



# Transparency and Reporting Requirements for Canadian **Extractive Companies**

May 2017



Meets Canada's 2013 G8 commitment to contribute to global efforts to increase transparency



ESTMA came into force on June 1, 2015



On March 1, 2016, NRCan issued implementation tools to assist businesses to comply with ESTMA

Even if a business is subject to Canadian law and is not involved in “commercial development” of oil, gas or minerals directly, **it may be subject to ESTMA** if it directly or indirectly “controls” another business that is so involved.

---

## TABLE OF CONTENTS

- |    |   |
|----|---|
| 01 | TRANSPARENCY AND REPORTING REQUIREMENTS FOR CANADIAN EXTRACTIVE COMPANIES   |
| 02 | CANADIAN FEDERAL LEGISLATION: EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT (CANADA)                                      |
| 03 | GUIDANCE FOR EXTRACTIVE COMPANIES: REPORTING TEMPLATES AND CONTACT FORMS  |
| 04 | QUEBEC'S PROVINCIAL LEGISLATION: AN ACT RESPECTING TRANSPARENCY MEASURES IN THE MINING, OIL AND GAS INDUSTRIES (QUÉBEC) |
| 05 | WHEN DOES ESTMA APPLY? TWO LEVELS OF ANALYSIS   |
| 08 | DEADLINES FOR FILING ANNUAL REPORTS   |
| 09 | THREE-PART TEST FOR DISCLOSING PAYMENTS   |
| 12 | WHO IS A "PAYEE" UNDER ESTMA?   |
| 14 | FORM AND MANNER OF REPORTING UNDER ESTMA  |
| 16 | ENFORCEMENT, OFFENSES AND PUNISHMENT UNDER ESTMA  |
| 17 | NO EXEMPTIONS FOR CONFIDENTIALITY OR VIOLATION OF LOCAL LAWS  |
| 18 | CONCLUSION  |



“Commercial development” under ESTMA captures both the exploration and extraction of oil, gas or minerals.



All ESTMA Reports must be filed within 150 days

It is crucial that **companies are familiar with the requirements under the legislation** to ensure that they meet all disclosure standards when doing business with governments

---

## TRANSPARENCY AND REPORTING REQUIREMENTS FOR CANADIAN EXTRACTIVE COMPANIES



A regime for mandatory reporting of payments to governments by participants in the extractive industries came into force in 2015, fulfilling Canada's 2013 G8 commitment to "contribute to global efforts to increase transparency and deter corruption in the extractive sector". Canada's reporting requirements are broadly aligned with those in Europe and the United Kingdom in an effort to ensure a level playing field for Canada's extractive companies operating domestically and abroad.

---

## CANADIAN FEDERAL LEGISLATION: EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT (CANADA)



On June 12, 2013, Prime Minister Stephen Harper announced that Canada would establish new mandatory reporting standards for Canadian extractive companies. Following public consultation, the *Extractive Sector Transparency Measures Act* (“**ESTMA**”)<sup>1</sup> was tabled before Parliament and received Royal Assent on December 16, 2014. ESTMA came into force on June 1, 2015.

---

1. Bill C-43, *Economic Action Plan 2014 Act, No 2*, 2<sup>nd</sup> Sess, 41<sup>st</sup> Parl, 2014, at Part 4, Div. 28.

---

## GUIDANCE FOR EXTRACTIVE COMPANIES: REPORTING TEMPLATES AND CONTACT FORMS



On March 1, 2016, Natural Resources Canada (“**NRCan**”) issued the following implementation tools to assist businesses to comply with ESTMA:

- Guidance on the reporting requirements under ESTMA (“**Guidance**”);<sup>2</sup> which is not intended to be prescriptive, but rather practical and illustrative;
- Technical Reporting Specifications for the form and manner of reporting under ESTMA;<sup>3</sup>
- Reporting Template in both XLS and PDF formats;<sup>4</sup> and
- Contact Form for businesses to enroll as Reporting Entities.<sup>5</sup>

---

2. Natural Resources Canada. (2016). *Extractive Sector Transparency Measures Act Guidance*: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA–Guidance.pdf>.

3. Natural Resources Canada. (2016). *Extractive Sector Transparency Measures Act Technical Reporting Specifications*: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA–TRS.pdf>.

4. Natural Resources Canada. (2016). *Extractive Sector Transparency Measures Act – Annual Report*. Link to XLS version of Reporting Template at <http://www.nrcan.gc.ca/mining-materials/estma/18192>. PDF version of Reporting Template: [http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ReportingTemplate\\_e.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ReportingTemplate_e.pdf).

