

# The Year in Review

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## Canada

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## Canada

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## Canada

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### I. Overview

The year 2015 saw a number of significant developments for Canada, including the introduction of legislation to combat corruption and bribery in the extractive sector;<sup>1</sup> changes to Canada's public procurement policy;<sup>2</sup> and a plan to address climate change that may well represent one of the more assertive economic approaches to climate change management in the world, let alone within Canada.<sup>3</sup>

In case law, the British Columbia Court of Appeal unanimously affirmed an injunction prohibiting Google from including certain websites in results delivered by its search engines worldwide,<sup>4</sup> while the Federal Court rendered a decision that will require companies who take uncertain tax filing positions to take steps to protect their working papers from the scrutiny of the Canada Revenue Agency.<sup>5</sup> The Supreme Court of Canada held that plaintiffs can seek to enforce foreign judgments in Canadian courts even when the litigants to, and the subject matter raised in, the foreign proceeding have no "real and substantial" connection to Canada.<sup>6</sup> Canada's highest court also gave its constitutional benediction to the right to strike, deeming it to be an activity protected by the Charter of Rights and Freedoms.<sup>7</sup>

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\* Edited by Angela E. Weaver. Individual authors will be identified by section.

1. See Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 376 (Can.).

2. See *Government of Canada's Integrity Regime*, GOV'T OF CANADA, (Sept. 28, 2015), <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>.

3. See Andrew Leach et. al., *Climate Leadership: Rep. to Minister*, 50-51 (Nov. 20, 2015), <http://alberta.ca/documents/climate/climate-leadership-report-to-minister.pdf>, at 50-51.

4. See *Equustek Solutions Inc. v. Jack*, [2015] B.C.C.A. 265 (Can. B.C.).

5. See *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), § 231.1 (Can.).

6. See *Chevron Corporation v. Yaiguaje*, 2015 SCC 42 (Can.).

7. See *Saskatchewan Fed'n of Labour v. Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4 (Can.).

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**II. Extractive Sector Transparency Measures Act<sup>8</sup>**

At the 2013 G8 Summit held in the United Kingdom, the then-leaders of the G8 issued a Communique agreeing that “raising global standards of transparency in the extractive sector . . . will . . . reduce the space for corruption and other illicit activities and ensure that citizens benefit fully from the extraction of natural resources.”<sup>9</sup> The then-Prime Minister of Canada, Stephen Harper, agreed in the Communique that Canada will launch consultations with stakeholders “with a view to developing [a] . . . mandatory reporting regime for extractive companies within the next two years” equivalent to that contained in section 1504 of the United States Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>10</sup> and the new Extractives Industries Transparency Initiative<sup>11</sup> (EITI) standard.

The Extractive Sector Transparency Measures Act (ESTMA), which entered into force on June 01, 2015,<sup>12</sup> has introduced the requirement that companies, involved in (or that control companies engaged in) the exploration or extraction of oil, gas, or minerals, publicly report each year the specific types of payments made to all levels of government in Canada and abroad.<sup>13</sup>

**A. THE PURPOSE OF ESTMA**

ESTMA is an instrument to combat corruption and bribery, and it expressly notes in its “purpose” section<sup>14</sup> that ESTMA’s aim is “to implement Canada’s international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector . . . [that are] designed to deter and detect corruption,” including corruption of both Canadian and foreign public officials pursuant to the Criminal Code<sup>15</sup> (CCC) and the Corruption of Foreign Public Officials Act.<sup>16</sup>

**B. COVERAGE OF ESTMA**

Entities subject to a reporting obligation are those engaged in the “commercial development” of oil, gas, or minerals. This is broadly defined to encompass exploration or extraction of oil, gas, or minerals, and the acquisition or holding of a permit, license, lease or other authorization to carry out any of these activities.<sup>17</sup>

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8. This section was prepared by Clifford Sosnow.

9. G8 2013 Lough Erie, [http://www.francophonie.org/IMG/pdf/lough\\_erne\\_2013\\_g8\\_leaders\\_communique.pdf](http://www.francophonie.org/IMG/pdf/lough_erne_2013_g8_leaders_communique.pdf), at ¶¶ 35, 38.

10. Dodd-Frank Wall Street Reform and Consumer Protection Act, 111 P.L. 203, 124 Stat. 1376, 2220 (codified as amended at 15 U.S.C. § 78m (2015)).

11. See generally, EITI International Secretariat, *The Extractive Industries Transparencies Standard*, [https://eiti.org/files/document/english\\_eiti\\_standard.pdf](https://eiti.org/files/document/english_eiti_standard.pdf) (last revised Jan. 1, 2015).

12. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39 (Can.).

13. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39 (Can.).

14. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 6 (Can.).

15. See Criminal Code, R.S.C., 1985, c. C-46.

16. See Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).

17. See Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 2 (Can.).

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## C. SCOPE OF REPORTING OBLIGATIONS

ESTMA's reporting obligations apply to all entities listed on a stock exchange in Canada. The reporting obligations also apply to any corporation, trust, or partnership (or any entity that controls such corporation, trust or partnership) that is engaged in the commercial development of oil, gas, or minerals and (1) has a place of business or assets in Canada, or does business in Canada, and (2) meets two of the following conditions in one of its two most recent financial years: (a) assets valued at a least \$20 million; (b) revenue of at least \$40 million; and, (c) an average of at least 250 employees. Note that the definition of "control" includes control by another entity, whether direct or indirect, and that an entity that controls another entity is deemed to control any entity that is controlled by this other entity.<sup>18</sup>

## D. REPORTING OBLIGATIONS

Payments must be disclosed to defined "payees" if the aggregate of all payments in a particular category of payment to the payee is at least \$100,000 for a financial year.<sup>19</sup> "Payee" is broadly defined to include any level of government in Canada or a foreign state; anybody established by two or more governments; and any board, corporation or authority established to perform the duties or functions of such government.<sup>20</sup> The definition also includes aboriginal governments, and bodies established by two or more such governments (or any board, corporation, or authority established to perform the duties or functions of such government), although ESTMA reporting obligations do not apply to them until June 1, 2017.<sup>21</sup>

