Nishnawbe Aski Development Fund

5th annual Mining Summit

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Extractive Sector Transparency Measures Act

Implications for First Nations

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Background

- On October 23, 2014, the Government of Canada tabled omnibus Bill C-43 which included the Extractive Sector Transparency Measures Act (the "Act").
- The Act received Royal Assent on December 16, 2014 and came into force on June 1, 2015.

Background

- Resource sector generates critical income for developed and developing countries
- Citizens lack much information on this industry, such as:
  - Which companies operate in extractive sector
  - How much governments collect in natural resource revenue
  - How those revenues are spent
- Lack of transparency makes it challenging for citizens and government to ensure country and communities are receiving maximum benefit from extraction of their natural resources
- Federal government, therefore, committing to make extractive sector more transparent and accountable
- Stephen Harper first announced the Federal Government's intention to implement a government payment disclosure program on June 12, 2013 (payments to government from resource developers)
- The Act was reviewed by the Resource Revenue Transparency Working Group (comprised of Industry and NGO groups) – which gave recommendations to the Government on a disclosure program

Purpose

- To implement Canada's international commitments made in the G8 to contribute to anti-corruption efforts through the implementation of reporting and transparency measures for the extractive sector.
- To enhance transparency on payments made to governments by resource developers
- To align Canada's framework with other G-8 countries, particularly with the U.S. and EU.

Who the Act applies to

- An entity listed on the stock exchange in Canada;
- An entity that has a place of business in Canada, does business in Canada or has assets in Canada and meets at least two of the following conditions for at least one of its two most recent financial years:
  - Has at least $20 million in assets;
  - Has generated at least $40 million in revenue;
  - Employs an average of at least 250 employees; and
- Any other prescribed entity.

- The Act applies to entities that are directly or indirectly engaged in the commercial development of oil, natural gas, or mineral that are subject to Canadian law. Such extractive entities, including their subsidiaries, are required to make reports.

Who the Act applies to

- Even if a business is not directly engaged in the commercial development of oil, gas or minerals, it's an entity for the purposes of the Act if it controls a corporation, trust, partnership or other unincorporated organization that is engaged in such development and is not an Act entity in its own right
- Control isn't limited to direct control. It's extended to indirectly controlled businesses down an organizational line
- Subsidiaries, partnerships, trusts, unincorporated organizations (e.g. joint ventures) can also be subject to control
- Where one business controls another under the accounting standards applicable to it (i.e. under International Financial Reporting Standards or US Generally Accepted Accounting Principles) that will generally be sufficient evidence of control for purposes of the Act

Who the Act applies to

- Commercial development of oil, gas, and minerals captures two categories of activities:
  - The exploration of oil, gas, and minerals; or
  - The acquisition or holding of a permit, licence, or any other authorization to carry out any exploration or extraction of oil, gas, or minerals
- Exploration or extraction refers to key phases of commercial activity occurring during life cycle of an oil, gas, or mineral project – extending from prospecting and exploration to closure and remediation of a project
- Exploration or extraction not limited to active phases of operations, also captures temporary periods of inactivity
  - E.g. commercial development doesn't end with completion of a seasonal exploration program and begin again with next seasonal program

Who the Act applies to

- Acquisition or holding of a permit, licence, or lease is intended to capture the permitting process
  - E.g. application for permits and undertaking of community consultations that will inform any such application
- Commercial development is not intended to extend to ancillary or preparatory activities for the exploration of oil, gas or minerals
  - E.g. manufacturing equipment or construction of extraction sites aren't included
- Commercial development generally doesn't include post-extraction activities
  - E.g. refining, smelting, procession of oil, gas, or minerals
  - Marketing, distribution, transportation

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Who the Act applies to

- The Act defines “entity” as a:
  - Corporation;
  - Trust;
  - Partnership;
  - Unincorporated organization; or
  - An entity that controls the entities listed above; and
  - Is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere.

What entities are required to report

- Entities must report annually on payments made to governments relating to the commercial development of oil, natural gas, or minerals, at home and abroad. Payments will be broken down in the report on a project basis.