5. Natural Resources Canada. (2016). *Extractive Sector Transparency Measures Act Reporting Entity Contact Form*: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA–ContactForm.pdf>.

---

## QUEBEC'S PROVINCIAL LEGISLATION: AN ACT RESPECTING TRANSPARENCY MEASURES IN THE MINING, OIL AND GAS INDUSTRIES (QUÉBEC)



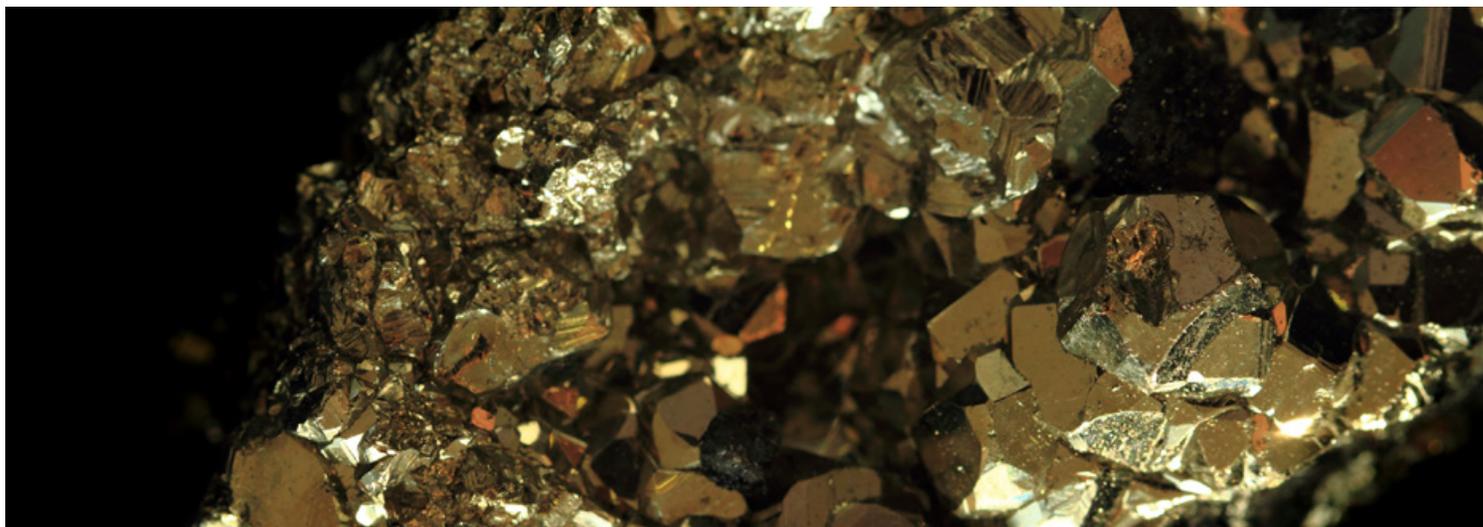
On October 21, 2015, Québec's National Assembly passed and assented to *An Act respecting transparency measures in the mining, oil and gas industries*,<sup>6</sup> which is substantively identical to the federal ESTMA legislation. This legislation was introduced, in part, to “occupy the field” in a constitutional sense and avoid ceding any core competency to the federal government. The legislation was also adopted to increase social acceptance of a provincial resource development strategy to improve growth, particularly in Northern Québec. To avoid duplication, this legislation provides for reporting in compliance with the comparable requirements of other jurisdictions, such as ESTMA.<sup>7</sup>

---

6.

7.

## WHEN DOES ESTMA APPLY? TWO LEVELS OF ANALYSIS



There are two levels of analysis to determine whether ESTMA applies to a business:

- First it must be assessed whether the business is an “entity” subject to ESTMA.
- Second, it must then be assessed whether such entity is required to report payments under ESTMA (a “**Reporting Entity**”).

### What businesses are “entities” under ESTMA?

A corporation, trust, partnership or other unincorporated organization engaged, directly or indirectly, in the commercial development of oil, gas or minerals in Canada or elsewhere constitutes an “entity” under ESTMA.<sup>8</sup>

The four business forms that are considered entities under ESTMA are intended to be interpreted broadly and apply to similar forms of business organizations both within and outside Canada. This includes, but is not limited to unlimited liability corporations, limited partnerships, royalty trusts, crown corporations and state-owned enterprises.

