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Enhancing corporate standing, shifting blame: An examination of Canada's Extractive Sector Transparency Measures Act

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ABSTRACT

Canada's Extractive Sector Transparency Measures Act (ESTMA) is the culmination of a series of proposals and consultations with government, industry and civil society organizations to address conflict over Canadian extractive industry. Created in the context of a global call for extractive industry accountability, as well as increasing scrutiny of Canadian mining activities for alleged human rights and environmental abuses, the ESTMA aims to deter corruption via financial reporting requirements for Canadian extractive firms operating in Canada and abroad. By mandating that firms publicly disclose payments to various levels of government, however, the ESTMA is constructed atop global corruption discourse that identifies host states in the Global South as the source of social pathologies that facilitate corruption, largely excluding a critical analysis of extractive firms in the Global North. Drawing on interviews, document analysis of material related to the ESTMA and case studies of extractive firm financial reporting, this paper argues that under the ESTMA's financial reporting processes, corporate risk management trumps meaningful social regulation. While the Act does mandate disclosures useful to the advocacy community, limited oversight, a lack of standardized reporting and excluded activities under the Act mean that the ESTMA offers limited leverage to substantively address the human and ecological cost of Canada's extractive industry. As has resulted from transparency policies more broadly, however, the ESTMA provides firms a means to counter broader critique and, in complying with audit culture, promotes investment security.

1. Introduction

In late 2014 the former Harper government enacted Canada's Extractive Sector Transparency Measures Act (ESTMA). The Act came into effect on June 1, 2015 four months prior to the election of a Liberal Majority Government under Prime Minister Justin Trudeau. The ESTMA fulfilled the commitment made by the Canadian government to implement the Extractive Industries Transparency Initiative (EITI) at home. Canada was among the global proponents of EITI implementation in 'host states' of the Global South and had served on the EITI Board from its inception. The ESTMA also made Canada compliant with key terms of the European Union (EU) Transparency Directive issued in 2004 (modified in 2013) and the US Dodd Frank Act and Consumer Protection Act. The NGO Publish What You Pay Canada (PWYP) advocated strongly for the ESTMA, and convoked and facilitated the multi-stakeholder Resource Revenue Transparency Working Group (RRTWG) whose negotiations significantly contributed to the legislation. In 2017, the ESTMA completed its first round of implementation and reporting by Canadian extractive sector firms operating domestically and internationally.

Within the context of domestic legislation, the ESTMA may be viewed as a major step forward, requiring firms listed on a stock exchange in Canada, or which conduct business in Canada that meets a particular minimum threshold, (thus incorporating some firms that are not publicly traded),1 to publicly disclose payments to various levels of government (Guidance, 2018). In principle international policies entailing global transparency practice are directed at reshaping relations between the Northern extractive industry and so-called 'host states' in...
the Global South as well as controversial industries at home. Discussed in various articles in this special issue, the key global example is the Extractive Industries Transparency Initiative implemented by domestic governments in varied jurisdictions. While the Canadian government had been an EITI supporter since 2007, it has never implemented it into law. Nevertheless, given that the ESTMA’s reporting requirements are mandatory, the legislation is viewed by some as more stringent than the voluntary dynamics underlying the EITI. In the case of the EITI, domestic implementing legislation may be rudimentary and thus neither obligatory nor enforceable at the firm level.

In Canada and elsewhere the content of twenty-first century extractive sector transparency legislation, with its emphasis on reporting and formal financial procedures, responds to public calls for greater accountability on the part of polluting and frequently violent industry. Yet is also offers measures of security to both the firm and state as a form of industrial audit – a topic that received important critical attention at the turn of the millennium from scholars from business to anthropology (Power 1994, 1997; Strathern 2000, 2000a). Critiques of audit influenced analyses of various practices - in accounting, public management and education, and has been revisited in recent work, including on the extractive sector (Kemp et al. 2012; Welker 2014; Shore and Wright 2015; Gilbert and Zalik, 2019). As Michael Power emphasized, audit practice operates primarily as a form of social reassurance regarding largely under-regulated, and potentially high-risk, industrial and institutional processes. In addition to audit and risk management, however, the ESTMA and EITI also are constructed atop global corruption discourse (Haufler, 2010), itself a function of a broader context of global systemic racism. Herein, critical race theory draws attention to how an investment in white supremacy entails justifying the overall impoverishment of Indigenous and racialized peoples through racist tropes. Scholars such as Doshi and Ranganathan (2019) and Bratisis (2014) discuss the roots of corruption discourse in modernization theory and orientalist and racist depictions of Global South governance. The EITI discourse of corporate ‘home’ state (Global North) and operational ‘host’ state (typically Global South), which characterized the initiative at its inception, set up an uneven application between extractive sites in the South and sites of corporate headquarters in the North, as Bracking (2009) delineates. The so-called ‘host states’ of the Global South or non-West are thus identified as the source of social pathologies that facilitate corruption, a problem to be remedied by revenue transparency confirming the amounts firms pay to government institutions. The broader international financial architecture that historically favoured massive wealth transfers from less to more industrialized sites or to unnamed ‘beneficial owners’ are left external to interrogation. While elites globally have benefited from wealth transfers, financial accumulation has tended to accrue in the North or in offshore havens that protect funds these elites control (Palan, 2006; Ozuoka and Zalik, 2016). Although practices of insider trading and nepotism in the Global North received increased scrutiny after the 2008 financial crisis, the term ‘corruption’ is not typically applied to refer to these practices. Rather, ‘corruption’ is largely reserved for practices that occur in the non-West and zones ‘overseas’ (Gillies, 2019), a notable discrepancy given that the oil and gas sector is an essentially global industry. The duplicity in this position has not gone unnoticed even by mainstream policy makers. Clare Short, former EITI Chair and one time UK minister for International Development implied as much when calling on the US, UK and Canada to pass domestic legislation and implement the EITI at home in 2014.

