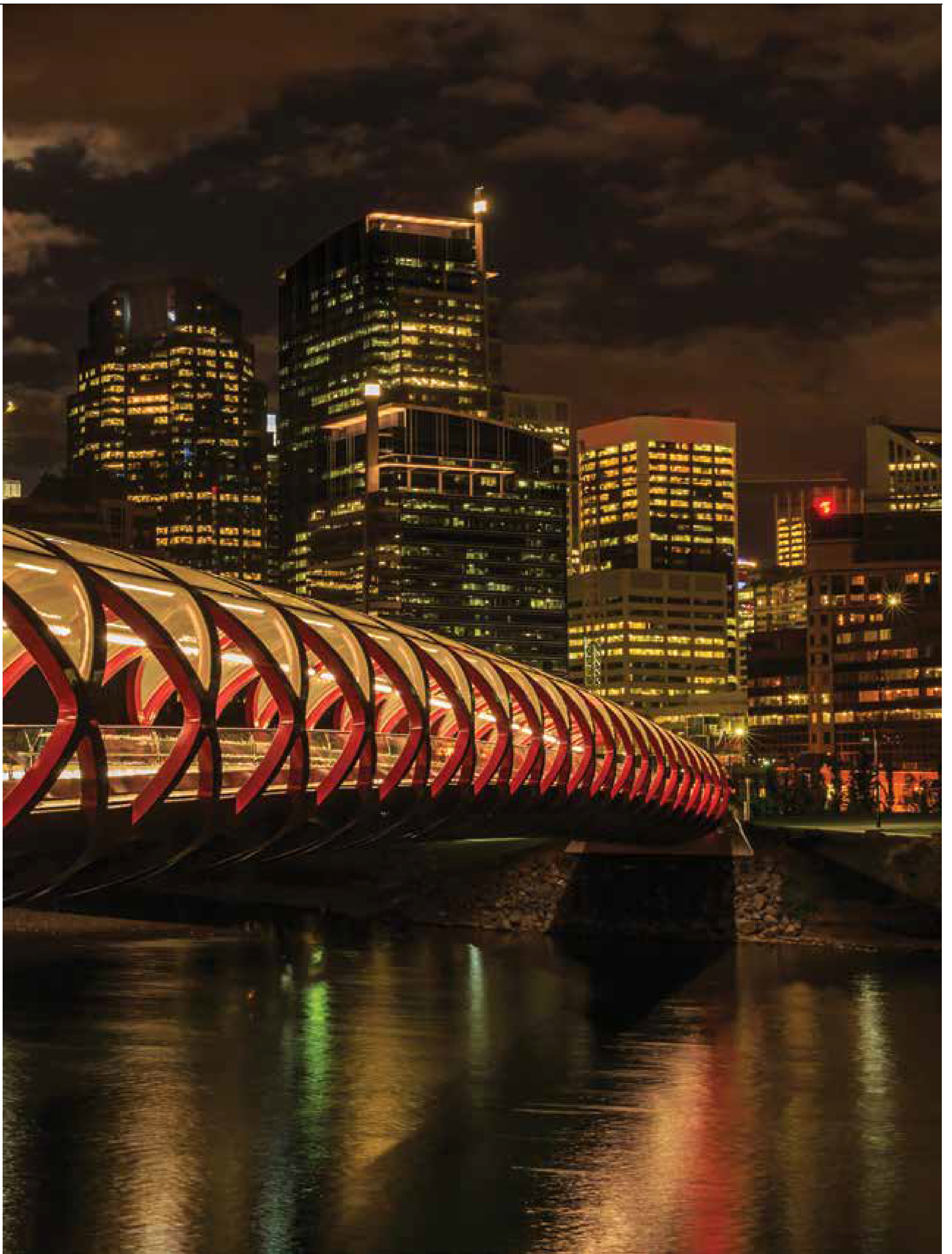
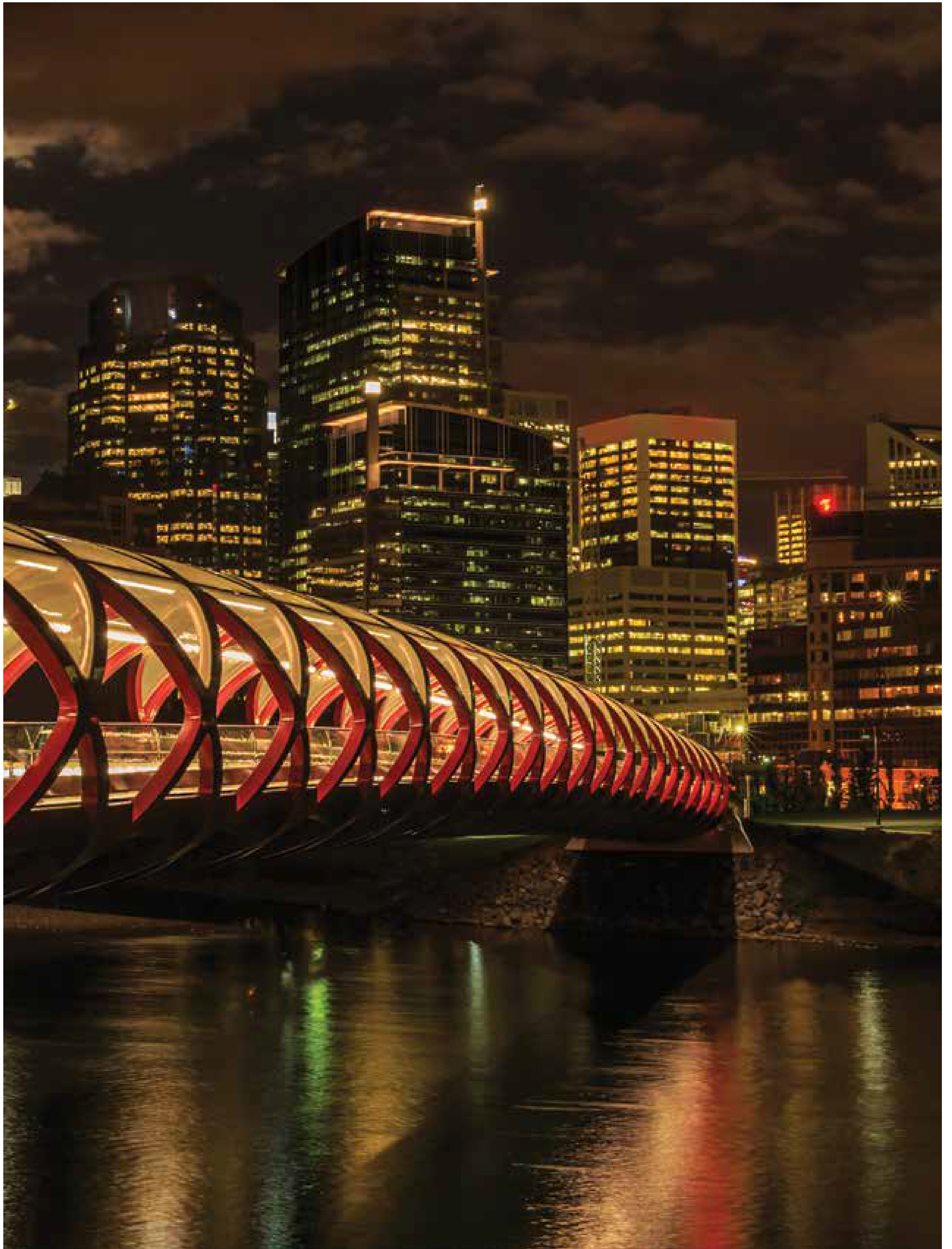
# Is Your Business Complying with the Canadian Extractive Sector Transparency Measures Act?

