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September 12, 2025

Department of Finance Canada
90 Elgin Street
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Via email: Consultation-Legislation@fin.gc.ca

RE: Legislation to Enhance the CRA's Audit Powers

Dear Sir or Madam:

Draft legislation released August 15, 2025 (the "Draft Legislation"), contains amended legislation to implement proposed amendments to the Income Tax Act (the "ITA") first announced in Budget 2024 (the "Budget Proposals"). The Budget Proposals would enhance the capacity of the Canada Revenue Agency ("CRA") to compel production of information and more effectively audit taxpayers who refuse to comply with CRA audit queries and information requirements (hereinafter, collectively, "information requirements").

In particular, the proposals contained in the Draft Legislation would: (i) impose a new penalty upon the issuance of a compliance order under subsection 231.7 (the "Penalty Proposal"); (ii) create a new notice of non-compliance ("NNC") regime (the "Notice Proposal"); (iii) toll the running of limitation periods in certain circumstances (the "Tolling Proposal"); (iv) create a power to require that responses to any requirement or notice be provided under oath or affirmation (whether orally or in writing) (the "Oath Proposal"), and (v) amend subsections 231.1(1), 231.2(1) and paragraph 231.2(3)(b) to authorize the CRA to collect information on behalf of foreign governments pursuant to tax treaties or "listed international agreements" as defined in subsection 248(1) (collectively, the "Information Exchange Proposal"). We refer to these various proposed new provisions of the ITA collectively as the "Revised Proposals."

Tax Executives Institute, Inc. ("TEI") submitted comments on the original Budget Proposals in a letter dated May 29, 2024 (the "2024 Letter") and subsequently discussed those comments with the Department of Finance.[1]

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[1] The 2024 Letter is available at https://www.tei.org/advocacy/submissions/canadian-budget-2024-expanded-cra-audit-powers-tei-comments.

While TEI understands and supports the Government's effort to enhance "the efficiency and effectiveness of tax audits," we had serious concerns about the premises underpinning the Budget Proposals and, consequently, the proposals based thereon.

We explained in the 2024 Letter that some of the Budget Proposals would infringe rights protected under the Canadian Charter of Rights and Freedoms (the "Charter"). Further, we expressed concerns that the Budget Proposals would at times be ineffective in achieving their purpose and in many instances would delay the existing audit process and unduly tax the resources of the Federal Court. While the Draft Legislation addresses some of our concerns, particularly regarding the Tolling Proposal, we continue to have significant concerns regarding the constitutionality and effectiveness of the Penalty Proposal, the Notice Proposal, and the Oath Proposal. We also remain concerned that these proposals will, whatever their intent, in practice further delay and undermine tax audit effectiveness, contrary to the overarching objective of the Budget and Revised Proposals.

Finally, the Information Exchange Proposal would allow foreign governments – including those with questionable human rights records – to compel Canadian companies to turn over personal information about their customers, with little if any safeguards about how that information will be used. This is a serious issue for our members and, again, raises significant Charter concerns.

About TEI

TEI was founded in 1944 to serve the professional needs of in-house tax professionals.[2] Today, the organization has 55 chapters across North and South America, Europe the Middle East & Africa ("EMEA"), and Asia, including four chapters in Canada. Our over 6,000 members represent 2,800 of the world's leading companies, many of which either are resident or do business in Canada. Over 15% of TEI's membership comprises tax professionals who work for Canadian businesses in a variety of industries across the country. The following comments and recommendations reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

TEI Comments

1. The Tolling Proposals

We commend the government for substantially narrowing the Tolling Proposal in new subsection 231.8(1). The new subsection largely addresses the Tolling Proposals concerns expressed in our 2024 Letter.

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2 TEI is organized under the Not-For-Profit Corporation Law of the State of New York and is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

2. The Penalty Proposals

The revised Penalty Proposals appear to exclude third party information requirements from their application and so taxpayers would only be subject to a notice of non-compliance penalty for their own taxes.

