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# **Codifying Canada's Glasgow Guidelines: A Proposal for Regulating Export Development Canada's Fossil Fuel Finance**

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# I. INTRODUCTION

There is scientific consensus that greenhouse gas (GHG) emissions alter the global climate and present an unprecedented risk to Canada's ecosystems, human health, and economic prosperity and stability.<sup>1</sup> The oil and gas industry contributes significantly to Canada's total GHG emissions at an estimated 25%.<sup>2</sup> Reliance on oil and gas, or the fossil fuel industry more broadly, increases climate-related financial risks.<sup>3</sup> In this light, continued financial support from Canada for the fossil fuel industry will increase the prevalence of future climate-related risks and will impact the stability of financial systems internationally.<sup>4</sup> The unique nature of climate-related financial risk requires "a distinct approach to urgently align financial flows with climate commitments" through divestment of the fossil fuel industry.<sup>5</sup> These changes to financial flows are urgent, as climate risks pose "radical uncertainty and irreversible catastrophic consequences" to human societies and economies.<sup>6</sup>

Export Development Canada ("EDC"), Canada's export credit agency, has traditionally provided significant public support for the oil and gas industry, both domestically and internationally. EDC provides or guarantees loans for various industries, including the oil and gas industry, which aim to "benefit Canadian exporters."<sup>7</sup> The impact of EDC's investments on the fossil fuel industry are immense. In 2021, EDC provided \$5.15 billion, and in 2022 an additional \$7.76 billion, in funding for oil and gas activity.<sup>8</sup> These amounts include domestic and international activity. Between 2018

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<sup>1</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, s. 2 Enactment.

<sup>2</sup> *International Energy Agency*, "Canada 2022: energy policy review" (2022), at pg. 13, online: <<https://iea.blob.core.windows.net/assets/7ec2467c-78b4-4c0c-a966-a42b8861ec5a/Canada2022.pdf>>.

<sup>3</sup> For example: "Local governments can face significant transition risk if their finances are built around industries, such as oil and gas production and refining, that emit substantial greenhouse gases. A 2022 RFF working paper, for example, found that fossil fuels are responsible for approximately \$85.2 billion in revenue each year for US municipalities, states, and tribes. And although revenue streams for fossil fuel communities are expected to dwindle both with and without future climate action, the uncertain nature of the low-carbon transition poses a further risk for communities that have historically relied on these funds to support infrastructure projects, education, and public health": Yanjun (Penny) Liao and Anne McDarris, "Climate financial risk 101" (2 June 2022), online: *Resources for the Future* <<https://www.rff.org/publications/explainers/climate-financial-risks-101/>>.

<sup>4</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, s. 2 Enactment.

<sup>5</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, s. 2 Enactment.

<sup>6</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, s. 2 Enactment.

<sup>7</sup> Matthew McClearn, "Canada has committed to halt financing to the oil and gas industry. To understand what that really means, watch for the fine print" (10 January 2022), online: *Globe and Mail* <<https://www.theglobeandmail.com/canada/article-canada-has-joined-a-global-movement-aiming-to-halt-financing-to-oil/>>.

<sup>8</sup> *Export Development Canada*, "Aggregate business facilitated by industry sub-sector for the period ending December 31, 2021" (2021), online: <<https://www.edc.ca/en/about-us/corporate/disclosure/reporting-transactions/canadian-industry-sub-sector-2021.html>>; *Export Development Canada*, "Aggregate business facilitated by industry sub-sector for the period ending December 31, 2022" (2022), online: <<https://www.edc.ca/en/about-us/corporate/disclosure/reporting-transactions/canadian-industry-sub-sector-2022.html>>.

and 2020, Canada provided more funding for oil and gas activity than any other G20 nation.<sup>9</sup> According to Bronwen Tucker, public finance campaign manager for Oil Change International, “this support is worth more than raw numbers would suggest: EDC provides better borrowing rates than private banks do, and its involvement reduces risk for private financiers, especially on large infrastructure projects.”<sup>10</sup> A database compiled in 2022 for the *Globe and Mail* demonstrates that oil and gas customers were consistently funded most generously by EDC when compared to other customers.<sup>11</sup>

In 2021 at the Conference of the Parties in Glasgow (COP 26), Canada committed to end public financing for the international unabated fossil fuel sector by the end of 2022 by signing onto *The Glasgow Statement on International Public Support for the Clean Energy Transition* (the “Glasgow Statement”).<sup>12</sup> The Glasgow Statement is the first multilateral commitment that addresses the public financing of oil and gas and was signed by 24 countries and five public finance institutions.<sup>13</sup> In response to this commitment, Minister of Natural Resources, Jonathan Wilkinson released the policy *Guidelines for Canada’s International Support for the Clean Energy Transition* (the “Guidelines”) on December 8, 2022. The Guidelines’ scope is to assist “implicated federal departments and agencies as well as Crown corporations in implementing the Glasgow Statement in their respective operations.”<sup>14</sup>

Despite Canada’s COP 26 commitment in 2021, EDC continued to provide new direct financing to international fossil fuel companies throughout 2022. In 2022, EDC’s total direct financing, old and new, was \$1.3 billion.<sup>15</sup> Added to this, in 2022 it also provided short-term insurance for fossil fuel

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<sup>9</sup> Matthew McClearn, “Canada has committed to halt financing to the oil and gas industry. To understand what that really means, watch for the fine print” (10 January 2022), online: *Globe and Mail* <<https://www.theglobeandmail.com/canada/article-canada-has-joined-a-global-movement-aiming-to-halt-financing-to-oil/>>.

<sup>10</sup> Matthew McClearn, “Canada has committed to halt financing to the oil and gas industry. To understand what that really means, watch for the fine print” (10 January 2022), online: *Globe and Mail* <<https://www.theglobeandmail.com/canada/article-canada-has-joined-a-global-movement-aiming-to-halt-financing-to-oil/>>.

<sup>11</sup> Note: This database involved nearly 20,000 EDC and Canada Account transactions between 2011 and the end of 2020. Matthew McClearn, “Canada has committed to halt financing to the oil and gas industry. To understand what that really means, watch for the fine print” (10 January 2022), online: *Globe and Mail* <<https://www.theglobeandmail.com/canada/article-canada-has-joined-a-global-movement-aiming-to-halt-financing-to-oil/>>.

<sup>12</sup> “Canada delivers on Glasgow statement pledge with policy Guidelines to end international public finance for fossil fuels” (8 December 2022), online: *International Institute for Sustainable Development* <<https://www.iisd.org/articles/statement/canada-delivers-glasgow-statement-pledge>>.

<sup>13</sup> “Canada delivers on Glasgow statement pledge with policy Guidelines to end international public finance for fossil fuels” (8 December 2022), online: *International Institute for Sustainable Development* <<https://www.iisd.org/articles/statement/canada-delivers-glasgow-statement-pledge>>.

<sup>14</sup> Natural Resources Canada, “Guidelines for Canada’s International Support for the Clean Energy Transition” (December 2022), at pg. 2, online: *Government of Canada* <[https://natural-resources.canada.ca/sites/nrcan/files/pdf/UK%20Statement\\_e.pdf](https://natural-resources.canada.ca/sites/nrcan/files/pdf/UK%20Statement_e.pdf)> [“The Guidelines”].

<sup>15</sup> Export Development Canada, “Better Through Trade: 2022 Integrated Annual Report” (2023), at pg. 71, online: <<https://www.edc.ca/content/dam/edc/en/corporate/corporate-reports/annual-reports/edc-2022-annual-report.pdf>>.

projects in the amount of \$6.5 billion, which EDC does not consider to be direct financing.<sup>16</sup> This appears to contrast with the steps taken by other international financial organizations, such as the World Bank, which reportedly aimed to reach almost zero funding by the end of 2022.<sup>17</sup> This report argues that, to ensure compliance with Canada's Glasgow commitments, Canadian lawmakers must codify the Glasgow Guidelines to ensure that they are binding, and that there are clear mechanisms of reporting, review and accountability.

This report provides the background and rationale for a law reform proposal toward the codification of the Guidelines as they apply to EDC in particular. After exploring the feasibility of some possible avenues toward this goal, we conclude that the development of a regulation under the *Export Development Act* ("EDA") is likely the most strategic and effective option. Part II begins by providing an overview of Canada's commitments to end public finance for the international fossil fuel industry. With this context, in Part III we canvas legislative reform options and explain our conclusion that the creation of a regulation under the *EDA* is the most feasible option.