On the basis of interviews and primary documents related to the ESTMA, this paper views the ESTMA as an expression of ‘audit culture’ (Gilbert and Zalik, 2019). Above we placed our analysis of ESTMA in conversation with some literatures on extractive sector transparency and the EITI, as well as the re-regulation of the US and EU financial sectors following the 2008 financial crisis. As discussed further below, we offer a critical view on how transparency and anti-corruption discourse pathologize states and Southern bureaucracies and Indigenous governments, subjecting them to imperial relations. The pathologizing of social and political relations in these spaces - and their economic and ecological role as capital and nature exporter - intersects with global logics of racism and white supremacy.

The next section examines the ESTMA in the context of (Section 2) Canadian domestic and international calls for greater oversight of Canada’s oil, gas and mining sectors given the Canadian industry’s complicity with growing human rights abuses. Subsequently the paper reviews (Section 3) the emergence of the ESTMA legislation in relationship to broader transparency discourse and EITI scholarship, and the role played by both civil society and the business sector in shaping it. Our particular focus of attention is the ESTMA legislation and guidance documents. Through this analysis we draw parallels with attributes of ‘audit culture’, including how anti-corruption discourse largely upholds the power of global capital, and serves to manage risk on the part of financial institutions.

On this basis we then consider (Section 4) actual reporting under the ESTMA to date, including both affirmations of its role in lifting the veil on corporate actions, as well as a less optimistic account of how information gaps could render the ESTMA a hollow example of transparency without substantive disclosure. As is typically the case in the corporate world, Boards of Directors and CEOs may overlap across firms engaged in activities that are and are not covered by the ESTMA; notably extraction and production on which the ESTMA mandates disclosure of payments, and exploration and processing activities which are not covered under the ESTMA. While the ESTMA, importantly, legally mandates reporting by firms, it also creates various loopholes that make disclosures either less useful to communities and civil society, or revocable. We attend to three examples - (i) that of Goldcorp/Tahoe’s/Pan American Silver - which Publish What You Pay Canada has featured among its case studies, as well as (ii) that of De Beers/Anglo American, including De Beers’ use of reporting under another jurisdiction to fulfill ESTMA requirements. We end with reflections on (iii) Africa Oil Corporation, part of the broader Lundin Group of companies that includes within it firms engaged in both exploration and development. The specific projects that prompt our attention to these firms are the El Escobal mine in Guatemala, the Victor mine in Northern Ontario and Africa Oil’s recent acquisition of assets in Nigeria and Guyana in joint ventures.

2Three formal interviews (1 – 1.5 hours) with key informants were conducted: one with a government representative and two with civil society representatives. In addition, the paper draws on notes from discussions with civil society and academic researchers over a two year period. Primary document (footnote continued) analysis draws on transcripts of formal legislative debates as recorded in the Canadian Senate and House of Commons Hansard.
communities, use of paramilitary forces and divide and rule tactics by Canadian firms increased while resistance at mining sites was met with aggression and outright repression. Film maker Steven Schnoor provided footage of the destruction of communities by security contracted by a Canadian mining company in Guatemala; in response the Canadian ambassador claimed this film was based on false testimony by actors. Following a legal suit, the Ambassador retracted.\(^3\) Activist scholars Deneault et al. (2008) documented practices of Canadian mining firms in the African context in their book *Noir Canada* and were subsequently faced with a SLAPP (strategic lawsuit against public participation) suit by Barrick Gold. Among others, scholars such as North et al. (2006), Campbell (2008), Nolin and Stephens (2011), Imay (2007, 2012), Deonandan and Dougherty (2016), Gutierrez-Haces (2016), MacDonald (2016) and Weisbart (2018) have documented the practices of Canadian extractive firms, as have Gordon and Webber (2016) in their account of Canadian imperialism in Latin America.

In the context of increasing attention to Canadian firms abroad, violations of First Nation rights in Canada garnered increasing attention. In 2007, the Band Council of the KI First Nation was jailed for refusing to allow mineral prospecting on their territory (Ruyek, 2008). In 2012, the Canadian government under Prime Minister Harper described NGOs challenging resource extraction in Western Canada as ‘enemies of the state’ (Zalik, 2015). In New Brunswick the community of Elsipogtog had a direct stand-off with the RCMP over a fracking company’s access to their territory, while in Alberta, various First Nations, including the Athabasca Chipewayan First Nation, launched legal suits against government for violations of their territorial rights. Nation-wide movements against major pipeline projects also emerged in this context. These successfully halted a number of projects including the Enbridge Northern Gateway and Energy East pipelines. Significantly, a major global movement against Tar Sands extraction in Alberta and its implications for climate change and Indigenous rights had a real effect on the presence of transnational industry at home (Haluza Delay and Carter, 2014). Assisted by a major drop in oil prices, this ultimately prompted the exodus of major transnational operators from Northern Alberta, including Shell. Most recently, mining giant Teck indicated that its cancellation of a proposed Tar Sands project was due to Canada’s unclear approach to questions of climate and Indigenous rights.\(^4\)

