



NRCan Updates Implementation Tools and Provides Guidance on Payments to Indigenous Payees under the Extractive Sector Transparency Measures Act

April 19, 2018

[Keith R. Chatwin](#), [Ivan T. Grbesic](#)

Natural Resources Canada (NRCan) has published [revised implementation tools](#) under the Extractive Sector Transparency Measures Act (ESTMA) nearly two years after its initial implementation. The revised tools result from the review of submissions of reporting entities through the first reporting cycle and extensive consultations with a variety of stakeholders.

The revised implementation tools consist of:

- A revised guidance document, which provides general information on who is subject to ESTMA, which entities must report payments under ESTMA, and what payments should be reported under ESTMA;
- New guidance on reporting payments to Indigenous payees which to date have been excluded from the reporting obligation;
- A new reporting template intended to simplify the reporting process; and
- A new version of the validation checklist.

The technical reporting specifications have not been revised.

Revised Guidance

The Concept of Control

While the revised guidance advances or introduces a number of important topics, the most instructive revisions to the guidance relate to the analysis of control in the context of the reporting obligation. Insofar as many commercial oil & gas and mining operations are conducted through direct or indirect affiliates - either individually or pursuant to joint venture or other cooperative arrangements - the determination in those contexts of whether reporting obligations exist and on whose behalf reports are required to be submitted is of critical importance. NRCan has clarified that the concept of “control” will be applied broadly and on a purposive basis. While the concept of control as dictated by applicable accounting standards will generally be sufficient to evidence control, that does not foreclose the possibility of other relationships nonetheless resulting in “control” for purposes of ESTMA, including situations of joint control of a commercial enterprise.

In certain joint control scenarios, the incremental consideration as to operatorship and non-operatorship of the particular commercial endeavour and the relative control of the operating entity, whether single-purpose or otherwise will be germane. In those contexts, NRCan is clear:

- If an operator is a **Reporting Entity in its own right**, then it should in most cases report all payments made on behalf of non-operators, with non-operator Reporting Entities obligated only to report direct payments by them and any joint venture payments not reported by the operator on its behalf.
- If an operator is **not a Reporting Entity**, then the non-operator members that are Reporting Entities would be obligated to report both direct payments by them and any joint venture payments made by the operator but not otherwise reported.

By necessary implication, the foregoing bifurcation of responsibilities will require participants in joint ventures to be well-informed as to the payments being made by an operator on behalf of the commercial endeavour, its own reporting situation and the obligations and the resultant implications for non-operator Reporting Entities. Commercial counterparties would be well advised as a result to contemplate drafting provisions into joint venture agreements and related documentation that will impose disclosure and record-keeping obligations on the operator in respect of the non-operator co-venturers.

Notwithstanding the foregoing, there may also be circumstances where no one entity truly “controls” a commercial endeavour involving multiple parties, in which case if the commercial endeavour itself is a Reporting Entity it will report the payments.

Social Payments

NRCan has clarified that in determining whether social payments are reportable, a Reporting Entity should consider the nature, timing or extent of the payment and the degree of control that the payee has over such criteria. To the extent the payee dictates one or more of the criteria, then a payment is likely reportable.

In that regard and following the purposive approach to reporting required by ESTMA, Reporting Entities should consider whether the commercial activities being undertaken could have proceeded in the absence of such payments, regardless of whether those payments were made as a bonus, infrastructure improvement or other payment category, including if they were made to secure the withdrawal of any potential opposition to the commercial activities proposed to be undertaken.

New Guidance on Reporting Payments to Indigenous Payees

Following a two year deferral from the date of initial implementation of ESTMA, effective June 1, 2017 qualifying payments made to Indigenous payees are now required to be reported by Reporting Entities.

While the analysis applicable to the need to report payments to Indigenous payees is essentially the same as in respect of other payments and to other payees, it is important to recognize that ESTMA does not discriminate between payees generally and Indigenous payees, requiring some guidance as to what the payee definition itself means in the Indigenous context.

In that regard, the overlay of Indigenous considerations on the existing payee framework is instructive:

- “any government in Canada...”

- Could include an Indigenous group that has the power, duty or function of government, including in respect of law and rule-making authority relative to natural resources or which is recognized as such legislatively or otherwise.
- “a body that is established by two or more governments”
 - Could include treaty associations, tribal councils or Chiefs’ council established by an Indigenous group.
- “any trust, board, commission, corporation, body or authority that...exercises or performs, a power, duty or function of government...”
 - Could include treaty associations, tribal councils or Chiefs’ council established by an Indigenous group or a body established by any such organizations.

New Reporting Template

NRCan has updated the reporting template for Reporting Entities both to streamline the reporting process and to add further reporting fields for, among other things, currency and exchange rates. Reports for 2017 can continue to be made on the previous template, though transition to the new reporting template is encouraged.

Further Information

For further information, please see our earlier blog posts on ESTMA ([here](#), [here](#), [here](#), and [here](#)).

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice.