



International Business Bulletin

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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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CANADA INTRODUCES LEGISLATION TO IMPOSE PAYMENT DISCLOSURE OBLIGATIONS ON EXTRACTIVE COMPANIES

Henry J. Chang

Introduction

On June 12, 2013, Prime Minister Stephen Harper announced that the Government of Canada would establish new mandatory reporting standards for Canadian extractive companies in order to enhance transparency regarding payments made to domestic or foreign governments. On October 23, 2014, the Government of Canada finally introduced the *Extractive Sector Transparency Measures Act* (the “Act”), as part of *Bill C-43, Economic Action Plan 2014 Act, No. 2*.

Entities Subject to the Act

The term “entity” is defined in Section 2 of the Act as a corporation, trust, partnership, or other unincorporated organization that is engaged in, or controls another entity that is engaged in, the commercial development of oil, gas, or minerals in Canada or elsewhere. According to Subsection 8(1) of the Act, reporting requirements will apply to the following entities (the “Reporting Entities”):

- a) An entity that is listed on a stock exchange;
- b) An entity that has its place of business in Canada, does business in Canada, or has assets in Canada and that, based on its con-

solidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years:

- i) It has at least \$20 million in assets;
 - ii) It has generated at least \$40 million in revenue;
 - iii) It employs an average of at least \$250 employees; and
- c) Any other entity prescribed by regulation.

Reporting Payments

According to Subsection 9(1), every Reporting Entity described above must file a report with the Minister, disclosing certain payments that it has made to specific payees during the financial year, within 150 days of the end of that year. Section 5 states that the Governor in Council may designate a member of the Queen’s Privy Council for Canada as the “Minister” for the purposes of the Act.

According to Subsection 9(2), Reporting Entities are required to disclose any payments that are made to the same payee where the total amount of such payments exceeds either the amount set by regulation for a particular category of payment (proposed regulations have not been published so these thresholds are still unknown) or, where no amount is prescribed by regulations, CAD\$100,000. Section 2 defines the term “payment” as any payment, whether monetary or in

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kind, that is made to a payee in relation to the commercial development of oil, gas, or minerals and that falls within any of the following categories of payments:

- 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 category of payment prescribed by regulation.

Section 2 also defines the term “payee” as:

- a) Any government in Canada or in a foreign state;
- b) A body that is established by two or more governments;
- c) Any trust, board, commission, corporation, body, or authority that exercises or performs a power, duty, or function of government on behalf of one of the above entities; or
- d) Any other payee prescribed by regulation.

The reporting obligations are expected to be consistent with existing international standards and aligned with other G-8 countries. As a result, it is

expected that a uniform reporting template will eventually be developed to report such payments in Canada, the European Union, and the United States.

Section 10 of the Act also states that the Minister may determine that complying with the requirements of another jurisdiction are an acceptable substitute. In such cases, a Reporting Entity will be deemed to have complied with the reporting requirements of the Act if it:

- a) Files the required payment disclosure report in the other jurisdiction;
- b) It provides a copy of that report to the Minister within the time permitted by the other jurisdiction; and
- c) Meets any other conditions imposed by the Minister.

Record Keeping and Compliance

According to Section 13, a Reporting Entity must keep records of its payments made in a financial year for the period prescribed by regulation. If no period is prescribed, the required period will be seven years, beginning on the day that the entity files its report with the Minister.

According to Section 14, in order to verify compliance, the Government of Canada may require the provision of any information and documents, including:

- a) A list of projects for the commercial development of oil, gas or minerals in which the entity has an interest and the nature of that interest;
- b) An explanation of how the entity has treated the payment in its report;

“The Act also contains criminal offenses for non-compliance, making false statements, giving false information, and structuring payments to avoid reporting requirements.”

- c) A statement of any policies that the entity has implemented for the purpose of complying with the Act; and
- d) The results of an audit of its report performed by an independent auditor in accordance with generally accepted auditing standards.

According to Section 16, any person designated to administer or enforce the Act will be permitted, for the purpose of verifying compliance, to enter any place reasonably believed to contain anything to which the Act applies or any document relating to its administration. Upon entry, a designated person may examine anything located therein, use any means of communication or computer system, use any copying equipment, take photographs/recordings/sketches, give directions, prohibit or limit access, or remove anything for examination. According to Section 19, if the Minister concludes that an entity is not in compliance with the Act, it may order corrective measures.

Offences

The Act also contains criminal offenses for non-compliance, making false statements, giving false information, and structuring payments to avoid reporting requirements. According to Section 24, every person or entity who fails to comply with reporting requirements, knowingly makes a false or misleading statement, knowingly provides false or misleading information, or structures payments or any other financial obligations or gifts that relate to its commercial development of oil, gas or minerals (with the intention of avoiding the reporting requirement) will be guilty of an

offence punishable on summary conviction and will be liable to a fine of not more than CAD\$250,000.

Section 24 also indicates that, if an offense is committed or continued on more than one day, it constitutes a separate offense for each day that the offence is committed or continued. Therefore, it is possible for a person or entity to be charged with multiple counts for a single offence that continues for more than one day. In such cases, the potential fine could be much more than the CAD\$250,000 limit mentioned above.

According to Section 25, if a person or an entity commits an offence under the Act, an officer/director/agent of that person or entity is considered a party to the offence if they directed, authorized, assented to, or acquiesced in or participated in its commission. They are also guilty of the offence whether or not the person or entity has been prosecuted or convicted.

According to Section 27, criminal proceedings under the Act may only be instituted within five years following the date at which the subject matter of the proceedings arose.

Outstanding Issues

Aboriginal Entities

During the consultation stage, several stakeholders expressed concern over the application of the Act to Aboriginal entities. It was felt that the Act's reporting obligations might significantly undermine the trust and goodwill developed between the extractive industry and these entities.

For now, the Act has proposed a two-year transitional period. Section 29 confirms that the reporting obligation will not apply to any payments made to the following Aboriginal entities, during the two-year period following its coming into force:

- a) An Aboriginal government in Canada;
- b) A body established by two or more Aboriginal governments in Canada; and
- c) Any trust, board, commission, corporation, body, or authority that exercises or performs a power, duty, or function of government for one of the above entities.

Project-Level Reporting

While the Act does not specifically include project-level payments in its mandatory reporting regime, Subsection 9(5) provides that the Minister may specify in writing the manner in which payments are to be organized or broken down in the report, including on a project basis. It is expected that future regulations or administrative guidance will clarify this issue.

Exemptions

During the consultation stage, stakeholders expressed concern that the Act's disclosure obligations might conflict with another jurisdiction's privacy or confidentiality requirements, or with an entity's contractual obligations. The Act does not

currently provide for any exemptions from the reporting obligation. However, Clause 23(1)(b) allows the regulations to describe circumstances in which the Act will not apply to specific entities, payments, or payees. Again, it is expected that future regulations will clarify this issue.

Manner of Public Disclosure

Section 12 requires the entity to make any information required by the regulations available to the public. However, as proposed regulations have not been published, it is not known what information will need to be made public or how this will occur. It is also expected that future regulations or administrative guidance will clarify this issue. ■

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