Legislative Summary **LS-407E**

BILL C-31: AN ACT TO AMEND THE EXPORT DEVELOPMENT ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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LEGISLATIVE HISTORY OF BILL C-31

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	20 September 2001
Second Reading:	2 October 2001
Committee Report:	26 October 2001
Report Stage:	30 October 2001
Third Reading:	30 October 2001

SENATE	
Bill Stage	**Date**
First Reading:	30 October 2001
Second Reading:	20 November 2001
Committee Report:	27 November 2001
Report Stage:	
Third Reading:	6 December 2001

Royal Assent: 18 December 2001

Statutes of Canada 2001, c.33

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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OVERVIEW

In 1998, the government began its mandated review of the Export Development Corporation (EDC). As part of that review, the law firm of Gowling, Strathy & Henderson was engaged to conduct stakeholder interviews. The firm issued a report in July 1999, to which the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) and the Senate Standing Committee on Banking, Trade and Commerce responded with hearings and reports.

EDC is a Crown Corporation. As the government's export-finance agency, it provides trade financing services to Canadian exporters. In 2000, Canadian business concluded $45.4 billion in export and domestic sales and investments in markets using EDC trade financing services.

The introduction of Bill C-31, An Act to amend the Export Development Act and to make consequential amendments to other Acts, represents a part of the government's response to this review of EDC. The bill's major focus is on its requirement that EDC conduct environmental impact assessments when undertaking projects or financing. The bill also:

- changes the name of the Export Development Corporation (in French: *la Société pour l'expansion des exportations*) to Export Development Canada (Exportation et développement Canada), and changes certain words in the *Export Development Act* (the *Act*) to gender-neutral language;

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

- enables EDC's Board of Directors to delegate its powers and duties to committees it may establish, other than the executive committee;
- enables EDC to set up a pension plan for its officers and employees, and their dependants; and
- enacts a technical amendment limiting corporate liability.

SUMMARY AND ANALYSIS

A. Environmental Review

The major change to the Act addresses how EDC will address the environmental effects of projects with which it gets involved. New section 10.1 (clause 9) requires EDC to make a two-part "determination" before entering into a transaction related to a project. The first part of the determination requires that EDC ascertain whether the project is likely to have adverse environmental effects, despite the implementation of mitigation measures. If the answer to this question is yes, then EDC must decide whether it is nevertheless justified in entering into the transaction.

The determination will be made in accordance with criteria set out in a "directive" which will be issued by the EDC Board. In addition to establishing the decision-making criteria, the Board will also define certain terms relevant to making the determination, for example: "transaction," "project," "adverse environmental effects" and "mitigation measures."

The Board may also define "exceptions," i.e., situations where EDC is not required to make a determination. The Board may define exceptions either specifically or according to the class of transaction involved.

Clause 11 directs the Auditor General to review, once every five years, the design and implementation of the directive. The report is to be submitted to the Minister and the Board, and must be submitted to each House of Parliament within 30 sitting days of its completion.

Related new section 24.1 (clause 12) exempts EDC from several sections of the *Canadian Environmental Assessment Act* (*CEAA*) detailing when a federal authority must conduct an environmental assessment. Clause 9 effectively supersedes these sections. Specifically:

- EDC is exempted from subsection 5(1) and 5(2) of the *CEAA* where the Minister of International Trade or the Minister of Finance performs a duty or function under the *CEAA* or its regulations, or exercises a power or authority with respect to EDC under any Act or regulation (ss. 5(1)), or the Governor in Council exercises a power of authorization or approval under the *CEAA*, or any other Act or regulations; and
- EDC is wholly exempted from ss. 8(1) of the *CEAA*. (Clauses 9, 11, 12)

B. Name Change and Gender-Neutral Language

Bill C-31 changes the name of the Export Development Corporation (in French: la Société pour l'expansion des exportations) to Export Development Canada (Exportation et développement Canada) in the *Act* and other related Acts, and transfers the Export Development Corporation's rights and obligations to Export Development Canada. This change will make EDC's acronym the same in both official languages. (Clauses 1-4, 14-30)

Two other clauses replace the English titles "chairman" and "vice-chairman" with the gender-neutral "chairperson" and "vice-chairperson." (Clauses 3, 4)

C. Board Delegation Powers

Bill C-31 gives EDC's Board of Directors the power to establish committees to exercise powers and perform any duties delegated to it by the Board, other than those that must be handled by the Executive Committee. (Clauses 5-7, 10)

D. Pension Board

Another amendment to the *Act* allows the Board to make bylaws establishing and governing the establishment, management and administration of a pension plan for EDC officers, employees and their dependants. (Clause 10)