The "payments" subject to the reporting obligations are taxes (other than consumption taxes and personal income taxes); royalties; fees; bonuses; dividends (other than dividends paid to ordinary shareholders); and infrastructure improvement payments.<sup>22</sup>

## E. FOREIGN JURISDICTION EQUIVALENT REPORTING REQUIREMENTS

ESTMA grants the Minister of Natural Resources the power to determine whether the reporting obligations of another jurisdiction "achieve the purposes of the reporting requirements under [ESTMA] . . . [and] are an acceptable substitute [therefor]."<sup>23</sup> An entity is deemed to comply with ESTMA if the entity provides the Minister with the required report to be filed with the other jurisdiction's competent authority and meets any other conditions the Minister may determine.<sup>24</sup> As of July 31, 2015, the Minister of Natural Resources has determined that the European Unions' Accounting and

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18. See Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 8 (Can.).

19. *Id.* § 9.

20. *Id.* § 2.

21. *Id.* § 29.

22. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 2 (Can.).

23. Order Designating the Minister of Natural Resources to be the Minister for the purpose of the Act, SI/2015-39 (Can.).

24. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 10 (Can.).

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Transparency Directive is an acceptable substitute for ESTMA's reporting requirements.<sup>25</sup>

F. PENALTIES FOR FAILURE TO COMPLY

Penalties for failure to comply with reporting obligations can be severe. Every person or entity that does not meet ESTMA's reporting obligations commits a criminal offence punishable by a fine of up to \$250,000 per each day that the offence has been found to continue.<sup>26</sup> Moreover, any officer, director, or agent of the person or entity that directed, authorized, or participated in the commission of the offence by the person or entity is equally liable.<sup>27</sup> However, no person or entity is liable if they establish that "they exercised due diligence to prevent its commission."<sup>28</sup>

**III. Enforcement of Foreign Judgments: Chevron Corporation v. Yaiguaje<sup>29</sup>**

In a unanimous decision the Supreme Court of Canada ("SCC"), in *Chevron Corporation v. Yaiguaje*, held that plaintiffs can seek to enforce foreign judgments in Canadian courts even when the litigants to, and the subject matter raised in, the foreign proceeding have no "real and substantial" connection to Canada.<sup>30</sup> Perhaps more startling for multinational organizations, the SCC left open the possibility that foreign judgments may be enforceable against the judgment debtor's Canadian affiliates where the Canadian entity was not a party to the foreign litigation.

The plaintiffs brought an action in the Ecuadorian courts against Chevron Corporation ("Chevron") for certain alleged environmental wrongs, and ultimately obtained judgment against Chevron in the amount of USD 9.51 billion.<sup>31</sup> As Chevron did not pay the judgment and had no assets in Ecuador, the plaintiffs commenced an action before the Ontario Superior Court of Justice ("OSCJ"), to have the Ecuadorian judgment recognized and enforced against Chevron as well as against Chevron Canada Limited ("Chevron Canada"), a wholly owned, seventh-level, indirect subsidiary of Chevron.<sup>32</sup> Chevron and Chevron Canada (which had not been a party to the Ecuadorian proceedings) brought a motion challenging the jurisdiction of the OSCJ to recognize and enforce the foreign judgment.

The OSCJ found that although it had jurisdiction over both Chevron and Chevron Canada to enforce the judgment, the OSCJ would not do so.<sup>33</sup> The OSCJ granted a stay of proceedings based on its view that there was no prospect of recovery on the judgment, as Chevron had no assets in Ontario and there existed no tenable basis for asserting that

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25. See Extractive Sector Transparency Measures Act – Substitution Determination, Natural Resources Canada, available at <http://www.nrcan.gc.ca/acts-regulations/17754>.

26. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, § 24 (Can.).

27. *Id.* § 25.

28. *Id.* § 26.

29. This section was prepared by George Karayannides and Ellen Snow.

30. See *Chevron Corporation v. Yaiguaje*, 2015 SCC 42 (Can.).

31. *Id.* ¶ 7.

32. *Id.* ¶¶ 8, 11.

33. See *Chevron Corporation v. Yaiguaje*, 2013 ONSC 2527 (Can.).

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Chevron owned Chevron Canada's shares, or that the corporate veil between them could be pierced.<sup>34</sup>

The Court of Appeal for Ontario ("CAO") agreed that Ontario courts had jurisdiction to enforce the judgment against both Chevron entities, and overturned the stay.<sup>35</sup>

On appeal, the Supreme Court of Canada ("SCC") upheld the ruling of the CAO, clarifying that the test for determining jurisdiction over a foreign defendant will differ depending on whether a proceeding is an action in the first instance or a proceeding to enforce a foreign judgment.<sup>36</sup> While in the former situation, a "real and substantial" connection must exist (as articulated in earlier decisions of the SCC<sup>37</sup>), in the latter situation, jurisdiction will be established when service is effected on the alleged judgment debtor.<sup>38</sup> The lower threshold for finding jurisdiction is justified on the basis that the court's role in the latter instance is less invasive, with the sole purpose of the litigation being the fulfillment of a pre-existing obligation.<sup>39</sup>

The SCC rejected Chevron's argument that the existence of assets in, or carrying on business within, the province was a necessary pre-requisite to jurisdiction over the judgment debtor being found, holding such an approach not to be consistent with the principles of order and fairness that underpin international law.<sup>40</sup> Recognizing the realities of e-commerce, particularly the ability to swiftly transfer funds between countries, the SCC found it would ignore economic reality to require that assets be present in a jurisdiction before considering enforcement.<sup>41</sup>

The SCC made clear, however, that the Ecuadorian judgment would not necessarily be enforced as a matter of course.<sup>42</sup> The SCC stated that the defendants were still able to argue, among other things, that a court should decline jurisdiction on the basis of forum non conveniens or that appropriate use of judicial resources militated in favour of a stay, as well as all other available defences to recognition and enforcement (being fraud, denial of natural justice or public policy).<sup>43</sup>

With respect to Chevron Canada, the SCC found it had jurisdiction notwithstanding the fact that Chevron Canada had not been a party to the Ecuadorian proceedings; the SCC based its finding of jurisdiction on Chevron Canada's presence in Ontario and the fact that it had been validly served at its business address.<sup>44</sup> The SCC was careful to note, however, that it was making no finding on whether Chevron Canada could be considered a judgment debtor, and that arguments regarding the distinction in corporate personality, and the availability of Chevron Canada's assets to satisfy Chevron's debts, remained open

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34. *Id.* ¶¶ 88-111.

