The purpose of this article is to analyze and critique Canada’s most recent attempt to enhance transparency in the extractive industry: the Extractive Sector Transparency Measures Act (ESTMA). This article outlines and discusses the two chief legal responses to corruption: substantive regulation and transparency-based regulation. It situates the ESTMA in this context and discusses its role in the broader anti-corruption framework. This article also explores the responses of extractive industry participants and other stakeholders to the shifting landscape.

The core argument advanced is the following: the ESTMA is, in principle, a significant step forward in Canada’s commitment to eradicating corruption and reversing the resource curse; however, it suffers from several shortcomings that must be attended to before its full potential can be realized. In advancing this argument, this article synthesizes emerging commentary on the ESTMA in light of the overarching narrative developed in the article.

Connor Bildfell* 

Le présent article a pour but d’analyser et de faire la critique de la tentative la plus récente du Canada d’accroître la transparence dans l’industrie extractive, grâce à l’adoption de la Loi sur les mesures de transparence dans le secteur extractif (LMTSE). Il décrit les deux principales réponses juridiques à la corruption, soit la réglementation substantielle et la réglementation basée sur la transparence, et en discute. De plus, il situe la LMTSE dans ce contexte et traite de son rôle dans le cadre plus large de la lutte contre la corruption. Cet article explore également les réactions des participants et autres acteurs de l’industrie extractive au changement qui s’opère. L’argument fondamental avancé est le suivant : la LMTSE représente, en principe, un grand pas en avant dans l’engagement du Canada à éradiquer la corruption et à renverser le fléau que représentent des ressources ; cependant, elle affiche plusieurs lacunes qui doivent être comblées avant que son plein potentiel ne puisse être réalisé. En avançant cet argument, le présent article synthétise un commentaire émergent sur la LMTSE à la lumière de l’argument principal développé dans l’article.

* Connor Bildfell is a graduate of the Peter A. Allard School of Law at the University of British Columbia. The author thanks the editors at the McGill Journal of Sustainable Development Law for all their hard work, as well as the anonymous reviewers for their helpful insights and feedback.
1. INTRODUCTION

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Like bad breath, [corruption] is hard for the one who has it to realize it; others realize it and have to tell him.

– Pope Francis, 23 October 2014

1. INTRODUCTION

As Cyndee Todgham Cherniak has noted, Canada’s anti-bribery framework involves a “critical balancing act involving domestic and international politics, foreign affairs, terrorism, and serious issues of corruption on one side of the scale. On the other side of the scale from these serious and important issues, the government of Canada balances the interests of Canadian businesses who operate in foreign markets.” The purpose of this article is to analyze and critique Canada’s most recent move in this balancing exercise: the Extractive Sector Transparency Measures Act (ESTMA). In doing so, this article synthesizes emerging...


commentary on the ESTMA and evaluates the ESTMA’s ability to generate accountability in the extractive sector. It advances the argument that the ESTMA is a significant step forward in Canada’s commitment to eradicating corruption and reversing the resource curse, as it embodies a broader recognition that the fight against corruption can only be won where transparency prevails; however, it suffers from several shortcomings that need to be attended to before it can realize its full potential in contributing to the eradication of corruption and the reversal of the “resource curse”.

The message of the latest developments in the area of bribery and corruption rings loud and clear: the traditional approach taken by some businesses abroad—“when in Rome, do as the Romans do”—is no longer acceptable. Canadian policy makers and business leaders are standing up to ensure Canadian values are reflected in Canadian corporate business practices abroad. As Todgham Cherniak has noted, Canadian values such as “equality, respect, freedom, fairness, social responsibility, commitment to social justice, and the rule of law” necessitate a robust approach to preventing corruption at home and abroad. Despite the laudable goal of ensuring corruption is met with strong sanctions, Canada’s commitment to targeting corruption must be delicately balanced against business owners’ interest in a free market which operates without undue government intervention. Such interests have come up against a growing number of legislative and policy measures that, for better or for worse, impose considerable burdens on businesses. As Peter Kirby opined regarding the shifting anti-corruption landscape, “Does it make life tougher? Life has been getting tougher in terms of compliance for the last decade at least. It’s the cost of doing business.”

Recent anti-corruption developments in Canada and around the world have focused on one industry in particular: the extractive industry, in which Canada stands as a global titan. In 2013, over 50 per cent of the world’s publicly listed exploration and mining companies were headquartered in Canada. The extractive industry is subject to intense scrutiny by civil society, giving Canada’s government and Canadian companies a heightened interest in ensuring that the “Canadian brand” in the extractive sector is marked by values of accountability, transparency, and responsibility. The importance of a value-driven “Canadian brand” in the extractive sector is evidenced by the fact that the industry itself is pushing for improved corporate social responsibility, signaling that there is a demonstrable business case for ensuring ethical behaviour at the highest standard. In sum, Canada has a responsibility—owing to its was an omnibus bill comprising a broad range of subject matter. Section 376 provides for the enactment of the ESTMA, which came into force June 1, 2014.

5 Todgham Cherniak, supra note 2 at 130.
6 See ibid.
7 Millan, supra note 4 at 21.
9 For example, MiningWatch Canada, an NGO, plays a significant role as an industry “watchdog”, monitoring and reporting on the activities of mining sector participants in Canada and elsewhere. MiningWatch Canada, “About Us”, online: <miningwatch.ca/about>.
prominent position in the extractive industry and its membership in a global community committed to an ethical and responsible extractive sector—not only to keep pace with international standards, but also to provide global leadership.

This article is divided into five parts after this introductory section. Part 2 begins with a brief overview of the landscape of corruption and bribery, the latter being a subset of the former. This Part discusses the nature of the “resource curse”, provides a statistical account of how corruption occurs in practice, and outlines the two chief legal responses to corruption: substantive and transparency-based regulation. Part 3 explores the primary source of “substantive regulation” of foreign corruption in Canada: the Corruption of Foreign Public Officials Act (CFPOA). Although the CFPOA is not the primary focal point of this article, a discussion of its history and substantive provisions is necessary to understand the ESTMA and its significance. Part 4 constitutes the core of this article. It outlines the ESTMA, discusses its history and role in the broader anti-corruption framework, and critiques aspects of the ESTMA in need of further attention. Part 5 examines the response of extractive industry participants and other stakeholders to the shifting landscape. Finally, Part 6 provides concluding remarks.

2. THE LANDSCAPE OF CORRUPTION AND BRIBERY

2.1. The Insidious Nature of Corruption and Bribery

The first question any legal commentary must answer is: why is the subject matter important and worthy of discussion? To answer that question here, we need only consider the insidious nature of corruption and bribery. Once the profoundly deleterious effect of corruption and bribery is made clear, the remainder of the paper will address how the law is shifting in response to this important issue.

Cheryl Gray and Daniel Kaufmann define corruption as “the use of public office for private gain”. A bribe thus constitutes a subset of corruption. The number of harmful economic ramifications wrought by bribery and corruption is considerable: bribery raises transaction costs and uncertainty in an economy; leads to inefficient economic outcomes, including impeding investment, misallocating talent, and distorting sectoral priorities and technology choices; pushes firms outside the formal sector, thereby undercutting the state’s ability to raise revenues and leading to higher tax rates levied on fewer tax payers; reduces the state’s ability to provide essential public goods; and undermines the state’s legitimacy. Apart from economic costs, bribery and corruption engenders harm in the form of “poverty, weak democratic and rule of law norms, international trade distortions, human rights violations, and the unsustainable exploitation of natural resources.”

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10 SC 1998, c 34 [CFPOA].
11 Cheryl W Gray & Daniel Kaufmann, “Corruption and Development” (1998) 35:1 Finance & Development 7 at 7. They provide a comprehensive list of what can be purchased from government officials (ibid at 7–8).
12 See ibid at 8.
There is widespread consensus among academics and those involved in business and politics that corruption undermines growth and development. Bribes given to government officials divert funds away from the well-being of the local community, instead padding the officials’ own accounts. Further, corruption stifles competition among businesses and dampens innovation. As the Alberta Court of Queen’s Bench opined in the first trial brought under the CFPOA, “Corruption distorts markets and harms overall economic, social, and political development. It is a pernicious disease that needs to be resisted by all citizens.”

Closely related to the issues of bribery and corruption is the notion of the “resource curse”. There is said to be a “paradoxical correlation between large resource endowments and endemic poverty as well as low growth in resource dependent countries.” This “resource curse” phenomenon has become a subject of the law’s attention both domestically and internationally. Legal responses to the resource curse can take the form of domestic anti-corruption statutes such as the CFPOA, analogous foreign statutes, or laws mandating disclosure of various types of information. Various entities, from stock exchanges, to non-governmental organizations

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14 When natural resource extraction is carried out appropriately, carefully, and respectfully, the benefits can be great. As the Resource Revenue Transparency Working Group notes, “[n]atural resource extraction can create jobs, generate business opportunities for direct and indirect suppliers, and contribute to infrastructure development as well as training and skill development”. In addition, “significant benefits can accrue via tax and royalty payments which are made from companies to governments and then transformed into public investments like health and education services and physical infrastructure”. The Resource Revenue Transparency Working Group, Background to Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments (14 June 2013) at 5, online: <www.pwyp.ca/images/documents/Working_Group/RRTWG_Background_-_June_2013.pdf> (“Background to RRTWG Recommendations”). When corruption results in the improper diversion of funds, however, such benefits go unrealized.

15 One striking example of the effects of corruption comes from Equatorial Guinea. As one of Africa’s leading oil producers, Equatorial Guinea has some of the highest GDP per capita figures in Sub-Saharan Africa. See e.g., US, Central Intelligence Agency, The World Factbook 2016 (Washington, DC: Central Intelligence Agency, 2016), online: Equatorial Guinea <www.cia.gov/library/publications/the-world-factbook/> (showing that Equatorial Guinea had a GDP per capita of approximately $33,300 in 2015, which was the 54th highest worldwide). Yet, 75 per cent of the population is below the poverty line, 50 per cent do not have access to safe drinking water, and 10 per cent of children die before the age of five. See Blair, supra note 1.


18 The phrase “resource curse” was coined in Richard M Auty, Sustaining Development in Mineral Economies: The Resource Curse Thesis (New York: Routledge, 1993). The phrase “paradox of plenty” is also often used to describe this phenomenon. The notion of the “resource curse”, however, has been challenged by several scholars. See e.g., Christa N Brunnschweiler, “Cursing the Blessings? Natural Resource Abundance, Institutions, and Economic Growth” (2008) 36:3 World Development 399 at 411–413 (concluding that resource-rich countries grew faster than resource-poor countries between 1970 and 2000, controlling for other variables, and that there is no evidence that resource abundance negatively influences institutional quality). For a full discussion of the resource curse, which is beyond the scope of this article, see generally Paul Collier, “Laws and Codes for the Resource Curse” (2008) 11 Yale Hum Rts & Dev LJ 9.
(NGOs) and governments have taken efforts to reverse the resource curse and to combat bribery and corruption.19

Countries rich in natural resources such as oil, gas, and minerals tend, paradoxically, to under-perform economically, have higher incidences of conflict and civil unrest, report higher levels of income inequality, and suffer from weak or almost non-existent governance, including weakened commitment to the rule of law—a fundamental precondition of a functioning society. Yet, these effects are not inevitable. It seems reasonable to expect that by enacting transparency and anti-corruption measures specific to the extractive industry, policy makers can encourage greater transparency and integrity in countries rich in these resources, mitigating some negative impacts of the resource curse. This underlying rationale is a key step in understanding why, out of the myriad industries afflicted by corruption and bribery, the extractive industry has captured the attention of legislators. The issues of stifled development and the resource curse are key drivers behind the demands for anti-corruption laws and transparency requirements in the extractive industry. However, in my view, the resource curse is a complex phenomenon, and no single response—legal or otherwise—can completely eradicate it. While legal requirements may potentially have some effect in reversing the resource curse, other changes—social, political, technological, environmental, economic, etc.—are required to more fully address the issue.

With this in mind, it is important to consider the following three questions in order to situate this paper in the broader context of bribery and ground the following discussion in a clear understanding of how bribery occurs: (1) in what industries is bribery occurring, (2) who is being bribed, and (3) for what purpose is the bribe being offered?

First, what are the key industries grappling with bribery? The OECD Foreign Bribery Report, which surveyed 427 cases of foreign bribery offences between 1999 and 2014, observed that two-thirds of foreign bribery cases occur in four sectors: extractive (19%), construction (15%), transportation and storage (15%), and information and communication (10%).20

Second, who is being bribed? Bribes are promised, offered, or given most frequently to employees of public enterprises (27%), customs officials (11%), health officials (7%), and defence officials (6%).21

Third, for what purposes are bribes being offered? Bribes have been paid most frequently for the purposes of obtaining public procurement contracts (57%) and clearance of customs procedures (12%).22

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19 For example, as will be discussed below, the Security and Exchange Commission (SEC) has promulgated rules for resource extraction issuers under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111–203, 124 Stat 1376 (2010) (codified as amended at 15 USC § 78M(q) (2012)) [Dodd-Frank Act].

20 OECD, OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, (2014) at 8, online: <dx.doi.org/10.1787/9789264226616-en> [OECD Foreign Bribery Report]. The data reflected in this study, of course, speaks only to cases that were ultimately brought to light. It is likely, therefore, that types of bribery that are less easily uncovered are not accurately represented in this study.

