



EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT

By James Beeby and Lisa Andrews

The Government of Canada recently passed the *Extractive Sector Transparency Measures Act* (the “**Act**”). The Act applies to a broad range of companies involved in the exploration and extraction of oil, gas and minerals as well as to companies acquiring or holding rights to these resources (including exploration activities). The Act will require such companies to disclose certain payments made to foreign and domestic government entities in relation to the commercial development of oil, gas or minerals.

The Government of Canada has announced that it intends to bring the Act into force by April 1, 2015 at the earliest and no later than June 1, 2015. Many of the details of the reporting regime discussed below are to be set out in regulations which have yet to be publicly released. Accordingly, the Act is likely not to be brought into effect until later in this period.

REPORTING COMPANIES

The Act will impose annual reporting requirements on any corporation, trust, partnership or other unincorporated organization that (a) is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere; or (b) controls a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere¹, in either case, that is listed on a stock exchange in Canada or meets certain other requirements (collectively, “**Reporting Companies**”)². Subsidiaries of a Reporting Company and entities falling under a Reporting Company’s direct or indirect control will also be subject to the Act.

¹ The Act defines “commercial development of oil, gas or minerals” to be (a) the exploration or extraction of oil (crude, bitumen and oil shale), gas (natural gas and all substances, other than oil, that are produced in association with natural gas) or minerals (all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious minerals and metals); (b) the acquisition or holding of a permit, license, lease or any authorization required to carry out the exploration or extraction of oil, gas or minerals or (c) any other prescribed activities in relation to oil and gas or minerals.

² An entity described in (a) or (b) above will be a Reporting Company if it has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated annual financial statements, for at least one of its two most recent financial years, meets at least two of the following conditions: (a) has at least \$20 million in assets; (b) has generated at least \$40 million in revenue; and (c) employs an average of at least 250 employees. The Government of Canada may also prescribe any other entity as a “Reporting Company”.

It is important to note that the definition of commercial development is quite broad and includes exploration activities. Accordingly we expect that most listed resource issuers will be required to comply with the reporting provisions of the Act.

PAYMENTS TO PAYEES

When the Act comes into force, Reporting Companies will be obligated to publicly disclose all payments³ made to:

- (a) all levels of domestic and foreign governments;
- (b) a body that is established by two or more governments;
- (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 a government for any level of domestic or foreign governments or a body that is established by two or more governments; or
- (d) any other prescribed payee,
(each, a “**Payee**”).⁴

A Reporting Company must keep a record of all payments made to Payees for a period of seven years from the date of the report unless otherwise prescribed.

ANNUAL REPORT

A Reporting Company must provide the Minister (as designated pursuant to the Act) with a report disclosing payments made to Payees during the previous financial year (the “**Annual Report**”). Absent any specific threshold prescribed by regulation, Reporting Companies will only be required to disclose single or cumulative payments within a category of payments amounting to \$100,000 or more.

The Annual Report must be filed within 150 days after the end of a Reporting Company’s financial year.

³ The Act identifies the following specific categories of payments, whether monetary or in kind, that must be reported: (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.

The following payments are also deemed to be payments by a Reporting Company: (a) a payment that is made to an employee or public office holder of a Payee is deemed to have been made to the Payee; (b) a payment that is due to a Payee and that is received by a body that is not a Payee on behalf of the Payee is deemed to have been made to the Payee; (c) a payment that is made to a Payee by an Entity that is controlled by a Reporting Company is deemed to have been made by the Reporting Company; and a payment that is made to a Payee for a Reporting Company is deemed to have been made by the Reporting Company.

⁴ The definition of “Payee” is very broad and includes aboriginal governments, however payments made to aboriginal governments in Canada will **not** be subject to the Act until two years after the Act comes into effect.

The form of the Annual Report has not yet been finalized. The Government of Canada is working with the European Union and the United States to develop a common reporting template, so as to reduce administrative costs for Reporting Companies.

While the Act does not require project-level disclosure, it is anticipated that the Annual Report will require information to be presented on a project-level basis, the parameters of which will likely be defined by a Reporting Company according to its particular industry and business context.

A director or officer of the Reporting Company, or an independent auditor or accountant, will be required to certify that the information in the Annual Report is true, accurate and complete.

REPORTS IN FOREIGN JURISDICTIONS

The Act recognizes that the reporting obligations imposed by another jurisdiction may achieve the intended purposes of the Act and, as a result, reports utilized in other jurisdictions (“**Foreign Reports**”) may be provided to the Minister in satisfaction of Canadian legal requirements.