**Compliance and Ethics**





The Canadian Extractive Sector Transparency Measures Act[1] (the Act) came into force on June 1, 2015. The purpose of this legislation is to implement Canada's international commitments to fight corruption in the extractive industries. It applies to certain Canadian businesses and their subsidiaries engaged in the commercial development of oil, gas, or minerals in Canada and abroad. The Act is different from anti-bribery legislation in that it creates disclosure obligations, rather than prohibiting specific payments and imposing criminal sanctions.

1 S.C. 2014, c.39, s.376.

## Disclosure requirements

As outlined in our previous legal update, the Act imposes annual reporting obligations on certain businesses that:

- are publicly listed in Canada; or have
- a place of business in Canada, do business in Canada or have assets in Canada and meet at least two of the following conditions for at least one of their two most recent financial years:
  - CAD$20 million in assets;
  - CAD$40 million in revenue; and/or
  - employ an average of at least 250 employees.

Now that the Act is in force, Canadian businesses must begin collecting information on certain categories of payments made to domestic and foreign governments (and related bodies), whether they are monetary or in-kind payments, over CAD$100,000 starting on the first day of their financial year. For example, companies with a financial year-end of December 31 will need to collect this information for the reporting period between January 1, 2016, and December 31, 2016. A series of related payments made to the same payee amounting to CAD$100,000 are also captured.

The categories of payments that must be publicly disclosed include taxes, royalties, fees, production entitlements, bonuses, dividends, and infrastructure improvement payments. Project-level information must be collected. It is important to note there are certain rules relating to payments designed to capture indirect payments. For example, payments made to an employee or a public office holder of a governmental entity are deemed to have been made to that governmental entity.

The Act does not currently require the disclosure of payments made to aboriginal governments; however starting June, 1, 2017, these payments will also need to be disclosed. Companies with a December 31 fiscal year-end will therefore need to track payments to aboriginal governments starting January 1, 2018, and the first report including this disclosure will be due on May 31, 2019.

Failure to comply with these reporting requirements will result in a fine of CAD$250,000 for each day the breach continues, on summary conviction. If an organization is found liable, its directors and officers may also be held personally liable for an equivalent fine. A due diligence defense is available.

## Draft guidance and technical specifications

Draft guidance to help reporting entities understand the Act's requirements was published for comment by Natural Resources Canada (NRCan) on July 29, 2015. The comment period closed on September 22, 2015, with the final guidance soon to be released. The draft guidance provides some clarification on what NRCan considers as being engaged in the commercial development of oil, gas or minerals, expands on the asset/revenue/employee thresholds, and provides additional detail on the scope of each payment category.

A Technical Specifications Reporting document followed on August 1, 2015, providing the form and manner specifications for the reporting process, as well as instructions on how to complete the Reporting Template (available here). Reports may be completed in English or French and must be attested to by either a director or officer of the reporting entity, or an independent auditor or accountant.

## Timeline for disclosure

The first report must be filed with NRCan within 150 days of the organization's financial year-end. If the organization's fiscal year-end is December 31, the first report will be due on May 30, 2017. The report must also be publicly available, for example on the company website, for five years.

## Exemptions and substitutions

Currently, no exemptions are provided in the Canadian legislation, even if the mandated disclosure is prohibited under local laws. However, relief may be granted in the future by regulation.

It is also insufficient for a company to be operating in an Extractive Industries Transparency Initiative (EITI) compliant state, since the Canadian disclosure is much more specific.

To date, there is only one acceptable substitution for the Canadian reporting requirements: the European Union's Accounting and Transparency Directives (the Directives). Reports submitted to European Union and European Economic Area member states that have implemented the Directives may be submitted to NRCan as a substitute to a report prepared under the Act. Organizations submitting substitute reports remain subject to the Act's publication requirements and consequently must make such reports publicly available for five years.