35. *See* Chevron Corporation v. Yaiguaje, 2013 ONCA 758 (Can.).

36. Chevron Corporation v. Yaiguaje, 2015 SCC 42, ¶ 36 (Can.).

37. *See generally*, Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077; Beals v. Saldanha, [2003] 3 S.C.R. 416, *Pro Swing Inc. v. Elta Golf Inc.*; [2006] 2 S.C.R. 612, *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572.

38. *See* Chevron Corporation v. Yaiguaje, 2015 SCC 42, ¶ 36 (Can.).

39. *Id.* ¶¶ 42, 48.

40. *Id.* ¶¶ 56-57.

41. *Id.* ¶ 57.

42. *Id.* ¶ 77.

43. *Id.*

44. Chevron Corporation v. Yaiguaje, 2015 SCC 42, ¶ 81 (Can.).

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for resolution before the lower courts in determining whether the Ecuadorian judgment was ultimately enforceable.<sup>45</sup>

In the result, the plaintiffs' action for the recognition and enforcement of the Ecuadorian judgment is permitted to proceed in Ontario.<sup>46</sup> Multinational companies will want to await the trial ruling as its outcome, particularly with respect to the enforceability of the Ecuadorian judgment against a corporate affiliate, could well have implications for how they structure their Canadian, and perhaps global, affairs.

**IV. British Columbia Court of Appeal Affirms Order for Google to Censor Search Results Worldwide<sup>47</sup>**

In June 2015, the British Columbia Court of Appeal unanimously affirmed an injunction that prohibits Google from including certain websites in results delivered by its search engines worldwide.<sup>48</sup> Commentators have described the decision as “disastrous” and “the most expansive decision in the common law world to date.”<sup>49</sup>

The case, *Equustek Solutions v. Datalink Technologies Gateways* (Equustek), arose out of a trademark dispute. The plaintiff was a “manufacturer of industrial network interface hardware, and the defendant [Datalink] . . . was its distributor.”<sup>50</sup> Datalink advertised the plaintiff's products but began filling orders with counterfeit articles. The plaintiff sued Datalink for infringement of its trademark and misappropriation of trade secrets.

Datalink initially contested the claim but later stopped defending the action. Datalink then “moved out of British Columbia and apparently out of Canada, but continued to advertise online and fill orders from an unknown location.”<sup>51</sup> Efforts to locate Datalink proved fruitless; injunctions against Datalink were ignored. “The plaintiff then sought an injunction against Google,” a non-party; if Google search results were to exclude Datalink's sites, then Datalink's sales (and thus a certain “amount of business diverted from the plaintiff”) would be significantly reduced (seventy to seventy-five percent of all internet searches are done through Google).<sup>52</sup>

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45. *Id.* ¶ 95.

46. This outcome may be different in provinces which have enacted legislation governing jurisdiction in civil proceedings. See *Court Jurisdiction and Transfer Proceedings Transfer Act*, S.B.C. 2003, c. 28 (British Columbia); *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2 (Nova Scotia); *The Court Jurisdiction and Transfer Proceedings Act*, S.S. 1997, c. C-41.1 (Saskatchewan). Similar legislation has also been enacted, but is currently not in force, in certain other provinces. See *Bill No. 19, Court Jurisdiction and Proceedings Transfer Act* (Prince Edward Island); *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7, as amended by S.Y. 2013, c. 15, § 1 (Yukon).

47. This section was prepared by Ken MacDonald.

48. See Julius Melnitzer, *B.C. ruling on jurisdiction over Google 'disastrous'*, LAW TIMES NEWS (June 22, 2015), <http://www.lawtimesnews.com/201506224763/headline-news/b-c-ruling-on-jurisdiction-over-google-disastrous>.

49. *Id.*

50. *Equustek Solutions Inc. v. Jack*, [2015] B.C.C.A. 265 (Can. B.C.).

51. Ken MacDonald, *BCCA Affirms Order for Google to Censor its Search Results Worldwide*, CROSS BORDER LITIGATOR (July 9, 2015), [http://crossborderlitigator.blogspot.com/2015/07/bcca-affirms-order-for-google-to-censor\\_9.html](http://crossborderlitigator.blogspot.com/2015/07/bcca-affirms-order-for-google-to-censor_9.html).

