

FACT SHEET
The Extractive Sector Transparency Measures Act
Division 28 of Bill C-43

The *Extractive Sector Transparency Measures Act* passed into law, receiving Royal Assent on 16th December, 2014. The Act will come into force at a date to be determined by the Governor in Council.¹ The Act was tabled on October 23rd as part of omnibus legislation, Bill C-43, Canada's second budget implementation bill.

The passage of mandatory payment reporting legislation implements Prime Minister Harper's commitment in June of 2013, preceding the G8 Lough Erne Summit, to develop a mandatory payment reporting standards.² Minister Oliver, while Minister of Natural Resources Canada (NRCAN), further committed to enact legislation by April 1st of 2015, now revised to June of 2015.³

Between now and when the legislation is enacted, NRCAN has publicly committed to form a working group which will provide input into the reporting template and accompanying administrative guidance. This working group will be multi-stakeholder, composed of industry, civil society, aboriginal groups and provinces/territories. The administrative document and the reporting template finalized by NRCAN will be legally enforceable under the Act and subject to penalty.⁴

It is expected that the Governor in Council will set a date for the coming into force of the legislation no later than April 1st 2015, as indicated in Minister Oliver's statement. At this time, the government does not expect to have regulations in place, but does expect to have the administrative document and reporting template complete.

The following is a summary of the legislations' key requirements.

¹ Section 377 of Bill C-43 states that, "The provisions of the *Extractive Sector Transparency Measures Act*, as enacted by section 376, come into force on a day or days to be fixed by order of the Governor in Council.

² <http://pm.gc.ca/eng/news/2013/06/12/canada-commits-enhancing-transparency-extractive-sector>

³ <http://www.nrcan.gc.ca/media-room/news-release/2014/15563>;

<http://open.canada.ca/en/forms/consultation-mandatory-reporting-standards-extractive-sector>

⁴ Under Section 24(1) "(1) Every person or entity that fails to comply with section 9, 12 or 13, an order made under section 14, subsection 16(4) or an order made under section 19, or that contravenes section 18 or the regulations, is guilty of an offence punishable on summary conviction and liable to a fine of not more than \$250,000."

1. Who must disclose?

- Any entity, including a corporation, trust, partnership or other unincorporated organization, that engages in the commercial development of oil, gas and minerals in Canada or elsewhere OR an entity that controls a corporation or a trust, partnership or other incorporated organization that engaged in the commercial development of oil, gas and mineral in Canada or elsewhere
 - *Minerals* is defined to include “naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious minerals and metals;”
 - *Gas* is defined to include “natural gas and includes all substances, other than oil, that are produced in association with natural gas;”
 - *Oil* is defined to include “crude petroleum, bitumen and oil shale.”⁵
- An entity listed on a stock exchange in Canada
- Entities that have a place of business in Canada, do business in Canada or have assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two recent financial years:
 - At least 20 million in assets
 - generated at least 40 million in revenue
 - employs an average of at least 250 employees
- Any other prescribed company (prescribed by the regulation)

Further Clarification

- Control: “an entity is controlled by another entity if it is controlled by the other entity, directly or indirectly, in any manner. All entities under the company’s control, directly or indirectly in any manner.”⁶
 - An entity is “deemed to control any entity that is controlled, or deemed to be controlled, by the other entity.”⁷
 - The definition of control can be changed amended or defined in the regulations⁸

Exclusions

- If a subsidiary or other entity has already provided the minister with a report. This will prevent duplicative reporting, whereby both a subsidiary and parent entity are captured under the disclosure obligations.⁹

2. What payment information must be disclosed?

- 150 days after the end of each of its financial years, companies must submit a report to the Minister that discloses the payments, whether monetary or in-kind, made during that year.¹⁰
- The form and manner of this disclosure will be specified through an administrative process which will lead to the publication of legally enforceable administrative guidance and a reporting template.

⁵ Section 2 “Interpretation and General Provisions”

⁶ Section 4(1)

⁷ Section 4(2)

⁸ Section 23(1)c

⁹ Section 11

¹⁰ Section 9(1); Section 2 “payment”

3. What is the threshold of payments to be disclosed?

- Any payment within a category of payment made to the same payee, if the total amount of those payments during the financial year is at least \$100,000.00.
- Regulations can be created to prescribe the amounts for each category of payment.

4. Which categories of payments must be disclosed?

The following payment categories must be disclosed:¹¹

- Taxes, other than consumption taxes and personal income taxes
- Royalties
- Fees, including rental fees, entre fees, regulatory charges as well as fees or other considerations for licenses, permits or concessions
- Production entitlements
- Bonuses, including signature bonuses, discovery and production bonuses
- Dividends other than dividends paid as ordinary shareholders
- Infrastructure improvement payments
- Any other prescribed category of payment
- Definitions of prescribed payment categories will be addressed through the administrative process.

5. For which activities must payments be disclosed?

Disclosure is for payments arising from activities relating to the commercial development of minerals, oil and gas, including,¹²

- Exploration
- Extraction
- Acquisition or holding of a permit, license, lease or any other authorization to carry out the exploration and/or extraction of oil, gas and minerals
- Any other prescribed activities in relation to oil, gas or minerals

6. Payments to which government entities?

Companies are required to disclose payments to all levels of government, including state-owned enterprises. Payments must be disclosed if they are made to any of the following payees:¹³

- “Any government in Canada or a foreign state;”
- “A body that is established by two or more governments;” and
- “Any trust, board, commission, corporation or 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...”