Next, in Part IV, we describe the processes that advocates of such a regulation must pursue in order to ensure that it is drafted and passed into law. In Part V, we describe the sources that we drew upon, and the methodologies that we followed, in order to develop a model regulation to codify Canada's Guidelines for EDC. Finally, in Part VI we explore the viability of duplicating our model EDC regulations and modifying them to apply to three other Crown corporations that have a history of funding fossil fuel activities. The Appendix to this report contains our model regulation for EDC.

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<sup>16</sup> Export Development Canada, "Better Through Trade: 2022 Integrated Annual Report" (2023), at pg. 71, online: <<https://www.edc.ca/content/dam/edc/en/corporate/corporate-reports/annual-reports/edc-2022-annual-report.pdf>>.

<sup>17</sup> Matthew McClearn, "Canada has committed to halt financing to the oil and gas industry. To understand what that really means, watch for the fine print" (10 January 2022), online: *Globe and Mail* <<https://www.theglobeandmail.com/canada/article-canada-has-joined-a-global-movement-aiming-to-halt-financing-to-oil/>>.



## II. THE GOVERNMENT OF CANADA'S GLASGOW COMMITMENTS

### Canada's Glasgow Statements

As stated previously, the Government of Canada made a significant commitment to end the public financing of fossil fuels at the 2021 United Nations (UN) Climate Change Conference in Glasgow, United Kingdom. On November 4, 2021, Canada's Minister of Natural Resources signed onto the Glasgow Statement and committed to "end new direct public support for the international unabated fossil fuel sector by the end of 2022."<sup>18</sup> However, Canada's commitment came with the caveat that financing may continue to fossil fuel projects in "limited and clearly defined circumstances that are consistent with the 1.5 degree Celsius warming limit and the goals of the Paris Agreement."<sup>19</sup> The following year, in 2023, the UN Intergovernmental Panel on Climate Change announced, based on projected greenhouse gas (GHG) emissions in 2030, that global warming will likely exceed 1.5 degrees this century.<sup>20</sup> As such, it is important to note that any new fossil fuel financing may, by definition, be inconsistent with the 1.5 degree warming limit or the goals of the Paris Agreement. While we flag this issue here, it is important to clarify that the larger question of whether or not Canada's Glasgow Guidelines are in compliance with Canada's Paris Agreement commitments is beyond the scope of this report.

### Canada's Glasgow Guidelines: An Overview

According to the federal government, Canada's 2022 Glasgow Guidelines will form the foundation of Canada's effort to achieve its commitments in the Glasgow Statement. The Guidelines address three overarching commitments which Glasgow signatories must abide by: 1) supporting the international economy in working "fully towards the clean energy transition, using [their]

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<sup>18</sup> "Canada announces commitment to end new direct public support for the international unabated fossil fuel sector by the end of 2022" (4 November 2021), News Release, online: Natural Resources Canada <<https://www.canada.ca/en/natural-resources-canada/news/2021/11/canada-announces-commitment-to-end-new-direct-public-support-for-the-international-unabated-fossil-fuel-sector-by-the-end-of-2022.html>>; "Canada delivers on Glasgow statement pledge with policy Guidelines to end international public finance for fossil fuels" (8 December 2022), online: *International Institute for Sustainable Development* <<https://www.iisd.org/articles/statement/canada-delivers-glasgow-statement-pledge>>.

<sup>19</sup> "Canada announces commitment to end new direct public support for the international unabated Fossil Fuel Sector by the end of 2022" (4 November 2021), News Release, online: Natural Resources Canada <<https://www.canada.ca/en/natural-resources-canada/news/2021/11/canada-announces-commitment-to-end-new-direct-public-support-for-the-international-unabated-fossil-fuel-sector-by-the-end-of-2022.html>>.

<sup>20</sup> Intergovernmental Panel on Climate Change, "AR6 Synthesis Report: Summary for Policymakers, Headline Statements" (2023), Current status and trends A.4, online: <<https://www.ipcc.ch/report/ar6/syr/resources/spm-headline-statements/>>.

resources to enhance what can be delivered by the private sector”; 2) ending the “new direct public support for the international unabated fossil fuel energy sector by the end of 2022, except in limited and clearly defined circumstances...”; and 3) encouraging other governments, their official export credit agencies, and their public finance institutions “to implement similar commitments into COP27 and beyond.”<sup>21</sup>

Part A of the Guidelines states that Canada’s Glasgow commitments are effective as of January 1, 2023, and cover “new direct support for the international unabated fossil fuel energy sector.”<sup>22</sup> In this part, “new direct public support” is defined as “financial advocacy, export finance, and any other direct financial or promotional support provided by Government of Canada and Crown entities.”<sup>23</sup> As such, the Guidelines include all federal Crown corporations, including EDC. Part A states that public funding “will be ended for all projects that fall within the scope of the ‘international unabated fossil fuel energy sector,’” defined as “the extraction, production, transportation, refining and marketing of crude oil, natural gas or thermal coal,” along with all “unabated fossil fuel power generation projects.”<sup>24</sup> Notably, the Guidelines do not apply to support for domestic fossil fuel activity.<sup>25</sup>

Part B of the Guidelines sets out exemptions which define fossil fuel related activities that may continue to receive direct public support. Briefly, this includes mitigation technologies in the power generation sector and the fossil fuel energy sector; decommissioning and conversion of fossil fuel energy assets; transitioning existing non-power infrastructure; natural gas power generation, production and distribution; and the use of low carbon intensity fuels for cooking and temperature regulation in private homes. For the precise language used to describe these exemptions, see section 6 of the model regulation in the Appendix to this report.

Notably, also in Part B, the Guidelines establish a set of detailed additional “due diligence” criteria that any exempted project must meet to ensure that its financing will be consistent with Canada’s Paris Agreement commitments.<sup>26</sup> It appears that *all* of the specified criteria must be met. First, the project proponent must “rigorously assess and manage stranded asset and carbon lock-in risks.”<sup>27</sup> Second, the project must undergo “a credible alternatives analysis” and be “compliant with the goals of the Paris Agreement.”<sup>28</sup> Third, there must be evidence that support for the project will not delay the “transition to renewables, where the development of renewables would be an available and affordable option.”<sup>29</sup> Furthermore, the project must use “best practices in environmental and social standards,” including the use “of carbon capture and storage

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<sup>21</sup> The Guidelines, at pg. 1.

<sup>22</sup> The Guidelines, at pg. 2.

<sup>23</sup> The Guidelines, at pg. 3.

<sup>24</sup> The Guidelines, at pg. 3.

<sup>25</sup> The Guidelines, at pgs. 2,7.

<sup>26</sup> The Guidelines, at pg. 5.

<sup>27</sup> The Guidelines, at pg. 5.

<sup>28</sup> The Guidelines, at pg. 5.

<sup>29</sup> The Guidelines, at pg. 5.



technologies.”<sup>30</sup> Lastly, the project must be “coherent with the...long-term decarbonization pathway to net-zero by 2050, in line with the Paris Agreement.”<sup>31</sup> Added to the above, there are further criteria for natural gas power projects, which might only be supported if there are no other “viable renewable alternative to the project,” and if they “demonstrably displace a higher-emitting fossil fuel energy source.”<sup>32</sup>

Added to this, the Guidelines also delineate limitations on the kind of advocacy and technical assistance that Canadian authorities may offer to the international oil and gas sector.<sup>33</sup> Finally, the Guidelines create two wide-open exceptions to the prohibition on direct public support on the grounds of: national security; and humanitarian and emergency responses.<sup>34</sup> Notably, the due diligence criteria set out above do not apply to these exceptions.

The federal government has committed to updating the Guidelines “as necessary, to validate their performance against the goals of the Glasgow Statement” and to address challenges including “Canada’s evolving international commitments,” “advancements in available science and technology,” and “coherence with Canada’s other climate commitments and policies.”<sup>35</sup> All of these features of the Guidelines are codified in the model regulation in the Appendix.

## EDC’s Initial Response to the Guidelines

On December 8, 2022, EDC issued a statement confirming its support for the Guidelines. In this statement, EDC declared that it is “on track to no longer provide new direct financing to international fossil fuel companies and international projects as of January 1, 2023.”<sup>36</sup> Furthermore, the EDC stated that it would “ensure implementation in line with this new technical guidance” and that the corporation has already taken several steps to reduce its “new direct financing to international fossil fuel companies,” with a decrease in new direct financing of the sector from \$2.7 billion in 2018 to \$395 million as of June 2022.<sup>37</sup> Finally, EDC committed to providing updates on the implementation of the Glasgow Statement in the next publication of its annual report in Spring 2023.<sup>38</sup>

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<sup>30</sup> The Guidelines, at pg. 5.