21 Ibid.

22 Ibid.
With this backdrop in mind, the following section examines the two chief legal responses to corruption: substantive regulation and transparency-based regulation.

2.2. THE TWO CHIEF LEGAL RESPONSES TO CORRUPTION

Generally speaking, there are two types of law used to combat corruption: (1) substantive regulation and (2) transparency-based regulation. Substantive regulation encompasses any legal measure that attaches some form of sanction to a given activity. Criminal law is the most obvious example of substantive regulation. Substantive regulation typically arises “where society has chosen to ban, limit, or otherwise control specified activities because of their intrinsic harmfulness or, in cases of market failure, where existing incentive structures are not sufficient to achieve socially optimal outcomes.” Canada’s CFPOA, discussed below in Part 3, falls precisely in this category. By enacting this legislation, Parliament has signalled its belief that corruption of foreign public officials is intrinsically harmful and that society requires criminal sanctions to be imposed in order to deter such conduct. In this context, incentives that can arise naturally by operation of the free market appear to be insufficient as a mode of regulation as they not only fail to discourage corruption, but may in fact encourage it. For example, shareholders have little incentive to stop bribe-making, and may in fact encourage such irresponsible activity, when they perceive it as operating to their benefit (e.g., where a company in which one holds shares secures a lucrative contract through a bribe). Thus, there are compelling grounds for state intervention, and in particular some form of transparency-based regulation.

Second, there is transparency-based regulation. Transparency, it is thought, impedes corrupt officials’ efforts to engage in corruption and misappropriate wealth from extractive activities through a combination of accountability and demands for integrity. It was Justice Louis Brandeis who wrote, “Sunlight is said to be the best of disinfectants.” It has been said that “[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of

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23 See Firger, supra note 13 at 1073.
24 Ibid.
25 Consider the following comments made by Mr. Bob Dechert during the third reading of Bill S-14, which ushered in important amendments to the CFPOA: “Corruption, in all its unsavoury forms, is an affront to the values of good, honest and hard-working Canadians. Our government’s position of zero tolerance in this area is clear. Canada needs to work to root out corruption wherever it lies … Clearly, the best means of addressing corruption is working to prevent it from occurring in the first place” (House of Commons Debates, 41st Parl, 1st Sess, No 272 (18 June 2013) at 18508 (Bob Dechert)). This links back to the discussion in Part 2.1. above regarding the insidious nature of corruption.
26 In actual fact, such a shareholder may suffer an economic loss due to the “tax” imposed by bribes and other corrupt activities, as compared to what the shareholder would make in a hypothetical corruption-free world.
27 Although in some cases the local citizens, due to institutional failures, may be unable to exert pressure, it is theorized that other stakeholders such as international civil society watchdogs will do so. At first blush, I question whether civil society watchdogs would have incentives comparable in strength to those of the local community to see to it that the government be held accountable.
28 Louis D Brandeis, Other People’s Money and how the Bankers Use It, (New York: Frederick Stokes Company, 1913), online: <www.law.louisville.edu/library/collections/brandeis/node/196>, cited in Firger, supra note 13 at 1072, n 128.
all guards against improbity.” Transparency-based approaches that have effect *transnationally* may offer an added degree of protection against corruption. For example, where a small set of powerful elites control the state apparatus, domestic legal and political efforts to wrest control from entrenched leaders or enforce true accountability would be nearly impossible. In such contexts, a transparency-based regime having transnational effect may be required to protect against corruption.

In my view, one of the overarching public policy goals pursued by much transparency legislation is to enable citizens in resource-rich countries to receive more complete information and to benefit from the natural resources in their country, perhaps even enabling a form of stewardship over such resources. This underlying premise of transparency legislation necessarily entails that citizens and civil society be armed with robust and accurate information, allowing them to engage in local-level oversight. In furtherance of this objective, transparency initiatives, such as “publish what you pay” regimes and similar initiatives, offer an “important tool in curtailing the resource curse that so heavily burdens resource-rich developing countries by shedding light on opaque payments between the extractive sector and host countries.”

A groundswell of public opinion in favour of increased use of transparency-based regulation, particularly in G8 countries, has formed. This is evident in the May 2011 G8 Deauville Declaration, which welcomed “complementary efforts to increase revenue transparency, and commit[ted] to setting in place transparency laws and regulations or to promoting voluntary standards that require or encourage oil, gas, and mining companies to disclose the payments they make to governments”. The proliferation of transparency-based regulations and the march toward transparency are also products of the “growing sophistication” of NGOs like Global Witness, Human Rights Watch, Oxfam America, Publish What You Pay, and Transparency International.

Having introduced the two chief legal responses to corruption, the following Part will outline the merits and describe the limitations of the first type of legal response to corruption: substantive regulation, which in Canada is found chiefly in the CFPOA.

### 3. SUBSTANTIVE REGULATION: THE NEW (AND IMPROVED) CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT

Up until the 1990s, bribes were tax deductible in Canada. Bernard Lamarre, the former head of Lavalin Inc., boasted in 1991 that whenever he did business in the third world, he

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never gave bribes without first demanding a receipt and a signed invoice—moreover, payment was always in the form of a cheque, not cash, “so we can claim it on our income tax!”34

There has since been a sea change in the law’s treatment of bribery. In 1999, the CFPOA35 came into force. This legislation was a result of Canada’s commitments under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.36 A brief discussion of the CFPOA here will assist in situating the ESTMA in the existing landscape of anti-corruption legislation and understanding the ESTMA’s significance. Neither instrument can be discussed in the absence of the other, as they are two complementary and mutually reinforcing pieces of legislation.

The CFPOA “prohibits the giving or offering to give a benefit of any kind to a foreign public official, or any other person for the benefit of the foreign public official, in the context of a business transaction.”37 The CFPOA is “outward oriented” in the sense that it focuses on bribery of foreign public officials, while domestic bribery is already the subject of Criminal Code38 provisions.39 The CFPOA, like its American equivalent, the Foreign Corrupt Practices Act (FCPA), is “designed to address bribe-making, not bribe-taking.”40 As Susan Hutton and Paul Beaudry summarize, “[the CFPOA] is applicable both to individuals and corporations, whether acting directly or through an agent or third party. An individual need not be Canadian to be charged; permanent residents can also be liable under the CFPOA.”41

In 2011, Canada’s CFPOA, as well as its surrounding institutional framework, was roundly criticized by the OECD Working Group on Bribery and by Transparency International for its

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35 supra note 10.
36 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Publishing, 1997). Canada is one of the 41 countries that have adopted this convention.
38 RSC 1985, c C-46 [Criminal Code] at ss 119–25 (addressing bribery, corruption and frauds on the Crown and breach of trust), 426 (addressing secret commissions received by an agent, including public officials), 354 (addressing the possession of property or proceeds from bribery), 462.31 (addressing the laundering of property or proceeds of property obtained from the proceeds of crime that apply to both domestic and foreign officials).
40 Firger, supra note 13 at 1050, n 24. As Firger notes, one critique of the structure of the CFPOA is that its supply-side focus fails to deter the taking of bribes and thereby perpetuates the paradox of the resource curse.
failure to adequately address white-collar crime. The five core concerns identified by the Working Group can be summarized as follows:

1. The offence of bribing a foreign public official under the CFPOA applied only to bribes for the purpose of obtaining or retaining an advantage of business carried out in Canada or elsewhere “for profit”. The Working Group noted that “the interpretation of this requirement in Canada is unclear, and the [Anti-Bribery] Convention does not differentiate between business for profit and not for profit.”

2. While statutory maximum penalties prescribed for violations of the CFPOA appeared to the Working Group to be appropriate, the sanctions applied in practice in the only CFPOA case that had been carried to a conclusion by 2011 were seen as being too low to be “effective, proportionate and dissuasive”.

3. Extraterritorial jurisdiction in Canada for offences under the CFPOA required a “real and substantial” link to Canada, which was seen by the Working Group to be inferior to a nationality-based regime.

4. Canada had interpreted Article 5 of the Anti-Bribery Convention as prohibiting consideration in investigations and prosecutions of “improper” considerations of “national economic interest, the potential effect upon relationship with another State or the identity of the natural or legal persons involved”, an interpretation with which the Working Group took issue, stating that consideration of the Article 5 factors could never be “proper”.

The Working Group expressed concern that Canada had “not yet committed resources for coping with the substantial body of cases that is expected to proceed to the prosecution stage in the near future.”

In response to calls for more robust anti-corruption provisions, the federal government passed Bill S-14, the Fighting Foreign Corruption Act (FFCA) in June 2013 and increased the number of foreign bribery investigations from 23 in 2010 to 35 in 2013. It is still too early to tell whether these stepped-up investigation efforts will lead to a significant long-term uptick in prosecutions.

The following section will briefly discuss seven key amendments to the CFPOA resulting from the FFCA. These amendments illustrate the trajectory of modern anti-corruption
legislation: the scope of activity captured by substantive regulation is broadening, and the size of the “sticks” brought to bear on those who contravene such regulation is increasing. By developing an understanding of these trends occurring in substantive regulation, we can more fully grasp the significance of recent changes in transparency-based measures and understand their role in the fight against corruption.

First, the **CFPOA** established nationality jurisdiction, bringing it into alignment with the US **FCPA** and the UK **Bribery Act 2010**. A key enforcement problem evident in the previous formulation of the **CFPOA** was that there had to be a territorial nexus (i.e., a “real and substantial connection”) between Canada and the offence for the **CFPOA** to apply. Therefore, “some part of the formulation, initiation or commission of the offence must have taken place within Canada.” The Bill S-14 amendments deem the acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purposes of the **CFPOA**.

Second, the available penalties have been strengthened. The maximum length of imprisonment for a violation of the **CFPOA** is now 14 years, compared to the previous maximum of 5 years. Neither a discharge nor a conditional sentence is available. Moreover, corporations can receive unlimited fines for failing to prevent bribery. The seriousness with which the government approaches these cases is most evident in one remarkable fact: there is no limitation period. A bribe may go unnoticed, but it never goes away. The **CFPOA**’s lack of limitation period can be contrasted with the **FCPA**, which contains a five-year limitation period.

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48 Foreign Corrupt Practices Act of 1977, Pub L No 95-213, 91 Stat 1494 (codified as amended at 15 USC §§ 78m(b), (d)(1), (g)–(h), 78dd(1)(2), 78ff (2000)) [FCPA]. The groundbreaking enactment of the **FCPA** in 1977 marked the world’s first law criminalizing the bribery of foreign officials by corporations and corporate actors.

49 Bribery Act 2010 (UK), c 23 [UK **Bribery Act**]. The UK **Bribery Act** differs from the **FCPA** in three key respects: (1) “The **FCPA** concerns payment of bribes to public officials only whereas the UK **Bribery Act** concerns public and private, and payment or receipt of bribes”; (2) “The **FCPA** contains exemptions for facilitation payments and reasonable marketing expenses whereas the UK **Bribery Act** does not include exemptions”; and (3) “Under the **FCPA**, the offence of failing to prevent bribery applies to publicly traded companies only whereas under the UK **Bribery Act**, it applies to all companies”. Paul D McEwen, Fraud and Corruption in the Mining and Metals Industry (Vancouver, BC: Continuing Legal Education Society of British Columbia, 2011) at 1.1.2.


51 Ibid.

52 **CFPOA**, supra note 10, s 5.

53 See Morrison et al, supra note 50.

54 See Hutton & Beaudry, supra note 37 at A-4.

55 See ibid.

Third, the *CFPOA* now contains a books-and-records offence that, *inter alia*, “prohibits the establishment of off-the-books accounts, failing to record or adequately identify transactions, and recording non-existent expenditures, for the purpose of foreign bribery or hiding that bribery.”57 Similar to the bribery offence under the *CFPOA*, the maximum penalty is 14 years’ imprisonment.58

Fourth, the 2013 amendments provided for the removal of the facilitation payment exception59 by order of the Governor-in-Council (which, surprisingly, at the time of writing has yet to be made). Currently, subsection 3(4) of the *CFPOA*, which remains in effect, states that “a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions”.60 As other authors have put it, “[f]acilitation payments constitute small payments to low-level officials made to secure or expedite performance of acts of a routine nature,” and thus fall easily in the traditional understanding of bribery.61 Such payments are permitted under US legislation but prohibited under UK legislation.

Fifth, the amendments removed the restriction that the *CFPOA* only applies to for-profit transactions.62

Sixth, the amendments make clear that double jeopardy is not operative. Accordingly, subject to limited exceptions, Canadian companies and private individuals tried in another jurisdiction cannot be tried for the same conduct in Canada.63

Seventh, and finally, the amendments granted exclusive enforcement jurisdiction to the RCMP.64 This eliminated any potential jurisdictional conflict between provincial and federal enforcement agencies.

The foregoing provides the backdrop against which the federal government introduced the *ESTMA*. Part 4 shifts the discussion to the notion of transparency, exploring the *ESTMA* and the areas of the *ESTMA* in need of further attention.