¹¹ Section 2 “payment”

¹² Section 2 *a,b,c*

¹³ Section 2 “payee”

Exclusions

- The Act does not apply to following payees for a two year period beginning after the Act comes into force:¹⁴
 - an Aboriginal government in Canada;
 - a body established by two or more Aboriginal governments in Canada; and
 - any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for an aboriginal government.

7. Project-level payment disclosure

- The Act suggests that the “Minister may specify, in writing, the way in which payments are to be organized or broken down in the report — including on a project basis — and the form and manner in which a report is to be provided. The Minister is to make those requirements available to the public in the manner that he or she considers appropriate.”¹⁵
- While the Act does not require project level reporting, the Government of Canada has repeatedly stated their commitment to require project level payment disclosure through the administrative guidance and reporting template. These statements were noted by government officials during their testimony in the Senate and the House of Commons and in the Government of Canada’s Media Backgrounder.¹⁶

8. When will the information be disclosed?

- A company will have to submit a report for their financial year beginning after the after the enactment of legislation. According to the coming into force clause, the Governor in Council is responsible for setting the date of enactment.¹⁷
 - If the legislation is enacted in April 1st, 2015, then those companies with a financial year end of December 31st will submit their first reports in May/June of 2017.
 - Companies must report no later than 150 days after the end of their fiscal year

9. How will the information be published?

The report must be made available to the public, however, future regulations can affect the information which is made publicly available:

- “The report and information must be made available to the public (a) in the manner specified by the Minister; and (b) for the period prescribed by regulation or, if no period is prescribed, for a period of five years.¹⁸
- The Governor in Council may make regulations “respecting the information that must be made available to the public under section 12.¹⁹

¹⁴ Section 29

¹⁵ Section 9(5)

¹⁶ <http://www.nrcan.gc.ca/media-room/backgrounder/2014/15565>

¹⁷ Section 9; Section 30

¹⁸ Section 12(2)

¹⁹ Section 23(1)f

10. Do the Regulations grant any exemptions on grounds of alleged prohibitions in foreign law, confidentiality or commercial sensitivity?

The Act does not specify any exemptions, however, the Act does allow for future regulations that grant exemptions.

- The Governor in Council may make regulations “respecting the circumstances in which any of the provisions of this Act do not apply to entities, payments or payees.”²⁰
- The Government has stated it does not plan to create regulations in advance of the enactment of the Act.

11. What other reporting regimes can be considered equivalent?

The Minister may determine if reporting “requirements of another jurisdiction achieve the purposes of the reporting under this Act,” and determine that those requirements are an acceptable substitute for those set out in section 9 of the Act.²¹ If the Minister has determined reporting requirements are an acceptable substitute, “an entity is deemed to have provided a report in accordance with section 9 if the entity:

- (a) provides the report required by the jurisdiction to the jurisdiction’s competent authority;
- (b) provides a copy of that report to the Minister, in the form and manner that he or she specifies, within any period specified in the jurisdiction’s reporting requirements for providing the report to the competent authority; and
- (c) meets any conditions imposed by the Minister under subsection (1).”²²

12. How will companies provide assurance for the reports?

Companies are to “include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.”²³ Further, directors and officers are liable for the commission of offences under the Act.

- “If a person or an entity commits an offence under this Act, any officer, director or agent or mandatary of the person or entity who directed, authorized, assented to, acquiesced in or participated in its commission is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether or not the person or entity has been prosecuted or convicted.”²⁴

²⁰ Section 23(1)*b*

²¹ Section 10(1)

²² Section 10(2)

²³ Section 9(4)

²⁴ Section 25

13. How will the Act be enforced, and what penalties do companies face for failing to comply?

Enforcement:

- To verify compliance with the Act, the Minister may require the entity to provide information and documents, including,²⁵
 - A list of projects for the commercial development of oil, gas, and minerals
 - An explanation of how the entity has treated a payment for the purposes of preparing a report
 - A statement of any policies the entity has implemented for the purposes of meeting reporting obligations under the act
 - The results of an audit, to be carried out in accordance with generally acceptable auditing standards specified by an independent auditor, of the report or of the records of payments
- A designated person, to verify “compliance with this Act, enter any place in which the person has reasonable grounds to believe there is anything to which this Act applies or any document relating to the administration of this Act.”²⁶ The designated person can “examine any document,” “use any means of communication,” “use any computer” ... to examine or reproduce data, “prepare a document...based on the data,” “prohibit or limit access to a place,” “remove anything from the place for the purposes of examination, amongst other things.”

Penalties:²⁷

- Failure to comply: companies failing to comply with the Act, including documents incorporated under section 9, are be liable for a fine upon summary conviction of up to \$250,000 CAD.
- Knowingly making false or misleading statements: companies that knowingly make false or misleading statements are liable upon summary conviction to a fine of up to \$250,000 CAD
- Structuring payments to avoid reporting: companies that structure payments with the intention of avoiding reporting are liable upon summary conviction to a fine of up to \$250,000.00
- Continuous Offences: the three offences detailed above, constitute separate offences for each day that they are committed.

More Information

- For more information please contact Claire Woodside, Director, PWYP-Canada at cwoodside@pwyp.ca and for more information visit www.pwyp.ca and www.publishwhatyoupaylorg

²⁵ Section 14

²⁶ Section 16

²⁷ Section 24