<sup>31</sup> The Guidelines, at pg. 5.

<sup>32</sup> The Guidelines, at pg. 6.

<sup>33</sup> The Guidelines, at pg. 6.

<sup>34</sup> The Guidelines, at pgs. 6-7.

<sup>35</sup> The Guidelines, at pg. 4.

<sup>36</sup> *Export Development Canada*, “EDC supports Canada’s Glasgow statement guidelines” (December 8, 2022), News Release, online: <<https://www.edc.ca/en/about-us/newsroom/edc-international-fossil-fuel-reduction.html>>.

<sup>37</sup> *Export Development Canada*, “EDC supports Canada’s Glasgow statement guidelines” (December 8, 2022), News Release, online: <<https://www.edc.ca/en/about-us/newsroom/edc-international-fossil-fuel-reduction.html>>.

<sup>38</sup> *Export Development Canada*, “EDC supports Canada’s Glasgow statement guidelines” (December 8, 2022), News Release, online: <<https://www.edc.ca/en/about-us/newsroom/edc-international-fossil-fuel-reduction.html>>.

### III. RATIONALE FOR THE CODIFICATION OF THE GUIDELINES THROUGH AN EDC REGULATION

While the Guidelines described above are a step forward, they are not binding on any public entities, including EDC, and they do not specify how compliance will be monitored and enforced. The creation of a regulation under the *EDA* that codifies the Guidelines for EDC could help to address these major weaknesses. Arguably, the complexity of the Guidelines further justifies codification as this would help to enhance their substantive and procedural clarity and the likelihood that they will be followed. In this section, we explain why this approach appears to be the most practical, strategic and effective among the available options. In sum, the proposed regulation would: apply to Canada's largest public fossil fuel financier, EDC; be binding on EDC and the government; be relatively politically feasible; fit well within the regulatory authority already recognized in the *EDA*; and allow for accountability mechanisms to ensure EDC's compliance.

#### Comprehensive vs Focused Law Reform Strategies

Canada's Glasgow commitments and Guidelines apply broadly to all direct public finance originating in Canada. As such, one alternative to a singular focus on EDC would be to pursue the passage of federal legislation that applies to all Crown entities, with concomitant amendments to the statutes that govern these entities. Notably, an ambitious bill along these lines, but that goes well beyond Canada's Glasgow commitments, is already before the Senate. In March 2022, Bill S-243, the *Enacting Climate Commitments Act*, underwent its first reading.<sup>39</sup> The Bill puts forward a comprehensive framework that aims to bring large parts of the Canadian financial system in line with Canada's climate commitments. The Act would apply to the Bank of Canada, federal Crown corporations, federal pension plans, and private sector entities that fall under the federal government's legislative jurisdiction.

As such, the Bill contemplates amendments to the *EDA*, including mandating EDC to consider whether a project is likely to have a negative climate change impact or adverse environmental effects before approving it.<sup>40</sup> Furthermore, the proposed Act would prohibit EDC's board of directors from issuing directives to allow entities to take on projects that are not aligned with Canada's climate commitments, and would require EDC to revise past directives to mitigate negative climate impacts.<sup>41</sup> Notably, these provisions are fairly broad. In contrast, law reform focused singularly on EDC would allow for detailed regulations with respect to prohibitions,

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<sup>39</sup> Note: At the time of writing, the Bill is currently amid its second reading at the Senate: LEGISinfo, "S-243 An Act to enact the climate-aligned finance act and to make related amendments to other Acts," online: <<https://www.parl.ca/legisinfo/en/bill/44-1/s-243>>.

<sup>40</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, Part 2, s. 5(1).

<sup>41</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, Part 2, s. 5(2).

exemptions, reporting and accountability provisions that are tailored to the nature of the corporation and its specific governing statutory framework.

Given Bill S-243's broad scope, it is likely to face significant political resistance, and its passage will require a great deal of political resources and political will. As such, while it is an extremely important initiative, it is fair to say that advocates cannot presume that it will pass into law as drafted. As such, it remains strategically important to advocate for an EDC-specific regulation, especially given that the two strategies are compatible in principle. There may also be some strategic benefits of a singular focus on EDC through the creation of a regulation in connection with the *EDA*. It will likely encounter relatively less political resistance as the political decision-maker would be limited to Cabinet, and the proposal would involve a single Crown corporation. Added to this, it is strategic to focus on the codification the Guidelines as these are commitments that the Canadian government has already articulated and endorsed. The benefits of a focus on EDC could be considerable because, as noted previously, EDC's historic financing of fossil fuel activity significantly exceeds that of other Crown entities, especially in the international sector. At the same time, regulations specifically tailored to other Crown entities could be modeled on a proposed EDC regulation. We explore this possibility in relation to three other Crown corporations in Part VI of this report.

## ***EDA* Statutory Amendments vs Regulations**

In developing the proposed model regulations to the *EDA*, we considered the possibility of amendments to the *EDA* itself, either instead of, or in combination with, new regulations. While both are binding instruments of law, amendments to the *EDA* would require the passage of a bill in the House of Commons, while regulations require endorsement from Cabinet.<sup>42</sup> Thus, it is important to note that while regulations are relatively easier to pass, it is also easier for a subsequent government to repeal or weaken them.

From a technical legal perspective, a regulation is arguably the most appropriate tool for the codification of the Guidelines as they pertain to EDC. This is because the *EDA* establishes a regulatory power which closely reflects many of the forms of public support covered in the Guidelines. Specifically, subsection 10(5) of the *EDA* provides that EDC must comply with conditions of general application that the Minister of Finance prescribes.<sup>43</sup> In this regard, subsection 10(6) empowers the Minister of International Trade, Export Promotion, Small Business and Economic Development ("Minister of International Trade") and the Minister of Finance to recommend that Cabinet make regulations governing certain EDC activities.<sup>44</sup> These activities are described in the remainder of subsection 10(6), and paragraphs 10(6)(c)-(f) all reflect EDC

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<sup>42</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 176, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>43</sup> *Export Development Act*, RSC 1985 c E-20, s. 10(5).

<sup>44</sup> *Export Development Act*, RSC 1985 c E-20, s. 10(6).

transactions that are already covered by the Guidelines. As such, these paragraphs of the *EDA* provide Cabinet with a clear legal basis for codifying the Guidelines as regulations as they pertain to EDC.

At the same time, regulations made pursuant to section 10 can draw on Cabinet's oversight power and reporting obligations, already established in the *EDA*, to create a more effective and transparent system of accountability for EDC compliance with the commitments set out in the Guidelines. For example, the *EDA* allows for regulations that specify certain EDC transactions that would require the approval of some combination of the Governor in Council, the Minister of International Trade, and the Minister of Finance.<sup>45</sup> In Part V of this report, we describe how we approached this issue in our model regulations.

## IV. THE PROCESS FOR CREATING EDC-RELATED REGULATIONS

The process for making federal regulations is governed by the *Statutory Instruments Act* and the *Regulatory Policy*.<sup>46</sup> The *Statutory Instruments Act* ensures that the process has a legally secure foundation, and that the regulation is accessible via the *Canada Gazette*. The *Regulatory Policy* establishes requirements for conducting a Regulatory Impact Analysis to ensure that a regulation serves a public purpose.<sup>47</sup>

### The Process of Drafting a Federal Regulation

Three legal requirements must be met to create a federal regulation: 1) legal examination, 2) registration, and 3) publication in the *Canada Gazette*.<sup>48</sup> First, relevant government bodies analyze possible regulatory proposals and engage with stakeholders to determine different policy

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<sup>45</sup> *Export Development Act*, RSC 1985 c E-20, s.10(7): "For greater certainty, the regulations made pursuant to subsection (6) may specify that certain transactions or classes of transactions of the Corporation require the approval of the Minister, the Minister jointly with the Minister of Finance, or the Governor in Council and, where so specified, the Minister, the Minister jointly with the Minister of Finance, or the Governor in Council is authorized to give that approval."