52. *Id.*

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Google “voluntarily agreed to remove” from search results Datalink webpages that advertised the plaintiff’s products, but only at the Canadian site “Google.ca.”<sup>53</sup> The motion court granted an injunction requiring Google to remove entire websites, not just specific webpages, from searches done anywhere in the world; Google appealed.<sup>54</sup>

Two aspects of the appeals court’s ruling are noteworthy. First, the court found that it had territorial jurisdiction over Google on the basis that Google does business in British Columbia even though Google has no office, staff, or servers there.<sup>55</sup> The court relied on the fact that Google sells advertising in British Columbia, and on the nature of its Google.ca website, holding that while the mere fact of advertising in British Columbia would not support jurisdiction, the sale of advertising there would;<sup>56</sup> the fact a company’s website is accessible in British Columbia would not suffice for jurisdiction, but Google’s website is not passive, inasmuch as its search results are based in part on data it collects from the user in question, including his/her IP address, location, and previous searches.<sup>57</sup> This ruling will be important across Canada because doing business is a basis for jurisdiction in all Canadian provinces and territories.<sup>58</sup>

The other noteworthy aspect of this ruling “is the world-wide scope of the injunction, made against an innocent party that neither intentionally facilitate[d] Datalink’s infringement of trademark, nor profit[ed] from it.”<sup>59</sup> Commentators have asked the question: what is there to stop a foreign court from issuing orders to Canadians and businesses in Canada?<sup>60</sup> In fact, “injunctions with extra-territorial effect are nothing new,” even against non-parties; for many years now, Canadian, British, and other courts have issued “world-wide Mareva injunctions freezing assets in foreign jurisdictions,” which “injunctions often include a provision requiring [foreign] banks to freeze funds.”<sup>61</sup> Courts can also issue Norwich Pharmacal orders that require a third party (usually a bank) to provide a plaintiff with financial or other information about the defendant or proposed defendant, if such is not otherwise available.<sup>62</sup> That said, the court in *Equustek* did acknowledge that orders with extra-territorial effect ought not be made if an order with domestic application alone would suffice.<sup>63</sup>

The court had earlier ordered Datalink to cease referencing the plaintiff’s products on its website, but Datalink ignored this order (and could not be sanctioned because it could not be found).<sup>64</sup> Google agreed to remove from search results the webpages that referenced those products, but not for searches outside Canada, where most of the sales

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53. *Id.*

54. Adam Bobker & Janice Calzavara, *Leave to Appeal to SCC: Google Inc v Equustek Solutions Inc (BCCA)*, LEXOLOGY (Mar. 7, 2016), <http://www.lexology.com/library/detail.aspx?g=3e6f2e21-29ea-4009-8581-78d8e579e86a> (“On February 18, 2016, the Supreme Court of Canada granted Google Inc’s . . . application for leave to appeal.”).

55. *See Equustek Solutions*, ¶ 54.

56. *See id.* ¶¶ 52–53.

57. *See id.* ¶ 52.

58. *See Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, ¶ 87 (Can.).

59. MacDonald, *supra* note 51.

60. *See id.*

61. *Id.*

62. *See id.*

63. *See Equustek Solutions Inc. v. Jack*, [2015] B.C.C.A. 265, ¶ 54 (Can. B.C.).

64. *See Bobker & Calzavara*, *supra* note 54.

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originated.<sup>65</sup> In general, Canadian courts are sensitive to considerations of comity, as shown by the quite liberal approach they take to the enforcement of foreign judgments.<sup>66</sup> In *Equustek*, the court mentioned comity only briefly, noting that the injunction could be varied if necessary.<sup>67</sup>

The injunction in *Equustek* imposes a limit on freedom of expression, in the sense that Datalink's website is made effectively invisible around the world, and Google is forced to censor its search results. However, as the court pointed out, the expression affected is commercial, not political.<sup>68</sup> Moreover, Datalink's expression was almost certainly an infringement of a trademark, as Datalink essentially admitting to this when it stopped defending the action.<sup>69</sup> The court did not address whether Google's search results are themselves a form of expression, nor whether such expression would warrant protection.<sup>70</sup>

The court indicated that if Google were to not abide by the order, Google might be barred from access to the courts of British Columbia even for unrelated cases.<sup>71</sup> Such a bar may be viewed as warranted because of the practical difficulty in enforcing the order.<sup>72</sup>

In any event, the injunction may well be unenforceable in much of the world, as it would be enforceable only in those countries that recognize and enforce foreign non-monetary judgments.<sup>73</sup> Thus the injunction will probably not be very intrusive, in practical terms.<sup>74</sup> But it seems it was the only practical remedy left, less intrusive measures having failed.

#### V. Canada's New Procurement Integrity Regime<sup>75</sup>

On July 3, 2015, the Government of Canada introduced a new, government-wide integrity regime for procurement (the "Integrity Regime").<sup>76</sup> The Integrity Regime is made up of an Ineligibility and Suspension Policy, and associated integrity provisions, to be incorporated into federal solicitations, contracts, and leases.<sup>77</sup> The Integrity Regime softens some of the obligations in the prior federal Integrity Framework that Public Works and Government Services Canada ("PWGSC") introduced in 2012 and amended in 2014, while adding new ones.<sup>78</sup>

65. See *Equustek Solutions*, ¶¶ 24–25.

66. *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, ¶¶ 26–27 (Can.).

67. See *Equustek Solutions*, ¶ 107.

68. MacDonald, *supra* note 51.

69. See *id.*

70. See *Equustek Solutions*, ¶¶ 92–93.

71. See *id.* ¶ 97.

72. See *id.* ¶ 98.

73. See MacDonald, *supra* note 51.

74. See *Equustek Solutions Inc.*, ¶ 96.

75. This section was prepared by Martin G. Masse and Erin Brown.

76. See *Background on the new government-wide integrity regime*, GOV'T OF CANADA (Aug. 18, 2015), <http://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html> [hereinafter *Backgrounder*].

77. See Martin G. Masse, A. Neil Campbell & Timothy Cullen, *For Better or Worse? Canada Updates Procurement Integrity Regime*, McMILLAN LLP (July 2015), [http://www.mcmillan.ca/Files/182985\\_For%20Better%20or%20Worse\\_Canada%20Updates%20Procurement%20Integrity%20Regime.pdf](http://www.mcmillan.ca/Files/182985_For%20Better%20or%20Worse_Canada%20Updates%20Procurement%20Integrity%20Regime.pdf) [hereinafter *For Better or Worse*].

78. See *id.*; see also *Government of Canada's Integrity Regime*, GOV'T OF CANADA, (Sept. 28, 2015), <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html> [hereinafter *Integrity Regime*].