Over this period various regulatory proposals sought to address conflict over Canadian extractive industry. The first major initiative was the Extractive Sector Roundtable. Intended to bring about substantive monitoring of human and ecological rights associated with Canadian extractive industry, various advocates felt that the process was thwarted and minimized through the creation of the ‘Devonshire Initiative’. The Initiative was named for the address of the Munk centre at the University of Toronto where it was to be housed. The Munk centre is financed by a major endowment from Barrick Gold, at the time Canada’s largest mining company, of which Peter Munk, now deceased, was founder and former CEO. The initiative resulted in the creation of an ‘Extractive Sector Counsellor’ in 2009 charged with the receipt of complaints from affected communities concerning the mining industry. Ultimately, in 2013 and after considerable criticism from civil society notably the Canadian Network on Corporate Accountability, government and the media – the office of the Extractive Sector Corporate Social Responsibility Counsellor (herein CSR Counsellor) was left vacant after Counsellor Marketa Evans’ resignation. Counsellor Evans had accepted only six complaints in the years the office was open and of these, five were closed without resolution (Saunders, 2014). In 2015 a new CSR Counsellor was appointed, a former Rio Tinto executive, but ultimately the critique of this office led to its permanent closure in May 2018. Overlapping with this initiative, from 2011 Canada’s National Contact Point for implementing the OECD guidelines for multinationals, chaired by Global Affairs Canada and co-chaired by Natural Resources Canada in partnership with five other ministries, also accepted complaints regarding Canadian extractive firms, but its own procedures were critiqued as providing insufficient protection to those who lodge a complaint (Above Ground/Mining Watch Canada/OECD Watch, 2016). Over these years, legislative initiatives such as John McKay’s private member bills (discussed below) aimed to address the gap in extractive sector regulation, human rights and transparency but were not passed - according to various commentators, due to private sector interference.

As Coumans (2011) describes, the Devonshire Initiative and the CSR roundtables in Canada were dominated by industry and the former Harper government. The dissolution of the office of the CSR Counsellor prompted further advocacy by legal and human rights and academic advocates, including a petition calling for the establishment of an ombudsperson for the extractive sector. The Trudeau Government announced in January 2018 that a Canadian Ombudsperson for Responsible Enterprise (CORE) would be established; an ombudsperson was hired in April 2019 who had previously worked as a lobbyist for the oil industry. The NGO community resigned from the government advisory board for CORE en masse in August 2019. Key concerns are that the office is insufficiently independent from industry, would not have powers to compel evidence from corporations or investigate but rather only ‘review’ cases, that the anonymity of complainants from affected communities abroad could not be guaranteed, and significantly that CORE would accept from companies complaints against human rights defenders, muzzling criticism and putting community members at risk (Dwyer, 2019). The broader regulatory context in Canada underlines our argument concerning the ESTMA’s role in legitimating and offering security for industry, rather than substantively reforming its activities.

### 3. The ESTMA legislation and transparency discourse

Given that transparency discourse elides the role of powerful states in shaping discussions of ‘corruption’ and in constituting the EITI (Bracking, 2009), it is perhaps unsurprising that the academic literature on the EITI has centered on EITI implementation as a global and domestic governance issue and institutional problem, largely involving policy elites (Haufler, 2010; Furstenberg, 2015; Arond et al., 2019). Within accounts of procedural transparency Mason (2008) and Gupta (2008) importantly called for, and convened, greater interrogation of the political economic implications of the discourse (Gupta and Mason, 2014). Recent studies in Extractive Industries and Society have assessed the effect of EITI adoption on GDP and the role of the EITI in reducing corruption. The results of this research are mixed. Interestingly some results point to the importance of a higher degree of perceived corruption in a particular state as a factor associated with EITI compliance, given the initiative’s role in attracting investment to a country’s mining sector (Magno and Gatmaytan, 2017). Other texts have also discussed the EITI as part of a broader set of global anti-corruption institutions (Gillies, 2020). In a more critical direction, Ŭge’s (2017) work on ‘transparent autocracies’ points at the ways in which civil society’s whistleblowing functions have been weakened even with EITI implementation.

Much of the more critical recent literature on the EITI assesses its ability to enact greater accountability from implementing states, those in which oil and gas extraction occurs. These studies measure the extent to which the costs and resources associated with the initiative bring about better accountability performance among implementing states than existed prior to EITI implementation (Sovacool et al., 2016). Despite the EITI’s initiation by elites, social accountability theory argues that it can and has been used to build stakeholder (civil society and local community) power in the Global South. Significantly for our analysis herein, however, the autocratic nature of host states in the

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\(^3\) See schnoorversuscanada.ca and https://miningwatch.ca/news/2010/4/29/canadian-ambassador-sued-defaming-documentary-film-maker-steven-schnoor.

\(^4\) See https://www.teck.com/news/news-releases/2020/teck-withdraws-regulatory-application-for-frontier-project.
Global South remains the central problematic (Akonnor and Ohemeng, this issue; Öge, 2017), disregarding global power relations and historical and contemporary transnational wealth transfers that extractive industries have entailed. While the accountability-oriented literature importantly identifies the problems of secrecy (Florini, 2007) that undergird industrial payments to governments and affected communities, these discussions are meant to further secure and regulate processes of financialization and audit in which the EITI is embedded, rather than critique or displace them. Our approach in contrast, critiques the unequal application of corruption discourse (Laurer, 2003), as it is embedded in broader orientalist and racist depictions of Southern states and Indigenous peoples generally. We consider, rather, the functional role that ESTMA plays in corporate audit practice as a means to reduce risk for the firm, what may be understood as ‘audit culture transparency’ (Gilbert and Zalik, 2019), a practice that draws attention away from industrial violence and obscures calls by colonized peoples for substantive reparations for wealth extracted from their lands. As per the Watts and Zalik (2020) paper in this issue, the time taken by advocates to review corporate disclosures reduces capacity available for systemic critique of global industrial systems.

Our research suggests that various aspects of the ESTMA are congruent with audit culture transparency. First of all, while the ESTMA mandates reporting by firms, there is little or no oversight by Canadian government bodies responsible for collecting the data. Thus, ultimately, reporting or assessment in the ESTMA seeks to achieve a further end, but without clear oversight and due to corporate exclusions, much information is protected and confidential. Blocking access to data may be understood as a form of ‘legal enclosure’ (Szabloski, 2019). Second, there is limited or no standardization of reporting among firms, making it difficult to evaluate results in divergent spatial and national contexts, or to make comparisons between the kinds of payments that firms make to national or local governments. Through the ESTMA, as apparent in its treatment in scholarship and NGO practice to date, public discontent with profit-driven, rights-violating, and environmentally harmful extraction is translated into legal and regulatory frameworks that produce highly technical information. While incorporating a number of contested interests and actors, these processes do not address the underlying concerns regarding social violations and wealth extraction that prompted industrial regulatory initiatives; arguably these are funneled into transparency regulations and voluntary codes of conduct for industry, protecting the interests of industry.