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59 The exception for facilitation payments is found at *ibid*, ss 3(4)–3(5).
60 *Ibid*, s 3(4).
62 *FFCA*, *supra* note 45, s 2(3) (defining “business” as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere”).
63 Morrison et al, *supra* note 50. *CFPOA*, *supra* note 10, s 5(4). Subsection 5(4) is qualified by subsection 5(5), which provides that “a person may not plead autrefois convict to a count that charges an offence in respect of the act or omission if (a) the person was not present and was not represented by counsel acting under the person's instructions at the trial outside Canada; and (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission.”
64 *CFPOA*, *supra* note 10, s 6. The RCMP has two specialized International Anti-Corruption Units (RCMP-IACU) situated in Ottawa and Calgary that are tasked with investigation of potential breaches of the *CFPOA*. 
4. TRANSPARENCY-BASED REGULATION: THE EX extracTIVE SECTOR TRANSPARENCY MEASURES ACT

4.1. The Extractive Industries Transparency Initiative

Prior to the enactment of the ESTMA, a ground-breaking transparency-based framework had already made its way onto the global agenda: the Extractive Industries Transparency Initiative (EITI). EITI sets out the history of its inception as follows: “In the late 1990s and early 2000s, there was an expanding library of academic literature around the resource curse by such acolytes as Jeffrey Sachs, Joseph Stiglitz, Terry Lynn Karl and Paul Collier detailing how the huge potential benefits of oil, gas and mining were not being realised and were associated with increased poverty, conflict and corruption.”

Next, “[t]hese academic analyses were followed by more and more journalistic pieces and a growing campaign by Global Witness, Human Rights Watch, Oxfam America, other civil society organizations.”

The next step in the historical development of the EITI was the Publish What You Pay (PWYP) initiative. PWYP, which launched in December 1999, “focused on the opaque mismanagement of oil in Angola”, calling on companies to adopt a policy of full transparency. In 2001, BP was the first to step up and answer the call, publishing the signing bonus of US $111 million paid to the Angolan Government for an offshore license. This invited the ire of Angola’s national oil company, Sonangol, and threats from the Angola government. As a result, it became clear that, in the words of Lord Browne, the “unilateral approach, whereby one company or country was pressured to ‘publish what you pay’ was not workable.”

The next step came from the oil companies. As the EITI describes, “[t]he oil companies argued for a shift away from company reporting, as sought by PWYP and others, to reporting by governments, in order to reduce conflict with host governments and put contracts at risk. If company reporting was to be required they wanted a global effort to level the playing field that required all companies in a country to disclose.”

The UK government evidently took careful note of both the PWYP campaign and the concerns of the oil companies. The solution they developed was to create an initiative built on equal, reciprocal transparency from the governments and the companies. Hence, the EITI was born.

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66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 See ibid.
73 Ibid.
The EITI stands as one of the most significant drivers of increased transparency over the past decade. Inaugurated in 2002 at the World Summit on Sustainable Development in Johannesburg by former UK Prime Minister Tony Blair, the EITI “aims at ensuring that revenues from natural resources contribute to transform national economies and reduce poverty in resource-rich countries.” It is argued here that the political momentum initiated by the EITI has led to a concerted transnational effort to develop transparency initiatives focused specifically on the extractive industry. Not only has the EITI marshaled support for the notion that the extractive industry is in need of heightened attention, but it has also fostered a greater commitment by industry stakeholders to improve governance and develop partnerships that respond to corruption.

The process by which the EITI seeks to achieve transparency is as follows: countries implementing EITI principles make a voluntary undertaking to increase transparency of their natural resources revenue. Companies and governments then submit information to an independent third party who compiles the information and publishes an accessible report. The report reconciles and compares the payments reported by companies vis-à-vis those reported by governments. The theory is that, under these conditions, citizens will collectively oversee their governments’ actions and hold their governments accountable. Three core stakeholders form the pillars of this co-operative endeavour: governments, companies, and civil society groups. Those stakeholders, however, often have differing—and even conflicting—interests.

Despite being widely celebrated, the EITI’s scope and effectiveness is limited. Due to the lack of strict reporting guidelines, the EITI stops short of requiring complete transparency regarding the underlying contractual terms of financial arrangements. More significantly, the EITI is entirely voluntary in nature; governments and companies are under no obligation to sign up. Consequently, calls for mandatory legislation emerge, particularly from civil society organizations and the public. The EITI also leaves it to the discretion of the Multi-Stakeholder Group—composed of government representatives, industry representatives, and

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74 See Extractive Industry Transparency Initiative, “EITI: ‘Successful, Even Groundbreaking’ in Efforts to Improve Governance” (24 June 2008), online: <eiti.org/news-events/eiti-successful-even-groundbreaking-efforts-improve-governance> [“EITI Successful”] (noting that EITI has resulted in significant improvements in governance in Africa and that “civil society is playing an important role in holding governments accountable in many countries”).
76 “EITI Successful”, supra note 74.
77 See Extractive Industries Transparency Initiative, “What Is the EITI?”, online: <eiti.org/eiti> [“What Is the EITI?”]. At the time of writing, 31 countries are EITI-compliant and 17 countries are in the process of implementing EITI standards but have not yet reached compliance. See Extractive Industries Transparency Initiative, “EITI Countries”, online: <eiti.org/countries>.
78 See “What Is the EITI?”, supra note 77.
79 See ibid.
80 See Firger, supra note 13 at 1065, n 90.
81 OECD, Development Centre, Extracting the Maximum from the EITI, Working Paper No 276 (2009) at 21, online: <www.oecd.org/development/pgd/42342311.pdf> [Extracting the Maximum]. This working paper provides an insightful critique of the EITI.
NGOs—to decide the degree to which payments are disaggregated by company and payment type, as well as the definition of the “materiality” threshold.\(^8\) This limits the effectiveness of the EITI by failing to impose strict, consistent, and uniform standards across countries, and may permit the adoption of relatively “lax” or idiosyncratic standards. Moreover, the EITI process—no matter how robust—assesses whether the amounts reported by the government and the company match, not whether they are correct. Consequently, there is a serious risk of collusion between governments and companies. There is also an accounting issue: the EITI invites reports based on cash payments, but most companies report in their annual financial statements on an accrual basis as stipulated by International Financial Reporting Standards.\(^8\) This makes the figures liable to manipulation or simple error.\(^8\) Finally, as Lars Gulbrandsen and Arild Moe point out, “[t]he main weakness of EITI is the lack of reporting and monitoring of the government’s spending of oil revenues.”\(^8\) Accountability is lost entirely once payments enter the state’s budget.

In sum, Jędrzej George Frynas has called into question the EITI’s reliance on transparency-based regulations to combat corruption, stating that, “there is no scientific basis for the assertion that revenue transparency leads to better social or economic outcomes.”\(^9\) One OECD Development Centre working paper summarized the literature and data on the EITI and concluded that “although the EITI has been very useful in directing the international community’s attention towards the extractive sector, it has not been able to significantly lower corruption levels.”\(^10\)

The gaps and shortcomings of the EITI scheme provide compelling reasons for crafting a home-country statutory framework for combatting corruption and the resource curse through transparency. The EITI’s host-country approach leaves home countries largely out of the picture.\(^8\) In light of the foregoing critiques, the EITI—though an important transparency-based regulatory initiative that provides “food for thought” for how to stifle corruption through transparency—is no silver bullet. As is clear from the history of the EITI, voluntary transparency-based regulation can usher in important changes in governance and stimulate greater resource management, yet it may still fall short of comprehensively addressing corruption. In order to stem the resource curse, it is advisable that states improve upon the EITI model by passing binding, robust transparency-based legislation. The following section describes Canada’s efforts to implement such a regime.

\(^8\) Ibid at 18.
\(^9\) Ibid at 17.
\(^10\) Ibid at 17–18.


87 Extracting the Maximum, supra note 81 at 5.

88 See Topal & Toledano, supra note 17 at 278.
4.2. The Contours of the Extractive Sector Transparency Measures Act

This section will examine the lead-up to the passage of the ESTMA by surveying the following: key definitions (and potential ambiguities and issues created by such definitions), the “nuts and bolts” of the legislation and its scope, the debate surrounding the decision to require disclosure on a project-level basis and the significance of this question, issues of oversight and assurance for reports, enforcement mechanisms, and potential penalties attached to a failure to comply. This analysis is carried out in order to set the stage for a balanced assessment of the ESTMA’s potential strengths and weaknesses. In this respect, it is argued that the ESTMA is a positive development overall, but, as is any legal response to a complex issue, it is imperfect.

On October 23, 2014, the federal government introduced legislation—the ESTMA—requiring mandatory disclosure of payments to all levels of government made by companies engaged in the commercial development of oil, gas, or minerals anywhere in the world, provided the entity is (a) publicly listed in Canada or (b) a private company doing business or having assets in Canada that has at least two of the following: (i) $20 million in assets, (ii) $40 million in revenue, or (iii) 250 employees. On June 1, 2015, the ESTMA was proclaimed into force, just before the G7 Summit on June 7, 2015.

The ESTMA’s application to private companies is one factor distinguishing Canada’s legislation from the US Dodd-Frank Act provisions, which applies only to “issuers” required to file an annual report with the Securities and Exchange Commission under the Securities Exchange Act. The ESTMA’s broad scope would theoretically capture foreign multinationals with a presence in Canada—regardless of whether that presence is linked to oil, gas, or mineral extraction.

89 It is significant that the ESTMA’s definition of “payee” includes state-owned enterprises (SOEs) (see ESTMA, supra note 3, s 2) in light of the OECD’s recent study reporting that officials in SOEs are the recipients of the bribe in over 80 per cent of the reported cases: OECD Foreign Bribery Report, supra note 20 at 24.

90 As Boscariol and Glasgow summarize, “The ESTMA defines ‘commercial development of oil, gas or minerals’ to mean the exploration and extraction of oil, gas or minerals and the acquisition or holding of a permit, lease or other authorization to carry out any such activities. The definition also explicitly contemplates the prescription of other activities in relation to oil, gas or mineral extraction, and for this reason it will be important to closely monitor the regulations made pursuant to the ESTMA.” John W Boscariol & Robert A Glasgow, “Canada Introduces New Payment Disclosure Regime: The Extractive Sector Transparency Measures Act”, McCarthy Tétrault (4 November 2014), online: <www.mccarthy.ca/article_detail.aspx?id=6930>.

91 ESTMA, supra note 3, s 8(1).


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The ESTMA is intended to supplement the anti-corruption measures contained in the Criminal Code\footnote{Criminal Code, supra note 38, ss 119–25.} and the CFPOA. For example, the CFPOA does not require disclosure of “legitimate” payments occurring under oil or mining agreements; the ESTMA fills this gap. An examination of the targeted payments and the provisions set out in the ESTMA and CFPOA shows that the two pieces of legislation have mutually exclusive spheres of coverage. The ESTMA is an extraterritorial information-forcing mechanism that, by contrast to the CFPOA, does not directly punish corruption or bribery. Rather, it relies on stakeholders to hold officials accountable. The idea is to require reporting entities with detailed information relevant to resource extraction revenues to report such information, thereby providing greater assurance that any irresponsible or inappropriate use of funds would be brought to light. When a prosecution is initiated under the CFPOA, that is a signal that a Crown attorney has concluded that there are reasonable grounds for obtaining a conviction—the horse is already out of the barn. The ESTMA seeks to create an upfront protection against such misconduct arising in the first place. In sum, the effects of the ESTMA are two-fold: (1) in working to reverse the resource curse by increasing stakeholders’ ability to hold governments accountable for the revenues generated by resource extraction, and (2) in combatting corruption by making corruption harder to cover up (i.e., the “sunlight is the best disinfectant” approach). These two effects are inextricably connected and mutually reinforcing.

The ESTMA follows on from former prime minister Stephen Harper’s commitment—announced on 12 June 2013\footnote{Government of Canada, News Release, “Canada Commits to Enhancing Transparency in the Extractive Sector” (12 June 2013), online: <news.gc.ca/web/article-en.do?nid=749279>.}—to establish mandatory reporting standards in the extractive sector. This announcement cited several rationales for the reporting regime:

improving transparency; ensuring Canada’s framework is consistent with existing international standards and aligned with other G-8 countries; ensuring a level playing field for companies operating domestically and abroad; enhancing investment certainty; helping reinforce the integrity of Canadian extractive companies; and, helping to ensure that citizens in resource-rich countries around the world are better informed and benefit from the natural resources in their country.\footnote{Ibid.}

It is clear that the government sought to bring Canada’s reporting framework into alignment with the transparency standards in operation in other G8 countries. At the time of Harper’s announcement, as summarized by Sarah Powell et al,

[T]he European Parliament had already approved transparency rules for public and large private extractive and logging companies, requiring them to publicly disclose the payments they make in excess of €100,000 to governments on a project-by-project basis. The United States Securities and Exchange Commission adopted
similar transparency rules under the Dodd-Frank Act that required publicly listed extractive companies to file an annual report disclosing payments to governments on a project-by-project basis.\textsuperscript{98}

Bearing in mind the narrative leading up to the \textit{ESTMA}, we can now turn to examine the \textit{ESTMA}'s provisions and effects in greater detail. Any entity subject to the \textit{ESTMA} must file an annual public report disclosing any payments to governments (whether foreign or domestic) within one of a number of specific categories of revenue streams related to commercial development of oil, gas, or minerals in excess of CAD $100,000 per year (or an amount otherwise prescribed by regulation\textsuperscript{99}). Annual reports under the \textit{ESTMA}, the first of which cover financial years ending on or after June 1, 2016, are due 150 days after the end of the financial year.\textsuperscript{100} In their recommendations to the government, the Resource Revenue Transparency Working Group\textsuperscript{101} called for a lower threshold of $10,000 applicable to venture issuers, citing the fact that, without a lowered threshold, a significant portion of the Canadian mining sector would report no revenue paid.\textsuperscript{102} The US and EU\textsuperscript{103} rules stipulate a threshold of USD $100,000 and €100,000, respectively.\textsuperscript{104} These differing thresholds threaten to create confusion and increased compliance costs for companies. Governments ought to work collaboratively to establish consistent, harmonized standards—otherwise, companies will be put to unnecessary costs in navigating and complying with the differing regimes.