<sup>46</sup> *Statutory Instruments Act*, RSC 1985 c S-22; Treasury Board of Canada Secretariat, "Policy on regulatory development" (2018), online: *Government of Canada* <<https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-development.html>>.

<sup>47</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 175, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>48</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 177, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

avenues.<sup>49</sup> After this consultation stage, draft regulations are developed by the Department of Justice on the basis of written instructions provided by the relevant authority. As stated, for the purposes of regulations under the *EDA*, the Minister of International Trade and the Minister of Finance are the relevant authorities as they are the decision-makers with the delegated authority to recommend regulations under this statute.<sup>50</sup>

Once the regulations are drafted, the Treasury Board reviews and approves the draft regulations for publication.<sup>51</sup> This approved draft is published in the *Canada Gazette, Part I*.<sup>52</sup> Once published, Canadians are provided with the opportunity to make comments for consideration before the draft regulations are finalized. Finally, the Governor in Council reviews and approves a final version of the regulations to be published in the *Canada Gazette, Part II*, and they come into force as prescribed in the regulations themselves.<sup>53</sup>

## Creating a Regulatory Impact Analysis Statement

As stated, the development of a regulatory proposal involves an analysis of the expected impact of the regulatory initiative. The results of this analysis are synthesized into a comprehensive document, called a Regulatory Impact Analysis Statement (“RIAS”).<sup>54</sup> Section 7.2.1 of the *Regulatory Policy* states that regulators must complete a RIAS.<sup>55</sup> The RIAS is a document that can

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<sup>49</sup> “Infographic: How new laws and regulations are created” (21 July 2021), online: Government of Canada <<https://www.justice.gc.ca/eng/laws-lois/infograph.html>>.

<sup>50</sup> *Export Development Act*, RSC 1985 c E-20, s. 10(6); “Organization profile Export development Canada” (14 January 2023), online: Government of Canada <<https://federal-organizations.canada.ca/profil.php?OrgID=EDC&lang=en>>; The Honourable Mary Ng is the current Minister of International Trade, Export Promotion, Small Business and Economic Development: “Global Affairs Canada” (2023), online: Government of Canada <<https://www.international.gc.ca/global-affairs-affaires-mondiales/home-accueil.aspx?lang=eng>>; The Honourable Chrystia Freeland is the current Minister of Finance: “Department of Finance Canada” (2023), online: Government of Canada <<https://www.canada.ca/en/department-finance.html>>.

<sup>51</sup> Note: The Treasury Board conducts this review only for Governor in Council regulations. This is the case for regulations made under the *EDA*: “Infographic: How new laws and regulations are created” (21 July 2021), online: Government of Canada <<https://www.justice.gc.ca/eng/laws-lois/infograph.html>>.

<sup>52</sup> “Infographic: How new laws and regulations are created” (21 July 2021), online: Government of Canada <<https://www.justice.gc.ca/eng/laws-lois/infograph.html>>.

<sup>53</sup> Note: The regulations are made once the Governor in Council signs the regulation’s Order in Council: “Infographic: How new laws and regulations are created” (21 July 2021), online: Government of Canada <<https://www.justice.gc.ca/eng/laws-lois/infograph.html>>.

<sup>54</sup> Department of Justice Canada, “Guide to Making Federal Acts and Regulations 2nd Edition” (2001), at pg. 182, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>55</sup> Treasury Board of Canada Secretariat, “Policy on regulatory development” (2018), at s. 7.2.1, online: Government of Canada <<https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-development.html>>.

hold the federal government publicly accountable for its use of delegated authority to make laws.<sup>56</sup>

The RIAS explains the elements of the regulatory proposal, including what problems the regulation will address and its desired effect.<sup>57</sup> The RIAS additionally explains the alternatives to regulation that have been considered, as well as the anticipated benefits and the potential costs of the regulation.<sup>58</sup> A RIAS describes the consultations conducted with those impacted by the proposed regulation, the opportunities that affected Canadians have had to be heard, as well as the response of the department or agency to the suggestions made during these consultations. Lastly, a RIAS includes an analysis of the relevant regulatory compliance mechanisms, as well as mechanisms to measure the effectiveness of the regulation.<sup>59</sup> It is possible that some of the steps required in the RIAS, such as consultation, may have already been partially satisfied when the Guidelines were drafted.

## **Creating Glasgow-Related Regulations under the *Export Development Act***

As previously explained, subsection 10(6) of the *EDA* empowers the Governor in Council, on the recommendation of the Minister of International Trade and the Minister of Finance, to make regulations governing certain EDC activities.<sup>60</sup> Thus, the recommendation must come from both ministers, and the decision is ultimately that of the federal Cabinet.

With the exception of paragraph 10(6)(b), which is limited to domestic financing, the regulations contemplated in subsection 10(6) may pertain to a wide range of EDC's actions on the international stage.<sup>61</sup> For example, regulations can address EDC's decision to extend credit to an entity, or to provide insurance, indemnity, or a guarantee to an entity, in order to assist them to secure financing.<sup>62</sup> Regulations may also be drafted to govern the acquisition by EDC of "any interest...in any entity" other than a security interest.<sup>63</sup> Finally, regulations can pertain to EDC's provision of consulting services and the disposal/sale of property.<sup>64</sup> As stated previously, the

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<sup>56</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 182-183, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>57</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 182-183, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>58</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 182-183, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>59</sup> Department of Justice Canada, "Guide to Making Federal Acts and Regulations 2nd Edition" (2001), at pg. 182-183, online: <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>>.

<sup>60</sup> *Export Development Act*, RSC 1985 c E-20, s.10(6): "The Governor in Council may, on the recommendation of the Minister and the Minister of Finance, make regulations..."

<sup>61</sup> *Export Development Act*, RSC 1985 c E-20, s.10(6)(a)(c)(d)(e)(f).

<sup>62</sup> Note: excluding security interest: *Export Development Act*, RSC 1985 c E-20, s.10(6)(c)(d).

<sup>63</sup> *Export Development Act*, RSC 1985 c E-20, s.10(6)(f).

<sup>64</sup> *Export Development Act*, RSC 1985 c E-20, s.10(6)(a)(e).



regulations may specify that certain EDC transactions require approval of some combination of the Governor in Council, the Minister of International Trade, and the Minister of Finance.<sup>65</sup>

## V. EXPLANATORY NOTES FOR THE MODEL EDC GLASGOW REGULATIONS

### Methodology

To develop an understanding of how the Glasgow Guidelines might be codified as a regulation in relation to EDC, we reviewed a range of sources, including civil society reports, government reports, past legal memos, as well as relevant federal legislation and policies.<sup>66</sup> We also took inspiration and some definitions from a selection of other sources, including the proposed *Enacting Climate Commitments Act* and the *Climate-Aligned Finance Act*.<sup>67</sup> In the drafting process, we attempted to reflect the substantive and procedural rules established in the Guidelines as closely as possible and to organize them in a concise, logical and internally coherent manner that also aligns with the EDC governance framework set out in the *EDA*.

### Domestic Applications

As has been noted, Canada's Glasgow Guidelines are limited to international fossil fuel projects. However, as previously noted, the federal government has signaled that it intends to end public finance of domestic fossil fuel projects in the future. As such, we have included an optional domestic application in the model regulation where we draw on a range of sources to define the term "*Direct domestic support*."

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<sup>65</sup> *Export Development Act*, RSC 1985 c E-20, s.10(7): "For greater certainty, the regulations made pursuant to subsection (6) may specify that certain transactions or classes of transactions of the Corporation require the approval of the Minister, the Minister jointly with the Minister of Finance, or the Governor in Council and, where so specified, the Minister, the Minister jointly with the Minister of Finance, or the Governor in Council is authorized to give that approval."

<sup>66</sup> *Export Development Act*, RSC 1985 c E-20; *Statutory Instruments Act*, RSC 1985 c S-22; Treasury Board of Canada Secretariat, "Cabinet directive on regulation" (1 September 2018), online: Government of Canada <<https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html>>.

<sup>67</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021. Note that Part 1 of this Bill is called the *Climate-Aligned Finance Act*. For this reason, we refer to both proposed Acts throughout this report, while recognizing that they are part of the same Bill.