However, sole proprietors and individuals are not considered entities under ESTMA.<sup>9</sup>

“Commercial development” under ESTMA captures both the exploration and extraction of oil, gas or minerals.<sup>10</sup> This effectively encapsulates all commercial activities that occur during the life cycle of an extractive project, ranging from the earliest stages of prospecting and exploration for natural resources to the closure and remediation of a project.<sup>11</sup> The definition of commercial development also applies to temporary periods of inactivity on a project (*e.g.*, commercial development would not be considered to end with the conclusion of a seasonal exploration program).<sup>12</sup>

8. S.Q. 2015, c. 23, ss.6 and 46.

9. S.Q. 2015, c.23, s. 15.

10. *ESTMA*, *supra* note 1 at s. 2.

11. *Guidance*, *supra* note 2 at 7

12. *ESTMA*, *supra* note 1 at s. 2.

“Commercial development” also applies to the acquisition or holding of a permit, licence, lease or any other authorization to carry out exploration or extraction activities for oil, gas or minerals.<sup>13</sup> This includes the permit application process itself and the undertaking of community consultations that comprise or inform any such application.<sup>14</sup>

However, “commercial development” under ESTMA is not meant to extend to ancillary or preparatory activities (*e.g.*, manufacturing of equipment) or to post-extraction activities (*e.g.*, refining, smelting, processing, marketing, distribution, transport or export). Likewise, commercial development is not intended to extend to businesses that provide goods or services associated with or related to commercial development.<sup>15</sup>

Even if a business is not involved in “commercial development” of oil, gas or minerals directly, it may be subject to ESTMA if it directly or indirectly “controls” another business that is so involved, whether or not that subsidiary is located in Canada or another country.<sup>16</sup> “Control” for purposes of ESTMA is not limited to direct control. It also extends to indirectly controlled businesses down an organizational chain (*e.g.*, a business that is controlled by another controlled business). Where one business controls another enterprise under the accounting standards applicable to it (*e.g.*, International Financial Reporting Standards or US Generally Accepted Accounting Principles), that will generally be sufficient evidence of control for purposes of ESTMA.<sup>17</sup>

### What “entities” are “Reporting Entities” under ESTMA?

An entity will qualify as a Reporting Entity under ESTMA if it meets **either** of the following two tests:

- I The entity is listed on a stock exchange in Canada;<sup>18</sup> **or**
- I The entity has a place of business in Canada, does business in Canada or has assets in Canada **and**, based on its consolidated financial statements, meets at least two of the following financial conditions for at least one

of its two most recent financial years:

- o it has at least CAD\$20 million in assets;
- o it has generated at least CAD\$40 million in revenue; or
- o it employs an average of at least 250 employees,<sup>19</sup>

(the “*Size-Related Criteria*”).

The two tests above are exclusive of one another. Thus, an entity with shares listed on the TSX Venture Exchange will be a Reporting Entity, even if it does not have a place of business in Canada or does not meet any of the Size-Related Criteria.

The calculation of assets, revenues and employees under the Size-Related Criteria only applies to consolidated Canadian and global operations of the entity itself and its subsidiaries. It does not include the global assets and revenues of the entity’s parent company (if any). For purposes of determining the Size-Related Criteria, assets should be calculated on a gross basis, not net, and amounts recorded in foreign currencies should be converted into Canadian dollars. This conversion can be done by using an exchange rate as of the entity’s financial year end or by using the entity’s method of translating the currency of assets or revenues employed in its financial statements.<sup>20</sup>

### No extra-territorial application under ESTMA

The Guidance on the reporting requirements under ESTMA also provides an important point of clarification regarding extra-territorial application. The legislation does not apply to businesses that are not subject to Canadian law. Accordingly, offshore parent companies that are not subject to Canadian law, but may have subsidiaries operating in Canada, will not be subject to ESTMA by virtue of their ownership of or interest in any Canadian subsidiary businesses, even if the subsidiary itself is a Reporting Entity.<sup>21</sup> In other words, ESTMA reporting obligations only flow down the corporate chain from a Reporting Entity, not upwards.

13. *Guidance, supra* note 2 at 4.

14. *Id.*

15. *ESTMA, supra* note 1 at s. 2.

16. *Guidance, supra* note 2 at 4.

17. *Id.*

18. *Id.* at 7.

19. *Id.* at 8.

20. *Id.* at 9 (this includes any exchange in Canada recognized or exempted under Canadian provincial securities legislation and that is regulated under National Instrument 21-101 – *Marketplace Operation* or National Instrument 23-101 – *Trading Rules*. Unlike the Transparency Directive in the UK, there is no exception under ESTMA for issuers listed on junior stock exchanges.)

21. *ESTMA, supra* note 1 at s. 8(1).