What payments are reported

- The Act defines “payment” as a payment (monetary or in kind) that is made to a payee in relation to the commercial development of oil, gas or minerals that falls within any of the following categories of payment:
  - Taxes, other than consumption taxes and personal income taxes;
  - Royalties;
  - Fees, including rental fees, entry fees and regulatory charges as well as 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; or
  - Any other prescribed category of payment.

What payments are reported

- Subject to any regulations prescribing an amount to a category of payment, an entity is required to disclose payments amounting to $100,000 or more in a financial year, falling within a category of payment that are made to the same payee
  - A single payment or cumulative payments

What payments are reported

- A payment or payments amounting to $100,000 or more falling within **one** of the categories listed must be reported
  - E.g. If the payment or payments do not amount to $100,000 in one financial year, then it is not reportable. Therefore, if $50,000 is paid to the same payee under one category in a financial year, and $50,000 is again paid to the same payee under the same category in the next financial year, it is not reportable

- It may not always be clear whether it is the same payee or not
  - E.g. if several "fee" payments are made to the National Energy Board, Environment Canada, and NRCAN, which amount to $100,000 – this series of payments is reportable – the entity's report should indicate the breakdown among the Canadian Governmental bodies being grouped as the same payee, however

Who is considered a “payee”

- The Act defines “payee” as”
  - Any government in Canada or in a foreign state’
  - A body that is established by two or more governments;
  - 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 referred to in paragraph (*a*) or a body referred to in paragraph (*b*); or
  - Any other prescribed payee.

- Aboriginal governments and any trust, board, commission, corporation or body or authority established to act for same are included as well.

- . However, the Act defers the requirement for extractive entities to report on payments made to Aboriginal governments in Canada for 2 years following the coming-into-force of the Act.

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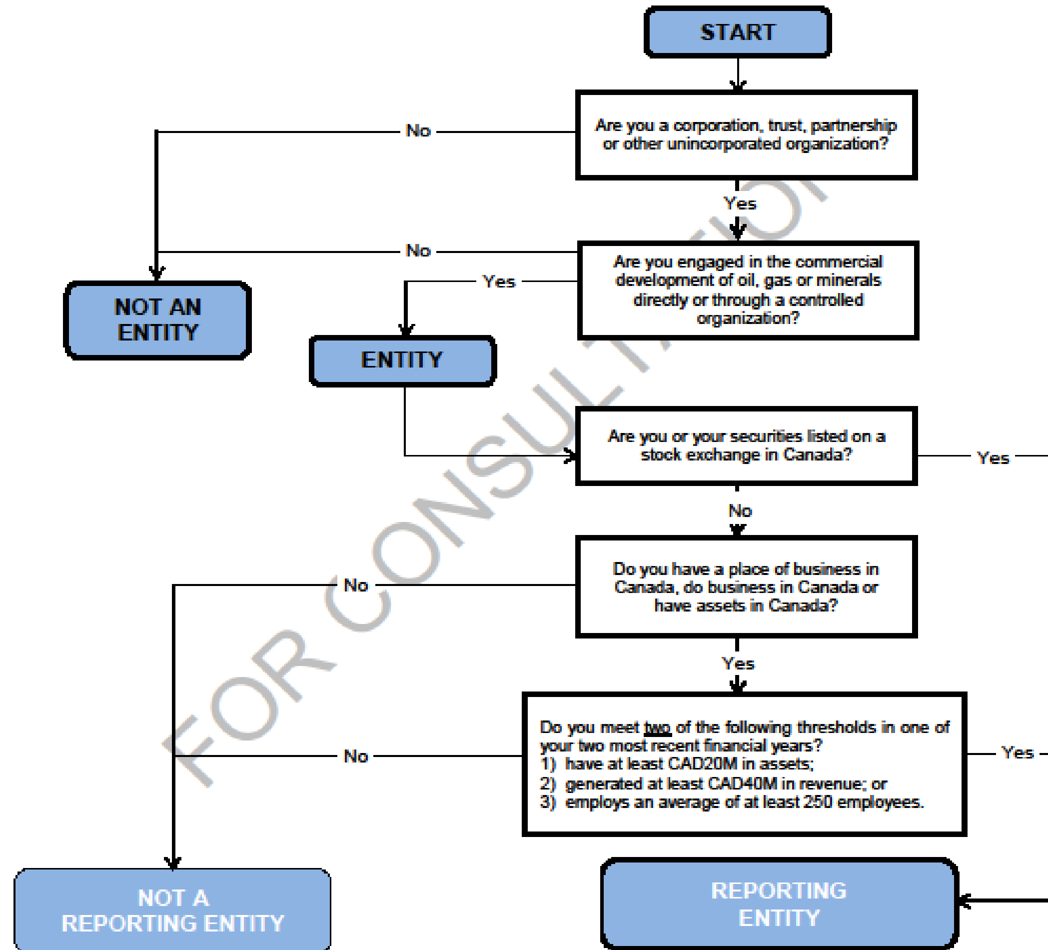
When reports must be filed