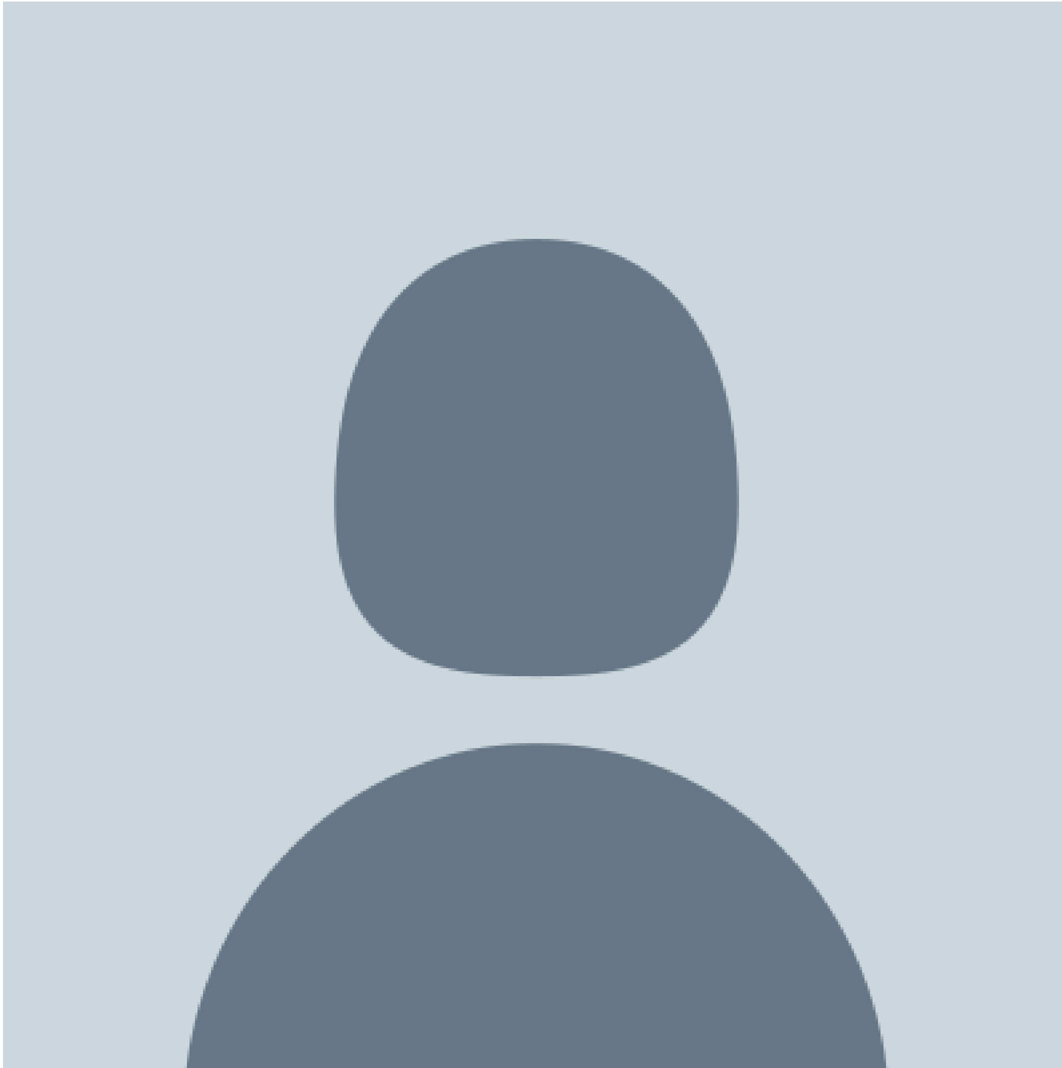
In the United States, the Securities and Exchange Commission (SEC) has yet to publish a final resource extraction issuer disclosure rule, as was mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and described in an earlier update. On September 2, 2015, following an action by Oxfam America, Inc., a US court ordered the SEC to file an expedited schedule for promulgating the final rule. It remains to be seen whether NRCan will accept US reports as a substitute; however the similarity between the two regimes suggests it is likely.