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## A. INELIGIBILITY AND SUSPENSION

1. *Ineligibility*

With respect to criminal provisions prohibiting frauds against the government under the CCC<sup>79</sup> or the Financial Administration Act<sup>80</sup> (“FAA”), suppliers who have ever been convicted of, or pleaded guilty to, such offences (“Fraud Offences”) will be ineligible to bid on government contracts for an indefinite period of time, with little access to recourse.<sup>81</sup>

The Government of Canada has maintained a list of other offences (“Other Offences”) that relate to the integrity of bidders. These include, inter alia, money laundering, extortion, and bribery offenses under the CCC,<sup>82</sup> the Competition Act,<sup>83</sup> the Income Tax Act<sup>84</sup> the Excise Tax Act,<sup>85</sup> the Corruption of Foreign Public Officials Act,<sup>86</sup> and the Controlled Drugs and Substances Act.<sup>87</sup> Suppliers will be ineligible to bid on government contracts for a period of ten years when they have been convicted of, or have pleaded guilty to, one or more of these Other Offences in the past three years (under the former Integrity Framework the period was ten years).<sup>88</sup> The most positive change introduced in the Integrity Regime is that suppliers will no longer be automatically ineligible as a result of the actions of affiliates, unless the supplier had “a degree of control over the convicted affiliate”<sup>89</sup> in relation to the acts or omissions that led to the conviction. Specifically, the Ineligibility and Suspension Policy specifies that a bidder must have “directed, influenced, authorized, assented to, acquiesced in, or participated in the commission or omission of acts or offenses” that would render the affiliate ineligible under the policy.<sup>90</sup> Note, however, that this remains a fact-specific assessment over which the Minister has significant discretion.<sup>91</sup>

Suppliers who contract with subcontractors who have been convicted or have pleaded guilty to any of the covered offences, and for which no pardon or equivalent has been received, become ineligible to bid on government contracts for a period of five years unless the supplier obtained the advance approval of PWGSC.<sup>92</sup> However, the Integrity

79. Criminal Code, R.S.C. 1985, c. C-46, §§ 121, 124, 380, 418 (Can.).

80. Financial Administration Act, R.S.C. 1985, c. F-11, §§ 80(1)(d), 80(2), 154.01 (Can.).

81. A Public Interest Exception and/or an administrative agreement cannot be invoked or applied to these situations; however, a record suspension may be obtained; *see id.* § 154.01(2).

82. *See* Criminal Code, R.S.C. 1985, c. C-46, §§ 119, 120, 346, 366 to 368, 382, 382.1, 397, 422, 426, 462.31, 467.11- 467.13 (Can.).

83. *See* Competition Act, R.S.C. 1985, c. C-34, §§ 45-47, 49, 52-53 (Can.).

84. *See* Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), § 239 (Can.).

85. *See* Excise Tax Act, R.S.C. 1985, c. E-15), § 327 (Can.).

86. *See* Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34, §§ 3-5 (Can.).

87. *See* Controlled Drugs and Substances Act, R.S.C. 1996, c. 19, §§ 5-7 (Can.).

88. *See* Integrity Regime, *supra* note 78.

89. *Frequently Asked Questions*, GOV'T OF CANADA, (July 3, 2015), <http://www.tpsgc-pwgsc.gc.ca/ci-if/faq-eng.html> [hereinafter FAQs].

90. *Id.*

91. *See* For Better or Worse, *supra* note 77; *see also* Integrity Regime, *supra* note 78.

92. *See Ineligibility and Suspension Policy*, GOV'T OF CANADA (Aug. 18, 2015), ¶ 16d, <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html> [hereinafter Ineligibility and Suspension Policy].

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Regime creates a public list of ineligible and suspended entities that prime contractors can use to verify the eligibility of subcontractors.<sup>93</sup>

2. *Suspension*

Under the Integrity Regime, the Minister of Public Works and Procurement (the “Minister”) has the power to suspend a supplier for up to eighteen months and to extend that suspension as necessary while a judicial process is underway.<sup>94</sup> The Minister’s considerable discretion in this regard can be triggered if a supplier has admitted guilt in relation to a listed offence (or similar foreign offence), or is charged with such an offence.<sup>95</sup> This, of course, raises serious concerns with respect to the presumption of innocence.<sup>96</sup> If the suspension power extends to entities seeking immunity in relation to criminal offences under the Competition Act, the number of entities that come forward could be significantly reduced, thus lessening the efficiency of the immunity regime in tackling anti-competitive cartels.<sup>97</sup>

B. RECOURSE

1. *Reduction of Ten-Year Ban*

The ten-year ban imposed on suppliers as a result of a conviction in relation to a listed offence can be reduced to five years if the supplier has either cooperated with authorities or taken steps to address the causes of the misconduct in question.<sup>98</sup> This added flexibility brings Canada in line with the policies of the United States.<sup>99</sup>

2. *Administrative Agreements*

Administrative agreements provide suppliers under the Integrity Regime with the possibility to obtain relief from the consequences of non-compliance. Administrative agreements may be used in lieu of suspending a supplier, or when a supplier’s ineligibility period is reduced, or when a Public Interest Exception (“PIE” (see below)) is invoked, or when the government decides to continue an existing contract with a supplier that has become non-compliant.<sup>100</sup> But administrative agreements cannot be used to gain relief from ineligibility in relation to frauds against the government under the CCC or FAA.<sup>101</sup>

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93. See FAQs, *supra* note 89. The Ineligibility List can be found at: <http://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>.

94. See Integrity Regime, *supra* note 78.

95. See For Better or Worse, *supra* note 77.

96. See *id.*

97. See *id.*

98. See Integrity Regime, *supra* note 78 (Note that the supplier would have to enter into an administrative agreement).

99. See U.S. DEP’T OF COMMERCE, SUSPENSION AND DEBARMENT HANDBOOK (Sept. 9, 2014), [http://www.osc.doc.gov/oam/acquisition\\_management/policy/handbooks/documents/Suspension%20and%20Debarment%20Handbook%20With%20Memo.pdf](http://www.osc.doc.gov/oam/acquisition_management/policy/handbooks/documents/Suspension%20and%20Debarment%20Handbook%20With%20Memo.pdf); see also *Frequently Asked Questions: Suspension & Debarment*, U.S. GEN. SERV’S ADMIN. (May 5, 2015), <http://www.gsa.gov/portal/content/192903#Q8>; see also For Better or Worse, *supra* note 77.