- Reports must be filed with the Minister 150 days following the end of an entity’s financial year, disclosing all payments it has made during that year.
- Records of the reports must be kept for seven years, unless a different period is prescribed.
- Parent companies may report on behalf of their subsidiaries.

EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT APPLICATION FLOWCHART



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Reports must be made public

- Entities must make their reports available to the public in a manner specified by the Minister
  - E.g. on an organization's website
  - For a period prescribed by regulation or, if no period is prescribed, for five years

Enforcement

- The Act provides the Minister with authority to enforce compliance with the Act, including requesting an audit from an entity or further information related to payments made to payees.
- The Minister has the authority to inspect any records relating to payments.

Offences and Punishment

- Any person or entity that fails to comply with the reporting obligations is guilty of an offence punishable on summary conviction and liable to a fine of $250,000.
- For each new day that the offence continues, it constitutes a new offence.
- Any officer, director or agent of the person or entity who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and liable to the punishment of the offence.

Defences

- Due Diligence
  - No person or entity is to be found guilty of the offence if they establish that they exercised due diligence to prevent its commission

Transitional provisions for Aboriginal Governments

- The Act does not apply to any payments made to Aboriginal Governments (or entities acting on behalf of same) in Canada during the two-year period that begins on the day on which the Act came into force (June 1, 2015 – June 1, 2017).

Implications for First Nations

- Aboriginal Governments, and organizations acting for same, are considered "payees" and therefore payments to them are caught by the Act.
- The Federal Government has proposed that payments to the following types of Aboriginal entities be reported:
  - Aboriginal organization or groups with law-making power and/or governance mechanisms related to the extractive sector (i.e. mining, oil, and gas)
  - Provincially or federally incorporated Aboriginal organizations that undertake activities in the extractive sector on behalf of their beneficiaries
  - Aboriginal organizations or groups that are empowered to negotiate legally binding agreements (e.g. impact benefit agreements) on behalf of their members

Implications for First Nations

- However, there remains uncertainty around private contracts between Industry and Aboriginal Governments
- Payments made by a developer to a First Nation are often outlined in an impact benefit agreement (IBA), which is confidential.
- Issue: the reason an IBA is made in the first place, is because Aboriginal and Treaty rights have been infringed.
  - IBA negotiations are private and the IBA is confidential
  - The First Nation's rights are infringed and it is compensated as a result – this is a private matter, not a public one.

Implications for First Nations

- Further uncertainty may arise when a resource developer deals with various Aboriginal organizations acting in different capacities
  - In a government capacity (i.e. an Indian Band)
  - In a commercial capacity (e.g. Aboriginal contractor provides services to the developer)

- Payments made by developers to First Nations acting in a governmental capacity would likely be reportable
  - Reportable payments as defined by the Act: Taxes, royalties, rents, production entitlements, infrastructure improvements, bonuses, etc.
  - An Indian Band's ability to tax developers on its lands
  - An Indian Band compensated for the extraction of surface or sub-surface materials by a developer
  - Such payments, sometimes made according to an IBA, are confidential agreements

- Payments made by developers to Aboriginal organizations acting in a commercial capacity is not as clear (e.g. a contractor providing goods or services to a developer not in a governmental capacity).
  - Sometimes payments to an Aboriginal contractor are negotiated under an IBA

Implications for First Nations

- E.g A signing bonus of $500,000 is paid by the Reporting Entity to an Aboriginal band council in Alberta for providing access to resource on traditional land. The payment is received by the Economic Development Board, a private entity that is owned by the Aboriginal band council to negotiate on its behalf with the oil & gas industry. Since the Act does not require reporting of such payments until June 1, 2017, the payment is not reported. A similar signing bonus is anticipated to be paid in the same manner in November 2017, and the Reporting Entity understands this payment will need

  to be reported in its report for that year.