---

## DEADLINES FOR FILING ANNUAL REPORTS



Reporting Entities must report annually on payments made to any level of government in Canada or abroad relating to the commercial development of oil, gas or minerals for each of their financial years beginning after June 1, 2015.<sup>22</sup> For example, a Reporting Entity whose financial year begins on January 1 must report on payments starting from January 1, 2016. All ESTMA Reports must be filed within 150 days following the end of the Reporting Entity's financial year.<sup>23</sup>

---

22. *Guidance*, *supra* note 2 at 9-10.

23. *Id.* at 5.

## THREE-PART TEST FOR DISCLOSING PAYMENTS



There is a three-part test for payments to which the ESTMA reporting rules apply.

### Part 1: Relationship to commercial development of oil, gas or minerals

Firstly, the payment made by a Reporting Entity must be in relation to the “commercial development” of oil, gas or minerals. For example, a tax levied on interest income is unlikely to be considered to be paid for commercial development activities.<sup>24</sup>

### Part 2: Seven categories of reportable payments

Secondly, the payment must also fall within *one* of the following seven reportable categories (together, the “Seven Categories”):<sup>25</sup>

- I **Taxes:** The term “tax” generally means any type of government charge that is enforceable by law, imposed under statutory authority, levied by a public body and intended for a public purpose. The tax category is intended to capture income, profit and production tax payments of a Reporting Entity, but specifically excludes consumption and personal income taxes. Withholding taxes (*i.e.*, taxes remitted to a government by a Reporting Entity on behalf of a third party) do not have to be reported, as these would not constitute a tax liability of the Reporting Entity.<sup>26</sup>

24. *ESTMA*, *supra* note 1 at s. 30.

25. *Id.* at s. 9(1)

26. *Guidance*, *supra* note 2 at 13.

27. *ESTMA*, *supra* note 1 at s. 2.

- Royalties:** Royalties under ESTMA have their common commercial meaning. Royalties paid in kind should be reported in their equivalent cash value.<sup>27</sup>
  - Fees:** The category of fees is broad, and it does not matter whether a payment is characterized as a fee or not. If a payment, whether in cash or in kind, accomplishes the same purpose in substance as a fee, it should be reported as a fee. This category, however, does not extend to amounts paid in ordinary course commercial transactions in exchange for services provided by government-owned entities (*e.g.*, payments made to a state-owned utility for electricity).<sup>28</sup>
  - Production Entitlements:** In-kind production entitlements of oil, gas or minerals paid to governments should be reported in their equivalent cash value. Volumes of production entitlements paid do not have to be reported. While a payee's share of oil, gas or mineral production under a legislated production sharing agreement or similar contractual arrangement should be categorized as a production entitlement under ESTMA, production taken in-kind by a state-owned enterprise under a non-legislated commercial joint venture should not be reported.<sup>29</sup>
  - Bonuses:** Payments which, regardless of their nomenclature, are in substance a signing, discovery, production or another type of bonus paid to a payee in relation to the commercial development of oil, gas or minerals must be reported. Share issuances ("**Bonus Shares**") by a Reporting Entity to a payee that are required by law or as consideration for the issuance of a license, permit or concession are a typical example of an in-kind bonus.<sup>30</sup>
  - Dividends:** Dividends paid to a payee as an ordinary shareholder do not need to be reported so long as: (i) the shares have been acquired by the payee for consideration on the same terms as were available to other shareholders at the time of acquisition; and (ii) the dividend is paid to the payee on the same terms as paid to other shareholders. Dividends on Bonus Shares, however, are likely to be reportable.<sup>31</sup>
  - Infrastructure Improvement Payments:** Payments for public infrastructure or infrastructure that will be handed over to a government for public use at the end of its operation by a Reporting Entity are intended to be captured by this category. Infrastructure improvement payments that relate primarily to the operational purposes of a Reporting Entity (*i.e.*, building a road to access an extraction site that is primarily for operational needs) are not intended to be reported.<sup>32</sup> Identifying the appropriate period in which to report the infrastructure improvement may be challenging.<sup>33</sup>
- Payments that fall outside of the Seven Categories listed above do not need to be reported under ESTMA.

#### Categorizing payments: substance over form

Reporting Entities are encouraged to look to the substance, rather than the form, of payments to determine which of the Seven Categories is applicable to a payment.<sup>34</sup> At times it may be unclear whether a payment should be reported under one of the Seven Categories or another (*e.g.*, a mineral royalty payment may be considered a tax, a royalty or perhaps both). In such cases, Reporting Entities should use their reasonable judgement to categorize a payment.<sup>35</sup> However, Reporting Entities must not artificially structure payments to avoid reporting under ESTMA.<sup>36</sup>

28. *Guidance, supra* note 2 at 13 (examples of taxes reportable under ESTMA include: income and profit taxes; capital gains taxes; capital taxes; mining taxes; windfall profits taxes; resource surcharges; and petroleum revenue taxes).

