC's governing statute. The current provisions of Bill C-31 on a new environmental directive for the EDC and other related provisions do not yet integrate those lessons. This Committee has the opportunity to make recommendations to correct the flaws.

A. PROPOSED CHANGES TO SECTION 10 — ENVIRONMENTAL EFFECTS

Section 10 of the Bill concerns environmental effects, and obligates the Corporation to issue a directive on environmental effects. While including environmental obligations in the EDC's governing statute is a welcome change, this brief provision is insufficient to ensure that environmental protection is made an integral part of the EDC's operations.

There are three key problems related to this section of the Bill:

1. It does not obligate the Corporation to withhold support if there are unacceptable environmental effects of a proposed project or transaction for which EDC's support is sought,
2. It provides no guidance on the criteria that the Corporation should apply to make its decision about environmental effects, ignoring the large body of expertise that exists on environmental assessment, and

3. It does not provide a good base to remedy the discrepancies between the design and operation of the Corporation's existing voluntary environmental review framework, as noted by the Auditor General.

A1. INCLUDE A DUTY TO WITHHOLD SUPPORT IF UNACCEPTABLE ENVIRONMENTAL EFFECTS EXIST

The current wording in the Bill is too discretionary, as it allows the EDC to approve any project or transaction on any grounds despite the existence of serious adverse environmental impacts. WCELA recommends amending this section to require the EDC to decline support for projects with unavoidable negative impacts. This requirement has precedents: the US Overseas Private Investment Corporation's governing statute requires it to refuse to support a project that "the Corporation determines will pose a major or unreasonable environmental, health or safety hazard, or will result in the significant degradation of national parks or similar protected areas."[1] In addition, the environmental policies of both the Australian and Japanese export credit agencies clearly state that if the environmental consequences of a proposed project or investment are unacceptable, and mitigation plans are inadequate, the project will be declined.

Recommendation 1: Amend section 10.1 (1) (b) to require the Corporation to refuse to support projects or transactions that will pose major unreasonable environmental, health or safety hazards. Alternatively, the statute should provide guidance on which circumstances, if any, justify the Corporation to enter a transaction after that transaction has been determined to have adverse environmental effects.

A2. AMENDMENTS SHOULD SET STANDARDS FOR THE EDC'S DIRECTIVE

Section 10.1 provides minimal guidance to the EDC on the content of an environmental directive. The content of the directive is left to the complete discretion of the Board of Directors of the EDC. Standards are an integral part of any environmental review process. Compliance with host country standards is an obvious legal requirement for any Canadian exporter. The "value added" component of an environmental review by the EDC is that it allows the EDC to assess the potential impacts of a project before it makes a decision to support an exporter. If those potential effects are too negative, it can then refuse support. For this review to be meaningful and effective, it must conform to clear, strong standards, yet those elements are now missing from this section of the Bill.

Recommendation 2: Amend section 10.1 (2) to make the suggested content of the directive mandatory by substituting the word "shall" for "may".

Recommendation 3: Amend section 10.1 (2) to enlarge the mandatory content of the directive and impose a duty on the EDC to:

- Determine the environmental effects as early as possible in the process, and before irrevocable decisions are made.

[1] 22 USC 2191.

- Disclose information about the environmental effects of a project or transaction to the public, and provide opportunities for public consultation both in Canada and in the host country (see more detailed recommendation on disclosure in next section of this Brief).
- Consider cumulative impacts of the project or transaction with other associated projects in the course of the review.
- Refer projects with adverse environmental consequences above a defined minimum level to an independent review by experts outside the EDC.

Recommendation 4: Amend section 10.1 (2) to require the Board of Directors of EDC to consult with the specialized regulatory agency which administers the *Canadian Environmental Assessment Act* on the content of an environmental directive for the EDC .

Recommendation 5: Amend section 10.1 (2) to require that before participating in any project or transaction, EDC shall satisfy itself, on reasonable grounds that:

- the proponent is and has the ability to remain in compliance with all applicable environmental laws, standards, codes and other regulatory requirements,
- the proposed project or transaction is consistent with the environmental commitments Canada has made in treaties. [2]

Recommendation 6: Amend section 10.1 (2) to require that before participating in any project or transaction with the potential for adverse environmental effects, EDC shall require the proponent to enter into an environmental covenant with contractual obligations to:

- implement environmental assessment recommendations,
- meet environmental mitigation measures,
- comply with all applicable regulatory requirements,
- follow emergency response notification procedures,
- implement environmental action plans,
- fulfill all applicable reporting requirements, and
- take corrective action if monitoring indicates a problem.

Recommendation 7: Include a new section 10.2 establishing an independent ombudsperson to oversee the implementation of the new EDC directive. An ombudsperson would provide monitoring and adjudication of complaints from the public. The establishment of an ombudsperson was recommended in the initial SCFAIT Report, and endorsed by the government in its response to that report.