\textsuperscript{99} A lower threshold might, for example, be introduced for juniors through regulations.

\textsuperscript{100} \textit{ESTMA}, supra note 3, s 9(1).

\textsuperscript{101} The Resource Revenue Transparency Working Group is a collaborative effort between the Mining Association of Canada, the Prospectors & Developers Association of Canada, Publish What You Pay Canada, and the Revenue Watch Institute. In their words, the Working Group “was created in order to collaboratively develop a framework for the mandatory disclosure of payments made to governments by Canadian mining companies, both within Canada and abroad” (“Background to RRTWG Recommendations”, supra note 14 at 2).

\textsuperscript{102} The Resource Revenue Transparency Working Group, Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments (16 January 2014) at 8, online: < www.pdac.ca/docs/default-source/publications-—papers-and-presentations/working-group-transparency-recommendations-(2014).pdf?sfvrsn=2> [RRTWG Recommendations]. See also Alisha Hiyate, “Transparency Act brings minors new reporting duties”, The Northern Miner (19 November 2014), online: <www2.northernminer.com/news/transparency-act-to-introduce-new-reporting-requirements-for-miners/1003348319/>. It is worth noting that bribery payments in the mining sector may be uncovered in the process of a major acquiring a junior. When the major carries out due diligence and takes an in-depth look at the books of the junior, it may uncover illicit payments made by the junior to foreign officials (a rather unpleasant surprise). This is significant from the major’s perspective because, under the \textit{CFPOA}, liability can be imposed on the acquiring entity.


\textsuperscript{104} Of course, companies could presumably disclose smaller payments on a voluntary basis, but the prospects of this occurring are perhaps slim.
“Entity” is defined in section 2 as “a corporation or a trust, partnership or other unincorporated organization” engaged in the commercial development of oil, gas or minerals in Canada or elsewhere, or an organization controlling—directly or indirectly, in any manner—such an entity. The definition of “control” in section 4 is sweeping, as it goes little further than to say that an entity is controlled by another entity if it is “controlled by the other entity, directly or indirectly, in any manner”. The interpretation of “control” could potentially lead to entities such as institutional investors falling within the scope of the ESTMA.105 Given this broad definition, it is unfortunate that the ESTMA does not contemplate an “advance ruling” mechanism, akin to advance rulings issued by the Canada Revenue Agency,106 allowing entities to seek and receive prospective guidance from regulators as to whether the ESTMA might apply to them. As a consequence, companies and other entities may be left in the dark about whether the ESTMA is applicable to them. They may then face the unenviable choice of either “rolling the dice” by not reporting, which would mean risking a sanction for non-compliance, or instead reporting when there was no obligation to do so. Advance rulings can serve a vital role in enhancing certainty and predictability, which are essential for market efficiency, and would be appropriate in the current context.

The scope of “payments” in section 2 includes taxes, royalties, fees and regulatory charges, production entitlements, bonuses, dividends, and infrastructure improvement payments.107 In determining whether a particular payment is captured by one of these categories, it is the substance, not the form, that is determinative. Nonetheless, uncertainty remains around what precisely each category might capture—in particular, “bonuses” and “infrastructure improvement payments” present considerable ambiguity.

The disclosure of the expansive range of payments listed above will have interesting implications for competitive intelligence. Participants in the extractive industry will be able to see precisely how much their competitors are paying to develop natural resources, even in the same jurisdiction.108 In addition, investors will be able to “punish” companies or company management when their payments to governments fall outside the established norms (i.e., they “overpay”). These effects are favourable to the extent that they make relevant market information more widely available and thereby encourage market efficiency. When investors have greater access to information about a given company, the valuation of the company will more closely align with its “true” underlying value.

105 See Boscariol & Glasgow, supra note 90.

106 An advance ruling, which can be obtained from the CRA after having filed a written request and having paid a fee, is “a written statement confirming how the CRA’s interpretation of specific provisions of Canadian income tax law applies to a definite transaction or transactions that a taxpayer is contemplating” (Canada Revenue Agency, Information Circular IC70-6R7, “Advance Income Tax Rulings and Technical Interpretations”, (22 April 2016) at 1, online: <www.cra-arc.gc.ca/E/pub/tp/ic70-6r7/ic70-6r7-15e.pdf>). The purposes of such rulings are to “promote voluntary compliance, uniformity and self-assessment by providing certainty with respect to the application of Canadian income tax law to proposed transactions” (ibid at 2).

107 ESTMA, supra note 3, s 2. The ESTMA’s ambit also encompasses payments in kind.

One issue subject to great contention has been the level at which the ESTMA should require reporting to be carried out. Should the regime require project-by-project reporting, reporting at the country level, or something in between? Previously, it was unclear whether the ESTMA would require disclosure on a country-level basis or, instead, on a disaggregated, project-level basis. Subsection 9(5) of the ESTMA left the matter to be determined by the Minister. However, it is now clear that reporting of payments will be on a project-by-project basis, thus aligning Canada’s legislative requirements with those of other G8 countries.

Natural Resources Canada (NRCan)—in its August 1, 2015 draft Technical Reporting Specifications—added an interesting gloss to what constitutes a “project”. “Project” means “the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. Nonetheless, if multiple such agreements are substantially interconnected, this shall be considered a project.” NRCan goes on to add that “substantially interconnected” means “forming a set of operationally and geographically integrated contracts, licences, leases or concessions or related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities.” What is encompassed within a given “project” is therefore broader than one might expect at first blush. Where the payment cannot be attributed to a specific project, it may be disclosed without such an attribution, and payee-level disclosure for such payments would suffice.

The importance of the ESTMA’s mandating project-level disclosure cannot be overstated. It is, in my view, a fundamentally important development in Canada’s commitment to effective transparency measures. But why exactly is project-level disclosure so critical? There are several reasons. First, the benefits, risks, and impacts of extractive projects vary markedly by project. Second, in some areas (such as in the Democratic Republic of Congo), local provinces and municipalities are entitled to shares in mining project revenues that occur in their territory. Therefore, project-level disclosure allows local governments and local populations to determine whether they are getting their fair share of the benefits derived from resource extraction taking place within their jurisdictions. Third, various levels of government will often require project-


\[\text{110 Ibid. NRCan’s interpretation of “project” is, in part, a result of feedback received by the federal government during public consultations carried out between March–May 2014. The parties consulted, which included industry participants, Aboriginal groups, and civil society organizations, it was suggested that “project” be “clearly defined to ensure sufficient guidance and clarity for companies.” As the federal government notes, “Some recommended a detailed description rather than allow companies to define the parameters, while others proposed an approach based on product, method and location (i.e., what, how and where the resource is being extracted)”: Government of Canada, “Mandatory Reporting Standards for Extractive Sector - What We Heard”, online: <http://open.canada.ca/en/consultations/mandatory-reporting-standards-for-extractive-sector-what-we-heard> [“What We Heard”].}\]

\[\text{111 “ESTMA Technical Reporting Specifications”, supra note 109.}\]

\[\text{112 Ibid.}\]

\[\text{113 See Revenue Watch Institute, Project-by-Project Reporting through the EITI: Background Paper for the EITI Strategy Working Group (April 2012) at 1, online: <eiti.org/files/SWG/RWI_SWG_Paper_Project_level_reporting_April_2012.pdf> [Project-by-Project Reporting].}\]
level reporting in order to conduct audits and compliance checks effectively.\textsuperscript{114} Fourth, local communities need sufficiently detailed and targeted information to track the social and environmental effects of extraction activities in their own backyard, as well as to develop the trust necessary to reduce the potential for conflict.\textsuperscript{115} Fifth, investors need data that can assist them in making decisions as to how their capital should be invested, and project-level disclosure is essential to making such capital allocation decisions, which are often complex and fraught with risk.\textsuperscript{116}

Both the US and EU transparency legislation contain explicit requirements of project-by-project reporting. Section 1504 of the US Dodd-Frank Act stipulates in paragraphs 2(A)(i)-(ii) that disclosure reports must contain “(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and (ii) the type and total amount of such payments made to each government.”\textsuperscript{117} Similarly, the EU Accounting Directive stipulates that reports must contain “(a) the total amount of payments made to each government; (b) the total amount per type of payment … made to each government; (c) where those payments have been attributed to a specific project, the total amount per type of payment … made for each such project and the total amount of payments for each such project.”\textsuperscript{118} Since its reporting regime was strengthened and revised in 2013, EITI also requires project-level reporting.\textsuperscript{119} Beyond this, some private companies voluntarily make payment disclosure on a project-level basis.\textsuperscript{120}

Without aligning itself with the emerging consensus on project-level disclosure, Canada would have fallen out of step with its international partners internationally in the fight against corruption, creating burdens on companies by demanding compliance with differing transparency regimes, in addition to failing to provide local communities and civil society with adequate information to hold their governments accountable.\textsuperscript{121} The decision to have the ESTMA require reporting at the project level should, for these reasons, be applauded.

The announcement that the ESTMA require project-level reporting has not come as a relief to all stakeholders. Certain participants in the oil and gas industry have opposed project-

\textsuperscript{114} See \textit{ibid}.
\textsuperscript{115} See \textit{ibid}.
\textsuperscript{116} See \textit{ibid}.
\textsuperscript{117} \textit{Dodd-Frank Act, supra} note 19, § 1504 (emphasis added).
\textsuperscript{118} \textit{EU Accounting Directive, supra} note 103, art 43.2 (emphasis added).
\textsuperscript{119} See Jonas Moberg, “Charting the Next Steps for Transparency in Extractives” (10 May 2013), Extractive Industries Transparency Initiative (blog), online: <eiti.org/blog/charting-next-steps-transparency-extractives>.
\textsuperscript{120} See \textit{Project-by-Project Reporting, supra} note 113 at 2.
\textsuperscript{121} See Publish What You Pay Canada & the National Resource Governance Institute, “The Extractive Sector Transparency Measures Act” at 1, online: <www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6761910/412_FIN4A_C-43_Briefs%5CPublishWhatYouPayCanada-e.pdf> (arguing that “[d]isaggregated project-level payment disclosure will be essential for these reports to be effectively used by citizens to deter and detect corruption – which is the purpose of the Act as stated in section 6”). This brief also reports that, in Peru, 34 per cent of mining, oil, and gas revenues are transferred to subnational governments, thus evidencing the importance of disaggregated, project-level disclosure. See \textit{ibid} at 2.
level reporting, Talisman Energy Inc—in its letter to NRCan dated May 14, 2014—set out its opposition in the following terms:

Disclosures that are immensely detailed at a very immaterial level are not only costly to companies but will yield hundreds of pages of data, per company, that are so plentiful that they are rendered meaningless to the reader. ... We support the American Petroleum Institute’s (API) compilation model on disclosing the ‘what’ (product type), ‘where’ (province, country) and ‘how’ (offshore, onshore, etc.) of government payments without attribution to individual companies.122

This “information overload” argument should perhaps be dismissed in favour of the counterargument: detailed information, in combination with proper training and support, is capable of being understood. Furthermore, the API’s proposal for simplified disclosure described above would likely undermine the ability of local communities to grasp precisely the contours of each project and its effects.

The “information overload” critique, however, cannot be entirely dismissed. There is merit in the argument that information is only as valuable as the user’s capacity to comprehend and deploy it, and there is undeniably a point at which data becomes so granular as to be effectively inscrutable. Two aspects of this argument are particularly noteworthy. First, the organizational structures of reporting corporations and their subsidiaries may be so convoluted and intricate that the data generated by the ESTMA becomes incomprehensible. Second, particularly given the complexity of the extractive industry, the terms, practical effects, and payments made under the contracts and bargains struck between parties may be misinterpreted by third parties due to a lack of technical or business expertise.

One solution is to focus on building that expertise (i.e., the “toolkit” for unpacking such information), which is valuable only when combined with the appropriate “building blocks” (i.e., the data) provided by transparency-based regulation such as Canada’s ESTMA. But what entity should take leadership in cultivating and disseminating that “toolkit” globally? It is unlikely that any single entity can undertake such a Herculean task alone. Efforts must be driven by networks of industry participants, think-tanks, governments, NGOs, corporations, civil society, and other organizations in partnership. Universities and other educational institutions might be particularly well positioned to take the lead in this area.

In sum, this analysis has shown that the benefits of aligning Canada’s transparency regime with those of the US and EU by adopting project-level reporting far outweigh the potential costs. Project-level reporting is essential for true accountability. But data is a necessary condition for accountability, not a sufficient one.

Beyond the project-level reporting requirement, there are several other salient features of the ESTMA that are important to understand as background to the discussion to follow. NRCan’s Technical Reporting Specifications demand that payments be disclosed on a cash basis.123 This requirement has been subject to considerable criticism—as will be discussed...

122 Letter from Robert R Rooney, QC, Executive Vice-President, Corporate and General Counsel of Talisman Energy Inc to the Honourable Greg Rickford, Minister of Natural Resources (14 May 2014) at 4, online: <data.gc.ca/sites/default/files/5h_talisman.pdf> [Talisman letter].

below—as it departs from the accounting standards applicable to financial statements, which demand reporting on an accrual basis.

