

Canadian major, midtier miners urged to prepare for transparency act compliance

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TORONTO (miningweekly.com) – The introduction of the Extractive Sector Transparency Act (ESTMA) would represent a sea change in the reporting of payments to government for Canadian seniors and midtiers, Borden Ladner Gervais partner **Andrew Powers** told an audience at the Canadian Institute of Mining’s management and economic society in Toronto last week.

Companies that fall within ESTMA’s catchment would be required to record and publish all payments, not only to national governments, but also local government, state-controlled agencies, municipalities or any other public-sector bodies.

“The general aim of ESTMA is corporate transparency and this is a laudable goal,” Powers said. “Revenues derived from natural resources will be tracked and governments and government bodies can be held accountable for how these revenues are spent.”

ESTMA UMBRELLA

ESTMA was given royal assent in December 2014 and would come into effect in January 2016. Dependant on various cut-off points, ESTMA would be mandatory for any company, organisation, joint venture (JV) or trust working in the extractive sector.

Based on consolidated financial statements for at least one of a company’s two most recent fiscal years, ESTMA would be applied for those that meet at least two of the following criteria: more than C\$20-million in assets, more than C\$40-million in revenue and a workforce of more than 250 employees.

Employees include full-time, part-time and temporary employees. However, the use of independent contractors is excluded.

Any company that comes under Canadian federal, provincial or territorial law would be included, as well as entities that operate internationally but have Canadian reporting obligations. ESTMA’s reach would also include those that hold permits or licences under Canadian federal, provincial or territorial legislation.

The Act would also be applied to any company that holds a controlling stake in a subsidiary in the extractive space or where a company has appointed the majority of another entity’s board of directors.

It would also apply for companies that control or have become the operating partner of a JV. “What’s unclear, at least for the time being, is a situation whereby a JV is 50:50 owned but the operator as a third party,” Powers noted.

“[Overall,] it’s a broad and all-encompassing list that, frankly, captures just about every possible permutation,” he added.

The final deadline for ESTMA reporting would be 150 days after the fiscal year, which meant that companies that had a December 31 year-end would have a deadline of May 31. “So the first wave of reporting can be expected in May 2017,” Powers noted.

Reporting would occur on project-by-project payments, a project being defined as any operational activity performed by an extractive company. ESTMA would be applied throughout project development or mine operation, from early-stage exploration until closure or until the asset is sold or divested.

In addition, periods of activity and inactivity would be encompassed.

PAY AND PLAY

Payment to any government body, national or local, or public-sector payee would be reported, as well as payment for commercial development that exceeded C\$100 000. "And that's both on a cumulative and on a one-time basis," Powers said.

Tax and royalty fees would be included, as well as fees for rental, entry, licensing, permitting or for obtaining any concessions from government. Production entitlements, bonuses and dividends paid to government in lieu of a royalty would also have to be recorded.

The building of infrastructure that might have been a government requirement to obtain a permit for extraction must be declared, although social payments, such as building a community centre or improving a school, need not be reported.

It was likely that infrastructure developed purely to obtain access to a well or mine and controlled by a company during its extraction phase would not have to be reported until it was handed over to the government.

The actions of third parties acting directly on behalf of a company to advance its interests or to engage in negotiations to secure permitting would also have to be reported.

In addition, the Act covered payments made to First Nations agencies or government bodies. This would include organisations that act on behalf of aboriginal communities or stakeholders, such as trusts, wards and government commissions.

Provisionally or federally incorporated aboriginal organisations that undertake activities in the extractive sector on behalf of their bands or beneficiaries might fall under ESTMA as well.

However, Powers stressed that the Act, in relation to the First Nations, had been deferred for two years and would only come into force in 2017.

TAKE THREE STEPS

Companies should expect three steps for ESTMA compliance reporting: website disclosure, public notice and formal confirmation that the company had satisfied its ESTMA obligations. Parent companies would have to report for subsidiaries.

An ESTMA filing would have to be attested to, either by a director, company officer or an independent auditor or accountant. The filing would need to be certified as true, accurate and complete.

Companies must keep documentation for seven years after filing, even if they subsequently fall out of ESTMA's catchment. The Act also permitted inspection and audit by the authorities, with a set of general enforcement measures. Penalties included possible fines of up to C\$250 000 for compliance failure or if an ESTMA report was found to be false or misleading.

"And then there's another punitive layer," Powers noted. Offences within a filing are considered separate for each day of noncompliance until corrected, carrying the threat of a cumulative fine.

"If applicable, a company might mitigate liability by highlighting any due diligence and preventive measures taken, even though a breach subsequently occurred. "But it remains to be seen how that will take shape," Powers said.

No exceptions for reporting have been envisaged, not even if ESTMA obligations conflict with the law of a host county or a confidentiality agreement that a company might already have in place with a government or government body.

“So carefully consider existing [confidential consent agreements] that you have and ensure they have carve-outs for disclosure now required under the law,” Powers advised companies.