The ESTMA was introduced to the House of Commons on October 23, 2014 as part of omnibus Bill C-43 under the title Economic Action Plan Act 2014, No. 2, before it received Royal Assent less than two months later on December 16, 2014. The ESTMA paralleled the Cardin Lugar provision of the Dodd Frank Act (Section 1504) which was subsequently repealed under the Trump presidency (Global Witness, 2020). Section 1504 directed the US Security and Exchange Commission to require oil and gas industry disclosure of payments to US and foreign governments.

As discussed above, among Canada’s precursors to the ESTMA were private member’s bills introduced by Liberal MP John McKay. These were narrowly defeated in 2010 (Bill C-300) and 2014 (Bill C-474). The changes from these earlier proposals were double edged: They increased the scope of reporting requirements to payments made to all governments not only abroad, but also in Canada. However a major difference between the aforementioned bills and the ESTMA legislation was that reporting oversight and reporting requirements to the public were scaled back under the ESTMA.

Omnibus bills, defined by the House of Commons as those whose purpose is to amend, repeal or enact several related, but separate, initiatives have been around since 1888 (Dodesk, 2017). Since 2001, however, budget bills have become longer and more complex. Under the Harper government in particular, ‘Omnibudget bills’ (omnibus budget implementation bills) grew exponentially to an average of 308.9 pages between 2006 and 2011, from an average of 73.6 pages between 1994 and 2005 (ibid). Using a practice referred to as “tacking”, seemingly unrelated provisions are included upon the logic that they are loosely connected to the budget; a practice sanctioned by speakers in the House of Commons. The increase in the size and scope of omnibus bills, however, makes it difficult for MPs to properly scrutinize a bill’s content, and therefore to consider and debate before enacting laws proposed by government. This, Dodesk (2017) argues, undermines the democratic process whereby elected citizens’ representatives consider different viewpoints when proposing, debating and enacting laws.

Bill C-43 and the ESTMA embedded within it are illustrative of this practice. The Bill was a 460-page document proposing wide-ranging legal reforms. These included, for example, legislation restricting the ability of refugee claimants to access social assistance, to the establishment of the Canadian High Arctic Research Station, and the reform of Canada’s intellectual property laws. With debates in the Canadian House of Commons pivoting on the Bill’s proposed cuts to social assistance, the ESTMA received scant attention. Critique of the massive omnibudget was a frequent topic of debate from opposition party MPs, but a motion to decline the Bill a third reading because it “amends dozens of unrelated Acts without adequate parliamentary debate and oversight” was defeated 151–120, with Conservative representatives almost unilaterally responsible for its defeat (Parliament of Canada, 2014). McKay noted that “…the irony is quite resplendent. That bill demanded of the extractive sector accountability and transparency and was put in an omnibus bill…which has no accountability and no transparency.” (House of Commons, 2014).

The proposed ESTMA, found under Division 28, Part 4 of Bill C-43, received the most attention from the Standing Senate Committee on Energy, the Environment and Natural Resources. These consultations occurred prior to the Bill coming before the Senate. Hearing from representatives of the Canadian Association of Petroleum Producers (CAPP), the Assembly of First Nations, Mining Association of Canada (MAC), and Publish What You Pay – Canada (PWYP), these debates centred around the issues of reporting requirements, the role of Aboriginal governments, and Canadian alignment with international transparency standards and legislation.

Quite explicitly these legislative proceedings illustrate that while extractive entities are responsible for reporting under the Act, the purpose of the legislation is to hold governments to account for money transferred to them from such entities. Mark Pearson, Director General, External Relations, of the Ministry of Natural Resources Canada stated that “…the purpose of this legislation… is to hold the governments to account for the money. Oftentimes you have industry working in countries abroad; the resource gets developed, the taxes, royalties and so forth have been paid to the government; the money does not seem to go back into the economy; the people are questioning what happened to the money; and then the industry can get the blame for it. This way, it's out there; the information is provided publicly; citizens in those countries can hold their governments to account: What happened to the money? Where did it go? It provides that element of transparency.” (Senate of Canada, 2014). Canadian and foreign companies operating within Canada must report transfers to the Canadian government under the Act. However, as per Doshi and Ranganathan (2019) and Bratis (2014) positions above, Canadian state officials promoting the ESTMA were most concerned with monitoring transfers to foreign governments by Canadian companies as a means of deterring corruption. In principle, such reporting would enable citizens in foreign countries to hold their governments to account for transfers such as taxes and royalties paid by Canadian extractive companies to governments which did not accrue to broader public accounts (ibid). The focus of the ESTMA in effect, is to monitor and undo elements of the resource curse associated with undemocratic governance regimes in the global South.

The Senate Committee proceedings also demonstrate that private, corporate interests were generally supportive of the way the ESTMA was taking shape, as a piece of legislation that could advance their...
interests. Arguing that the ESTMA goes ‘hand in hand with the Corruption of Foreign Public Officials Act’, Ben Chalmers of the MAC stated that the Act could be used as a tool for Canadian extractive companies to use against foreign governments when being asked by them for a bribe. Such companies could cite the requirement to report these illicit transfers under the Act. As stated by Chalmers, “it provides an opportunity for us to say, ‘We can pay you that money, but we’re going to have to report it, so if you want us to report it, then let’s have a conversation, but I don’t think you want us to report that, so let’s move on and do business above board.’” (Senate of Canada, 2014). Further, reporting under ESTMA could increase extractive companies’ standing within communities: “...as it provides a mechanism for us to credibly and independently communicate the benefits that mining can bring to communities and countries where we operate, wherever that might be in the world.” (ibid). In this way, ESTMA deters corruption via reporting, rather than regulating and monitoring extractive industry’s human rights and socio-ecological practices. This purpose diverges from, and fails to address, the original concerns that prompted the creation of transparency legislation: public discontent with profit-driven, rights-violating, and environmentally-harmful extraction.