The definition of “payee” in the ESTMA includes, *inter alia*, a “government” either in Canada or in a foreign state. Determining whether something is a “government” (or whether a particular individual is acting on behalf of a “government”) outside of Canada will be challenging in certain circumstances. To add to this difficulty, the definition of “payee” in the ESTMA includes any trust, board, commission, corporation, body, or authority that exercises or performs a power, duty, or function of government. The ESTMA also allows for additional payees to be prescribed in the future.

In light of the potentially onerous task of reporting under numerous instruments, section 10 of the ESTMA allows for the substitution of the ESTMA’s payment reporting requirements with those of another jurisdiction (such as the EU Accounting and Transparency Directives or the Dodd-Frank extractive sector transparency rules in place in the US), provided they are considered by the Minister of Natural Resources to be an acceptable substitute for Canada’s requirements. The substituted regime need not be identical to the ESTMA; rather, it must seek to achieve the same purposes of the ESTMA—namely, deterring corruption through systematic reporting of oil, gas, and mineral commercial development payments to all levels of government. Mere participation in the EITI would not suffice as an acceptable substitute, however, as the EITI does not demand the sort of detailed disclosure contemplated by the ESTMA. As the Minister makes determinations on acceptable substitute rules, such determinations will be made public.

Perhaps most notably, the federal government has taken the bold (some might say brash) step of making its mandatory reporting standards applicable to payments made by covered entities to Aboriginal governments in Canada. This is unique to Canada’s reporting regime. Section 29 of the ESTMA, however, postpones this requirement from taking effect for two years, thereby stipulating that this provision will come into effect June 1, 2017. The government intends to carry out consultation with Aboriginal groups during this time. The delay will at least postpone the inevitable legal challenge facing this provision of the ESTMA.

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124 ESTMA, *supra* note 3, s 2.
125 Ibid.
126 See Natural Resources Canada, “Extractive Sector Transparency Measures Act: Substitution Determination” (21 March 2016), online: <www.nrcan.gc.ca/mining-materials/estma/18196>. The issue of substitutability was an important concern leading up to the passage of the ESTMA. See “What We Heard”, *supra* note 110.
129 The two-year deferral period arose as a result of concerns expressed by Aboriginal governments, industry participants, and some provincial governments about how the ESTMA might affect impact benefit agreements. See Standing Senate Committee on Energy, the Environment and Natural Resources, “Report on the subject matter of those elements contained in Divisions 3, 28 and 29 of Part 4 of Bill C-43, *A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*” (November 2014) at 7, online: <https://sencanada.ca/content/sen/Committee/412/enev/rep/rep08nov14-e.pdf>.
Another interesting aspect of the ESTMA is the attestation requirement contained in subsection 9(4). The report issued by the reporting entity must include an attestation made by a “director or officer of the entity, or an independent auditor or accountant” that the report is true, accurate, and complete.\(^{130}\) Notably, as one commentary puts it, “[t]his is a significantly relaxed verification standard from earlier discussions where the government had indicated that it was seeking verification solely from independent auditors, akin to accounting standards for annual financial statements.”\(^{131}\) Verification by a director or officer will presumably lower compliance costs.\(^{132}\) If a prosecution were to be commenced, the acknowledgment and verification by an officer or director would be an important factor, having an effect similar to the signing of annual financial statements.\(^{133}\) Such an attestation would signal that the officer or director has satisfied him or herself that the report is indeed true, accurate, and complete, thereby having some bearing on any mens rea determination to be made in legal or regulatory proceedings. The effect of stopping short of requiring independent audits, however, may be to lower the reliability and accuracy of the report. This trade-off—while sensitive to concerns for efficiency and minimizing compliance costs—may not be in the public interest.

The ESTMA does not specify how covered entities will publish their reports in order to make them available to the public, but NRCan has provided insight on the matter. During initial consultations, NRCan indicated a preference for allowing publication on corporate websites.\(^{134}\) NRCan also indicated its intention to have companies issue a public notice stating that reports have been posted, as well as a notice to the government that the notice to the public had been sent and reporting requirements met.\(^{135}\) A link would then be made to the reports though the Treasury Board Secretariat’s Open Government website.\(^{136}\) More recently, on August 1, 2015, NRCan issued draft Technical Reporting Specifications that set out in greater detail NRCan’s vision for the publication of reports.\(^{137}\) A reporting entity must publish its final report on the Internet in XLS or PDF format, and that report must be publicly available for at least five years.\(^{138}\) The entity will then provide a link to NRCan. NRCan will then publish direct links to all reports on their website.\(^{139}\) While NRCan may have a link posted on its

\(^{130}\) ESTMA, supra note 3, s 9(4).

\(^{131}\) John Munnis, “Canada Introduces Payment Reporting Legislation: What Mining and Oil & Gas Companies Need to Know”, DLA Piper (27 October 2014), online: <www.dlapiper.com/en/canada/insights/publications/2014/10/canada-introduces-payment-reporting-legislation/> . The issue of auditing/verification requirements arose in the March–May 2014 consultations preceding the implementation of the ESTMA. It was suggested by various parties consulted that director/officer attestation of reports or third party assurance reporting would “allow companies to demonstrate the effectiveness of internal controls”: “What We Heard”, supra note 110.

\(^{132}\) See Munnis, supra note 131.

\(^{133}\) See ibid.

\(^{134}\) See ibid.; Natural Resources Canada, “Developing Mandatory Reporting Standards for the Extractive Sector” (March 2014) at 6, online: <open.canada.ca/sites/default/files/nrcan_consultation_spring_2014_en.pdf> [“Developing Mandatory Reporting Standards”].

\(^{135}\) Ibid.

\(^{136}\) Ibid.


\(^{138}\) Ibid at 3.

\(^{139}\) Ibid.
website to the information, they do not review or audit the information (though the Minister of Natural Resources, under section 14 of the ESTMA, can order any entity subject to the ESTMA to provide an independent audit of its compliance).

In light of the foregoing, one might ask: is there sufficient oversight and assurance that the information is accurate and complete? Does the Minister’s ability to order an audit provide sufficient assurance, or would this provision be invoked with such infrequency as to be rendered meaningless? Furthermore, although section 12 of the ESTMA requires companies to make their reports public, some have expressed a concern that paragraph 23(1)(f) of the ESTMA, which allows the Governor in Council to make regulations respecting what information that must be made available to the public, might be used to reduce or revise the required content of reports, thereby undermining the intent of the ESTMA to provide for full, detailed disclosure.140

Moreover, under section 15, the Minister has the power to delegate the administration and enforcement of the ESTMA. This may be a responsibility intended for a future national securities regulator, should such an entity come to fruition—a development which this author would welcome.141 On January 16, 2014, the Resource Revenue Transparency Working Group called for implementation of the ESTMA through provincial securities regulators, citing the experience of securities regulators in receiving and managing disclosure filings, decreased start-up costs compared to establishing a new reporting regime, and the ability to extend application to foreign companies seeking to raise capital in Canadian markets.142 This proposal provides a sensible solution, as it is not at all clear that NRCan is in a better position to administer the ESTMA reporting requirements than provincial securities regulators would be. Should this approach be adopted, attention must be paid to ensuring harmonization between provincial securities regulators, a task that could prove difficult given economic, legal, cultural, political, and other variations between provinces.

The legal consequence of failing to publish a report, knowingly making misleading statements in the report, or trying to structure payments to avoid including them in the report (e.g., characterizing certain payments as “gifts” or lumping them improperly with other items) is a summary offence, punishable by a fine of up to $250,000.143 At first blush, this amount appears rather low. As John Boscariol and Robert Glasgow note, however, under subsection 24(4), “each day that passes prior to a non-compliant report being corrected forms a new offence; therefore, a payment that goes unreported for a year could result in over $9 million in total liability.”144 Suddenly, the “teeth” of the ESTMA become apparent. Moreover, under section 25, an “officer, director or agent or mandatary of the person or entity who directed, authorized, assented to, acquiesced in or participated in its commission is a party to and guilty


141 For information pertaining to the proposed Cooperative Capital Markets Regulatory System, see CCMR, “The Cooperative Capital Markets Regulatory System”, online: <ccmr-ocrmc.ca>.

142 RRTWG Recommendations, supra note 102 at 4.

143 ESTMA, supra note 3, s 24. Parties consulted by the federal government regarding the ESTMA have emphasized that “penalties should be sufficient to ensure compliance, while proportional to the violation and its impact”: see “What We Heard”, supra note 110.

144 Boscariol & Glasgow, supra note 90.
of the offence and liable on conviction to the punishment provided for the offence, whether or not the person or entity has been prosecuted or convicted.”145 Unlike the US Dodd-Frank Act provisions, the ESTMA does not contemplate the de-listing of public companies that transgress its provisions. Finally, proceedings under the ESTMA must be brought within five years after the subject matter of the proceedings arose.146

If a person or entity is found guilty of an offence, that party can turn to subsection 26(b), which creates a broad due diligence defence. If it can be established that the person or entity “exercised due diligence to prevent” the commission of the offence, the defence will succeed. This ostensibly creates a compelling incentive for companies to set up procedural safeguards, such as input of external counsel and oversight of independent auditors.147 The inclusion of a due diligence defence is par for the course in securities law, and the rationale behind such a defence—namely, encouraging compliance and oversight—applies equally in the ESTMA context.

As noted above, NRCan has taken measures to address some of the ambiguities that surround the ESTMA. On July 29, 2015 and August 1, 2015, respectively, NRCan released draft Guidance148 and Technical Reporting Specifications149 documents aimed at assisting businesses in understanding the requirements of the ESTMA, providing general information on the Act, and supplying instructions on how to report. With the release of these draft documents, which were developed in consultation with industry, civil society organizations, Aboriginal experts, and provinces, NRCan invited public commentary.150 The comment period closed as of September 22, 2015. On March 21, 2016, NRCan released final versions of these guidance documents, with additional supplements available online.151

Given that the ESTMA has entered into force, covered entities face a pressing need to put in place comprehensive compliance systems to track and record payments to governments. This is particularly the case for companies listed on multiple stock exchanges, as they must ensure compliance in multiple jurisdictions, at least until a global reporting standard emerges. As the foregoing discussion demonstrates, the ESTMA presents a number of knotty complexities and questions open to debate: does it go too far (or not far enough)? Will project-level reporting deliver on its promise to assist in holding governments more accountable for natural resource revenues? Is there sufficient oversight and assurance that ESTMA reports will be accurate? With these questions in mind, I turn to a discussion of the limitations of transparency-based regulation more broadly.

145 ESTMA, supra note 3, s 25.
146 Ibid, s 27.
147 See Boscariol & Glasgow, supra note 90.
148 “ESTMA Guidance”, supra note 127.
4.3. The Shortcomings of Transparency-Based Regulation Broadly

Several strands of academic literature on transparency-based regulation posit that transparency (and the legal measures that promote it) is no panacea. As Deval Desai and Michael Jarvis aptly describe, “information and evidence have been referred to as the ‘currency of accountability’, meaning—to extend the metaphor—that transparency is the minting process.”\(^{152}\) However, transparency can be effective only when combined with participation.\(^{153}\) Without participation, there is no oversight and, in turn, no meaningful change in behaviour or norms. To put it another way, transparency should not be seen as an end in itself; it is merely a means by which we move towards accountability.\(^{154}\)

Accordingly, we ought to ask: do transparency measures—such as Canada’s \textit{ESTMA}—enable sufficient participation? In my view, the answer depends on two criteria: the information generated must be (1) sufficiently detailed and (2) publicly available, such that stakeholders can apply pressure on governments and corporations when the conditions warrant. The “sufficiently detailed” criterion, however, can be pushed too far. To illustrate, mandating that a corporation issue standalone reports for each and every payment made to a government during the life of a project would undoubtedly leave the reader feeling inundated with granular data, not to mention impose disproportionate compliance costs on the company itself. This critique, which I explore in greater detail below, posits that disclosure at an excessively granular level actually \textit{inhibits} the ability of stakeholders to effectively use the data, and thereby precludes participation and accountability. This ties back into the discussion above regarding the merits and demerits of project-level disclosure.

Deval Desai and Michael Jarvis describe the two-faced nature of transparency. On the one hand, greater transparency (1) provides a fuller picture of the resources that can be deployed to alleviate poverty and (2) shapes stakeholders’ expectations (most importantly, the expectations of local populations) of their fair share of the windfall.\(^{155}\) On the other hand, the authors contend that transparency pushed too far can impair politicians’ ability to “negotiate, build coalitions and act for the benefit of marginalised groups”.\(^{156}\) Perhaps the counterargument to the authors’ claim in the latter respect is that, in order to advance the interests of marginalized groups, politicians will have to shift the prevailing \textit{status quo} from one of concealment to one of transparency. An unfortunate downside of full transparency does arise, however. Where the windfall resulting from resource extraction is significant, in which case stakeholders’ expectations are inflated, tensions can rise between parties competing for the benefits of such windfalls, carrying increased risk of conflict.\(^{157}\) This alone, however, ought not to be seen as a sufficient reason for abandoning transparency efforts. In fact, incurring the risks of increased


\(^{153}\) See Desai & Jarvis, supra note 152 at 109.

\(^{154}\) See \textit{ibid} at 110.

