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Extractive Sector Transparency Measures Act: Reporting Without Context Will Subvert Reconciliation Efforts

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Legislation Commented On: *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376

Canada's new *Extractive Sector Transparency Measures Act* (*ESTMA*), which came into force on June 1, 2015, requires companies engaged in the commercial development of oil, gas or minerals to publically report certain payments made to governments in Canada and abroad. Notably, in February of this year, Natural Resources Canada (NRCan) released an information sheet responding to long-standing concerns surrounding *ESTMA* and payments to Indigenous governments.

There has been significant dialogue around whether Indigenous governments *should* be included as "payees" under *ESTMA* (see Open Canada here). Regardless of one's opinion on that broader issue, this post argues that reporting the quantum of funds paid to Canadian Aboriginal governments through confidential impact and benefit agreements (IBA), without providing essential context, is folly. In other words, the contents of IBAs should be publicly disclosed in full or remain entirely confidential.

The History of Indigenous "Payees" Under *ESTMA*

Section 2 of *ESTMA* contemplates Indigenous governments as "payees" and, therefore, resource companies will be obligated to disclose reportable payments made to these payees. However, Section 29 of the Act includes a two-year deferral period during which time payments made to Canadian Aboriginal governments need not be reported (although payments made to Indigenous governments abroad must now be reported). Already, one year of this hiatus has elapsed.

In 2014, the Standing Senate Committee on Energy, the Environment and Natural Resources noted that: "NRCan and Justice Canada officials said this deferral period arose as a result of concerns expressed by Aboriginal governments, industry and some provinces about how the Act will affect impact benefit agreements. In many cases, these agreements are confidential and therefore stakeholders need to work out how information will be reported."

Now, NRCan's information sheet responds directly to this issue:

> Are extractive companies required to disclose impact and benefit agreements?
>
> No. Extractive companies are not required to disclose impact and benefit agreements (IBA). The Act requires extractive companies to report certain types of payments of $100,000 or more made in relation to the commercial development of oil, gas or

minerals. *Some of these reportable payments might be included in IBAs* (emphasis added).

That is to say there is no obligation to disclose IBAs in their entirety but qualifying payments made pursuant to an IBA must still be reported.

Why IBAs Are Negotiated

Mandating the public reporting of only select portions of IBAs is ill-advised because of its unintended negative consequences.

To understand the full implications of this proposed practice, it is essential to consider the nature of payments made by resource extraction companies to Aboriginal governments through IBAs. Payments made to Aboriginal governments under IBAs serve two purposes: to provide compensation and benefits. Compensation is owed to an Aboriginal government by a project proponent for any interference the project may have with their Aboriginal or treaty rights. Common examples of interferences include damages to the environment or loss of quiet enjoyment of traditional lands, impact on wildlife, and socio-economic impacts on members and the community. Alternatively, the provision of benefits refers to a sharing of wealth of the resources that are being extracted from traditional lands.

Simply put, parties negotiate IBAs to ensure compensation for interference with Aboriginal and treaty rights and a fair share of the benefits flowing from resources extracted from their lands.

Why Portions of Confidential IBAs Cannot be Severed and Made Public

As such, IBA negotiations are inherently a "give-and-take" process in which a party may compromise on an important issue in order to gain a favourable overall outcome. Therefore, severing and reporting only limited elements of IBAs fails to provide the necessary context for this "give-and-take" process.

If only select portions of IBAs are reportable, the broader public receives an incomplete, and therefore, flawed understanding of the issues negotiated by the parties. For example, reporting merely the total quantum paid to an Aboriginal government on a particular project without casting this transfer in the context of the infringement of an Aboriginal or treaty right is misleading.

In fact, Aboriginal communities highlighted this exact concern when they were invited to comment on the proposed legislation in 2015: "Concerns were also expressed that the information disclosed could be misinterpreted, taken out of context or somehow used against Aboriginal communities."

Conclusion and Final Considerations

If *ESTMA* serves to inform non-Aboriginal Canadians of moneys paid by resource extraction companies to Aboriginal governments and does so *without context*, then this could result in the

perpetuation of inaccurate and prejudicial stereotypes of Aboriginal communities. In turn, this may result in continued disengagement from indigenous perspectives and hamper Canada's broader objective of reconciliation.

Finally, including only certain elements of IBAs as reportable payments may, perversely, provide an incentive to creatively administer funds under IBAs to subvert this reporting. This would result in the formation of IBAs that do not optimally fulfill their stated purposes: to compensate and provide benefits.