ESTMA’s congruence with audit practice is also revealed in these debates. First, while the ESTMA mandates reporting by firms, there is no direct enforcement mechanism to ensure that the reporting requirements are achieved. Rather, the obligation is on entities to report, and it is up to the Minister of Natural Resources of Canada (NRCan) to then deem whether the reports are accurate and appropriate (ESTMA, Article 9). While an independent audit of an ESTMA report can be requested by NRCan (ESTMA, Article 14), the Ministry website indicates that such verification compliance will only be conducted if there are multiple errors or data anomalies in a report, or if a company fails to report, for example, a joint venture (NRCan, 2020). As such, NRCan uses a ‘risk-based approach’, where companies found to be at higher risk of non-compliance may be asked for further verification, rather than systematic oversight of each report. Accordingly, the purpose of the ESTMA is to act as a deterrent against corruption, explained Elkatirina Ohandjanian from Justice Canada (Senate of Canada, 2014), with little guaranteed oversight, where reporting operates as a form of social reassurance in an under-regulated industry. The limitations of this form of industrial audit on increasing accountability were succinctly articulated by Senator Ringuette in these debates:

You may have serious evidence that the money spent within Canada by the extraction company or outside of Canada is being used in a corrupt manner, but this entire piece of proposed legislation has no policing. There’s no way you can go elsewhere in the world to see if Canadian company X is providing any kind of funding to a government entity” (ibid).

Still, representatives from NRCan, PWYP and the MAC agreed on the merit of the reporting scheme to deter corruption overall. Chalmers of the MAC noted that ‘making sure this information sees the light of day’ is a ‘business imperative’ since it is more difficult for companies to communicate the benefit of resource extraction to communities when money is misspent by governments. For Pearson from NRCan, and Woodside from PWYP, the merit of the reporting scheme lies in “making this information public...to provide to those who want to hold governments to account the information they need to do so” (Pearson, Senate of Canada, 2014). Both noted that it is civil society organizations that are committed to seeing this information disclosed by companies operating in their countries (Woodside, ibid), and that such organizations would be monitoring disclosures and holding their governments to account (Pearson, bid). NRCan considers requests by parties to further examine a report if there are ‘reasonable grounds to believe that the report merits further scrutiny’, according to their website (NRCan, 2020), though there is no formal legal recourse by third parties themselves. The penalties imposed for non-disclosure however are minimal for larger firms (ESTMA, Article 24(3)).

As we discuss in specific examples below, the ESTMA also lacks systematized reporting requirements for firms which undermines the ability of civil society organizations to monitor and hold governments accountable based on company disclosures. The precise content for inclusion in ESTMA reports is not spelled out in the Act, but instead outlined in the Guidance document first published by the Ministry of Natural Resources in 2016 in which industry was highly influential (interview 2017). To align with similar legislation in the US and UK, outlining reporting requirements in accompanying rules, such as the ESTMA Guidance, makes the content easier to amend in future (Senate of Canada, 2014). PWYP Canada expressed concern that the lack of detail could limit the ability of citizens, communities, journalists and parliamentarians to interpret information project-by-project, particularly since the regulations give the Governor in Council the power to grant exemptions on reporting: “Citizens, communities, journalists and parliamentarians cannot use this information to hold their governments to account if they cannot access disaggregated payment information on a project-level basis. …our perspective is that the legislation needs to be strengthened to reference the type of disaggregation that will be required and to include a main date to require project-level reporting” (ibid). Ultimately, PWYP was successful in bringing about project based disaggregation. As we discuss below, however, the project level information is not disaggregated by community requiring analysts to compare and make assumptions about firm reporting disclosed on a governmental and project level basis; a tedious undertaking.

The final version of the legislation also increased discretionary powers for exemptions to standardized reporting through the inclusion of a substitution provision (ESTMA, Article 10). This provision enables the Minister of NRCan to accept reports employed in another jurisdiction as acceptable substitutes for those set out in section 9 of the Act (ESTMA, Article 10(1)), so long as the entity provides a copy to the Minister within the other jurisdiction’s specified reporting period (ESTMA, Article 10(2)). This amendment reflects concerns expressed in the oral testimony of the CAPP (Senate of Canada, 2014a), and a written report submitted by sections of the Canadian Bar Association, wherein both argue that preparing a second report to fulfill reporting requirements under the ESTMA would create an administrative burden for companies already filing a report in a foreign jurisdiction (CBA, 2014). In particular, the CAPP noted that there are frequently confidentiality clauses between extractive companies and foreign governments concerning payments to state institutions; therefore stringent reporting conditions could force reporting entities to choose between complying with Canadian or foreign legislation (Senate of Canada, 2014a). Consequently the standardization clause incorporated industry’s preferences while also creating paid work for legal counsel. Although standardization exceptions on extractive company reporting across different jurisdictions lessen the administrative burden for business entities, they make evaluating the results for civil society organizations more difficult. This dilutes the pretext that such legislation empowers civil society organizations to access and interpret information disclosed by companies as a means of exacting government accountability. Missing in the debates in the House and Senate on the bill, and in the legislation itself, are provisions for civil society organizations to hold extractive entities themselves to account.

A number of exclusions from the ESTMA are also notable. The pipeline and processing sectors are not subject to the ESTMA, an exclusion these sectors sought early in the negotiations in the RRTWG that led to the legislation. Yet given their much larger spatial and indeed material footprint in Canada, pipeline projects have been domestically highly controversial in recent years, particularly in their economic relationships with communities - including Indigenous Impact Benefit Agreements - along the extension of their operations. Further, only extractive and not exploratory firms are subject to ESTMA’s terms. This

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5 Author’s interview, key informant, 2017.
may facilitate partnerships between firms engaging in each of exploration and extraction, which allows the former to conceal problematic cash transfers associated with securing a contract under the category of exploration, a possibility we discuss further below in relation to Africa Oil Corporation. Transparency in various forms of Impact Benefit Agreements, for instance, could be highly controversial in the context of broader divide and rule policies pursued by the oil and gas industry (Caine and Krogman, 2010; Zalik, 2015; Pasternak, 2020).