29. *Id.* at 14.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 15.

35. *Id.* (noting that it may be appropriate to report such payments, depending on the applicable facts and circumstances: (i) when costs are incurred by the Reporting Entity; (ii) when the infrastructure is handed over to the government; or (iii) when the infrastructure is brought into use).

36. *Id.* at 12.

### Charitable gifts are not (usually) reportable

It is noteworthy that the Seven Categories for payments under ESTMA do not include a specific category for philanthropic or voluntary payments or contributions. Although such payments and contributions, such as building schools or contributing endowments to hospitals or community centres, may be a critical aspect of a Reporting Issuer's commitment to corporate social responsibility, gratuitous payments to benefit local communities are not reportable payments under ESTMA. Only where the facts and circumstances indicate that a philanthropic payment or contribution was made in relation to the "commercial development" of oil, gas or minerals and made to a payee in lieu of one of the Seven Categories would reporting be required under ESTMA.<sup>37</sup> The onus is on Reporting Entities to make such determinations on a reasonable basis.

### Part 3: CAD\$100,000 minimum threshold

Thirdly, only payments, individually or in aggregate, totalling CAD\$100,000 or more to the "same payee" in one of the Seven Categories must be disclosed.<sup>38</sup> Amounts should not be aggregated across the Seven Categories or between different levels of payees for purposes of determining whether the CAD\$100,000 threshold has been met. Unlike a "first dollar" indemnification basket, when the CAD\$100,000 minimum threshold has been met for payments in one of the Seven Categories to the "same payee"<sup>39</sup>, it does not require reporting of all additional payments in other categories or to other payees unless the CAD\$100,000 minimum threshold is met again for the "same payees" in each of the Seven Categories.

### Project-by-project reporting

Payments are required to be reported on a project-level basis, where possible.<sup>40</sup> Disaggregation of payment disclosure on a project-by-project basis was a key concern of civil society organizations at the time of ESTMA's and the Guidance's drafting, as it was felt that reports could only be effectively used by citizens to deter and detect corruption at a project level.<sup>41</sup>

For purposes of ESTMA, a "project" should be conceived of as operational activities that are governed by a single contract, license, lease, concession or similar legal agreement and form the basis for payment liabilities with a government.<sup>42</sup> Activities based on multiple substantially interconnected contracts, licences, leases, concessions or agreements may also be considered a "project" under ESTMA.<sup>43</sup> Substantial interconnectedness arises when a set of contracts, licences, leases, concessions or agreements with substantially similar terms are operationally and geographically integrated.<sup>44</sup>

Reporting Entities are not required to allocate a particular payment on a project-by-project basis if it is not attributable to a specific project (*e.g.*, corporate income taxes for a holding company that controls subsidiaries operating multiple projects). In such a scenario, it is sufficient for Reporting Entities to provide payee-level disclosure without splitting or disaggregating the payment.<sup>45</sup>

37. *Id.* at 12-13.

38. *Id.* at 13.

39. *Id.* at 12.

40. *ESTMA*, *supra* note 1 at s. 9(2)(b).

41. *Infra* note 48.

42. *Id.* at s.5; *Guidance*, *supra* note 2 at 2; *Specifications*, *Supra* note 3 at 5.

43. Publish What You Pay-Canada and the Natural Resource Governance Institute, The Extractive Sector Transparency Measures Act (2014). Retrieved from [http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6761910/412\\_FINA\\_C-43\\_Briefs%5CPublishWhatYouPayCanada-e.pdf](http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6761910/412_FINA_C-43_Briefs%5CPublishWhatYouPayCanada-e.pdf).

44. *Specifications*, *supra* note 3 at 5.

45. *Id.*

## WHO IS A “PAYEE” UNDER ESTMA?



A “payee” is defined under ESTMA as:

- any government in Canada or in a foreign state;
- a body that is established by two or more such governments; or
- any trust, board, commission, corporation, body or other authority established to exercise or perform a power, duty or function of a government, for a government or for a body referred to above.<sup>46</sup>

Payees include crown corporations, state-owned enterprises and agencies that exercise or perform a power, duty or function of government. However, payments made to state-owned enterprises may not constitute a reportable payment when the state-owned enterprise is engaging in ordinary course commercial activity rather than exercising

or performing a power, duty, or function of government. The Guidance acknowledges a state-owned enterprise operating outside of its home jurisdiction is unlikely to be exercising or performing a power, duty or function of government and levying reportable payments on Reporting Entities.<sup>47</sup>

