

Aird & Berlis LLP

Mining Bulletin

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The *Extractive Sector Transparency Measures Act*

The *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376 (“ESTMA”), which received royal assent on December 16, 2014, applies to all commercial developers of “oil, gas or minerals.” Developers who meet certain criteria must report to the Minister regarding payments they make to various parties (payees). The ESTMA defines “payee” broadly to include any domestic or foreign government, trust, board, commission, corporation or other body or authority, including bodies established by two or more governments, or government delegates. For financial years starting after June 1, 2017, Aboriginal governments will also be considered payees.

This Bulletin summarizes some of the key provisions, and regulatory burden that will be borne by the Canadian resource extraction sector, in respect to the ESTMA.

The ESTMA’s stated purpose is “to implement Canada’s international commitments to participate in the fight against corruption through the imposition of measures applicable to the extractive sector.”

WHO IS AFFECTED?

The ESTMA affects commercial developers of “oil, gas or minerals.” Under the ESTMA, oil specifically refers to “crude petroleum, bitumen and oil shale.” However, “gas” and “minerals” are broad terms. Gas means anything produced “in association with natural gas,” not including oil, while minerals refers to “all naturally occurring metallic and non-metallic” minerals.

An entity is engaged in the commercial development of oil, gas or minerals if it is engaged in:

- i. the exploration or extraction of oil, gas or minerals;
- ii. the acquisition or holding of a permit, licence, lease or any other authorization to carry out any of the activities referred to in (i) above; or
- iii. any other prescribed activities in relation to oil, gas or minerals.

Connection to Canada

If a commercial developer is listed on a Canadian stock exchange, they *must* comply with the ESTMA. Developers who are not listed on a Canadian stock exchange might still be required to comply if they have assets, a place of business or do business in Canada.

These developers must comply with the ESTMA if they meet two of the following three criteria, for at least one of their two most recent financial years:

- i. owns \$20 million or more in assets;
- ii. generated at least \$40 million in revenue; or
- iii. employs an average of at least 250 employees.

The ESTMA regulations have not yet been issued. Once they are issued, the regulations may prescribe other commercial developers who must comply.

WHAT ARE A DEVELOPER'S OBLIGATIONS?

Developers caught by the ESTMA are required to provide a report to the Minister. Such report must include all payments (as defined below) made to governments. Payments only need to be included in a report if the payments are *in excess of \$100,000* in any one payment category, to any one government. A developer might pay more than \$100,000 to a single government and not need to include these payments in the report. This would occur if the payments are less than \$100,000 in each category. It is an offence under the ESTMA to structure "*any payments... with the intention of avoiding the requirement to report those payments.*"

WHAT IS A "PAYMENT"?

Under the ESTMA, payments do not have to be monetary. They can also be in kind. Payment categories include the following:

- a. taxes (other than consumption taxes and personal income taxes);
- b. royalties;
- c. fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions;
- d. production entitlements;
- e. bonuses, including signature, discovery and production bonuses;
- f. dividends other than dividends paid as ordinary shareholders;
- g. infrastructure improvement payments; or
- h. any other prescribed category of payment.

WHAT ELSE IS REQUIRED?

In addition to providing the report, a director or officer of the developer needs to attest that the report is "*true, accurate and complete.*" Developers also need to provide ESTMA reports to the Minister and to the public. Developers need to keep records of their reports for seven years, unless later specified in the regulations.

WHEN TO REPORT?

The ESTMA is now in force. Developers will have to comply for their financial years which start after June 1, 2015. Reports are due 150 days after their financial year end.

FAILURE TO FILE

Failure to file a report under the ESTMA can result, upon summary conviction, in a \$250,000 fine.

The [Mining Group](#) at Aird & Berlis LLP has extensive experience in providing expert Canadian legal services to various participants in the mining industry. For more information, please contact [Tom Fenton](#) or another [member](#) of the Mining Group.

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