## Provincial-level transparency legislation

Transparency measures were proposed for the mining, oil and gas industries in Quebec with Bill 55, which was adopted in principle by Quebec's National Assembly on September 17, 2015. If the legislation is adopted as proposed, corporations listed on a stock exchange in Canada and having a head office in Quebec, as well as corporations having an establishment in Quebec and carrying on activities or having assets in the province and meeting the federal asset/revenue/employment thresholds, will be required to report to the Autorité des Marchés Financiers du Québec (Quebec's securities regulator) and be subject to its oversight.

Fortunately, the proposed measures will not require organizations to report to two levels of government, as the reporting obligations are expected to be harmonized with the federal requirements.

Jean Phillipe Buteau



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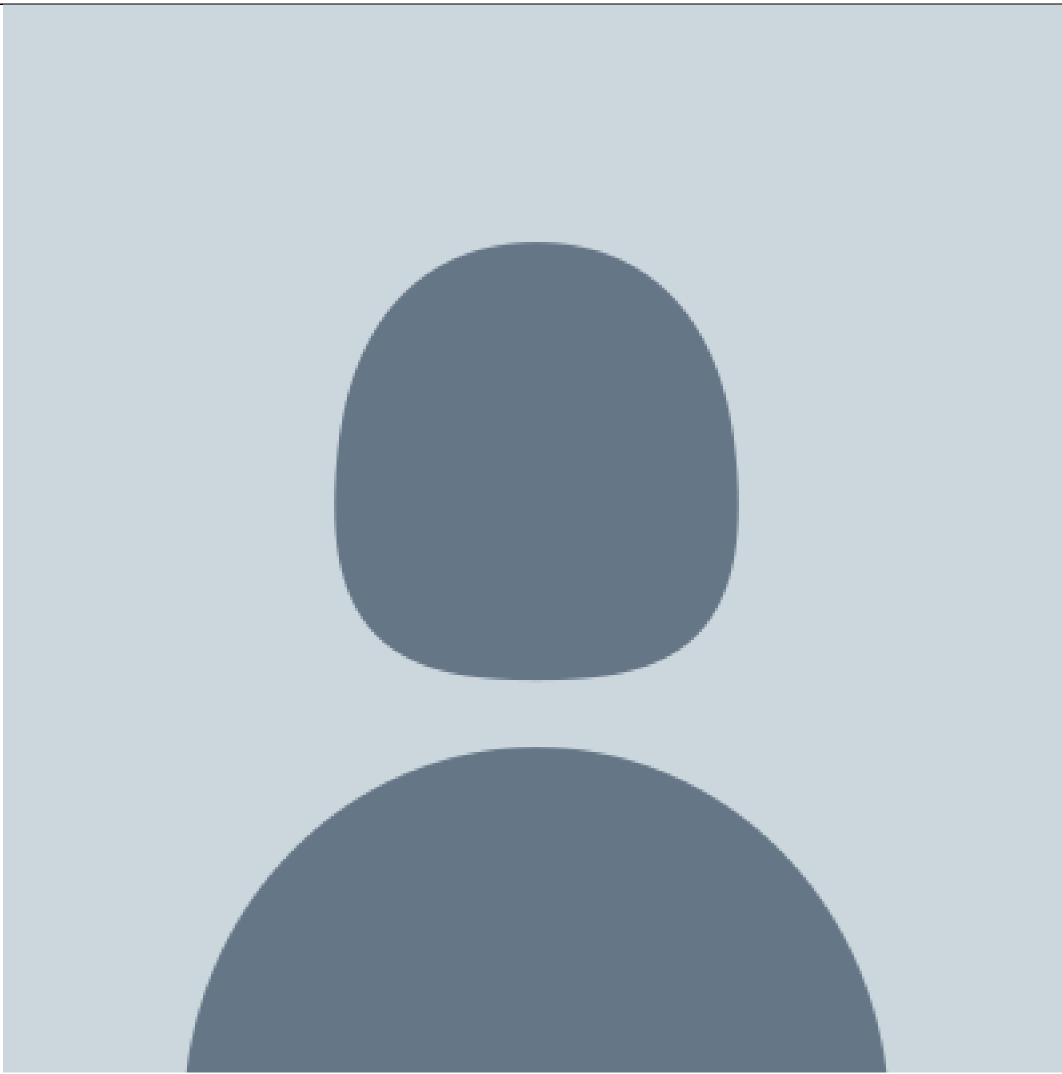
Janne Duncan