46. *Id.*

47. *Id.*

When payments are made to several different departments, ministries, trusts, boards, commissions, corporations, bodies or other authorities that perform or are established to perform a power, duty or function on behalf of the same broad level of government (*e.g.*, national, regional, municipal, local or Aboriginal), those payments should be grouped together and reported as being made to the “same Payee”.<sup>48</sup> For example, the National Energy Board, Environment Canada and NRCan (which are all Canadian federal bodies) would constitute the “same payee” under ESTMA. If a CAD\$50,000 fee were paid to each of those three bodies in a year, a CAD\$150,000 payment would be reportable.<sup>49</sup>

Reporting Entities are encouraged, where practical, to list in their ESTMA Report the name of each department, agency or entity that received a payment from the Reporting Entity, even where such bodies constitute the “same payee”.<sup>50</sup>

### Aboriginal governments may qualify as a payee

Aboriginal and indigenous groups and organizations within Canada and in other jurisdictions may be regarded as governments for purposes of qualifying as a payee under ESTMA.<sup>51</sup> However, the requirement to report on payments made to Aboriginal governments in Canada has been deferred until two years after ESTMA comes into force, beginning on June 1, 2017.<sup>52</sup> The deferral responds to comments from Canadian indigenous peoples and industry during the development of ESTMA that more time was needed to consider the potential implications of reporting payments made to Aboriginal governments in Canada. NRCan continues to consult with indigenous peoples on the implementation of ESTMA.<sup>53</sup> The deferral period, however, does not apply to payments made to Aboriginal governments outside of Canada.

### Third-party payment attribution rules

Under ESTMA, if a third party (*e.g.*, a service provider) accepts a payment from a Reporting Entity on behalf of

a payee or makes a payment to a payee for a Reporting Entity, that payment is deemed to have been made by the Reporting Entity to the payee.<sup>54</sup> These payment attribution rules also apply to payments made to employees or public office holders of any payee.<sup>55</sup>

Reporting entities that control another entity are also deemed to have made any payments made to a payee by that controlled entity, unless the controlled entity is itself a separate Reporting Entity.<sup>56</sup> Typically, this would include payments made by a joint venture that a Reporting Entity controls. For example, payments made by the joint venture would not be proportionately reported by the minority joint venture partners that are also Reporting Entities – unless reporting is required by one of the other attribution rules.

### Joint ownership and control

The Guidance acknowledges, however, that there may be situations where two or more businesses control a business arrangement in partnership.<sup>57</sup> In situations of such joint control, any Reporting Entities involved should keep two key disclosure principles of ESTMA in mind: (i) if a Reporting Entity makes any payment to a payee, whether as an operator of a joint venture or as a member of a joint venture, it must report that payment – irrespective of who controls the underlying venture; *but* (ii) if a payment is made for another entity, such as a joint venture partner, the payment is deemed to have been made by that entity.<sup>58</sup>

Accordingly, Reporting Entities should carefully weigh the facts and circumstances of payments when determining whether and which payments to report in situations of joint control. Going forward, Reporting Entities entering into contractual joint control arrangements, such as shareholder agreements and joint venture agreements, may wish to explicitly assign responsibility for compliance with ESTMA and allocate the risks and costs of non-compliance within those contracts.

48. *ESTMA*, *supra* note 1 at s. 2.

49. *Guidance*, *supra* note 2 at 11.

50. *Id.* at 11.

51. *Id.*

52. *Id.*

53. *Id.*

54. *ESTMA*, *supra* note 1 at s. 29.

55. Natural Resources Canada. (2016). *ESTMA and payments to Indigenous governments*. Retrieved from [http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA\\_Aboriginal\\_Eng.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA_Aboriginal_Eng.pdf).

56. *ESTMA*, *supra* note 1 at s. 3(b) and (d).

57. *Id.* at s. 3(a).

58. *Id.* at s. 3(c).