100. See Integrity Regime, *supra* note 78.

101. See FAQs, *supra* note 89.

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3. *Public Interest Exception*

The Public Interest Exception (“PIE”), which is continued from the Integrity Framework, allows the government, on public interest grounds, to do business with suppliers who have been convicted, or absolutely or conditionally discharged, of the specified offences. The PIE can be applied in situations when no other supplier is capable of performing the contract; or there exists an emergency, a national security threat, or a health and safety concern; or when it is necessary to avoid economic harm. When the PIE is applied, an administrative agreement between the supplier and PWGSC is required.<sup>102</sup>

C. DUE PROCESS

The Integrity Regime contains the following procedural components:

- suppliers will be notified if they become ineligible or are suspended;<sup>103</sup>
- suppliers are incentivized to disclose wrongdoing proactively and can at any time seek an advanced determination; if they are determined to be ineligible, their ineligibility period would begin immediately; and<sup>104</sup>
- ineligible or suspended suppliers may apply to the Minister for a review of decisions with respect to whether a supplier “directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission” of the acts that made its affiliate ineligible.<sup>105</sup>

**VI. Tax Reserves Working Papers Are Not Protected From Scrutiny by the Canada Revenue Agency<sup>106</sup>**

In a recent decision of the Federal Court in the *Minister of National Revenue v. BP Canada Energy Co.*,<sup>107</sup> the Minister of National Revenue (“Minister”) successfully brought a motion during the audit of BP Canada Energy Company (“BP Canada”), a public company, to obtain the company’s tax reserve working papers or issues lists. This decision sent shockwaves throughout the business community. The issues list or tax reserves working papers set out the uncertain tax positions a company has taken when it filed its tax returns. The reserves have to be entered on the financial statement pursuant to Generally Accepted Accounting Principles (“GAAP”).<sup>108</sup> The purpose of the tax reserves is to set aside funds to cover tax and interest due in the event that the Canada Revenue Agency (“CRA”) challenges the position a company has taken. A company would understandably be reluctant to provide the CRA with its issues lists.

BP Canada objected to the Minister’s request, on the basis that the issues list was not necessary for the CRA to carry out its audit, as the Minister to date had been able to successfully complete all previous audits of the company without them. Furthermore

102. See Integrity Regime, *supra* note 78.

103. See *id.*

104. See *id.*

105. Ineligibility and Suspension Policy, *supra* note 92, ¶ 11a.

106. This section was prepared by Sunita D. Doobay.

107. *Minister of National Revenue v. BP Canada Energy Company*, 2015 FC 714, ¶ 1 (Can. Ont.).

108. *Id.* ¶ 4.

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although the Income Tax Act<sup>109</sup> mandates that the Minister has access to all books and records of a taxpayer, the Act does not mandate that a taxpayer must follow GAAP.<sup>110</sup>

The phrase “books and records,” the Minister argued, does not mean that a CRA audit is limited to merely books and records. The Minister further contended that the courts have interpreted “books and records” to include:

banking statements, credit card information and corporate reorganization documents in the possession of a bank; financial statements prepared for and submitted to another regulator; financial statements of a taxpayer’s foreign parent corporation; sales records maintained by an online auction house; minute books and other corporate records; transaction documents in the possession of a lawyer; and tax planning documents that are not privileged.<sup>111</sup>

The Federal Court held in favour of the Minister, and quoted the Minister’s argument in support of its decision:

If the CRA does not discover the transactions within the normal reassessment period, there is no scrutiny of the tax compliance with respect to these positions. There is no verification by the CRA, and there is no review by the Tax Court of Canada. If the CRA does not uncover the tax positions in time, the shareholders of BP win, and the taxpayers of Canada lose. If the tax position is discovered and challenged by the CRA, the matter can ultimately be resolved by the Tax Court of Canada as to the propriety.

I submit these are cases that should be reviewed by the CRA and ultimately by the Tax Court of Canada. Where large corporations are taking positions that are on the line, that they are not black and white, these are precisely the types of cases that should ultimately be resolved before the courts.<sup>112</sup>

BP Canada has appealed the Federal Court’s decision to the Federal Court of Appeal.<sup>113</sup> In the meantime, the Federal Court’s decision stands. This means that companies that take uncertain positions need to plan to protect their working papers from the scrutiny of the CRA. As accountants do not have privilege in Canada,<sup>114</sup> it is advisable that a lawyer be retained when an uncertain position is contemplated. Litigation privilege rather than solicitor-client privilege could be relied on to shield a tax reserve or issues list from the CRA’s scrutiny, as solicitor-client privilege only applies to communication between a lawyer and his or her client.<sup>115</sup> Litigation privilege as explained by the SCC in *Blank v. Canada (Minister of Justice)* applies to “communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature.”<sup>116</sup>

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109. See Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), § 231.1 (Can.).

110. See *id.* § 20.2.

111. Minister of National Revenue v. BP Canada Energy Company, 2015 FC 714, ¶ 14 (Can. Ont.).

112. *Id.* ¶ 47.