A Reporting Company relying on a Foreign Report will have to provide the Foreign Report to the foreign jurisdiction’s competent authority and to the Minister within the time required by the foreign jurisdiction.

PUBLIC DISCLOSURE OF THE ANNUAL REPORT

A Reporting Company will be required to make its Annual Report or Foreign Report, as applicable, available to the public likely by posting such report on the Reporting Company’s website. After the Annual Report or Foreign Report, as applicable, is posted on its website, it is expected that a Reporting Company will be required to issue a public notice stating that it has complied with its obligations under the Act and to notify the Minister of its compliance.

A Reporting Company will be required to keep the Annual Report or Foreign Report, as applicable, available to the public, most likely by keeping it posted on its website, for a period of five years after the date of such report unless otherwise prescribed. There is no requirement to file the Annual Report or Foreign Report on the *System for Electronic Document Analysis and Retrieval* (SEDAR) or refer to it in a reporting issuer’s annual information form or information circular.

CEASE TO BE A REPORTING COMPANY

A company that ceases to be a Reporting Company as defined by the Act will no longer be required to file Annual Reports. However, such company will continue to have obligations under the Act for a certain period of time. It will be required to continue to make all previous Annual Reports available to the public for a period of five years from the date of the Annual Report and must keep records of payments made to Payees for a period seven years from the date of the last Annual Report.

COMPLIANCE

The Minister may require a Reporting Company to provide additional information or documents for the purposes of verifying compliance with the Act including lists of projects for the commercial development of oil, gas or minerals in which the Reporting Company has an interest and the nature of that interest, explanations of the treatment of payments by the Reporting Company, a statement of any policies that the Reporting Company has implemented for the purpose of compliance with the Act and the results of any audit of its Annual Report conducted in accordance with generally accepted auditing standards by an independent auditor.

In addition, any person or entity:

- (a) failing to comply with the reporting standards or any corrective measures;
- (b) knowingly making false or misleading statements or knowingly providing false or misleading information; or
- (c) structuring payments or any other financial obligations or gifts, whether monetary or in kind, that relate to its commercial development of oil, gas or minerals, with the intention of avoiding the requirement to report,

may be liable to a fine of not more than \$250,000. Each day the offence under the Act is committed or continues will constitute a separate offence.

Any officer, director or agent of any such person or entity that directed, authorized, assented to or acquiesced in or participated in its commission is a party to and guilty of the offence and may be liable on conviction to the punishment.

EXEMPTIONS

The Government of Canada has acknowledged that there may be situations in which the proposed legislation requires the disclosure of information that is prohibited by another country's laws. However, currently no exemptions for such information have been granted under the proposed legislation. Both the European Union and the United States have considered this issue as well, and the European Union has confirmed that no exemptions have been granted under its equivalent reporting regime.

In the United States, the Securities Exchange Commission (the "SEC") has sought to implement its own rule in respect of the extractive sector transparency which excludes exemptions. However, by virtue of the SEC's attempt to exclude exemptions, among other things, a District Court invalidated the SEC rule entirely. The SEC has not yet responded to the ruling, and their response may affect the decision to exclude exemptions from the proposed legislation when regulations are ultimately brought into force.

EFFECTIVE DATE

It is the intention of the Government of Canada to bring the Act into force by April 1, 2015 at the earliest and no later than June 1, 2015. As the Act requires Annual Reports to be filed within 150 days of financial year end, Reporting Companies with a financial year end of December 31 will not be required to file their first Annual Report until the end of May 2016. However, the requirement to keep records of all payments to Payees will be effective from the date the Act comes into force, and therefore resource issuers are well advised to establish reporting procedures prior to the date the Act actually comes into force.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

ABOUT MCCULLOUGH O'CONNOR IRWIN LLP

At MOI we focus on one core practice area: corporate and securities law. We are recognized for our work both nationally and internationally. Our firm has been repeatedly ranked as a leading law firm in the corporate finance, securities, mining and private equity practice areas and as a leading Canadian boutique business law firm. A number of our lawyers are recognized as leading lawyers in their areas of practice.

Contact Information

James Beeby

(604) 646-3326

jbeeby@moisolicitors.com

Lisa Andrews

(604) 646-3327

landrews@moisolicitors.com

This bulletin is prepared as a service for our clients and other persons dealing with legal issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavor to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered. No part of this bulletin may be reproduced without prior permission of McCullough O'Connor Irwin LLP.