## Non-Financial Support in the Guidelines

As mentioned, the Guidelines refer to two forms of public support that are not directly related to financial support: advocacy and technical assistance.<sup>68</sup> We considered these topics as follows:

### ADVOCACY SUPPORT

The Guidelines state that “advocacy will be provided to Canadian entities participating in operations abroad, as a direct function of these operations being scoped out or exempted from these Guidelines.”<sup>69</sup> In other words, if a fossil fuel activity is exempted from the Guidelines, and therefore eligible for EDC support, it will also benefit from advocacy support from the Canadian foreign service. However, advocacy support for companies is not, to our knowledge, part of EDC’s mandate. For this reason, we did not include this component of the Guidelines in the model regulation. However, it appears that in order to be eligible for diplomacy support or advocacy with respect to their overseas operations, Canadian energy companies must be engaged in a project that complies with the Guidelines. The implications of this new rule for Canadian economic diplomacy likely warrant further analysis to determine how civil society groups might ensure that it is followed.

### TECHNICAL ASSISTANCE SUPPORT

The Guidelines state that technical assistance may be provided to other countries and entities that can benefit from Canadian expertise across the energy sector with respect to decarbonization and mitigation technologies, fossil fuel industry regulation, and adoption of best practices for carbon pricing, data consistency and transparency.<sup>70</sup> In our understanding, EDC is captured by this rule as it may from time to time provide some form of technical assistance to companies. We determined that this rule most appropriately fits in the application portion of the regulations (section 4) because it refers to the kind of supports that might be offered by EDC in accordance with the Guidelines.

## Definitions and Sources in the Model Regulation

Unfortunately, the Guidelines do not include definitions of all key terms. As such, some portions of the model regulation incorporate definitions from other sources. These sources include the proposed *Climate Aligned Finance Act*, the *EDA*, Public Safety Canada, the International Energy

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<sup>68</sup> See The Guidelines, at pg. 6.

<sup>69</sup> The Guidelines, at pg. 7.

<sup>70</sup> The Guidelines, at pg. 7.

Agency, the Humanitarian Coalition, and the United Nations. Wherever we rely on these alternative sources, they are cited in a footnote in the model regulation.

Some of the language regarding reporting and accountability in the model regulation is taken from the proposed *Climate Aligned Finance Act*, as the Guidelines themselves contain no guidance on this issue. While subsection 11(1) of the *EDA* establishes the Minister’s reporting responsibilities to Parliament, these are limited to the authorized capital of the corporation. As such, the approach taken in the proposed *Enacting Climate Commitments Act*, which aims to ensure reporting on any direct funding of fossil fuel projects, was very helpful.

This table summarizes the terms that we defined by drawing from other sources because they were not adequately defined in the Guidelines.

Term in the Model Regulation	Definition Source
<i>Carbon capture utilization and storage (CCS/CCUS)</i>	The International Energy Agency <sup>71</sup>
<i>Clean or Renewable Energy Source</i>	Bill C-318, <i>National Renewable Energy Strategy Act</i> <sup>72</sup>
<i>Direct public support</i>	Subsection 10(6) of the <i>Export Development Act</i> <sup>73</sup>
<i>Humanitarian and emergency responses</i>	The Humanitarian Coalition <sup>74</sup>
<i>National Security</i>	Public Safety Canada <sup>75</sup> <i>Canadian Security Intelligence Service Act</i> (alternative option) <sup>76</sup>
<i>Nationally Determined Contribution (NDC)</i>	United Nations <sup>77</sup>

More work must be done to clarify many key terms in the model regulation, and/or to develop standards that are higher than those set out in the Guidelines. For example, there are a number of terms and concepts in subsection 6(2) of the model regulations that reflect the due diligence steps described in the Guidelines, but that are not defined. These include: stranded asset and carbon lock-in risks; a credible alternative analysis; best practices in environmental and social standards;

<sup>71</sup> International Energy Agency, “Carbon capture, utilisation and storage,” online: <<https://www.iea.org/fuels-and-technologies/carbon-capture-utilisation-and-storage>>.

<sup>72</sup> *National Renewable Energy Strategy Act*, Bill C-318 (21 June 2021), 2<sup>nd</sup> sess 43<sup>rd</sup> parl, 2021, s.2 Definitions.

<sup>73</sup> *Export Development Act*, RSC 1985 c E-20, at s.10(6).

<sup>74</sup> “What is a humanitarian emergency?” online: Humanitarian Coalition <<https://www.humanitariancoalition.ca/what-is-a-humanitarian-emergency>>. Note: Other Canadian Acts were reviewed to find a definition including the *Immigration and Refugee Protection Act*, SC 2001 c 27, and the *Emergencies Act*, RSC 1985 c 22 4<sup>th</sup> supp. However, these Acts did not provide such a definition.

<sup>75</sup> Public Safety Canada, “National security” (10 March 2023), online: Government of Canada <<https://www.publicsafety.gc.ca/cnt/ntnl-scrpt/index-en.aspx>>. Note: Other Canadian Acts were reviewed to find a definition including the *Royal Canadian Mounted Police Act*, RSC 1985 c R-10, the *National Security Act*, SC 2019 c 13, and the *National Defence Act*, RSC 1985 c N-5. However, these Acts did not provide such a definition.

<sup>76</sup> *Canadian Security Intelligence Service Act*, RSC 1985, c 23, s 2.

<sup>77</sup> United Nations, “Climate Action: All about the NDCs,” online: <<https://www.un.org/en/climatechange/all-about-ndcs#:~:text=NDCs%20are%20where%20countries%20set,for%20adapting%20to%20climate%20impacts>>.

and proving that EDC's support will not delay or diminish the transition to renewables, where the development of renewables would be an available and affordable option.<sup>78</sup>

The lack of clarity in the definition of these key terms is concerning because they establish the criteria for determining whether or not a fossil fuel project is exempted from the Guidelines and therefore meritorious of public support. Added to this, it is clear that EDC does not have the expertise to properly interpret and administer these complex exemptions, which engage technical environmental matters that go well beyond EDC's traditional finance expertise. For this reason, the model regulation requires the Ministry of Environment to assist EDC by creating guidelines for the interpretation of these terms and exemptions.

Also of note, the model regulations adopt the language of subsection 10(6) of the *EDA* to define the scope of "direct support." As explained previously, it is necessary to refer to this section of the *EDA* in this regard because it informs the scope of Cabinet's power to enact regulations with respect to EDC. However, since 10(6) does not specifically define "direct support," it is worth noting two alternative definitions which may be used as a supplement to further clarify the language in subsection 10(6).

First, EDC's Environmental and Social Review Directive uses the term "financing transaction," defined as:

"financing transaction" means a loan, any facility whereby EDC purchases receivables whether or not such receivables are evidenced by debt instruments, any lease or any financing guarantee entered into by EDC pursuant to EDC's financing program.<sup>79</sup>

Second, the proposed *Enacting Climate Commitments Act*, uses the term "financially facilitate," defined as:

financially facilitate means to provide any assistance or services of any financial value, including

- (a) funds or funding of any kind, including debt and equity financing;
- (b) project or general corporate financing of any kind;
- (c) loans, loan guarantees, insurance or credit protection of any kind;
- (d) the issuance, purchase, transfer, securitization, arrangement, underwriting, syndication, sale or any other transaction of any security or derivative instrument; and
- (e) off-balance-sheet activities; and
- (f) the provision of any advisory, consulting or management services. (faciliter financièrement).<sup>80</sup>

The proposed *Enacting Climate Commitments Act* also has alternative definitions of "fossil fuel power generation projects" and "fossil fuel activity" which may be used in the model EDC

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<sup>78</sup> The Guidelines, at pg. 5.

<sup>79</sup> Export Development Canada, *Environmental and Social Review Directive* (Ottawa: Export Development Canada, 2022) at pg. 11.

<sup>80</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1st sess 44th parl, 2021, s. 2.

regulations in place of the definitions put forward in the Guidelines. For example, the definition of “fossil fuel activity” in the proposed Act is:

fossil fuel activity means any activity involved in the fossil fuel supply or demand chain, including

- (a) exploring for or extracting, producing, exploiting, transporting, storing, exporting, refining or retailing oil, gas or coal; and
- (b) the combustion of oil, gas or coal for energy generation in a power plant. (activité liée aux combustibles fossiles)”<sup>81</sup>

These are just some of the points of discussion that could be pursued to strengthen and clarify the model regulation beyond the baseline language used the Guidelines.