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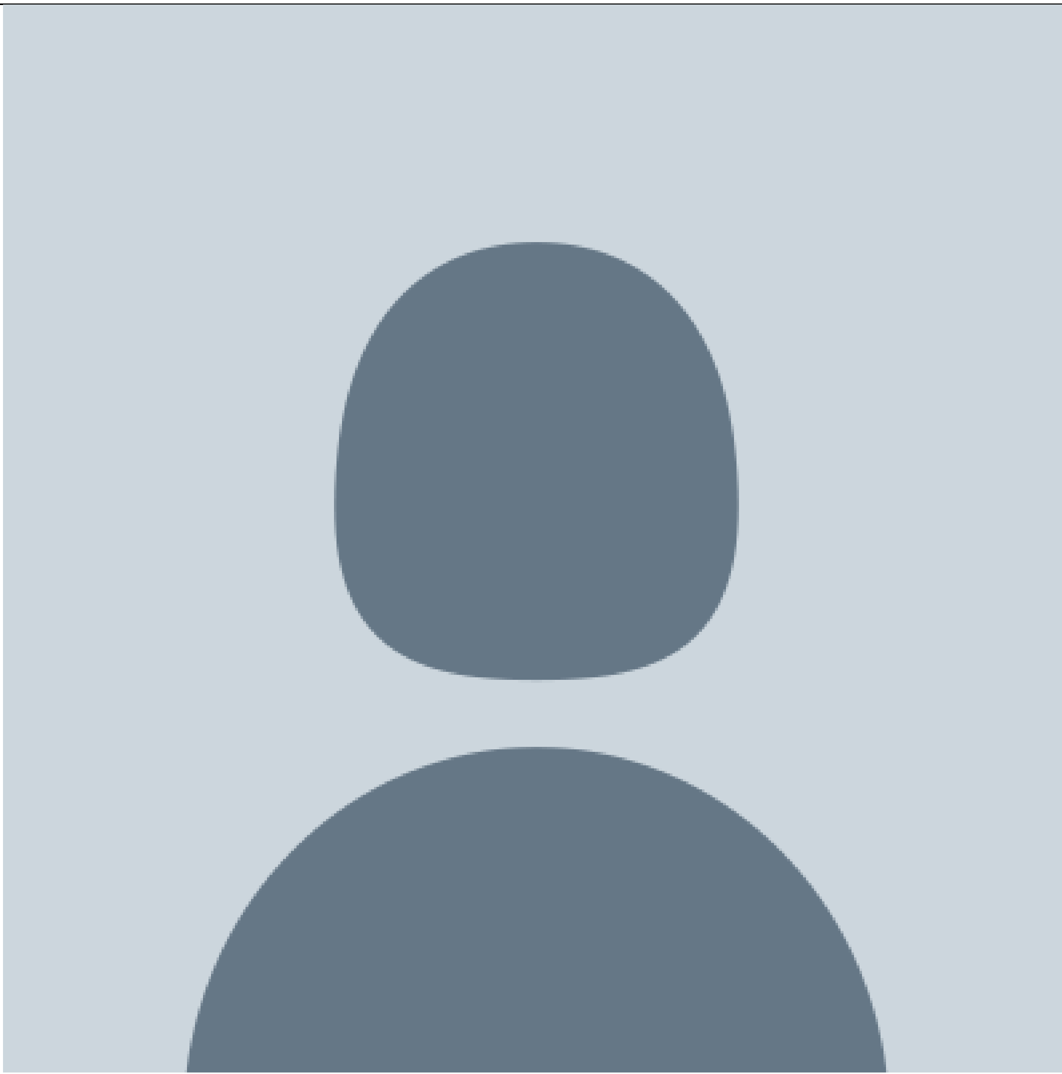

