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Extractive Sector Transparency Measures Act

Payments to Indigenous Payees in Canada

Overview

The *Extractive Sector Transparency Measures Act* (ESTMA or the Act) came into force on June 1, 2015. The Act implemented reporting requirements for Entities involved in the commercial development of oil, gas and minerals, which contributes to the emerging global standard of increased transparency in the extractive sector. It is important to note that the new mandatory reporting requirements apply only to industry, and the legislation does not impose any obligations on governments, including Indigenous governments.

The Act included a two-year deferral period for reporting payments to Indigenous Payees in Canada, which ended on June 1, 2017. The deferral responded to comments from Indigenous people and industry during the development of the Act that more time was needed to consider the potential implications of reporting payments made to Indigenous governments. Summaries of the Government's engagement during the development of the Act and key clarifications are available on-line: <https://open.canada.ca/en/content/developing-mandatory-reporting-standards-extractive-sector>

Reporting Entities

The ESTMA applies to Entities involved in the commercial development of oil, gas or minerals, either directly or through direct or indirect control of an Entity involved in the commercial development of oil, gas or minerals. It imposes reporting requirements on those Entities that are listed on a stock exchange in Canada or companies that have a place of business in Canada, do business in Canada, or have assets in Canada and meet at least two of the three criteria in section 8 (1)(b) of the Act (i.e. Reporting Entities).

Indigenous Payees

The Act defines "Payee" (see a, b, c) but does not specifically define an Indigenous Payee. The following sections provide general examples.

Payees

The term "Payee" is broadly defined within the ESTMA and includes any government in Canada or abroad. Payees include governments at any level, including national, regional, state/provincial/territorial or local/municipal levels, as well as Indigenous governments. This definition recognizes that governments around the world come in many forms.

a. Any government in Canada or in a foreign state

This could include any Indigenous group or organization that exercises or performs the power, duty or function of government. For example, this may include, but is not limited to, any group or organization with the power to make laws in relation to natural resources or the management and exploitation of those resources. This may also a government that has been recognized in federal, provincial or territorial legislation).

b. A body that is established by two or more governments

This could include, but is not limited to, a treaty association, tribal council or Chiefs' council that is established by a government as defined in paragraph a.

c. Any trust, board, commission, corporation, body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph a or a body referred to in paragraph b.

This could include, but is not limited to, an Indigenous trust, an Indigenous development corporation, and a Métis group, as well as other boards, commissions, corporations or bodies that are established to exercise or perform a power, duty or function of a government.

Reporting Payments Made to Indigenous Payees

Starting on June 1, 2017, Reporting Entities are required to track certain types of payments of C\$100,000 or more made in relation to the commercial development of oil, gas or minerals to Indigenous Payees in Canada. Reportable Payments¹ must be included in ESTMA reports published by Reporting Entities after June 1, 2017. ESTMA reports must cover a Reporting Entity's entire financial year and be published no later than 150 days following the end of their financial year.

Reportable Payments Made to Payees: Key Considerations

- Is the payment related to the commercial development of oil, gas or minerals?
 - The Act defines the commercial development of oil, gas or minerals as the exploration or extraction of oil, gas or minerals, as well as the acquisition or holding of a permit, licence, lease or any other authorization to carry out any exploration or extraction of oil, gas or minerals.
- Does the payment fall under one of the seven payment categories?
 - Looking at the substance rather than the form of the payment, would it be considered a tax, royalty, fee, production entitlement, bonus, dividend or infrastructure improvement payment?
- Do all payments made to a Payee under a single payment category total C\$100,000 or more?
 - Aggregate all payments to a Payee over the course of a financial year under a single payment category.
- Does the body receiving the payment meet the definition of a "Payee" under the Act? If not, is the body receiving the payment on behalf of a Payee?
 - Pursuant to section 3 of the Act, payments made to a body on behalf of a Payee would be reportable.

Categories of Reportable Payments

- Taxes (other than consumption taxes and personal income taxes)
- Royalties
- Fees (including rental fees, entry fees and regulatory charges, and fees or other consideration for licences, permits or concessions)
- Production entitlements
- Bonuses, including signature, discovery and production bonuses)
- Dividends (other than dividends paid as ordinary shareholders)
- Infrastructure improvement payments

If these criteria are met, the payment may be reportable. It is important to consider the facts and circumstances of the payment in determining if it is reportable.

¹ The term "Reportable Payment" refers to payments made to a "Payee" in relation to the commercial development of oil, gas, or minerals of CAD \$100,000 or more in one of the seven payment categories defined in the ESTMA.

Examples

Examples of Reportable and non-Reportable Payments to Indigenous Payees in Canada

In all scenarios, payments to Indigenous Payees in Canada are reportable only if they are made on or after June 1, 2017. In addition, the legally binding *Technical Reporting Specifications* require that payments be reported on a cash basis and reported when they are made, not when a commitment is made for a payment.

- For a project on Crown land, a Reporting Entity signs an impact benefit agreement (IBA) with a tribal council that has six member First Nations. Through the agreement, the Reporting Entity makes royalty payments over C\$100,000 to the tribal council, which then transfers the payments to each First Nation. The tribal council would be considered a Payee under the ESTMA. In its ESTMA report, the Reporting Entity would disclose the total amount of royalties paid to the tribal council over the course of its financial year.
- A Reporting Entity, as part of its IBA with a First Nation government to gain access to a mineral deposit, builds a community centre for the community. This payment, which is made as a condition of the commercial development of oil, gas or minerals, would be reportable under the ESTMA.
- A Reporting Entity purchases equipment required for its commercial operations at market value from a local Indigenous corporation. Since this is a commercial-to-commercial transaction, the payment is not reportable under the ESTMA. [Note that while purchases made in the ordinary course of business are not reportable, if purchasing a good or service at a cost of more than fair market value as a condition of development, the payment, or the portion thereof in excess of fair market value, is *reportable under the Act*.]
- A Reporting Entity with an agreement with a First Nation government in relation to a mining project on the nation's traditional territory is required to pay annual royalties of over C\$100,000 to the band administration as well as to an Indigenous trust, which was established by the band administration to exercise a function of government on its behalf. Under the Act, the Reporting Entity is required to report the total payment made to the First Nation government. However, for the purposes of disclosing the payments in its report, the Reporting Entity may also break down the individual amounts paid to the Band administration and trust, respectively.
- A Reporting Entity has signed a socio-economic agreement with an Indigenous Payee for the life of an operating mine. The agreement includes annual payments to an Economic Development Corporation associated with the Indigenous Payee. These payments over C\$100,000 per category would be included in the ESTMA reports from the Reporting Entity in the total provided to the controlling Indigenous group.