4. Exploring particular firms and data

To further explore the above mentioned attributes of the ESTMA, we turn to a number of examples of current ESTMA reporting. An exploration of examples of Canadian extractive firms (including Canada Resources, DeBeers and Africa Oil Corporation), and their relationship to the ESTMA reporting requirements, reveals the contradictions we have discussed above concerning ESTMA reporting as audit culture transparency. It is also suggestive for the way in which the marker of corruption is employed in the Global South while the absence of full disclosure by firms is protected as corporate exclusion. This section situates these examples within the context of three aspects of audit culture transparency outlined above: little or no oversight by Canadian government bodies responsible for collecting data; limited standardization of reporting among firms; and the failure of transparency regulations to address underlying societal concerns about human rights violations and environmental degradation.

Although ESTMA reporting is meant to achieve increased transparency and accountability, there is no direct enforcement mechanism to ensure that reporting mandates are met. Rather, Natural Resources Canada only mandates an independent audit when a report is submitted with numerous unrectified errors, and the reporting entity is thus deemed to be at higher risk of non-compliance. This means that in the vast majority of cases, reporting becomes an end in itself; a concern echoed in Senate Committee debates on the proposed ESTMA. During the Senate Committee debates, both the government and Publish What You Pay anticipated that civil society organizations would play a key role in reviewing corporate reporting made public under the ESTMA. Civil society oversight was anticipated to hold foreign governments to account, rather than the extractive firms themselves. In practice, however, public use of ESTMA reports is constrained by a series of exclusions, blocked access to data, and exceptions to standardized reporting requirements, as well as by the often shifting and overlapping ownership structure of extractive activities.

4.1. Exclusion of extractive adjacent activities from reporting requirements

First, the exclusion of pipeline, processing and exploratory firms under the ESTMA means that only the extractive subsector of oil, gas and mineral production is subject to reporting requirements. What is notable is that the exclusion of these activities from the ESTMA allows firms to divide up potentially controversial activities into excluded sector companies in order to shield them from scrutiny. For example, Africa Oil Corporation - part of the Lundin Group of companies - has recently acquired major offshore holdings in Nigeria and Guyana including both production and exploratory leases. Offshore holdings in both countries have been under considerable scrutiny for issues of tax avoidance and corruption. The manner in which sectoral activities are divided, however, has protected them from further analysis under the ESTMA since exploration is exempt. In addition, Africa Oil Corporation's acquisition involves the purchase of a PetroBras stake in the project, but was initially facilitated by a consortium headed by private oil trading firm Vitol whose dealings in Nigeria and elsewhere have been the subject of scrutiny for non-disclosure (SOMO forthcoming). As Vitol is a private firm that is not headquartered in Canada, the business dealings that preceded and led up to the acquisition are unlikely to be subject to ESTMA reporting.

In Guyana, Africa Oil Corporation's partnership with Eco Atlantic, an exploratory firm headquartered in the US, similarly indicates that payments made around acquisition will not be subject to ESTMA. Yet, a review of board and management structure reveals the close connection between these firms. The CEO of Africa Oil corporation, Keith Hill, sits on the Eco Atlantic board as an Independent Director but as a non-Canadian firm Eco Atlantic is not subject to ESTMA, and with changes to section 1504 of the Dodd Frank Act is not subject to disclosure in the US either (Ostfeld, 2020). The Africa Oil Corporation case is thus suggestive of the narrow role of ESTMA in strengthening global financial transparency in extractive industry.

In addition to those activities excluded under the ESTMA, reports from extractive firms normally subject to the ESTMA may become publicly unavailable under specific exclusions. Reporting by Tahoe Resources is an example of this. Tahoe Resources was founded by former Goldcorp CEO Kevin McArthur and is headquartered in Reno Nevada (PWYP, 2018); its Canadian entity is registered to its lawyer's office McMillan LLP. Tahoe is subject to ESTMA reporting requirements, and its 2016 and 2017 reports are publicly available.

Tahoe's solely-owned Guatemalan subsidiary, Minera San Rafael, operated a highly contentious project in Guatemala, the El Escobal mine, which was previously owned by Goldcorp. In 2014, claims were brought against the El Escobal project to British Columbia (B.C.) courts in a civil case by Guatemalan protesters seriously injured when the firm’s security shot unarmed community protesters at its gates in 2013 (Weisbart, 2018). The El Escobal project has also been the subject of a Publish What You Pay (2018) case study, which notably had to be released following complaints from the firm that the initial PWYP report did not use language they consider acceptable to describe charges against them. A retraction published by PWYP states that its reporting should have used the term 'alleged' to describe that the firm's security shot protesters. Following a B.C. Court of Appeal's decision which found that Canada was the preferred forum to hear the claims of Guatemalan protesters given the risks posed to plaintiffs if the case were tried in Guatemala, and the subsequent refusal in June 2017 by the Supreme Court of Canada to hear Tahoe's appeal of that decision, the path was cleared to try the case in Canada. From this time, Tahoe's ESTMA reports would no longer be available on ESTMA's public database given that they were subject to legal proceedings. Although the legal proceedings pertain to Guatemala, no Tahoe report is available for 2018 on any of its operations. In 2018, Tahoe Resources announced that it was to be acquired by Vancouver based Pan American Silver (Canadian Press, 2018).