Implications for First Nations

- Disclosure of payments to First Nations by developers may affect Federal Government transfers to First Nations
  - Federal Government may be inclined to decrease financial transfers to First Nations that are in receipt of payments from developers
  - Own-source revenue

Implications for First Nations

- Public image
  - Having payments disclosed to the public may negatively affect a First Nation's public image
  - The public may not fully appreciate the complexities of Aboriginal and Treaty rights and compensation for infringement of same

Implications for First Nations

- There have been some concerns about the reporting requirements concerning First Nations. The following quotes are taken from an article from NorthernLife.ca on May 11, 2015. (http://www.northernlife.ca/news/localNews/2015/05/11-mining-report-sudbury.aspx)
- "The government could, in theory, use payments from mining companies to justify cuts to social programs for First Nations, Gratton said" – Interviewing Pierre Gratton, President and CEO of the Mining Association of Canada
- "Hans Matthews, the president of the Canadian Aboriginal Minerals Association, said potential cuts in government funding for First Nations are the 'underlying hidden agenda' behind the legislation."
- "Matthews added the act could potentially contravene non-disclosure agreements First Nations have signed with mining companies and damage their relationships."

Implications for First Nations

- “Clark said contributions to First Nations - whether they be scholarships or funding for infrastructure - are often lumped in with exploration expenses.” – Interviewing Garry Clark, Executive Director of the Ontario Prospectors Association

- "A lot of times it's buried," he said. ‘That's not fair to investors, and it's not fair to the general public.’” - Garry Clark, Executive Director of the Ontario Prospectors Association

- “But he said he also agreed with the Mining Association of Canada's concerns that there is potential - or at least opportunity - federal government could use the information it gets through the act to cut back on the its own payments to First Nations.” – Interviewing Garry Clark, Executive Director of the Ontario Prospectors Association

Implications for First Nations

- As mentioned earlier, there is a two-year deferral period for reporting payments to First Nations
- The Federal government is using this period to continue to engage First Nations regarding the implementation of the Act

Avoiding reporting requirements

- Lobby the Federal Government over the next two years to modify the Act to create exceptions for payments to First Nations
  - Educate on difference between payments to governments in Canada and around the world, and payments to First Nations through an IBA resulting from the infringement of Aboriginal and Treaty Rights
- If an Aboriginal organization is created that is not considered a government, nor an entity performing a function for government, then perhaps a payment paid to such an entity would not be caught by the Act
  - Practically, this may be difficult as payments from developers to a community would certainly be a matter for consideration by its government

Consultations

- Since July 2013, the Federal Government has engaged provinces, territories, Aboriginal Governments, stakeholders (e.g. industry and civil society organizations) in the developments of the reporting requirements
- Between March and May 2014, Natural Resources Canada (NRCan) held cross-Canada engagement sessions on the mandatory reporting standards
- Sessions were held in 11 cities
- Attendees included 70 industry representatives, over 20 civil society representatives, and more than 40 Aboriginal Governments and national Aboriginal organizations
- During the two-year deferral period, the Government will continue engage Aboriginal Governments

Consultations

- Key issues raised during the sessions concerning First Nations. Some suggestions included:
  - Impact benefit agreements: some suggested that IBAs should be exempt as they primarily address social issues related to resource development and are considered commercial, confidential agreements. It was noted that disclosure of these payments could affect relationships and negotiations between Aboriginal Governments and Industry
  - Government should undertake formal consultations with Aboriginal Governments and organizations
  - Was noted there appeared to be no clear benefit for Aboriginal Governments, give the transparency and accountability mechanisms already in place
  - Payments of a social nature from industry to First Nations related to resource development (e.g. building of schools, contributions to social programming) be excluded from reporting standards
  - concerns that information revealed through the standards could be used to reduce funding to Aboriginal communities or withhold financial assistance through reformulation of federal transfer payments (i.e., own source revenues)
  - concerns that information disclosed could be misinterpreted, taken out of context or somehow used against Aboriginal communities
  - some remarked Aboriginal communities lack capacity to analyze the potential impact of the reporting requirements