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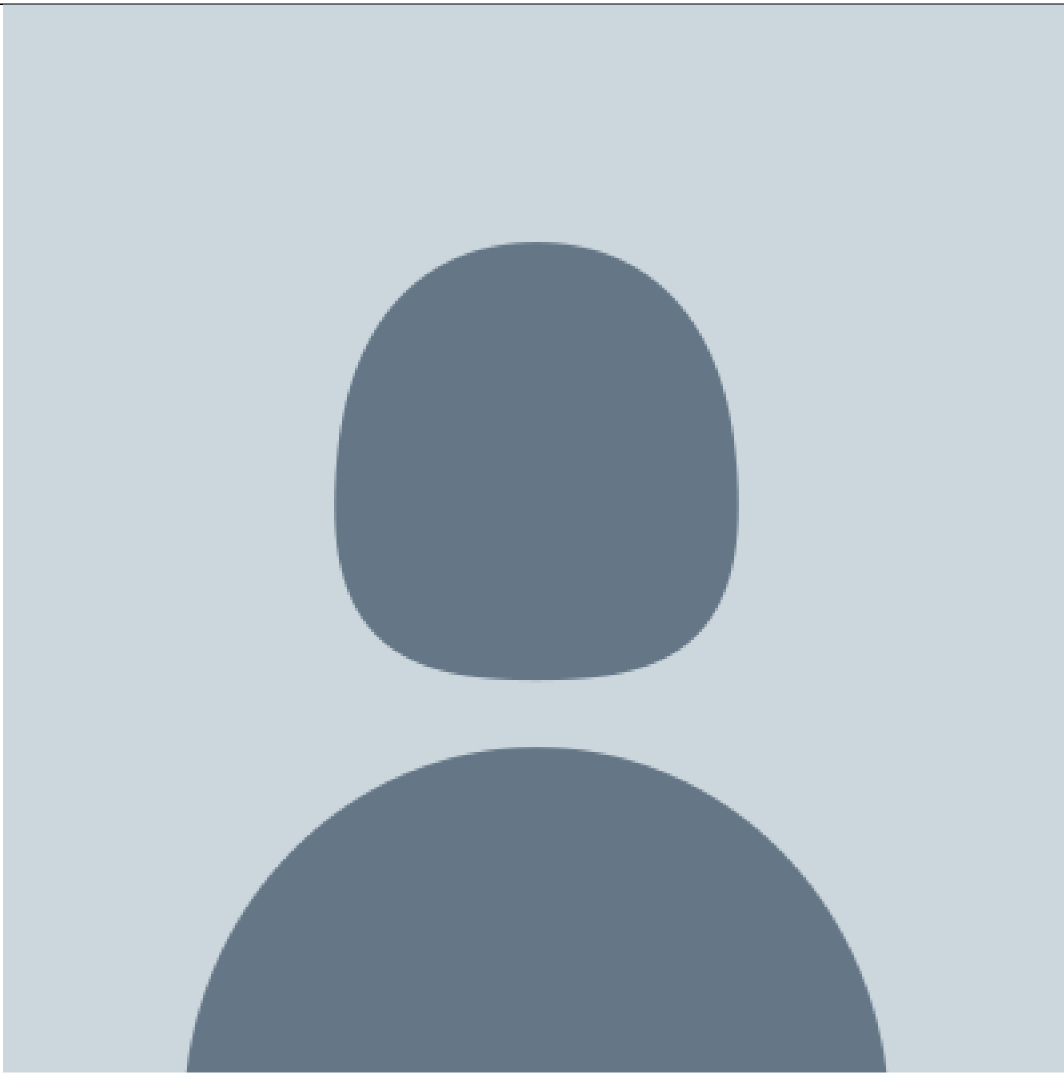

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