After the PWYP case study of El Escobal was completed, and in the midst of the lawsuit delineated above, the Pan American Silver/Tahoe acquisition was completed in February 2019, making Pan American Silver the world's largest silver mining firm. On July 30, 2019, Pan American Silver reached a settlement with the Guatemalan plaintiffs, though the mine remains closed pending a consultation process with the local Xinka community. Pan American Silver ESTMA reporting is available for 2016 through 2018, and as of July 2020 the Pan American Silver report indicates payments to the Guatemalan government (taxes) and the municipality of San Rafael Las Flores (royalties). The El Escobal mine (Earth Works, 2019) and Pan American Silver (Environmental Justice Atlas, 2020) are subject to considerable ongoing criticism from civil society (Moore, 2020); ESTMA reporting does not address these crucial concerns.

4.2. Financial categorization and constraints on public interpretation and monitoring

Second, public access to data is limited by the manner in which financial transfers are reported, which can make their interpretation difficult. For example, according to PWYP’s (2018) study of the El Escobal project, two types of royalties were paid: statutory royalties to the Guatemalan government and the San Flores municipality, and
voluntary royalties paid to both the government and affected communities in the area of the mine. The voluntary royalty paid to municipalities ranges from 1 percent split between three communities and 1.5 percent owed to one of them. The voluntary royalty is not required on sales of silver at a price lower than $16/ounce. PWYP explains that since the company does not disclose the voluntary royalty paid, PWYP cannot ascertain how much of the royalty payment disclosed in the ESTMA report was paid due to the voluntary, as opposed to the statutory, royalty. Important here is that the dispute over the El Escobal mine revolves considerably around the exclusion of the Indigenous Xinka, who have consistently opposed its development, from the consultation process (Earthworks, 2019). The affected municipalities, in a form sharing parallels with dynamics around industry relationships with Indigenous Band Councils and Indigenous Hereditary Chiefs in Canada through Impact Benefit Agreements (Caine and Krogman, 2010; Scott, 2020), have received this voluntary royalty in principle as part of the company's 'support' to communities, providing a superficial means for a firm to claim a 'social license to operate'. As per the Canadian context, the acceptance of the royalty has also created the conditions for divide and rule, with communities ousting leadership that had accepted these payments (Maritimes-Canada Breaking the Silence Network et al., 2015), and fewer mayors accepting the payment than Tahoe had publicly announced.\(^6\) As a recent legal case in Canada demonstrates (Axmann and Cassidy, 2018), payments for community development subject to legal privilege have been used to argue against affected communities (in this case an Indigenous community's) claims for damages from resource projects. This, along with other forms of excluded data, can be understood as a form of what Szabłowski (2019) calls 'legal enclosure'. That is, blocking access to data on (in this case voluntary) royalties closes off potential spaces of legal recourse, and inhibits residents of extractive territories from seeking justice from resource firms.

4.3. Limited standardization across international jurisdictions and firms

Third, due to ESTMA's substitution provisions, there is limited standardization of reporting requirements among firms. As discussed above, this enables companies operating in multiple jurisdictions to file reports in other formats, if approved by the Minister. A lack of standardization makes it difficult to evaluate results in divergent spatial and national contexts, or to make comparisons between the kinds of payments that firms make to national or local governments. The case of the De Beers Victor mine near Attawapiskat is suggestive of the implications for reporting in varied jurisdictions. De Beers' ESTMA reports consist of filings that Anglo American – DeBeers’ majority owner – made elsewhere. The cover letters to the report indicate that it was prepared for the United Kingdom, and one assumes this reporting was required by the UK to comply with the EU Transparency Directive. The ESTMA cover letter does not specify where the UK reporting is posted or available and thus cross-referencing of the data is not straightforward and requires the user have specialized knowledge of ESTMA and other legislative guidelines and reporting locations. As the Victor Mine was closed in May 2019, payments arising from clean-up or remediation concerns may be excluded from reporting. Again such exceptions to reporting requirements lessen the administrative burden on extractive firms, but undermine the ability of civil society organizations to monitor and hold governments accountable based on company disclosures.

4.4. Technical data detracts attention from social and environmental violence and broader systemic injustice

Lastly, ESTMA reporting produces highly technical information, but does not address the underlying concerns regarding social violations and wealth extraction. This is consonant with a Gramscian understanding of civil society's role in undergirding elite hegemony, wherein the development of transparency regulations and codes over the extractive industry serve as private initiatives to garner ongoing consent (Cox, 1999). MAC, indeed, identified ESTMA reporting as a means to enhance extractive company standing in local communities. Division between communities is a frequent outcome of extractive sector activity, where blame is shifted away from firms and to neighboring settlements. Some scholarship suggests that Attawapiskat has benefited more than surrounding communities from the Victor Mine's presence (Whitelaw et al., 2009), and the payments themselves – disclosed as of 2016 when ESTMA's application to Indigenous government took effect – have the potential to lead to intra-community conflict given the significant discrepancy in amounts paid to some communities over others. No explanation is available in the reported information for this variance. While it likely arises from the relative assessment of 'impact' associated with various First Nations Impact Benefit Agreements, this is not specified. Similarly the El Escobal case indicates that ESTMA reporting could increase conflict amongst local communities affected by extraction where there are internal tensions over royalty payments. In this way, the ESTMA may serve the interests of extractive firms by increasing their reputation in contrast to a perceived deficit of transparency in local community governance. This does little to protect the interests of local communities, while deepening intra-community tensions. The challenges civil society faces in navigating this data obscure more fundamental controversies over physical and ecological violence.