## Reporting on Exempted Projects

To ensure accountability and public oversight of EDC’s compliance with the Guidelines, EDC must be required to fully disclose the fossil fuel activities that it chooses to support in accordance with the exemptions. Unfortunately, neither the Guidelines nor the *EDA* contain provisions for project-specific reporting on the part of EDC. The only reporting requirement in the *EDA* appears in subsection 25(1) which requires a review every 10 years of the Act itself.<sup>82</sup> To facilitate civil society involvement and public scrutiny, we included two forms of mandatory reporting in the model regulation. The first would require EDC to give notice of its intention to provide support to an exempted project, the second requires disclosure of the exempted projects that are ultimately supported.

The model regulation’s reporting and notice requirements drew inspiration from similar provisions that appear in two related sources. First, the proposed *Enacting Climate Commitments Act*, currently under Senate review, contains certain transparency and disclosure requirements.<sup>83</sup> Second, there appears to be an established “common approaches” agreement between OECD countries whereby member countries have agreed that their export credit agencies will report on any financial support provided to projects with significant environmental impacts, such as fossil fuel production.<sup>84</sup>

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<sup>81</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1st sess 44th parl, 2021, s. 2

<sup>82</sup> *Export Development Act*, RSC 1985 c E-20, s. 25.

<sup>83</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1st sess 44th parl, 2021, Part 2: Reporting: ss. 5(1), 7(1).

<sup>84</sup> Organization for Economic Cooperation and Development, *Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (OECD 2022) at s. 39.

## VI. APPLYING THE MODEL REGULATION TO OTHER CROWN CORPORATIONS

As stated above, the *Guidelines for Canada's International Support for the Clean Energy Transition* include all federal Crown corporations. For this reason, in principle, regulations tailored to other Crown corporations could be modeled on the proposed EDC regulation. In analyzing the viability of this strategy, there are two central questions that must be answered:

First, does the Crown corporation have a mandate that could include support for fossil fuel activities, and if so, is this form of support captured by the Glasgow Guidelines?

Second, does the corporation's governing statute contain a regulation-making power that would allow lawmakers to regulate the corporation in alignment with the Guidelines?

In this section, we analyze these two questions in relation to three Crown corporations (beyond EDC) that have publicly disclosed the fact that they provide support to fossil fuel projects: the Canada Development Investment Corporation (CDEV), the Business Development Bank of Canada (BDC), and the Sustainable Development Technology Canada (SDTC).

Another Crown corporation, the Canada Infrastructure Bank appears to support some fossil fuel activities, but opportunities for investments appear to be limited to CCUS and hydrogen technologies.<sup>85</sup> While there are problems with using CCS/CCUS and hydrogen technologies as a substitute for reducing carbon emissions, the *Guidelines for Canada's International Support for the Clean Energy Transition* notes that the Government of Canada may provide support for the fossil fuel energy sector where a project falls within one of 12 defined exemptions (several of which involve CCS/CCUS and/or hydrogen technologies).<sup>86</sup> The Canada Infrastructure Bank's investments therefore appear to be aligned with Canada's Guidelines and exceed the scope of this project.

The Bank of Canada, a fifth Crown corporation, does not appear to support fossil fuel projects.

### CANADA DEVELOPMENT INVESTMENT CORPORATION

CDEV is a holding company, owned by the Crown, for major assets, including two very large fossil fuel projects located in Canada: the Trans Mountain pipeline and the Hibernia Project, which is an oil development and production project located offshore Newfoundland and Labrador.<sup>87</sup> CDEV's

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<sup>85</sup> See: Canada Infrastructure Bank, "Priority Sectors", online: <https://cib-bic.ca/en/sectors/priority-sectors/>; See also: Canada Infrastructure Bank, "Green Infrastructure", online: <https://cib-bic.ca/en/sectors/priority-sectors/>.

<sup>86</sup> The Guidelines, at pp 6-8.

<sup>87</sup> Canada Development Investment Corporation, "Our Assets," online: <https://cdev.gc.ca/our-assets/>.



board of directors are appointed under the *Financial Administration Act*, and it reports to Parliament through the minister responsible, being the Minister of Finance.<sup>88</sup>

Unlike other Crown corporations, CDEV does not have a dedicated governing statute. Rather, it is incorporated under the *Canada Business Corporations Act*.<sup>89</sup> Pursuant to subsection 261(1), the Governor in Council may make regulations with prescriptions or definitions further to the provisions in the Act.<sup>90</sup> Following a review of the regulatory power in this subsection, it does appear to include the power to create regulations similar to the model EDC regulations. In other words, it does not appear that the Governor in Council has the authority to create regulations under subsection 261(2) that would bind CDEV to abide by the Glasgow Guidelines with respect to its domestic investments.

In light of all of the above, any imposition of the Glasgow Guidelines on CDEV is likely in the purview of the Minister of Finance, as the responsible authority. However, it is not clear that there is an external legal instrument by which the Minister might create binding obligations of this nature on CDEV. One alternative option may be to amend CDEV's internal corporate governing documents, such as its bylaws. However, more research is required to determine the viability of this option.

## BUSINESS DEVELOPMENT BANK OF CANADA

BDC's mandate is to support domestic companies, but it may also support persons engaged in enterprises outside of Canada, or it may invest directly in projects located abroad.<sup>91</sup> According to its website, BDC provides financing and advisory services to oil and gas companies.<sup>92</sup> However, client information and transaction details are not disclosed online, rather, to acquire such information one must submit an access to information request or go to the reading room in their Montreal office.<sup>93</sup>

BDC is governed by the *Business Development Bank of Canada Act*. Subsection 40(b) establishes the power of the Governor in Council to make regulations prescribing anything that is prescribed by the Act.<sup>94</sup> In this regard, the Act contains extensive provisions prescribing the financial and managements services that BDC may provide, and in some cases, it explicitly refers to regulation-making power with respect to these services. For example, paragraph 14(1)(c) states that

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<sup>88</sup> Canada Development Investment Corporation, "Organization Profile" (January 2023), online: *Government of Canada* <<https://federal-organizations.canada.ca/profil.php?OrgID=CDEV&lang=en#>>.

<sup>89</sup> Canada Development Investment Corporation, "Organization Profile" (January 2023), online: *Government of Canada* <<https://federal-organizations.canada.ca/profil.php?OrgID=CDEV&lang=en#>>.

<sup>90</sup> *Canada Business Corporations Act*, RSC 1985 c 44, s. 261(1)(a).

<sup>91</sup> *Canada Business Corporations Act*, RSC 1985 c 44, ss. 14(5) and 14(6).

<sup>92</sup> Business Development Bank of Canada, "Oil and gas Solutions for SMEs operating in the energy sector" online: <<https://www.bdc.ca/en/industries/oil-gas>>.

<sup>93</sup> Business Development Bank of Canada, "Transparency" online: <<https://www.bdc.ca/en/transparency/infosource>>.

<sup>94</sup> *Business Development Bank of Canada Act*, SC 1985 c 28, s. 40(b).

regulations may prescribe the categories of transactions that BDC may consider when extending credit, and paragraph 14(5)(b) requires that BDC investments made in enterprises occurring outside of Canada fall into a category prescribed by regulations.<sup>95</sup> As a result, it appears plausible that the Glasgow Guideline could be codified and adopted as a regulation for BDC in a way that is very similar to what we have proposed for EDC.

## SUSTAINABLE DEVELOPMENT TECHNOLOGY CANADA

SDTC, officially the Canada Foundation for Sustainable Development Technology, discloses information about the projects it funds online with a relatively up-to-date list of transactions including company names and financial amounts.<sup>96</sup> The transactions are categorized into eight sectors, including a sector called Energy Exploration & Production. While the transactions listed in this category appear to include support for numerous endeavours related to the fossil fuel industry, there are no fossil fuel projects listed after 2021. According to the *Canada Foundation for Sustainable Development Technology Act*, Foundation-supported projects must be carried on “primarily in Canada.”<sup>97</sup> As such, there is at least a theoretical possibility that SDTC could support a fossil fuel related project with an international component that would be captured by the Glasgow Guidelines in their current formulation.

While SDTC is governed by the aforementioned Act, the Act does not provide for any regulatory power on the part of the responsible minister. However, in subsection 3(1), the Act establishes that the SDTC is in fact a corporation without share capital, governed in part by the *Canada Business Corporations Act*. Subsection 3(7) also refers to the existence of corporate bylaws that govern SDTC. As such, in order to ensure that the Glasgow Guidelines are binding on SDTC, the best avenue is likely through changes to its corporate bylaws in accordance with the applicable legislation.