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[2] The US International Finance Corporation is obligated not to finance project activities that would contravene a country's obligations under relevant international environmental treaties and agreements, as identified during the EA IFC Environment Operational Procedures, OP 4.01. Environmental Assessment, at the IFC's website at http://www.ifc.org.

A3. ELIMINATE GAP BETWEEN THE DIRECTIVE'S DESIGN AND OPERATION WITH STRONGER STATUTORY OBLIGATIONS

The Auditor General of Canada in its May 2001 *Report on the Export Development Corporation's Environmental Review Framework* stated that "…(i)n most cases we found significant differences between the Framework's design and its operation. In those cases employees seem to have viewed the Framework more as guidance, to be interpreted according to the circumstances of each project, than as an important risk management tool they were expected to apply. Potential environmental effects were not identified, the Corporation thus based its decisions on incomplete information. We concluded that the Framework was not operating effectively."

Requiring the Corporation to adhere to strong statutory standards would improve the effectiveness of any new directive. The recommendations of the Auditor General of Canada provide guidance in this regard.

Recommendation 8: Amend section 10.1 (b) to require the Corporation to conduct annual internal audits of the directive's application, report the results to the Board of Directors and present a summary in the Annual Report.

Recommendation 9: Amend section 11 of the Bill to require the Auditor General to audit the design and implementation of the directive at least once every two years, instead of the five years currently set out in the Bill.[3]

B. ADDITIONAL PROBLEMS WITH ENVIRONMENTAL PROTECTION PARTS OF THE BILL

Two additional problems with the Bill relate to the environment:

1. The EDC should be required to prepare a Sustainable Development Strategy, and
2. The EDC should not be exempt from the *Canadian Environmental Assessment Act*.

B1. A SUSTAINABLE DEVELOPMENT STRATEGY FOR THE EDC IS DESIRABLE

The Commissioner of the Environment and Sustainable Development is the government's chief vehicle for ensuring that the environment is a key part of federal decision making. The Commissioner's mandate is to make the government accountable for greening its policies, operations, and programs. Twenty-five federal departments and agencies are now bound to prepare Sustainable Development Strategies. To increase public accountability, and to ensure that the EDC fully integrates environment into all its procedures, the EDC should be bound to prepare a Strategy and report to the Commissioner of Environment and Sustainable Development on the implementation of this Strategy.

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[3] The Auditor General recommended an audit every three years, and the Minister of International Trade asked that this audit be done every two years: Response of Minister for International Trade, included in Auditor General of Canada, *Report on the Export Development Corporation's Environmental Review Framework* May 2001.

Recommendation 10: Bill C-31 should be amended to require the EDC to report to the Commissioner of Environment and Sustainable Development pursuant to s.24 (3) of the *1995 Amendment to the Auditor General Act.*

B2. EXEMPTION FROM CEAA NOT JUSTIFIED

Section 24.1 of this Bill exempts the EDC from the *Canadian Environmental Assessment Act*. The issue of whether the Act applies to the EDC is being litigated.[4] One reason for this proposed exemption appears to be the EDC's and government's desire to shield itself from further litigation, as it currently faces a lawsuit which it is in danger of losing. Whether this public policy goal should be the driving force of efforts to ensure that EDC operates in an environmentally responsible manner is debatable.

Maintaining a key role for the Canadian Environmental Assessment Agency (the Agency) in the conduct of environmental assessments for certain of the EDC's decisions and transactions is desirable. CEAA is the only Canadian agency with the necessary expertise and experience to oversee the implementation of an EA regime for the EDC. This government agency has been entrusted as the repository of environmental assessment knowledge throughout the government. One of the consensus recommendations emerging out of the 5-year review of CEAA is that the capacity and expertise of the Agency must be consolidated, and the Agency must be given a more meaningful role in the conduct of federal EAs.[5] Consistency of application of EA throughout Canada, and in projects abroad where Canada has an interest will provide certainty, for the public and proponents alike.[6]

A Subcommittee of the Regulatory Advisory Committee (RAC) to the Agency devoted considerable time and energy to consider how CEAA could be applied to the EDC in a good faith effort to adjust the Act to the specific requirements of the EDC. Bill C-31 would eliminate any role for the Agency in the conduct of environmental reviews by the EDC.

Recommendation 11: Delete section 24.1 of the Bill.

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4 The Sierra Club of Canada is challenging the failure of the Ministers of Finance and International Trade to subject the proposed sale and construction of two Candu reactors in China to an EA under CEAA. While AECL pursued the sale and owns the technology, the EDC financed the loan to China under its Canada Account. The Sierra Club is arguing that in approving the loan, the two ministers also granted a loan guarantee, which should have been subject to the funding trigger of CEAA (s. 5(1)(b)). The Department of Justice advised the government, in a leaked cabinet document, that "its case is not strong and that the Federal Court may well rule in favour of the Sierra Club. The judicial review is expected to be heard sometime this year.