Both the DeBeers’ Victor Mine and Tahoe Resources’ El Escobal project raise questions around the ESTMA’s ability to address socio-environmental justice particularly around private security contracting and ecological disclosure. The Victor Mine has been highly contentious given its siting at an Indigenous community which has faced a major drinking water crisis. It is a quintessential example of disputes over questions of environmental justice in Ontario’s Ring of Fire region. The Victor Mine is the subject of a legal case in Ontario for mercury contamination, brought by the Wildlands League – formerly Canadian Parks and Wilderness. The case has been in Ontario provincial courts since 2017 and concerns the mine’s failure to report data on mercury monitoring. In both the Victor Mine and El Escobal cases, ESTMA reporting has not assisted in identifying or addressing human rights and environmental violations. Rather, legal proceedings on these violations served to diminish ESTMA reporting requirements. While the scope of the ESTMA is arguably confined to financial transparency, this legislation was created in the context of a call to end human rights abuses by Canadian extractive companies. The fact that the legislation, guidance document and reporting requirements contain little that could be used to monitor, or advocate for, human rights and environmental protections is indicative of the way in which the final product was reshaped to protect – and was in fact strongly supported by – the interests of industry.

The relations described in the aforementioned examples of firms required to report on the ESTMA are not exceptional. They offer an example of a number of the broader financial, judicial, and environmental regulatory structures excluded under the legislation and guidance provisions but which should be central to any form of substantive transparency. They are suggestive for the ESTMA as a form of broader audit culture within the extractive industry where highly technical information is produced with little guaranteed oversight, and limited standardization of reporting. Rather, reporting serves as a form of social reassurance in an under-regulated industry, while the drawbacks of this reporting structure inhibit civil society organizations from holding reporting firms accountable.

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\(^6\) See p. 11 of the disclosure complaint filed by Shin Imai for the Justice and Corporate Accountability Project at https://justice-project.org/wp-content/uploads/2017/07/final-bcsc-disclosure-complaint-re-tahoe-may-15-2017.pdf.
5. Conclusion

As we conclude this paper, the role of systemic racism in the broader socio-economic system is receiving long overdue attention in mainstream media. This attention sheds light on how the broader contours of corruption discourse operate in a form that ‘blames the victim’ for an industrial system that has accumulated capital through the oppression of racialized peoples. The global extractive industry is a long standing profiteer of this system (Rodney, 1972/2018).

Our analysis of legislative debates and specific reporting examples herein indicates that the ESTMA in Canada offers some terrain to critique and gain access to the inner workings of financial capitalism which protect corporate privacy. Yet the broader systemic violence upon which the industry is built remains shielded from view, with scrutiny of minutiae drawing attention away from a broader context of substantive injustice wherein the wealth extracted from specific lands - notably those of Indigenous peoples - entails the overall impoverishment of those who reside there.

The Canadian implementation of ESTMA shares attributes with the global implementation of EITI, in particular where more stringent requirements than those of the EITI have been implemented through civil society pressures, as per the example of Nigeria. These create space for further research on corporate activity that by necessity requires detective work. But despite the ways in which access to such corporate information may ‘lift the veil’ on secrecy, corporate disclosure most pertinent to the work of human rights advocates is not proffered through this legislation. As argued by Bratsis (2014) with regard to anti-corruption discourse generally, the broader context of transparency discourse can serve to justify Northern intervention into economic activities of global South governments and Indigenous nations by suggesting mismanagement of funds.

On the basis of the above analysis we see that ESTMA’s terms prompt reporting by firms that may indeed be useful to the advocacy community and thus broader struggles for equality. Yet the patchy additional documentation it makes available to those affected by extractive sector activities requires inordinate analysis from corporate monitors, producing information that is just as notable for its absences as what it reveals (Weisbart 2018; see also Watts and Zalik, this issue). Above we identified key limitations to the ESTMA that may render it an example of ‘audit culture transparency’ (Gilbert and Zalik 2019) – where limited oversight by government bodies means that reporting becomes an end in itself, and where financial requirements for corporate risk management trump substantive social regulation and disclosure. In the context of particular examples of ESTMA reporting, the problems entail: i) the exclusion of extractive adjacent activities from ESTMA mandated reporting; ii) the employ of financial categories that act as obstacles and exclusion to public access and interpretation of data; iii) limited standardization across international reporting jurisdictions and between parent/subsidiary firms; and iv) the production of technical data that distracts attention from more fundamental questions of human and environmental rights violations and systemic injustice. Ultimately, the ESTMA offers limited leverage to substantively address the ecological and human cost of extractive industry.

Including more systematized disclosure of information that is publicly available in ESTMA reporting – such as the frequently changing ownership structure among firms, and overlapping relationships between board and management – is a key area wherein the value of actual ESTMA data for substantive transparency might be improved. Such reporting would begin to respond to civil society demands for clear beneficial ownership information, although given the centrality of secrecy to global corporate management (Bracking, 2012), much more is required. The 2016 Panama Papers disclosures demonstrated the extent to which offshore havens employ ownership systems to exploit taxation and regulation. Beneficial ownership disclosure is a demand of the Publish What You Pay coalition internationally and in Canada (Johnson, 2017), an issue on which the Canadian government is now making legislative overtures (Lim, 2020). Nevertheless, the Trudeau government’s lobbying scandal over prosecution of the firm SNC La-valin and controversial purchase of the TransMountain pipeline demonstrate the extent to which corporate elites remain central to state decision-making post-Harper (Luukas 2019), a long-standing critique among political economists (Sklaire, 2001; Strange, 1996). Indeed, the most significant gaps in the ESTMA data are privileged materials that firms are not required to disclose. In the context of proposed and implemented Canadian and Alberta government bailouts of the broader mining, oil and gas pipeline sectors (Riley, 2020), the dilution of environmental monitoring (Weber, 2020), Ontario’s declaring mining essential during the COVID-19 pandemic, and CEO stock sell-offs prior to the Covid lockdown, calls for substantive corporate disclosure are eclipsed by global corporate profiteering and its attendant racist inequalities (Amin, 1990/2011). Returning to the questions of systemic racism as a feature in the repression of racialized and Indigenous peoples and of nature exporting (Southern) states, we recall once more that corruption (and transparency as an antidote) may serve as a pathologizing trope and distraction. The time has come to seek substantive reparations (Nwajiaku et al., 2020), from the industrial/economic actors who have profited from global structural injustice.

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