## FORM AND MANNER OF REPORTING UNDER ESTMA



Once an ESTMA Report on either the XLS or PDF Reporting Template is completed, the Reporting Entity must publish it online. Generally, the Report is published on the Reporting Entity's corporate website. ESTMA Reports must be publicly available for at least five years. The Reporting Entity must also provide the Minister of Natural Resources Canada (the "**Minister**") with a direct link to the published ESTMA Report, and a copy of the ESTMA Report. These must be submitted within 150 days of the end of a Reporting Entity's financial year. NRCan will then publish the link to the ESTMA Report on its website.<sup>59</sup>

### Cash Accounting Basis

Reporting Entities must disclose payments on a cash accounting basis, not an accrual basis (*i.e.*, for the period in which each payment is actually made, and not when a Reporting Entity makes a commitment to make a payment).<sup>60</sup> Payments should be rounded to the nearest

CAD\$10,000 and must be reported in either Canadian dollars or in the currency of the Reporting Entity (*e.g.*, the currency used in a Reporting Entity's consolidated financial statements).<sup>61</sup> For clarity, ESTMA Reports must only use one currency.<sup>62</sup>

59. *Guidance*, *supra* note 2 at 16-17.

60. *Id.*

61. *Specifications*, *supra* note 3 at 8-11.

62. *Id.* at 5.65.

## Attestation of annual reports

ESTMA Reports must be attested to by either a director or officer of the Reporting Entity or by an independent auditor or accountant. An attestation under ESTMA is a written certification that the report is “true, accurate and complete”.<sup>63</sup>

When an independent attestation is used, the required engagement with an independent auditor is an audit conducted in accordance with Canadian auditing standards. The independent auditor’s responsibility is to express an unmodified opinion on the ESTMA report based on its audit.<sup>64</sup> For the purposes of conducting an audit, the applicable financial reporting framework for reporting is considered to be a special purpose framework.<sup>65</sup>

## Substitute reports from other jurisdictions

To reduce costs and duplication, ESTMA provides the Minister with the authority to determine whether reports of another jurisdiction may be substituted for ESTMA Reports.<sup>66</sup> The Minister must make such determinations based on an assessment of whether a jurisdiction’s legislation or other measures achieve the purpose of the reporting requirements under ESTMA (*i.e.*, to deter corruption through public transparency) and have a similar scope to the reporting requirements under ESTMA.<sup>67</sup> It is not necessary that another jurisdiction’s reporting requirements be identical to those of ESTMA for a substitution determination to be made.<sup>68</sup>

For a Reporting Entity to use a substitute report, it must provide the report required by the alternate jurisdiction to

both that jurisdiction’s authority as well as the Minister in Canada.<sup>69</sup> ESTMA further provides the Minister with the authority to impose additional obligations on Reporting Entities that wish to use a substitute report.<sup>70</sup>

As of July 31, 2015, the Minister has determined that reports submitted to European Union and European Economic Area member states that have implemented the EU Accounting and Transparency Directive at a national level can be submitted as a substitute for a report prepared under ESTMA.<sup>71</sup> A condition of using such a substitute report is that Reporting Entities must, however, submit an attestation statement with their substitute report.<sup>72</sup>

## Consolidated reporting

Where a Reporting Entity that would otherwise be subject to the reporting requirements under ESTMA is a wholly-owned or controlled subsidiary of another Reporting Entity, both entities may report their respective payments on a consolidated basis on the parent Reporting Entity’s ESTMA Report.<sup>73</sup> The subsidiary Reporting Entity, however, must provide notice to the Minister that the parent entity is providing the ESTMA Report on behalf of both entities.<sup>74</sup>

## Record keeping requirements

Reporting Entities are required to maintain records of any payment made to a Payee for a seven-year period following the disclosure of that payment in an ESTMA Report.<sup>75</sup> This rule applies to all Reporting Entities even after they cease to qualify as a Reporting Entity under ESTMA.

63. *Id.* at 3 and 5.

64. *Id.* at 5.

65. *ESTMA*, *supra* note 1 at s. 4.

66. *Specifications*, *supra* note 3 at 6 (*i.e.*, the auditor cannot have identified a need to modify the audit opinion because of a material misstatement of the information in the ESTMA Report or because the auditor is unable to obtain sufficient appropriate audit evidence to conclude that the ESTMA Report is free from a material misstatement).

67. *Id.*

68. *ESTMA*, *supra* note 1 at s. 10.

69. Natural Resources Canada. (2016). *Substitution Process and Determination*. [*Substitution*]. Retrieved from <http://www.nrcan.gc.ca/mining-materials/estma/18196>

70. *Guidance*, *supra* note 2 at 17.

71. *Specifications*, *supra* note 3 at 7.

72. *Guidance*, *supra* note 2 at 17.

73. *Substitution*, *supra* note 67.

74. *Specifications*, *supra* note 3 at 13.

75. *Id.*; *ESTMA*, *supra* note 1 at s. 11.