## Recommendations

This brief review of three Crown corporations (beyond EDC) suggests that it may be strategic and viable to duplicate the model Glasgow regulations developed for EDC and modify them to apply to the Business Development Bank of Canada. The BDC provides services and supports to fossil fuel activities and has a mandate to invest in companies carrying on business outside of Canada. As such, the Glasgow Guidelines in their current form apply directly to BDC and, just as with EDC, there is a strong case for their codification as regulations.

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<sup>95</sup> *Business Development Bank of Canada Act*, SC 1985 c 28, ss. 14(1)(c), 14(5)(b).

<sup>96</sup> Sustainable Development Technology Canada, “Transparency” online: <https://www.sdtc.ca/en/about/accountability/>.

<sup>97</sup> *Canada Foundation for Sustainable Development Technology Act*, SC 2001 c 23, s. 2, definition of “eligible project.”

The other two corporations reviewed, SDTC and CDEV, are not candidates for the development of Glasgow-related regulations for two reasons. First, their Acts contain no regulatory power, rather they are governed by corporate bylaws. Second, both corporations appear to finance activities primarily or exclusively in Canada, and as such, the Glasgow Guidelines in their current form do not apply. However, if the Government of Canada follows through on its promise to develop a plan to phase out domestic public financing for the fossil fuel sector, then changes to these two corporations' bylaws could be a strategic route for imbuing any future domestic-facing guidelines with the force of law for each company.

## APPENDIX: MODEL GLASGOW REGULATION FOR EDC

*Note:* We have applied yellow highlight to those provisions of the model regulation that are specifically tailored to EDC and its governing Act, and that would therefore require some modification if the model regulation is applied to another Crown corporations. Those portions that are not highlighted in yellow are generic and reflective of the Glasgow Guidelines. Therefore, all unhighlighted provisions will likely require little to no modification when the model regulations are adapted to other entities.

***A Regulation applying the Guidelines for Canada's International Support for the Clean Energy Transition to Export Development Canada***  
SOR/\_\_\_\_

### EXPORT DEVELOPMENT ACT

A regulation to enact the *Guidelines for Canada's International Support for the Clean Energy Transition* to fulfill Export Development Canada's commitments to ending direct international public finance of fossil fuel activity.

#### **Short Title**

**1** These Regulations may be cited as the *Regulation Applying the Clean Energy Transition Guidelines to Export Development Canada*.

#### **Interpretation**

**2** In these Regulations,

**Act** means the *Export Development Act*.

**Carbon Capture Utilization and Storage (CCS/CCUS)** means the process of capturing carbon dioxide emissions from a smokestack or flue, and either using them to make commercial products (utilization) or permanently storing them thousands of feet underground (storage).<sup>98</sup>

**Clean or renewable energy source** means an energy source that can be naturally replenished or renewed within a human lifespan.<sup>99</sup>

**Corporation** means Export Development Canada.

**Direct international support** refers to financial (including commercial or concessional), advocacy, export finance, and any other direct financial or promotional support provided by the Corporation,<sup>100</sup> as well as those activities described in S.10(6)(c)-(f) of the Act, including projects that have the effect of:

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<sup>98</sup> International Energy Agency, "Carbon capture, utilisation and storage," online: <<https://www.iea.org/fuels-and-technologies/carbon-capture-utilisation-and-storage>>.

<sup>99</sup> National Renewable Energy Strategy Act, Bill C-318 (21 June 2021), 2<sup>nd</sup> sess 43<sup>rd</sup> parl, 2021, s.2 Definitions.

<sup>100</sup> The Guidelines, at pg. 3.

- (a) extending credit to a person in respect of the acquisition by that person of any interest, other than a security interest, in any entity;
- (b) providing to a person any insurance, indemnity or guarantee, in respect of the financing, by that person, of an acquisition by another person of any interest, other than a security interest, in any entity; or
- (c) the acquisition by the Corporation of any interest, other than a security interest or an interest resulting from the realization of a security interest, in any entity.

**Direct domestic support** (optional) refers to the entering into by the Corporation of arrangements described in S.10(6)(b)(i)(A)(B)(C) and S.10(6)(b)(ii) of the Act, including projects that:

- (a) have the effect of
  - (i) providing, to any person, any insurance, reinsurance, indemnity or guarantee;
  - (ii) extending credit to any person; or
  - (iii) providing an undertaking to pay money to any person; and
- (b) are made in respect of transactions not relating, directly or indirectly, to the carrying on of business or other activities outside Canada.

**Financing transaction (first alternative to “direct support” definition)** means:<sup>101</sup>

- (a) a loan;
- (b) any facility whereby EDC purchases receivables, whether or not such receivables are evidenced by debt instruments;
- (c) any lease or any financing guarantee entered into by EDC pursuant to EDC’s financing program.

**Financially facilitate (second alternative to “direct support” definition)** means to provide any assistance or services of any financial value, including:<sup>102</sup>

- (a) funds or funding of any kind, including debt and equity financing;
- (b) project or general corporate financing of any kind;
- (c) loans, loan guarantees, insurance or credit protection of any kind;
- (d) the issuance, purchase, transfer, securitization, arrangement, underwriting, syndication, sale or any other transaction of any security or derivative instrument;
- (e) off-balance-sheet activities; and
- (f) the provision of any advisory, consulting or management services.

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<sup>101</sup> Export Development Canada, *Environmental and Social Review Directive* (Ottawa: Export Development Canada, 2022) at pg. 10.

<sup>102</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, s. 2.

**Fossil fuel power generation projects** refers to:<sup>103</sup>

- (a) the extraction, production, transportation, refining and marketing of crude oil, natural gas or thermal coal;
- (b) any unabated fossil fuel power generation projects.

**Humanitarian and emergency responses** include activities that assist Canadians and non-Canadians after an event that affects vulnerable populations who are unable to withstand the negative consequences without assistance.<sup>104</sup>

**International** in the context of “international unabated fossil fuel energy sector” refers to operations outside of Canada’s jurisdiction in the fossil fuel energy sector regardless of owner domicile.<sup>105</sup>

**International Unabated Fossil Fuel Energy Sector** refers to the extraction, production, transportation, refining and marketing of crude oil, natural gas or thermal coal, as well as any unabated fossil fuel power generation projects.<sup>106</sup>

**National security** refers to activities which are directly concerned with the foreign relations of Canada, or protection and promotion of safety of Canadians from internal subversion, foreign aggression, or terrorism.<sup>107</sup>

**National security** (alternate option) refers to:<sup>108</sup>

- (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage;
- (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person;
- (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state; and
- (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

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<sup>103</sup> The Guidelines, at pg. 3.

<sup>104</sup> Humanitarian Coalition, “What is a humanitarian emergency?” online: <<https://www.humanitariancoalition.ca/what-is-a-humanitarian-emergency>>.

<sup>105</sup> The Guidelines, at pg. 3.

<sup>106</sup> The Guidelines, at pg. 3.

<sup>107</sup> Public Safety Canada, “National security” (10 March 2023), online: Government of Canada <<https://www.publicsafety.gc.ca/cnt/ntnl-scr/index-en.aspx>>.

<sup>108</sup> *Canadian Security Intelligence Service Act*, RSC 1985, c 23, s 2.



**NDC** refers to Canada's Nationally Determined Contribution (NDC) under the Paris Agreement. The NDC is Canada's climate action plan to cut emissions and adapt to climate impacts. Canada is required to update this plan every five years.<sup>109</sup>

**Unabated** refers to the absence of effective operational carbon capture and storage (CCS)/carbon capture, utilization and storage (CCUS) or equivalent technologies in the power generation sector.<sup>110</sup>

### Purpose

**3(1)** These regulations implement guidelines which respond to the *Statement on International Public Support for the Clean Energy Transition* ("The Glasgow Statement"). These regulations require the Corporation to align its activities with the goals of the Glasgow Statement, which calls on governments and public finance institutions to end direct public support for the international unabated fossil fuel energy sector by the end of 2022, except in limited and clearly defined circumstances that are consistent with the 1.5°C warming limit and the goals of the Paris Agreement.<sup>111</sup>

**(2)** These regulations govern any determinations made by the Corporation after January 1, 2023 regarding direct public support for international unabated fossil fuel energy projects.