113. BP Canada Energy Company filed their Notice of Appeal (Appeal Court File No. A-385-15) on September 3, 2015.

114. See *Tower v. M.N.R.* (2002), [2003] 2 F.C. 146, ¶ 222(Can.).

115. See ADAM DODEK, SOLICITOR-CLIENT PRIVILEGE IN CANADA 8-10 (2011).

116. See *Blank v. Can. (Minister of Justice)* 2006 SCC 39, ¶ 28 (Can.).

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**VII. The Supreme Court of Canada and the Right to Strike: Constitutional Imperative or Judicial Overreach?**<sup>117</sup>

In *Saskatchewan Federation of Labour v. Saskatchewan*<sup>118</sup> (*Saskatchewan Federation*), the SCC deemed the right to strike to be an activity protected by S. 2(d) of the Charter of Rights and Freedoms (Charter),<sup>119</sup> and in so doing reversed its own precedent.<sup>120</sup> Justice Abella noted that the modern historical, international, and jurisprudential landscape the majority opinion sets out “suggests compellingly . . . that S. 2(d) has arrived at the destination sought by Dickson C.J. [author of the dissent] in *the Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services . . . .”<sup>121</sup>

For the majority, the trajectory of this judgment began with the recognition, in *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*,<sup>122</sup> that the Charter, in section 2(d), “protects the right of employees to engage in a meaningful process of collective bargaining,”<sup>123</sup> which, pursuant to *Ontario (Attorney General) v. Fraser*,<sup>124</sup> “includes employees’ rights . . . to make collective representations . . . and to have those representations considered in good faith, including having a means of recourse,”<sup>125</sup> should that not be the case, and which, pursuant to *Mounted Police Association of Ontario v. Canada (Attorney General)*,<sup>126</sup> requires independence of choice “to determine and pursue their collective interests.”<sup>127</sup>

For the dissent, constitutionalizing the right to strike is to interfere with “the appropriate balance between employers and unions, . . . a delicate and essentially political matter . . . [that] may vary with the labour relations climates from region to region,”<sup>128</sup> something within the exclusive purview of an elected legislature and in respect of which the Supreme Court of Canada itself cautioned against thirteen years previously.<sup>129</sup>

The majority castigated the dissent for “attributing equivalence between the power of employees and employers,”<sup>130</sup> a position that drives us inevitably to Anatole Frances’ aphoristic sophism: “[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”<sup>131</sup>

117. This section was prepared by Theodore Goloff.

118. See *Saskatchewan Fed’n of Labour v. Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4 (Can.).

119. See *id.* (Section 2(d) provides: “Everyone has the following fundamental freedoms: (d) freedom of association.”).

120. See Reference Re Public Serv. Emp. Relations Act (Alta.), [1987] 1 SCR 313 (Can.).

121. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 75.

122. See *Health Serv. and Support - Facilities Subsector Bargaining Assn. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 (Can.).

123. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 1.

124. See *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 (Can.).

125. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 1.

126. See *Mounted Police Ass’n of Ontario v. Can. (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3 (Can.).

127. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 1.

128. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 105 (citing R.W.D.S.U., Local 558 v. Pepsi-Cola Can. Beverages (West) Ltd., 2002 SCC 8, para. 85, [2002] 1 SCR 156.).

129. See *Saskatchewan Fed’n*, *supra* note 118, ¶ 105.

130. See *id.* at ¶ 56.

131. See *id.*

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From the get-go, the majority framed the question as “whether a prohibition on designated employees participating in strike action . . . amounts to a substantial interference with their right to a meaningful process of collective bargaining”<sup>132</sup> in violation of subsection 2(d), adding “[t]he question of whether other forms of collective work stoppage are protected by s. 2(d) of the Charter is not at issue here.”<sup>133</sup>

Does the majority decision make all statutory limits on the right to strike “presumptively illegal,” with the resulting dual requirements of evidence of (a) justification in a free and democratic society, and (b) minimal impairment, to ensure legality and Charter compliance? Since self-sustaining Charter rights that are deemed fundamental freedoms apply broadly to all Canadians, is the strike weapon available to those workers who are as yet outside institutionalised labour relations systems?

In Quebec, Canada’s most unionized province,<sup>134</sup> the Labour Code provides that the right to strike does not exist, and its exercise is therefore illegal, unless the association of employees has been certified and has obtained the right to strike pursuant to Section 58.<sup>135</sup>

Since 1969, Quebec, alone among North-American labour relations jurisdictions, has forbidden voluntary certification, the right to strike being limited to associations that have acquired exclusive bargaining rights by way of government fiat, by a decision of the Quebec Commission des relations du travail, at least with respect to employees within provincial jurisdiction. A declaration of strike by a certified union leads, at least indirectly, to the loss of a right of individual members of the bargaining unit to continue working for the same employer either within the bargaining unit then on strike or elsewhere.<sup>136</sup>

It is, of course, for the reader to judge the presence or absence of any incongruity between the exercise of a constitutionalized right to strike, deemed fundamental to “workplace justice” that results in the loss or at least restriction of an individual worker’s freedom to seek employment whenever and under whatever conditions of employment might prevail.<sup>137</sup>

### VIII. Alberta’s Climate Change Leadership Plan<sup>138</sup>

On November 22, 2015, Alberta’s newly formed NDP Government announced a climate change leadership plan (“Plan”) designed to overhaul Alberta’s energy market, and

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132. *See id.* at ¶ 2.

133. *See id.*

134. The rate of unionization in Quebec in 2012 (public and private sectors) overall is 39.9%, while that in Canada, as a whole, is 31.5%. By comparison, the rate in Ontario is 28.2%, source: Calculs de RHDCC basés sur Statistique Canada. Tableau 282-0078.

135. *See* Canada Labour Code, CQLR, 2016, c. C-27, art. 106.

136. *See id.* § 109.1(b)-(c).

137. The legislation prohibits an employer that is “struck” or has declared a “lockout” from utilizing the services of an employee covered by the bargaining unit, i.e. the group on strike or locked-out either in the bargaining unit *or anywhere else*. *The effect, however, is felt by the employee*. It is his “right to work” or seek gainful employment anywhere that is impaired or restricted. Hence, the exercise of the constitutionally protected right to strike, actively protected by s 2(d) of the *Charter* as a “fundamental freedom,” entails a consequent loss of freedom to seek work wherever it might be available.