E. Technical Amendment

Bill C-31 amends ss. 10(3) to specify more explicitly the limit of EDC's liability under outstanding arrangements it enters into regarding insurance, reinsurance, indemnity or guarantee. (Clause 8)

COMMENTARY

Bill C-31's major component – the amendments dealing with environmental assessment – responds to criticisms voiced by various interest groups. Previously, as a Crown corporation, EDC was not subject to the *CEAA*. Bill C-31 generally reflects the environmental recommendations made by Gowling, Strathy & Henderson and, to a lesser extent, SCFAIT. However, Bill C-31 does not address the disclosure of such environmental assessments. In its report, the law firm recommended that EDC develop a policy to make its environmental assessments available to the public, subject to the requirements of commercial confidentiality and commercial viability of projects. SCFAIT also called for disclosure of environmental impact assessments.

These concerns were echoed by the Office of the Auditor General in a 15 May 2001 report on EDC's Environmental Review Framework, which concluded that it was not operating effectively. The Auditor General found that the Framework had most elements of a suitably designed environmental review process and compared favourably with the policies of other export credit agencies around the world, with two key gaps in transparency: public consultation, and disclosure of information. The audit also found significant differences between the Framework's design and its operation. Because EDC did not identify potential environmental risks, it thus based its decisions on incomplete information.

Under its draft information disclosure policy,(1) EDC indicates that it will undertake "pre-commitment disclosure of certain information for selected projects which pose potential adverse environmental impact." As well, under the Department of Foreign Affairs and International Trade's *Government Guidance on a Revised Environmental Review Framework for Export Development Corporation*,(2) issued in June 2001, "EDC shall disclose environmental information regarding its projects in accordance with the provisions of its Disclosure Policy."

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(1) Available at http://www.edc-see.ca/docs/news/2001/Enviro/05-15-01_e.htm.

(2) Available at http://www.dfait-maeci.gc.ca/tna-nac/ENV-EDC-e.asp#consul.

Bill C-31 fulfills some, but not all, of SCFAIT's recommendations. For example, it does not require that EDC "give due regard to 'the commitments and obligations undertaken by Canada under international agreements,'" or create an ombudsman position within EDC "to respond directly and in a timely fashion to public inquiries and appeals regarding sustainable development impacts."

Bill C-31 does incorporate the independent public oversight and reporting to Parliament suggested by SCFAIT. It does not, however, add "a provision to the *Auditor General Act* establishing the Office of the Commissioner of Environment and Sustainable Development as the Government's designated agent for that purpose."

Another issue that may warrant discussion is the absence in Bill C-31 of any type of limits on the Board's decision-making power. The Board exercises its decision-making power in two ways: (1) when it defines terms (such as "adverse environmental effects"); and (2) when it exempts a transaction or transactions from the environmental determination requirement of the Act.

Here the bill appears to create a "loophole": it requires, on the one hand, that EDC make an environmental determination; at the same time, however, it gives the Board the authority to exempt any transaction or class of transaction from that same requirement. In effect, the Board may exempt EDC from the requirement to make a determination.

This particular delegation by Parliament of its decision-making authority is somewhat unusual for the reasons that the delegation has not been made subject to any limits or criteria. Normally, when Parliament delegates its decision-making power, it also prescribes limits or criteria subject to which the decision-maker's power must be exercised. If the decision-maker exceeds the limits of its delegated decision-making power (or if it fails to exercise it in accordance with the prescribed criteria), its decision will be *ultra vires* (i.e., beyond its powers). A decision that is *ultra vires* the decision-maker is made without statutory authority and is, therefore, a nullity – and subject to being struck down by a court on an application for judicial review. In this case, though, because Parliament has not prescribed any limits or criteria, the Board appears to have complete, unlimited freedom to make any decision, i.e., to define terms as it chooses, or to exempt any project it chooses. As well, the complete absence of limits on the decision-making power would suggest that the Board directives would be virtually immune from judicial review.

Parliament has a number of mechanisms with which it could restrict the Board's decision-making discretion without significantly having an impact on the Corporation's ability to pursue its mandate effectively. For example, the bill could specify that the Board must give reasons for exempting a transaction or a class of transactions. This would increase the transparency in the decision-making process, and would provide a reviewing court with something upon which to determine that the decision had been arrived at properly and not for improper reasons. Or, it could require that the Board submit its directives to a Parliamentary committee for approval (as is increasingly the case with regulations). Parliament could also require the Board to consult with concerned groups or other government departments (most obviously, the Minister of the Environment) prior to making directives (particularly where the directive involves defining terms such as "adverse environmental impact"). As well, perhaps most obviously, Parliament itself could prescribe (or incorporate by reference) the criteria to which the Board would be required to have reference in issuing directives.