5 See "Report to the Minister of the Environment of the Regulatory Advisory Committee", May 8, 2000, recommendations 1.1 to 1.5 and 2.4.

6 NGO Working Group on the Export Development Corporation, *Environmental Assessment and the Export Development Corporation of Canada — The Shock of the Possible* (Halifax Initiative: Ottawa) 2001.

III TRANSPARENCY, DISCLOSURE, AND PUBLIC PARTICIPATION

> To remain a leader, the Corporation will have to act quickly to address issues of transparency: a lack of policies and procedures at project level to govern public consultation and disclosure of environmental information. While these gaps are common among the world's export credit agencies, public consultation and disclosure are essential elements of a credible environmental review process. The approaches taken by other international financial institutions provide useful models for disclosing more information to the public, while maintaining commercial confidentiality for customers.
>
> **Auditor General of Canada, *Report on the Export Development Corporation's Environmental Review Framework*** — May 2001

From the beginning of the legislative review process for the Export Development Corporation, information disclosure and public participation have been noted as key defects in the EDC's current procedures, by NGO critics, Gowlings, the Minister for International Trade, the Regulatory Advisory Committee for the Canadian Environmental Assessment Agency, and most recently by the Auditor General of Canada, as the quote above demonstrates.

Release of a voluntary EDC disclosure policy on October 1, 2001 is an improvement over past practice, but statutory disclosure requirements are also required for this critical component of EDC's operations.

Meaningful public participation is absolutely essential in good environmental practice. The World Commission on Dams reviewed a number of large dam case studies and found that "most unsatisfactory social outcomes of past dam projects are linked to cases where affected people played no role in the planning process". The Commission also found that "there are recent examples that show where participation has reduced conflict and made outcomes more publicly acceptable."[7]

Local consultations make good business sense for project proponents, suppliers and other contributors to a project. These consultations should become standard practice and should be required by the EDC. The American and Australian export credit agencies have agreed to post project information for public comment before a financing decision is made.

[7] World Commission on Dams, *Dams and Development — A New Framework for Decision-Making*, (London: Earthscan), 2000, pp. 176-177.

Recommendation 12:

Section 10.1 (2) should be amended to require the EDC's environmental directive to include disclosure and public participation provisions, including:

- notification of project opportunities to occur both in Canada, and in the home jurisdiction of the proposed project;
- if a more detailed EA is to be conducted, such as a comprehensive study, then more elaborate consultation must occur, including opportunities to respond and incorporate public comment in a revised project proposal;
- the EDC should NOT be able to approve a project until a public consultation period has been completed, if required;[8] and
- The results of public consultations should be required to be disclosed.

[8] NGO Working Group on the Export Development Corporation, *Environmental Assessment and the Export Development Corporation of Canada — The Shock of the Possible* (Halifax Initiative: Ottawa) 2001.

IV SILENCING THE PUBLIC — EXISTING LAW SUFFICIENT TO PROTECT EDC'S TRADEMARK

Proposed section 24.2 is offensive, and should be deleted from Bill C-31. It would prohibit any public mention of the Export Development Corporation's name, orally or in writing, in any circumstances that could be characterized as a "business purpose", unless written permission from the Corporation has been obtained. The offence is punishable by a fine of up to $10,000 or imprisonment for six months, or both.

The meaning of "business purpose" is unclear. What is the difference between a "business" and a "public" purpose? Would SCFAIT itself be barred from using the EDC's name in the course of these hearings, without written permission, if this provision becomes law?

Obviously, this section is not meant to prevent Parliamentarians from discussing the EDC. This example is meant to demonstrate the overly broad nature of the provision. The section appears to be designed to prohibit groups such as the NGO Working Group on the EDC from using the EDC name.

It is not unusual for NGOs to include the names of the institutions they critique in their own name: prominent examples of this phenomenon include the Common Front on the World Trade Organization (CFWTO); and WTO Watch. Environmental networks and coalitions often form Working Groups on specific subjects or entities. Yet these groups are not threatened with lawsuits.

What harm is being remedied by this section that cannot be cured by existing law? The EDC has the protection of the *Trade-marks Act*, RSC, c. T-13. That *Act* contains prohibitions against unauthorized use of trade-marks and provides remedies for breaches of the Act. In WCELA's submission, there is no justification for additional protection for the EDC's trademark, and this provision in the Bill is an attempt to stifle legitimate public debate.

Recommendation 13: Delete section 24.2 of the Bill.

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