## ENFORCEMENT, OFFENSES AND PUNISHMENT UNDER ESTMA

ESTMA provides the Minister with broad investigative powers to ensure compliance with ESTMA. The Minister has the authority to order audits of ESTMA Reports,<sup>76</sup> to conduct inspections of company offices<sup>77</sup> and to issue corrective orders to ensure that Reporting Entities are taking steps to comply with the legislation.<sup>78</sup>

### Penalties for non-compliance

A Reporting Entity that fails to file an ESTMA Report within 150 days after the end of its financial year, fails to make its ESTMA Report accessible to the public, or knowingly makes or provides any false or misleading statements to the Minister, is liable to a fine of up to CAD\$250,000 and is guilty of an offence punishable on summary conviction.<sup>79</sup>

A Reporting Entity is subject to the same penalties if it fails to keep records of its payments for seven years after it submits its applicable ESTMA Report, or structures any payments, financial obligations or gifts (whether monetary or in-kind) with the intention of avoiding reporting obligations under ESTMA.<sup>80</sup>

Officers, directors and agents of a Reporting Entity that directed, authorized, assented to, acquiesced in or participated in the commission of an offence under ESTMA are also a party to and guilty of the offence. Such persons would be personally liable on conviction to the punishment provided for by the offence.<sup>81</sup>

Offences under ESTMA that are committed or continued for more than one day constitute a separate offence for each day that the offence is committed or continued.<sup>82</sup> Accordingly, if a Reporting Entity is charged with multiple offences arising out of a single event that spans over multiple days, that Reporting Entity could face hefty cumulative fines.

### Due diligence defense

ESTMA includes a broad due diligence defence against liability if a person or entity can establish that it exercised due diligence to prevent the commission of an offence.<sup>83</sup> This provides a strong incentive for Reporting Entities to adopt rigorous internal compliance and reporting procedures and controls.<sup>84</sup> If concerns regarding compliance arise, companies should document their internal process, analysis, conclusions and rationale, as well as seek external legal and accounting advice, where appropriate, to support their decision making.

76. *ESTMA*, *supra* note 1 at s. 11(b).

77. *Id.* at s. 13.

78. *Id.* at s. 14.

79. *Id.* at ss. 16 and 17.

80. *Id.* at s. 19.

81. *Id.* at s. 24(1) and (2).

82. *Id.* at s. 24(1) and (3).

83. *Id.* at s. 25.

84. *Id.* at s. 24(4).

85. *Id.* at s. 26(b).

86. See *Guidance*, *supra* note 2 at 18 (suggesting that appropriate actions to ensure that a Reporting Entity has the capabilities in place to meet

---

## NO EXEMPTIONS FOR CONFIDENTIALITY OR VIOLATION OF LOCAL LAWS



ESTMA provides no exemptions for reporting in any circumstances where a Reporting Entity's disclosure obligations under ESTMA conflict with a host country's laws or a contractual confidentiality agreement. While the lack of such exemptions was criticized by commentators who claimed that serious irreconcilable conflicts would result,<sup>85</sup> these objections may have been overstated. The Guidance notes that the Government of Canada identified no foreign laws that would give rise to a conflict with reporting under ESTMA.<sup>86</sup> Nevertheless, to further address potential concerns, the Government of Canada has held discussions with "countries of interest" to advise them of the new reporting requirements under ESTMA and continues to monitor the risk of potential conflicts between ESTMA and the laws of other jurisdictions. NRCan suggests that if a Reporting Entity encounters challenges in a foreign jurisdiction, it should provide details to NRCan.<sup>87</sup>

---

its obligations under ESTMA "could include approaches such as putting in place appropriate data collection systems, ensuring awareness of obligations within the Reporting Entity's corporate structure and appropriate types of training").

87. See generally Alan Detheridge, "On transparency bill, Canada should stand its ground against Big Oil", *The Globe and Mail* (Tuesday, Nov. 18, 2014) (responding to these criticisms).

88. *Guidance*, supra note 2 at 18.

89. *Id.*

---

## CONCLUSION



The introduction of ESTMA marks a significant change in the reporting landscape for Canadian extractive sector companies. It is crucial that companies are familiar with the requirements under the legislation to ensure that they meet all disclosure standards when doing business with governments both domestically and abroad. We hope that this overview assists in this regard, and we would be pleased to answer any detailed questions you may have about this overview and the new reporting requirements imposed under ESTMA.



## KEY CONTACTS

### Calgary

**Bruce Lawrence**  
T 403.232.9597  
blawrence@blg.com

### Montréal

**Pascal de Guise**  
T 514.954.3167  
pdeguire@blg.com

### Toronto

**Mark Wheeler**  
T 416.350.3501  
mwheeler@blg.com

### Vancouver

**Fred R. Pletcher**  
T 604.640.4245  
fletcher@blg.com