\(^{155}\) \textit{Ibid.}

\(^{156}\) \textit{Ibid.}

\(^{157}\) See \textit{ibid}. 
tensions may be necessary to achieve greater fairness and justice for those who should share in the benefits generated by responsible, sustainable resource extraction. Although transparency carries a risk of increased conflict in the short-term, the long-term benefits of having widely available public information pertaining to resource extraction revenues outweighs this concern. With greater access to information, competing constituencies will be better positioned to resolve their conflicts over the long term.

Apart from this argument, some contend that transparency taken too far can impose unfair burdens on companies, risk disclosure of competitively sensitive information, and threaten to dissolve contracts. These critiques are justified. Even the most well-intentioned transparency initiative will fail if it steamrolls over the legitimate concerns of market participants. Any regulatory requirement must seek to achieve a reasonable balance between (1) the costs it imposes upon those subject to regulation and (2) the ultimate end sought to be achieved by the regulation.158

Even if the level of disclosure is “just right”, transparency initiatives can succeed only where three conditions are present: (1) a free press, (2) a strong role of civil society, and (3) proper timing of the introduction of transparency measures.159 The first two elements are often absent in countries plagued by weak institutions, poor governance, and an absence of the rule of law. The third element embraces the idea that once a resource-rich country’s dependence on external revenues diminishes due to increases in internal revenues, external actors (such as the World Bank160) lose traction over the country.161 Put differently, once the government is swimming in extractive industry revenue, external actors lose bargaining power in persuading host governments to adopt principles of good governance and transparency.162 Therefore, the overall development benefits from transparency measures, including improved governance and political and societal institutions, are greatest when the measures are implemented before extraction takes place.163 The sooner transparency measures can be put in place, the better (provided early intervention does not come at the expense of effectiveness). The takeaway message from the three principles enumerated above is clear: the extent to which transparency-based regulation will bring about its desired outcomes often depends on local conditions.

Finally, a 2008 report by Transparency Intentional, cited by Jędrzej George Frynas,164 analyzed the revenue transparency of 42 leading oil companies. The report suggested that an

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158 The costs imposed on entities subject to transparency-based regulation can be minimized without jeopardizing its ultimate objectives by, for example, ensuring that there is consistency in application and requirements across regulatory regimes. Industry stakeholders have argued that Canada should work with U.S. and EU regulators to develop a common reporting template that would be accepted by all jurisdictions. This would not only lessen compliance costs, but also ensure data is easily accessible and comprehensible to stakeholders. See “What We Heard”, supra note 110.

159 See Frynas, supra note 86 at 169–70.

160 See ibid at 172. To illustrate, an established oil-producing nation is less dependent on foreign aid and loans from the World Bank because it can obtain oil-backed loans from international banks.

161 Ibid at 170.

162 Ibid.

163 Ibid.

exclusive focus on reporting payments to governments is insufficient to generate a climate of transparency: “Revenue transparency by oil and gas companies is comprised of more than just reporting on payments to home governments on a country-by-country basis. It also requires disclosure of operations data and anticorruption programmes both of which support such transparency and enable its sustainability by the company.”165 Put differently, a focus on revenue transparency alone may be insufficient; moving to a broader understanding of transparency, which comprises operations and anti-corruption programmes as well, may be required to achieve the desired effect.

Having discussed the shortcomings and complexities of transparency-based regulation broadly, this article now narrows in on the ESTMA specifically. The ensuing discussion is meant to highlight several key issues that remain outstanding. Although the ESTMA is a step forward, there is still work to be done.

4.4. CRITIQUE OF THE ESTMA SPECIFICALLY

Numerous commentators have extolled the public policy motivating the ESTMA. Oxfam Canada, for example, praises “the federal government for championing a global transparency standard that, it says, could help millions of people living in poverty demand their fair share of wealth from resource extraction.”166 Despite the groundswell of support in favour of the ESTMA, there remain three core critiques which will be discussed here: (1) the future application of the ESTMA to payments made by extractives to Aboriginal groups, (2) the ESTMA’s susceptibility to the kinds of failures experienced in the US regarding similar legislation, and (3) the ESTMA’s arguably limited scope of application.

4.4.1. THE FUTURE APPLICATION OF THE ESTMA TO PAYMENTS MADE BY EXTRACTIVES TO ABORIGINAL GROUPS

To many, the most controversial aspect of the ESTMA is its future application to payments made by extractive companies to Aboriginal groups.167 During consultations, NRCan proposed

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165 Ibid at 24.
167 See e.g. “What to Know about the New Extractive Sector Transparency Measures Act”, Alberta Oil (1 May 2015), online: <www.albertaoilmagazine.com/2015/05/the-ask-terri-lee-oleniuk-osler-extractive-sector-transparency-measures-act/> [“What to Know about the ESTMA”]. (Terri-Lee Oleniuk explains that “the [Canadian federal] government certainly knows [the ESTMA] is controversial” and that there has been pushback from Aboriginal communities regarding the reporting requirement. One of the primary concerns, she adds, “is that aboriginal groups are being treated differently than contracts with other private commercial entities.”); Liane Langstaff, “Recent Federal Legislation Affecting Aboriginal Communities”, Ontario Bar Association (5 January 2016), online: <www.oba.org/Sections/Aboriginal-Law/Articles/Articles-2016/January-2016/RECENT-FEDERAL-LEGISLATION-AFFECTING-ABORIGINAL-CO> (noting that the ESTMA, in requiring the disclosure of Impact Benefit Agreements (IBAs), “will have cost implications and may have a chilling effect on economic development and business opportunities for First Nations.”); Oliver MacLaren, “The Challenge of Reconciliation” (25 November 2014), Olthuis Kleer Townshend LLP (blog), online: <www.oktlaw.com/blog/the-challenge-
that payments by covered entities to the following types of Aboriginal entities would be reported: (1) “Aboriginal organizations or groups with law-making power and/or governance mechanisms related to the extractive sector (i.e., mining, oil and gas)”; (2) “provincially or federally incorporated Aboriginal organizations that undertake activities in the extractive sector on behalf of their beneficiaries”; and (3) “Aboriginal organizations or groups that are empowered to negotiate legally binding agreements (e.g., impact benefit agreements) on behalf of their members.” The application of the ESTMA to payments made to Aboriginal groups comes as an unwelcome surprise to many. Pierre Gratton, President and CEO of the Mining Association of Canada, stated, “We [the Mining Association of Canada] actually discussed [the potential application of the ESTMA to payments made to Aboriginal groups] with the NGOs at the very beginning, and we all agreed that was too complex and would require extensive consultation we don’t have the capacity to do.” It would appear, however, that the federal government has taken a different view.

A number of questions arise with respect to the ESTMA’s application to payments made to Aboriginal groups. First, how will this provision fit into harmonized global reporting standards? Given that the US and EU have not adopted a similar reporting requirement, the requirement imposed in Canada to disclose payments made to Aboriginal groups might toss a wrench in efforts to create a harmonized global reporting standard. This unfortunate lack of harmonization serves as a powerful reminder that no international consensus has yet emerged on precisely how and in what ways transparency in this area should be achieved.

A further—and critically important—concern is whether the federal government, equipped with full knowledge of the sums received by Aboriginal groups from extractive companies, might consider these project payments as a basis for the reduction of transfer payments to Aboriginal groups. The federal government, in light of more complete information regarding the (potentially large) payments made to Aboriginal groups by extractive companies, may conclude that Aboriginal groups are financially self-sufficient and thus less in need of federal funds. The ESTMA might thereby be used as a claw-back mechanism, which is certainly not the purpose for which it was enacted. In sum, as Hans Matthews, President of the Canadian Aboriginal Minerals Association, has expressed, there is fear of an “underlying hidden agenda” of cutting government transfers to Aboriginal groups behind the legislation.

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171 See ibid.

172 “New Legislation Has Far-Reaching Implications”, supra note 169. See also “New Legislation Will Affect Aboriginal IBAs” (2 November 2014), Olthuis Kleer Townshend LLP (blog), online: <www.oktlaw.com/
This concern has arisen before, namely in the context of the former Parti Québécois’ Bill 43.\footnote{Bill 43, \textit{Mining Act}, 1st Sess, 40th Legis, Quebec (2013).} Bill 43, tabled May 29, 2013, sought to reform Quebec’s \textit{Mining Act}\footnote{RSQ, c M-13.1 [\textit{Mining Act}].} but was eventually defeated and dropped from the Order Paper. Bill 43 would have made payments by extractive companies to governments (including Aboriginal groups) transparent but, after protest from Aboriginal and other groups, was “toned down” in Bill 70,\footnote{Bill 70, \textit{An act to amend the Mining Act}, 1st Sess, 40th Leg, Quebec, 2013 (assented to 10 December 2013) [Bill 70].} which kept private all agreements between holders of mining leases and Aboriginal groups.\footnote{Hathout, \textit{supra} note 170.} Bill 70 also added section 2.2 to the \textit{Mining Act}, which states: “Taking into account the rights and interests of Native communities is an integral part of reconciling mining activities with other possible uses of the territory.”\footnote{\textit{Mining Act}, \textit{supra} note 174, s 2.2; Bill 70, \textit{supra} note 175, cl 2.2.} Section 2.3 of the \textit{Mining Act} now reads: “The Minister draws up, makes public and keeps up to date a Native community consultation policy specific to the mining sector.”\footnote{\textit{Mining Act}, \textit{supra} note 174, s 2.3; see also Bill 70, \textit{supra} note 175, cl 2.3.}

In considering the issues identified above, one must first understand how federal payments are made to Aboriginal groups. Indigenous and Northern Affairs Canada sets out the following: own-source revenue (OSR) is the revenue that is earned from sources such as “levying taxes and resource revenues or by generating business and other income. Under self-government agreements, Aboriginal governments use some of this revenue to contribute to the costs of their own operations (e.g., providing programs and services to their citizens).”\footnote{Indigenous and Northern Affairs Canada, “Fact Sheet - Own-Source Revenue - At a Glance” (27 July 2015), online: <www.aadnc-aandc.gc.ca/eng/1354117773784/1354117819765>.} Aboriginal governments are required to report OSR to the federal government through an OSR report; the federal government then “fills the gap” between OSR capacity and the estimated cost of programs and services.\footnote{See Hathout, \textit{supra} note 170; see also Indigenous and Northern Affairs Canada, \textit{supra} note 179.} Excluded revenues from OSR include claim settlements, program transfers from other governments, profits from the sale of treaty lands, compensation from an insurance or legal claim, and gifts or charitable donations.\footnote{Hathout, \textit{supra} note 170; see also Indigenous and Northern Affairs Canada, \textit{supra} note 179.}

Bernd Christmas, a Toronto-based lawyer practicing Aboriginal law, posits that governments and Aboriginal groups view transfer payments differently: “Governments [over the years have been] trying to look into the books of First Nations for various reasons, usually under the guise that this is taxpayers’ dollars and governments need to report to the taxpayer...
about where their money is spent.”182 By contrast, Aboriginal groups view the funding as compensation for things they gave up, such as land and water being taken from them.183

The payments made by extractive companies to Aboriginal groups arise primarily through Impact and Benefit Agreements (IBAs), which are contracts “between an extractive company and an Aboriginal government that [outline] the impacts of a project, responsibilities of both parties, and how the community will put the proceeds of the contract towards employment and economic development.”184 IBAs are said to serve two core purposes: (1) “ensur[ing] compensation for interference with Aboriginal and treaty rights”, and (2) providing “a fair share of the benefits flowing from resources extracted from [Aboriginal groups’] lands.”185 Many IBAs require that the terms of payment to be kept confidential.186 In certain areas, IBAs have become a pillar of the relationship between project proponents and Aboriginal communities; respecting such agreements is essential to maintaining trust. As such, extractive companies have reason to fear that the ESTMA’s application to payments made to Aboriginal groups could harm their relationships with Aboriginal communities. As one report summarizes, the new regulations “might continue to guard [the confidentiality of First Nations benefits agreements]. But the ‘quantum’ of what mining and oil and gas companies will be paying to First Nations will have to be reported publicly every year.”187 Andrew Godfrey, an Ottawa-based lawyer specializing in capital markets and mergers and acquisitions, noted that “there are concerns that this disclosure can potentially jeopardize investments companies have made in building strong existing relationships with aboriginal communities.”188 Indeed, during the 2014 consultations between the federal government and various stakeholders prior to the

182 Hathout, supra note 170. The First Nations Financial Transparency Act, SC 2013, c 7, which came into force on 27 March 2013, represents a further measure aimed at transparency around First Nations’ finances. The Act requires First Nations financial information—including salaries and expenses of band chiefs and councillors—to be published on the Indigenous and Northern Affairs Canada website. The Act has been the subject of considerable controversy. The discontent felt by Aboriginal groups is evident in the fact that six bands were sued by the federal government for having explicitly indicated their intention not to adhere to the Act. Moreover, CBC News reported that 48 out of 582 First Nations had not complied with the Act, according to the office of the Minister of Aboriginal Affairs. The federal government under Stephen Harper threatened to withdraw funding to any non-compliant First Nations. See Karina Roman, “Ottawa Takes First Nations to Court over Transparency Law”, CBC News (8 December 2014), online: <www.cbc.ca/news/politics/ottawa-takes-first-nations-to-court-over-transparency-law-1.2864735>.

183 Hathout, supra note 170.

184 Ibid. See also “New Legislation Will Affect Aboriginal IBAs”, supra note 172 (“payments from oil, gas and mining companies—called ‘Impact and Benefits Agreements’ (IBAs)—are effectively compensation for violations of Aboriginal and Treaty rights”).


