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PUBLICATION

New Rules for Resources Sector Financial Reporting Aim to Help Reduce Corruption

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The 2015 conference of the Prospectors and Developers Association of Canada (PDAC), one of the most influential annual resources sector meetings in the world, is scheduled for the Metro Toronto Convention Centre March 1 – 4. New federal law requiring all Canadian oil, gas, mineral and other resource companies to disclose publicly all payments to all governments is certain to be the subject of much discussion. In the following article, Blaney McMurtry partner Ralph Cuervo-Lorens highlights the key provisions of the new statute.

After considerable consultation and discussion, Parliament is debating the *Extractive Sector Transparency Measures Act*, which creates new reporting standards for payments made to foreign and domestic governments (including Aboriginal groups) by Canadian mineral, oil or gas development companies.

When the Act comes into force, it will apply to payments to governments immediately and to Aboriginal groups two years later. Despite the unknowns in the exact legislative timetable, a number of extractive sector enterprises are moving forward with development of their payment-reporting systems. The reporting standards are expected to be in place by June 2015, according to the federal government.

The Act is another piece in the world-wide drive to better deal with political and government corruption. As with the *Corruption of Foreign Public Officials Act*, it is intended to follow similar measures introduced by the United States and the European Union. (Note that the U.S. measures are under challenge in the courts and, to the extent that they are ultimately changed, Canada's law may also have to be changed to maintain the desired alignment between the two jurisdictions.) The Act contains harmonization provisions allowing the Minister to deem another jurisdiction's standards a substitute acceptable to Canada.

Entities

Broadly speaking, the *Extractive Sector Transparency Measures Act* applies to any publicly-listed Canadian entity engaged directly or indirectly in the commercial development of oil, gas or minerals. “Commercial development” is defined to include exploration, extraction and the acquisition or holding of a permit, licence or lease, or any other authorization to carry out exploration or extraction of oil, gas or minerals.

For the Act to apply, the entity must (a) be listed on a stock exchange in Canada or (b) have a place of business in Canada, do business in Canada or have assets in Canada. In addition, the entity must further, and for least one of its two most recent financial years, have at least $20 million in assets, have generated at least $40 million in revenue or employed an average of at least 250 employees.

Payments to be Reported

The basic obligation under the statute is to report all payments to foreign and domestic governments (including any to Aboriginal groups, as noted) made in relation to the commercial development of oil, gas or minerals that are in the prescribed amount (for the various categories of payment). Where no amount is prescribed, all payments of $100,000 or more must be disclosed.

As drafted when it went to the House of Commons’ Standing Committee on Natural Resources in late October, the Act requires disclosure of *all* payments, regardless of whether there are confidentiality clauses in contracts underpinning the resource development in question or confidentiality requirements in other statutes or regulations covering such development. This potentially creates a delicate problem for companies.

The types of payments in the Act are intended to cast a wide net:

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, discover and production bonuses);

f. dividends other than dividends paid to ordinary shareholders (such as dividends related to production or development milestones);

g. infrastructure improvement payments; or

h. any other prescribed category of payment.

Any such payments must be reported to the federal minister of natural resources no later than 150 days after the end of each of financial year and, perhaps just as important, must also be made public. The law, as it went to standing committee, did not specify how that will be done, or to what level of detail.

Sanction for Non-Compliance

Anyone who fails to comply with the reporting standards, or who knowingly makes false or misleading statements or who structures payments in such a way as to avoid the reporting requirements, is subject to a maximum fine of $250,000.

As in other regulatory-type legislation, the Act also stipulates that any officer, director or agent who directed, authorized, assented to, acquiesced or participated in the commission of the offence is also guilty of an offence and liable to sanction upon conviction. These offences will be subject to a defence of due diligence if the accused person can establish that all reasonable, prudent measures were taken to prevent the offence.