138. This section was prepared by Terri-Lee Oleniuk, Melissa N. Burkett and Taylor Schappert. The authors would like to thank Lorne Carson (partner), Martin Ignasiak (partner), Dana Saric (associate), and Jeremy Barretto (associate), with Osler, Hoskin & Harcourt LLP for their input in this article.

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affecting all Albertans and a number of industries.<sup>139</sup> The Plan is based on the recommendations of the Province's Climate Change Advisory Panel ("Panel") chaired by Dr. Andrew Leach of the University of Alberta.<sup>140</sup>

There are four pillars of the Plan: (A) an accelerated phase-out of coal; (B) an economy-wide carbon levy; (C) an absolute cap on oil sands emissions; and, (D) a methane gas emissions reduction plan.

**A. ALBERTA WILL PHASE OUT COAL**

The Government will aim to phase out coal-fired electricity production by 2030 and replace two-thirds of that electricity with renewable sources of power.<sup>141</sup> Wind energy will likely provide the majority of renewable capacity.<sup>142</sup> Per the Panel's recommendation, this phase out will occur on a schedule developed in consultation with the Federal Government and the Alberta Electric System Operator.<sup>143</sup>

Market-like auctions will be used to maintain reasonable electricity prices for consumers.<sup>144</sup> The procurement process will require renewable power producers to bid each year for a fixed amount of long-term government contracts, which will be awarded to projects requiring the lowest levels of incremental support, and thus encourage the desired quantity of the cheapest available, renewable power production.<sup>145</sup>

The Panel's recommendation is to remain technology-neutral in the offer of long-term fixed price contracts.<sup>146</sup> Under a competitive auctioning system, only those renewable projects that need the least incremental financial support from government in order to secure financing will be developed.<sup>147</sup> As they become more cost-efficient, solar and other more expensive options may comprise an increasing portion of renewable power production.

**B. ALBERTA WILL IMPLEMENT A CARBON PRICE**

The second part of the Plan is to develop Carbon Competitiveness Regulations intended to expand the scope of carbon pricing.<sup>148</sup> In addition to a previously announced increased carbon levy to be paid by large industrial emitters, an economy-wide carbon tax of \$20 per tonne will be introduced beginning in January 2017 (increasing to \$30 per tonne by January 2018).<sup>149</sup> This carbon tax will affect all Albertans.

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139. See Rachel Notley, Premier, *Climate Leadership Plan* (Nov. 22, 2015) (available at <http://www.alberta.ca/release.cfm?xID=38886E9269850-A787-1C1E-A5C90ACF52A4DAE4>).

140. *See id.*

141. *See id.*

142. See Andrew Leach et. al., *Climate Leadership: Rep. to Minister*, 50-51 (Nov. 20, 2015), <http://alberta.ca/documents/climate/climate-leadership-report-to-minister.pdf>, at 50-51.

143. *See id.* at 6; *see also Climate Leadership Plan*, *supra* note 139.

144. *See Climate Leadership Plan*, *supra* note 139.

145. *See Climate Leadership: Rep. to Minister*, *supra* note 139, at 49-50.

146. *See id.* at 56.

147. *See id.* at 50.

148. *See id.* at 5, 31-32.

149. *See Climate Leadership Plan*, *supra* note 139.

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The NDP Government has pledged that this carbon tax will be revenue-neutral, and that its proceeds will be fully reinvested in the Alberta economy.<sup>150</sup> While no detailed breakdown has been provided, the identified uses of the carbon price are expected to include the following:<sup>151</sup>

- investment in green infrastructure;
- energy-efficiency programs;
- renewable energy research and development; and
- an adjustment fund used to help lower-income Albertans offset the cost increases of carbon pricing, and provide financial support to small businesses, First Nations, and those working in coal facilities affected by the accelerated phase-out.

C. ALBERTA WILL LEGISLATE A LIMIT ON CARBON EMISSIONS

The third part of the Plan is an absolute limit on oil sands emissions of 100 megatonnes per year, based on the Panel's recommendation that all emissions over this amount be effectively priced in proportion to output and value added.<sup>152</sup> Facilities with lower emissions will pay less for their emissions, thus incentivizing further reductions in emissions. The Panel recognized that using an output-based allocation at top-quartile performance with a price of \$30 per tonne would approximately double aggregate compliance costs for oil sands producers in 2018, as compared to the system in place today.<sup>153</sup>

This new treatment will likely provide a significant advantage for new projects with top-quartile (or better) potential emissions performance. But it also has the potential to magnify risks, and to render unattractive new projects with high prospective emission intensities.

The absolute cap on oil sands emissions is a departure from the previous intensity-based cap, and risks frustrating the development of future oil sands projects.<sup>154</sup> The industry currently emits 70 percent of its new capped emissions allotment.<sup>155</sup> Unless there are significant efficiency-based emissions reductions from existing projects, new projects will have to compete for the remaining capacity in order to come online. There could be an incentive for companies to seek regulatory approval for new projects before the absolute cap is reached. An absolute cap without the opportunity to buy or trade emissions capacity could stifle the development of some new projects.

D. ALBERTA WILL IMPLEMENT A NEW METHANE GAS EMISSIONS REDUCTION STRATEGY

Through the fourth part of the Plan, Alberta will reduce methane gas emissions from oil and gas operations by 45 percent of 2014 levels by 2025.<sup>156</sup> The Panel recommended

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150. *See id.*

151. *See Climate Leadership Plan, supra* note 139; *see also Climate Leadership: Rep. to Minister, supra* note 142, at 88.

152. *See id.* at 31.

153. *See id.* at 65.

154. *See Climate Leadership: Rep. to Minister, supra* note 142, at 7, 59.

155. *See id.* at 7.

156. *See id.* at 70.

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that reduction occur through the application of emissions standards on all new facilities, coupled with the development of a multi-stakeholder initiative that would administer the provision of offset credits to facilities implementing new technology.<sup>157</sup>

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<sup>157</sup>. *See id.* at 7-8.

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