186 Hathout, supra note 170.

187 Nelson Bennett, “Resource-Sector Legislation Targets Graft, Corruption”, Business in Vancouver (16 June 2015), online: <www.biv.com/article/2015/6/resource-sector-legislation-targets-graft-corruption/>. At the very least, the relationship between First Nations and companies in extractive sector will be profoundly changed. See “What to Know about the ESTMA”, supra note 167 (noting that the disclosure of previously confidential IBAs “could increase the leverage that either a company has or a First Nation has depending on how these amounts compare once they’re publicly released.”).

188 Hiyate, supra note 102.
implementation of the ESTMA, some stakeholders suggested that “IBAs should be exempt as they primarily address social issues related to resource development and are considered commercial, confidential agreements”, and further that “disclosure of these payments could affect relationships and negotiations between Aboriginal governments and industry.”

On the other hand, not all Aboriginal groups share the same view on the ESTMA. Nadir André, a Montreal-based lawyer specializing in Aboriginal law, notes that some Aboriginal groups with no IBAs in place would likely welcome transparency-based reporting measures, as their interests would be served by knowing how much other Aboriginal groups receive. Equipped with this data, Aboriginal groups interested in entering into IBAs could use these figures as benchmarks in negotiations. Aboriginal groups with existing IBAs, however, are more likely to oppose the ESTMA’s reporting requirements due to privacy concerns. On the other hand, it would certainly be in the band members’ interests to have a clear and accurate picture of the revenues the band is receiving, so as to ensure band leaders are accountable for those funds and to gain a better understanding of how their lands and resources are being used. Nonetheless, some have argued that the ESTMA appears to provide no real benefit to Aboriginal groups, given other transparency and accountability mechanisms in place, though one might question whether sufficient mechanisms are in place already. Concerns have also been expressed that the information disclosed through ESTMA reports could be misinterpreted, taken out of context, or somehow used against Aboriginal communities. Aboriginal groups may also feel that the government is creating a double standard—that the federal government has no right to demand information in the name of transparency when the government itself lacks transparency.

From the extractive company’s perspective, a further tension arises: some private companies will want to keep information about their payments to Aboriginal groups private because, as economically rational actors, they want to get the most favourable, lowest-cost deals. Where private payments to Aboriginal groups are made transparent, the company’s leverage in negotiating future agreements decreases significantly, for better or for worse. Thus, to some companies, full transparency conflicts with the objective of profit maximization. To others, the new status quo will be welcomed as a more just and equitable state of affairs—one that moves the business landscape closer to an approximation of the oft-cited “level playing field” by recruiting consistent disclosure. Only time will tell whether the overall reaction by the business community to the ESTMA’s application to Aboriginal group payments will be positive or negative.

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189 See “What We Heard”, supra note 110.

190 Hathout, supra note 170.

191 Ibid.

192 “What We Heard”, supra note 110.

193 See ibid.

194 See MacLaren, supra note 167 (stating, “That this [i.e. forcing payments made to Aboriginal groups to be disclosed] is being done amidst the Conservatives’ lack of transparency over the alleged misallocation of $500 million in infrastructure funding intended for Indian reserves, and the Conservatives’ lack of transparency regarding the amount of public money used on partisan advertising during their last electoral term is an ugly double standard that has no place in a post-Truth and Reconciliation Commission Canada.”)
The ESTMA does not explicitly require the disclosure of payments of a “social” nature (e.g., payments for training and education, community development, philanthropic purposes). The categories of “infrastructure improvement payments” and “bonuses”, however, could potentially encompass community improvement payments made by companies to Aboriginal groups, such as those made under IBAs. What types of payments would be captured by the ESTMA remains unclear. In any case, a number of stakeholders consulted during the lead-up to the implementation of the ESTMA took the position that payments of a social nature made by industry to Aboriginal governments related to resource development should be excluded from the reporting standards.

It is important to recall that the ESTMA’s reporting obligations do not apply to Aboriginal groups themselves; rather, the companies are the entities that must provide payment information to the federal government. This point may be marshalled by supporters of the ESTMA provisions to argue that there is no substantial infringement on Aboriginal rights or privacy. That argument, however, overlooks that the effect of the ESTMA provisions is to increase access to sensitive information—which may, in some cases, harm or impair the interests of Aboriginal groups. Although this will likely have an effect only on a limited number of Aboriginal groups, the effect may be dramatic.

In light of the concerns discussed above, one alternative to consider would be to craft standalone, tailored legislation that applies specifically to payments from extractive industry companies to Aboriginal groups in Canada and responds to the key concerns arising in this context. A further alternative would be to create an exception within the ESTMA that allows companies to respect the terms of IBAs upon demonstrating that a conflict exists. I think there are a sufficient number of important distinguishing features to justify the enactment of separate legislation applicable to payments made to domestic Aboriginal groups. Moreover, crafting standalone legislation and removing the Aboriginal group payment provisions from the ESTMA would put the ESTMA in greater harmony with emerging global standards. As a counterargument, setting out different principles or creating exceptions could be a step in the wrong direction. First, creating standalone measures applicable to payments made to Aboriginal groups would create a burden on companies, who would have yet another legal regime with which to comply. Second, one core rationale for the ESTMA—equipping local communities with valuable information so that they can hold their government accountable—applies equally to Aboriginal groups. Creating exemptions to the general ESTMA regime might result in a failure to bring transparency where it is needed. Indeed, supporters of the ESTMA’s application to Aboriginal group payments argue that extractive sector companies need to be more transparent about said payments.

Before the provisions pertaining to Aboriginal groups come into force on June 1, 2017, the government should devote significant resources to consulting Aboriginal groups and the business community and accommodating their concerns, as the government has suggested it will do. If the ESTMA is to succeed, Aboriginal groups and the federal government

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195 See “What We Heard”, supra note 110. Concerns have also been expressed that Aboriginal groups may lack the capacity to analyze the potential impact of the reporting requirements. See ibid.


197 See “New Legislation Will Affect Aboriginal IBAs, supra note 172 (criticism has been levelled on the grounds that “[t]his grace period does nothing to address legitimate concerns of aboriginal communities.}
must be working in partnership, with a shared vision of the best way for the ESTMA to operate. However, this raises the question of how meaningful this consultation can realistically be when the Aboriginal groups being consulted know the provisions are going to come into effect anyway. The government has clearly indicated that the provisions related to Aboriginal groups will come into effect—the “consultation” the government is slated to engage in is hence tantamount to saying “this is happening, but let’s talk about it.” Arguably, this does not constitute a respectful and considerate approach to meaningful consultation.

4.4.2. **Learning from History: Section 1504 of the Dodd-Frank Act**

Before proclaiming the ESTMA a success, we should consider the history of our neighbours to the south. The US experience sheds light on critiques of transparency-based legislation like the ESTMA, as well as how such legislation can be brought down entirely through a legal challenge. This section will examine the context surrounding the rocky history of the Dodd-Frank Act’s extractive sector transparency provisions, and analyze the relevant lessons for Canadian legislators. Ashley Renders summarizes a key part of the saga of transparency legislation in the US, specifically the rule implemented under section 1504 of the Dodd-Frank Act:

President Obama signed section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act into public law in 2010 and sent it to the U.S. Securities and Exchange Commission (SEC) to implement a rule. The SEC wrote a strong rule in August 2012 that required companies to disclose payments to all levels of government for each of their projects. But the American Petroleum Institute challenged the rule in court only two months later, saying it placed an undue burden on the industry and would negatively affect competition.

What precisely might these negative effects on competition encompass? One prominent concern of US companies was that companies in countries such as China and Russia are not subject to such onerous disclosure standards and can thereby attain a competitive advantage. This reflects a concern for the much-maligned “uneven playing field”. Yet, this argument lacks force for two reasons. First, many of the most powerful extractive Chinese and Russian companies are listed on US securities exchanges, and would therefore be subject to the US provisions. This list includes, for example, China’s PetroChina, CNPC, and CNOOC. Second, on October 24, 2014 the CCCMC, a Chinese business chamber supervised by China’s Ministry of Commerce, set out new guidelines for Chinese mining companies operating overseas. The guidelines—which cite the EITI, section 1504 of the Dodd-Frank Act, and It only delays the impacts.”).

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198 *Dodd-Frank Act*, § 1504.

199 Renders, *supra* note 166.

200 This predicament highlights the need for global standards.


the EU Transparency Accounting Initiative—marks “the strongest endorsement by a Chinese government-affiliated body of international standards to prevent corruption linked to the mining sector”. Put simply, the “what about China?” argument is losing steam.

Whatever the strength of these critiques, in July 2013, the US District Court for the District of Columbia in American Petroleum Institute v Securities and Exchange Commission (SEC) sent the rule back to the SEC to either: (1) write a new rule or (2) provide a better justification for the initial rule. Specifically, the Court concluded that the SEC needed to reconsider two aspects of the rule: (1) the requirement that all company payment reports be made public and (2) the decision not to grant any exemptions for foreign law prohibitions, which the Court saw as “arbitrary and capricious.” Notably, these two aspects are reflected in Canada’s ESTMA as well, perhaps providing an indication of where the legislation may be vulnerable to legal challenge.

On December 11, 2015, the SEC announced, after considerable delay and an order to expedite the production of a new rule, that it had voted to propose rules that would “require resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas or minerals.” The rules were adopted in final form on June 27, 2016. Although a full analysis of these rules is outside the scope of this article, a few brief comments are warranted.

The rules fill the gap left by the July 2013 decision in American Petroleum Institute to vacate the 2012 rules, and the SEC appears confident that it has adequately addressed the concerns identified in that decision. However, it is not entirely clear that the concerns articulated in American Petroleum Institute have been fully addressed. For example, a principal ground on which the rule was vacated was that it failed to provide for exemptions if the disclosure would conflict with the laws of another jurisdiction. In the proposed rules, the SEC has opted not to provide for a blanket exemption where a conflict would occur, instead providing relief on a case-by-case basis where merited. Arguably, this does not go far enough in addressing the Court’s concern regarding the availability of exemptions.


O’Donnell, supra note 201.


See Renders, supra note 166.

American Petroleum Institute, supra note 219 at 7.

“Proposed Dodd-Frank Rules”, supra note 93.

See “Final Dodd-Frank Rules”, supra note 93


See ibid.
The SEC’s rules mirror the ESTMA provisions to a large extent, though there are important differences. For example, the US provisions apply only to entities that file annual reports with the SEC (whereas being listed on a stock exchange is not a prerequisite under the ESTMA), and require the disclosure of payments of US $100,000 or more (whereas the threshold is CAD $100,000 under the ESTMA). On the whole, however, the regimes are largely in harmony, which is encouraging.

Apart from the legal struggles over the Dodd-Frank Act transparency rule, the academic literature has offered two streams of critique, which can be considered in analyzing the ESTMA as well. First, there is the difficulty of enforcement, particularly down the supply chain.211 Second, there is the argument that transparency rules such as the Dodd-Frank transparency rules and the ESTMA “[do] not target issues of corruption and ‘getting a fair deal’ that sit at the heart of many critical political analyses of the resource curse literature.”212 I would add to these critiques that both the Dodd-Frank Act rule and the ESTMA can only measure tangible transactions. There are a number of impacts that the extractive industry has on local communities, host and home governments, and the environment, to name a few. The idea that transparency in the narrow sense of openness around financial transactions can lead to accountability for the entire suite of effects (positive and negative) wrought by resource extraction is fanciful. Clarity around payments is but one measure of activity, and we should not lose sight of the broader effects of the extractive industry’s activity.

In sum, Canadians should bear in mind the US experience, as it sheds light on the potential legal vulnerabilities of extractive sector transparency regulations, as well as several key concerns raised by shareholders. Going forward, it will be essential to track the developments of the Dodd-Frank transparency rules. Canada’s ESTMA will be successful only if it sits in harmony with its US counterpart, given the importance of US capital markets and the need for consistency in regulatory regimes.

4.4.3. Casting Too Narrow a Net

The ESTMA applies exclusively to the oil, gas, and mining sectors, as one would expect given its title. But might its provision have useful application to other industries? Moreover, should we be concerned with transparency only in the oil, gas, and mining sectors? But why are we concerned with only this sector? Although the extractive sector plays a unique role in Canada’s economy,213 should we not ensure that a broad range of Canadian companies adhere to similar regulations and norms of transparency? We can draw a comparison between Canada’s approach and the approach adopted by the Liberia Extractive Industries Transparency Initiative (LEITI).214 The LEITI, which marked Liberia’s joining the EITI in 2007, requires contract disclosure in addition to payment disclosure, and covers forestry and commercial agriculture in addition to oil, gas, and mining. The EU Transparency Directive also covers

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211 Desai & Jarvis, supra note 152 at 118, n 68.
212 Ibid.
213 See “CSR in Canada’s Extractive Sector”, supra note 8.
forestry. These examples underscore that there is no reason why Canada’s ESTMA could not be extended to other industries.