Consultations

- Between February and March, 2015, NRCan held 13 regional Aboriginal roundtable discussion on the Act
- Held in Thunder Bay, Ottawa, Yellowknife, Fort McMurray, Edmonton, Saskatoon, Montreal, Halifax, Winnipeg, Whitehorse, Prince George and Vancouver
- 104 participants representing 83 Aboriginal governments/organizations attended
- Purpose of roundtables:
  - Clarify reporting requirements for extractive businesses
  - Discuss the relevance of the standards for Aboriginal governments and communities
  - Discuss concerns raised in earlier engagements
  - Gather further input regarding implementation

Consultations

- Federal Government noted that it will be important to consider differences between Aboriginal Governments across Canada
- E.g. commitments made in Aboriginal treaties including settled land claims, numbered treaties, modern treaties, and pre-confederation treaties may affect how Aboriginal governments address their natural resources
- Some participants thought Aboriginal engagements was lacking during development of the Act
- Most participants though the roundtables didn't constitute consultation and noted that given the potential impact on Aboriginal treaties that formal consultation may be required
- Noted concern that disclosed payments could be treated as own-source revenue thereby affecting federal transfers
- Noted excessive reporting required: First Nations Financial Transparency Act, own-source revenue reporting, and Indian Oil and Gas Act

Consultations

- Due to complexity of the Act an the challenges faced by Aboriginal communities, Aboriginal Governments lack capacity to monitor extractive businesses' reports and to use the information made available
- Participants noted the Act may negatively affects their relationship with Industry, hampering efforts to negotiate agreements (e.g. IBAs) and deterring investment due to excessive requirements
  - Also, information revealed by the Act may result in an industry "Race to the bottom" (i.e. using the lowest common compensation point) in terms of negotiating agreements

Consultations

- Perceived potential benefits of the Act for Aboriginal Governments as noted by participants:
  - increasing understanding of the economic contributions of exploration / extraction activities to Aboriginal communities;
  - determining when extractive businesses are operating on Aboriginal lands and whether they are contributing to Aboriginal communities impacted by their operations;
  - providing information on extractive industry payments to other Aboriginal governments / communities as well as other levels of government (e.g. provincial/territorial, federal);
  - assisting the understanding of how Impact Benefit Agreements are developed;
  - understanding the value of resources so as to level the playing field in the negotiation of agreements with industry; and
  - benefitting international indigenous peoples, who do not have similar relationships with extractive industries.

Uncertainty ahead

- The Act has left room for the incorporation of regulations dealing with various matters, such as:
  - What amount of payments to a payee within a category of payments triggers mandatory disclosure (if no amount is prescribed for a category, the amount is $100,000)
  - The manner in which a report (disclosing payments) to the Minister must be made public (currently, the entire report must be made public). This may leave room for limitations on public disclosure. The Act does not currently instruct how a report must be made public.
  - The length of time a report must made public (unless prescribed by regulation, that period is five years)
  - Defining “exploration” and “extraction”
  - Prescribing circumstances in which an entity is controlled by another entity
  - Prescribing circumstances in which the Act does not apply to an entity, payment, or payee

Uncertainty ahead

- As mentioned earlier, uncertainty exists regarding the obligations to report payments made by developers to First Nation governments and organizations when those payments arise from commitments outlined in private contracts between the parties (currently payments made to governments are likely reportable but payments made to organizations acting in commercial capacity are less clear)
- There is a potential for a conflict between contract law (e.g. IBA) and the reporting standards. This will need be fleshed out
- The two-year deferral period hopefully will address such matters
- The deferral period can also be used to campaign against the public disclosure of payments agreed to in private contracts

Questions?