### Application

**4(1)** As per the power conferred to the Governor in Council under subsection 10(6) of the *Act*, on or after January 1, 2023, the Corporation shall not provide any direct support to projects that fall within the scope of the "international unabated fossil fuel energy sector."<sup>112</sup>

**(2)** For greater clarity, subsection 4(1) does not apply to ongoing commitments made before January 1, 2023.<sup>113</sup>

**(3)** Notwithstanding subsection 4(1), the Corporation can provide technical assistance to countries and other entities that may benefit from Canadian expertise across the energy sector with respect to decarbonization and mitigation technologies (e.g., methane abatement in oil production), fossil fuel industry regulation, and sector adoption of best practices for carbon pricing, data consistency and transparency.

### Updates

**5(1)** The Minister of Finance must<sup>114</sup> update this regulation as necessary to:

- (a)** validate its performance against the Guidelines; and
- (b)** address potential implementation challenges, including but not limited to
  - (i)** Canada's evolving international commitments and policies;

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<sup>109</sup> United Nations, "Climate Action: All about the NDCs," online: <<https://www.un.org/en/climatechange/all-about-ndcs#:~:text=NDCs%20are%20where%20countries%20set,for%20adapting%20to%20climate%20impacts>>.

<sup>110</sup> The Guidelines, at pg. 3.

<sup>111</sup> The Guidelines, at pg. 3.

<sup>112</sup> The Guidelines, at pg. 3.

<sup>113</sup> The Guidelines, at pg. 3.

<sup>114</sup> The Guidelines, at pg. 4.

- (ii) advancements in available science and technology; and
- (iii) coherence with Canada's other climate commitments and policies, including Canada's G20 commitment to eliminate inefficient fossil fuel subsidies.<sup>115</sup>

### **Exemptions**

**6 (1)** The Corporation may provide direct support to projects otherwise prohibited by subsection 4(1) in certain limited and clearly defined circumstances, and if the project meets the criteria in subsections 6(2), (3) and (4), as applicable.

### **Due Diligence**

**(2)** In evaluating whether or not a project meets the criteria in subsection 6(5), the Corporation must undergo all of the following due diligence steps:<sup>116</sup>

- (a) rigorously assess and manage stranded asset and carbon lock-in risks;
- (b) conduct a credible alternative analysis;
- (c) prove that the support will not delay or diminish the transition to renewables, where the development of renewables would be an available and affordable option;
- (d) ensure that the project under consideration has best practices in environmental and social standards, including the integration of carbon capture and storage technologies and measures to abate negative environmental impacts, such as methane leakage; and
- (e) establish that the project will be coherent with the NDC and a 1.5°C pathway, and long-term decarbonization pathway, to net-zero by 2050 in line with the Paris Agreement, of the country where the project will be located.

**(3)** In evaluating whether or not a project meets the criteria in paragraphs 6(5)(f) and 6(5)(g), the Corporation must undergo the following additional steps in addition to the steps in subsection 6(2):

- (a) ensure that there is no viable renewable alternative to the project, both from a climate impact (emissions reduction) perspective and a cost perspective over the project lifetime; and
- (b) ensure that the project will demonstrably displace a higher-emitting fossil fuel energy source.

**(4)** In evaluating whether or not a project meets the criteria in paragraphs 6(5)(f) and 6(5)(g), if the role of natural gas is not already established in an NDC and a 2030 emissions reductions pathway aligned with 1.5°C, in addition to meeting subsections 6(2) and 6(3), the project must meet all of the following conditions:

- (a) contribute to domestic energy security in a developing country or in a country facing significant energy insecurity;

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<sup>115</sup> The Guidelines, at pg. 4.

<sup>116</sup> The Guidelines, at pg. 5.

**(b)** contribute to the UN Sustainable Development Goals, especially “to ensure access to affordable, reliable, sustainable and modern energy for all” and “to take urgent action to combat climate change and its impacts”; and

**(c)** contain a realistic transition plan to net-zero by 2050 that is aligned with a 1.5°C pathway.<sup>117</sup>

**(5)** The Corporation may provide direct support to the following projects provided they meet the criteria in subsection 6(2), (3) and (4) as applicable:<sup>118</sup>

**(a)** mitigation technologies in the power generation sector including power sector projects that abate emissions using CCS/CCUS;

**(b)** mitigation technologies in the power generation sector including projects that seek to decarbonize power generation primarily by other mitigation methods, insofar as the mitigation does not extend the facility life and has a transition plan to a clean energy source;

**(c)** mitigation technologies in the fossil fuel energy sector, including projects that seek to decarbonize existing facilities in the fossil fuel energy sector, insofar as the mitigation does not extend the facility life and there is a transition plan to a clean source;

**(d)** decommissioning existing fossil fuel energy assets or converting them to clean uses where these actions would lead to meaningful emissions reductions;

**(e)** other emissions mitigation projects including those that do not fall under (a) or (b) of this section;

**(f)** transitioning existing non-power infrastructure, including natural gas and related infrastructure projects beyond the power generation sector to be converted to use for other lower-emitting energy sources;

**(g)** natural gas power generation, including exceptional support for an unabated natural gas power generation project. Such support is exclusive of any related upstream, midstream, or downstream activities that are not power generation;

**(h)** production, distribution and use of low carbon intensity fuels including those that are produced with carbon abatement or mitigation; and

**(i)** cooking and temperature regulation in private homes, including standalone generators (and their fuel) and liquefied petroleum gas for cooking, cooling and heating, as well as for the use of natural gas and oil products for household temperature regulation and clean cooking projects.

**(6)** Any direct support for projects under subsection 6(5) must be approved on a case-by-case basis by the Minister of International Trade in consultation with the Minister of the Environment.

**(7)** Within six months of the passage of this regulation, the Minister will create Guidelines in consultation with Minister of the Environment to assist EDC in making its determinations under 6(2), 6(3) and 6(4) of this regulation.

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<sup>117</sup> The Guidelines, at pg. 6.

<sup>118</sup> The Guidelines, at pgs. 6-7.

## National Security and Humanitarian Response

**7(1)** The conditions in subsection 6(2), 6(3) and 6(4) do not apply where the Corporation supports a project otherwise prohibited by subsection 4(1) provided that:<sup>119</sup>

- (a) support for the project is required on national security grounds, including ensuring the energy security requirements of Canada, an ally, or other recipient country deemed important to Canada's national interests, on a case-by-case basis; or
- (b) support for the project is timebound and required on humanitarian and emergency response grounds.

**(2)** Any decisions on part of the Corporation to support projects falling under subsection 7(1) must be made on a case-by-case basis and must be approved by Cabinet pursuant to subsection 10(7) of the Act.

## Reporting & Notice

**8(1)** If the Corporation is considering support for a project pursuant to the terms of subsection 6(1), it must publicly disclose project information, including:<sup>120</sup>

- (a) project name, location, and a description of the project; and
- (b) details of where additional information may be obtained, such as a buyer and/or project sponsor contact point, website links, and the Environmental and Social Impact Assessment report,

as early as possible in the review process, and at least 30 calendar days before making a final decision under subsection 6(1).

**(2)** The Corporation must disclose publicly any projects approved for direct financing under subsection 6(1) within thirty days of that approval and the Corporation must consider any public feedback in response to the notice.

**(3)** On the first day of each month, the Minister must publish a report respecting any public finance covered by this regulation, and in particular,

**(4)** The report must:<sup>121</sup>

- (a) cover the one-month period ending on the day before the report is published;
- (b) include information about all direct public support issued pursuant to sections 6 and 7; and
- (c) include a detailed explanation of how the project met the criteria in subsections 6(2)-(5), as applicable, as well as information with respect to
  - (i) the total amounts issued; and

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<sup>119</sup> The Guidelines, at pg. 8.

<sup>120</sup> Organization for Economic Cooperation and Development, *Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (OECD 2022) at s. 39.

<sup>121</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, Part 2: Reporting: s. 5(1) Definitions.

(ii) the name of the entity and project that received the exempted support.

(5) The report must be published in a manner that can be reasonably expected to bring the report to the attention of the public by making it easily accessible on the website of the Corporation and by ensuring that it can be viewed free of charge and without restriction of any kind.<sup>122</sup>

(6) If the Minister determines that the report will not be published by the date referred to in subsection 8(1), on or before that date the Minister must issue a written statement giving the reasons for the non-compliance and the expected date of compliance.

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<sup>122</sup> *Enacting Climate Commitments Act*, Bill S-243 (24 March 2022), 1<sup>st</sup> sess 44<sup>th</sup> parl, 2021, Part 2: Reporting: s. 7(1) Reporting Requirements.