The oil, gas, and mining industries clearly present compelling targets for transparency legislation, due in large part to the high level of interaction and interfacing between corporate agents and government representatives, as well as the extent to which government authorization is required.215 In addition, the wealth generated by these industries is often categorized as a “windfall” in the “sense that it is income derived from an unforeseen event over which the country had no control”.216 As Daniel Firger notes, national economies cannot be planned ex ante around the existence of natural resources.217 Windfalls generate rents and thereby rent-seeking behaviour, which is distinguished from profit-seeking behaviour by the fact that rent-seekers do not contribute to overall wealth.218 A construction project, for example, does not carry the same “windfall” attribute and thereby may avoid creating rent-seeking behaviour. Furthermore, the oil, gas, and mining industries are characterized by finite resources. This feature may strongly encourage actors to raid the wealth while there is wealth to be raided, hence heightening rent-seeking behaviour.

Nonetheless, several of the features noted above are shared by other industries, and so we might question the decision to restrict the transparency regime’s application to the oil, gas, and mining industries. We might especially wonder why the regime should not be applied to other industries that arguably are subject to the “resource curse” phenomenon, such as the forestry industry and the agricultural industry. We might also wonder whether industries such as the construction industry might benefit from ESTMA-like transparency-based regulation, as such measures may enhance the ability of local populations to hold their governments accountable for their expenditures and receipts of funds connected to construction projects. Admittedly, different sectors raise different concerns and are inherently different in nature; yet, the benefits of transparency-based regulation may well arise in contexts outside the oil, gas, and mining industries.

Besides the features noted above, there are other reasons one might postulate for the ESTMA’s restricted scope of application. It may simply be a matter of political will. Perhaps the government was not prepared to expend too much of its political capital by extending transparency measures to other industries such as the forestry industry. In addition, the Canadian government has expressed a strong interest in harmonizing its transparency framework with

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215 See McEwen, supra note 49 at 1.1.2 (“Regulation licenses and approvals need to be sought from government officials for the exploration, development, construction and operation of a mine. Typically, the government also owns the infrastructure such as ports and railway which means that companies and their agents are constantly dealing with governments and government bodies to get their products to market. The government is also responsible for reviewing environmental and social impact assessments; planning for local and regional development; upholding health and safety standards; and investing and distributing revenues from mineral development. As a result, officials who have the power to block, delay or frustrate a project may attempt to solicit bribes for the benign exercise of that power.”).

216 See Firger, supra note 13 at 1057, n 59.

217 Ibid.

those in place in other G8 countries; to extend the ESTMA’s application beyond the oil, gas, and mining industries would be to throw a wrench in the pursuit of framework harmonization. This is likely the primary reason why the ESTMA is restricted to oil, gas, and mining industries. Finally, it may be a matter of symbolism and identity. Canada’s global economic presence is strong in the oil, gas, and mining industries. Thus, perhaps Canadians see the most value in ensuring that those industries are the sectors in which we focus our efforts. Nonetheless, we ought to at least consider whether other industries should be subject to similar transparency-based measures.

5. THE EXTRACTIVE INDUSTRY AND OTHER STAKEHOLDERS’ RESPONSES TO THE ESTMA

Having discussed the ESTMA in detail, we can now consider how the legislation has been received by various stakeholders. While some, such as many mining companies and associations, have given a warm reception to the ESTMA, others, such as certain oil and gas companies, have taken a dim view of the new legislation.

As one report summarizes, “[t]he broad initiative [embodied in the ESTMA] has the support of Canada’s mining industry, including the Prospectors and Developers Association of Canada (PDAC) and Mining Association of Canada (MAC), in part because they believe that greater transparency will allow citizens and media to hold governments to account for how they spend mining revenues.” President Rod Thomas of the PDAC welcomed the new provisions: “Improved transparency on revenues paid will help increase accountability and ensure that the benefits of resource development reach the more than one billion people living in resource-rich countries”. Some suggest that the mining industry is supportive of greater transparency for another (perhaps more self-interested) reason as well: if the public can see how much mining companies pay governments, mining companies can “increase their social capital and redirect public grievances at political leaders rather than mining companies.”

Ashley Renders makes several key observations. Curiously, the Canadian oil and gas industry, unlike the Canadian mining industry, opposes the new transparency rules. A Globe and Mail report commented that “the Canadian Association of Petroleum Producers supports the principle of transparency, but has concerns about how it may be implemented.” As well, Talisman Energy Inc., a Canadian oil and gas company, has called for a weaker rule: “The company stated in a letter to Natural Resources Canada in May that it does not believe that trying to draft Canadian rules so that they are ‘equivalent’ with the most severe set of rules

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219 See supra note 98 and accompanying text.

220 Hiyate, supra note 102.


222 Renders, supra note 166.

223 McCarthy, supra note 221, cited in Renders, supra note 166.
currently proposed is of any service to Canadian companies.”

She also notes that Talisman’s letter goes further, pointing out that:

> the EU Accounting Directive was drafted to align with the then-existing Dodd Frank 1504 rules in order to establish a global reporting standard. Those Dodd Frank rules were subsequently vacated …. If Canada drafts its revenue transparency rules to align with the EU Accounting Directive in the name of having one set of rules applicable to its companies, then it is ignoring the lessons learned in the US.

Oil and gas industry leaders, such as Talisman Energy Inc., have also expressed concern over the potential compliance costs facing Canadian companies. In its letter to NRCan, Talisman noted that in the event that mandatory payment disclosures are required to be made on a cash basis, the compliance costs would be significant. The ESTMA does indeed mandate disclosure on a cash basis. External financial reporting standards require companies to produce reports on an accrual basis; to impose disclosure on a cash basis, Talisman wrote, would lead not only to increased cost and time expenditures, but also to investor confusion. The argument is that this results in a dangerous cocktail of “data fatigue” and “data overload”—that is, companies are forced to produce data to the point of exhaustion, while consumers of data are barraged with such a mountain of information that the data becomes unwieldy and useless. Talisman also argued against any requirement for independent review of these payment disclosures because, unlike audited financial reports issued to the public, the rationale for the ESTMA disclosures is not investor protection.

Might the ESTMA require too much transparency? Is there such a thing in the first place? One argument marshalled by Western companies against the growing transparency revolution is that abiding by transparency legislation, such as the ESTMA, could mean breaking a law in a foreign jurisdiction in which disclosure is prohibited. Companies such as Royal Dutch Shell have expressed concerns over finding themselves between a rock and a hard place: if the company discloses payments, foreign governments may decline to enter into or continue agreements out of a view that such payments are confidential, competitively sensitive, or a security risk. The degree to which there is empirical evidence to back up this assertion, however, has been questioned. Nevertheless, one alternative proposed by some within the oil and gas industry is to provide an exemption when a foreign law conflicts with Canada’s requirement of disclosure. The issue of exemptions generally arose in the 2014 consultations

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224 Talisman Letter, supra note 122 at 2, cited in Renders, supra note 166.
225 Talisman Letter, supra note 122 at 2–3.
226 Ibid at 4.
228 Talisman Letter, supra note 122 at 4.
229 Ibid at 5.
230 See “Openness Revolution”, supra note 32. The Court in American Petroleum Institute cited Angola, Cameroon, China, and Qatar as four countries that prohibit disclosure: supra note 204 at 5.
232 See “Openness Revolution”, supra note 32.
between the federal government and various stakeholders prior to the implementation of the *ESTMA*. The federal government noted that “participants expressed mixed views on exemptions; while some cited the need for exemptions to allow for flexibility and exceptional circumstances (e.g., conflicts of law), others believed that exemptions could provide a loophole and undermine the initiative”.233

Alan Detheridge of the Natural Resource Governance Institute presents a compelling counterargument that a framework permitting exemptions would be fundamentally flawed.234 First, to provide such exemptions would be to fail to “provide transparency where it is needed most.”235 Second, Canada’s provision of an exemption would simply “encourage those governments who wish to withhold information from their citizens to enact such legislation.” Companies might also use their significant influence and considerable resources to exert pressure on foreign governments to enact secrecy and non-disclosure laws. Third, Canada should seek to harmonize its legislation with emerging global standards.236 Indeed, the EU Transparency Directive adopts a universality approach, providing that “no exemptions, for instance for issuers active in certain countries, should be made which have a distortive impact and allow issuers to exploit lax transparency requirements”.237 This third argument, however, has lost some force, since the SEC, as noted above, has provided for an exception from its disclosure requirements where a conflict arises with foreign laws on a case-by-case basis.238 In fact, the better argument may be that Canada should follow suit by adopting the US approach and providing for exceptions on a case-by-case basis. Nonetheless, there appears to be little evidence that there is in fact a great proliferation of states that prohibit the type of disclosure required by the *ESTMA*,239 and so the argument that all Canadian companies will suddenly find themselves between a rock and a hard place may be overstated.

Broadly speaking, at the company level, there are several possible reactions to the march towards transparency. Some companies may simply accept change as inevitable: there is an unavoidable movement towards transparency, and so it is advantageous to be an “early mover”. Those companies that embrace transparency at an early stage will, over the long term, derive a competitive advantage by putting in place robust compliance systems that become increasingly efficient and refined over time. Early movers may also benefit from an improved public perception in the marketplace, as they are more likely to be viewed as thought leaders capable of responding to public concerns. These early movers may even find themselves in a position to help shape the coming standards, thereby advancing their own interests. Still others may see

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233 “What We Heard”, supra note 110.


235 *Ibid*.

236 *Ibid*.


239 The Court in *American Petroleum Institute* cited Angola, Cameroon, China, and Qatar as four countries that prohibit disclosure: *supra* note 204 at 5.
greater transparency as an extension of corporate social responsibility. Embracing transparency as an integral element of corporate social responsibility may even boost share prices by signaling to the market the competence and responsibility of company management. For example, as the Resource Revenue Transparency Working Group notes that, through revenue transparency, “companies better explain how their tax and royalty payments to domestic governments have led to tangible benefits like roads, schools and water facilities.”

Corporate transparency also has strong links to the modern labour and capital markets: prospective employees and investors may seek out companies that demonstrate dedication and leadership in the area of transparency. Thus, being an early adopter can allow a company to reap benefits in the competition for talent and capital. Finally, to the extent that increased transparency signals ethical practice, companies benefit from a lower risk of losing reputational capital and eliminate potential legal costs.

We can also examine the potential responses of investors to the ESTMA and the legislation’s effect on investors. Although increasing the level of information available to potential investors may not be the primary purpose of the ESTMA, I argue that the information disclosed could have a profoundly positive effect on investment. First, sufficiently detailed and comparable data regarding company payments to host governments can bring to light potential regulatory, political, reputational, and taxation risks. This wealth of information supports a more efficient market of decision makers. Second, investors can utilize such data to construct predictions of whether and for how long a project—note the importance of project-level disclosure—may remain economically profitable. The information disclosed reveals important cost data for the project and gives an indication as to the potential value of the project. Third, from the perspective of socially responsible investors, decision makers have a broader array of data when making decisions based on the company’s environmental, human rights, and other impacts. Finally, it is noteworthy that neither investors nor NGOs have voiced much opposition to the ESTMA.

6. CONCLUSION

Canada’s commitment to transparency in the extractive industry is encouraging. The passage of the ESTMA signals that the “when in Rome” mentality is falling by the wayside. To the extent that a lack of robust systems of transparency in the management of natural resources in resource-rich countries has allowed revenues to be misallocated or diverted, Canada’s efforts to put in place domestic transparency-based measures applicable to payments made abroad may serve as a key stepping stone on the road to a reducing the incidence of misallocation and diversion of funds derived from resource extraction. Moreover, these recent developments reflect many positive aspects of modern corporate culture and corporate citizenship in Canada. Not only is the government committed to establishing a new status quo in Canada that aligns with the norms being forged by the international community, but also the mining industry itself sees such a step as beneficial and necessary.

The resource curse is a complex phenomenon, and there is no silver bullet solution. Both substantive regulation and transparency-based legislation can play an integral role in

240 “Background to RRTWG Recommendations”, supra note 14 at 6.
241 For a review of the efficient market hypothesis, the critiques challenging this hypothesis, and the connection between information and investor decision-making, see generally Burton G Malkiel, “The Efficient Market Hypothesis and Its Critics” (2003) 17:1 J Economic Perspectives 59.
reversing the resource curse; yet, neither approach—alone or in combination—can completely eradicate corruption and its profoundly damaging effects. The contribution to this effort made by transparency-based legislation may be contingent on factors such as the level of detail in the information disclosed and degree to which that information is available, and the extent to which industry participants actively embrace such regulations. Only time will tell if the ESTMA will succeed on these accounts, but I am optimistic that the legislation will contribute to global efforts to ensure that community members benefit from the natural resource revenues derived from local projects.

Despite the ESTMA’s potential, this article has explored three core issues that could cause difficulty: (1) the future application of the ESTMA to payments made by extractives to Aboriginal groups, (2) the ESTMA’s susceptibility to the kinds of failures experienced in the US regarding similar legislation, and (3) the ESTMA’s arguably limited scope of application. Of these three problems, Canada’s decision to extend the application of its transparency legislation to payments made to Aboriginal groups represents a particularly knotty issue. There is no consensus that this decision is, on a whole, a positive development. Moreover, it certainly detracts from efforts to achieve a globally harmonized standard for transparency-based legislation. The absence of a comprehensive, harmonized global standard presents an unfortunate state of affairs.

In sum, and considering the arguments advanced above, the overarching conclusion of this paper’s analysis is that though the ESTMA is a progressive and in many respects groundbreaking piece legislation, we must look at it through a critical lens. As I have argued, and in the words of Renders,242 we should not celebrate just yet. There is still work to be done, and several key issues to which attention must be paid, before the ESTMA can reach its full potential.

242 See supra note 166.