We commend the government for this change. We also commend the government for addressing our concerns with the Penalty Proposals' (and the Notice Proposals') constitutionality as they apply legal privilege disputes. A taxpayer's reasonable belief that the information requested by the CRA was protected by the solicitor-client privilege will exclude the taxpayer's failure to turn over the information being subject to the Penalty Proposals, at least in theory. We are concerned, however, by how this exclusion will work in practice. Taxpayers base privilege claim assertions on their advisors' legal advice. Is the expectation that to claim this exclusion, taxpayers must share their privileged legal advice with the Minister (which is obviously untenable) or that a judge will determine the taxpayer's reasonable belief that the underlying information was protected by the solicitor-client privilege? The Revised Proposals should address these questions.

Finance's commendable change to the Penalty Proposals does not, however, address many circumstances where the threat of penalties regarding a dispute over the legality of an information requirement would result in an unreasonable search and seizure under section 8 of the Charter. Our 2024 Letter noted numerous circumstances under which a taxpayer may lawfully refuse to comply with a CRA information requirement and solicitor-client privilege is merely one. Making taxpayers liable for substantial penalties for reasonably, if unsuccessfully, asserting their rights vis-à-vis the CRA deters taxpayers from asserting their rights and coerces taxpayers into acceding to unlawful CRA information requirements, again violating their rights under section 8 of the Charter.

The changes to the Penalty Proposals to provide the Minister with (i) discretion to levy a penalty less than 10% of the taxpayer's taxable income for the relevant year and (ii) a mandate to vary or vacate a penalty imposed by the Minister, if the Minister determines that the penalty previously imposed by the Minister was "disproportionate or unfair," do not address the potential violation of taxpayers' Charter rights. Indeed, the Minister already has the discretion to waive penalties in appropriate circumstances, but taxpayers cannot rely on Ministerial discretion or the possibility that the Minister might consider the imposition of a penalty unfair or disproportionate when deciding whether to comply with potentially unlawful information requirements. The constitutional concern is that the threat of penalties may coerce taxpayers into responding to unlawful inquiries – that the Minister may not to follow through on the threat does not alleviate the concern.

The amendments to the Penalty Provisions also do not meaningfully address their penal nature, which would trigger section 11 of the Charter. The revised Penalty Provisions still contemplate penalties exceeding, by orders of magnitude, the maximum criminal fine under section 238(1) of the ITA for failing to comply with CRA information requirements. In practice, fines imposed by the courts on persons who criminally fail to comply with information requirements are far less than the penalties contemplated by the Penalty Proposals.[3] We fail to understand how a taxpayer can be subject to a civil penalty that is greater, potentially significantly greater, than that imposed for a criminal conviction for the same conduct. In fact, since the Penalty Provisions, in their current form, potentially apply to taxpayers who genuinely dispute the legality of a CRA information requirement and who therefore lack an intent to not comply with the requirement. In other words, the Penalty Provisions would impose greater penalties on taxpayers engaged in less blameworthy conduct than those imposed on taxpayers who are criminally convicted under section 238(1).

Moreover, the proposed requirement for the Minister to vacate or vary a penalty that is disproportionate or unfair does not address the constitutional issue. As a starting point, any administrative penalty that would be greater a fine that could be imposed on a criminal conviction for the same act is on its face to be disproportionate and unfair, given the greater moral blameworthiness required for a criminal conviction. In addition, given that the penalties are penal, we fail to see how providing a discretion to the Minister to impose a lesser penalty addresses the absence of Charter mandated procedural protections for penal penalties.

The Revised Proposals also do not address the many technical problems identified in our 2024 Letter. As noted in the letter, the Penalty Proposals:

(a) Apply differently to different legal entities (e.g., partnerships are effectively excluded from the rules).

(b) Penalize identical misconduct differently based on arbitrary and irrelevant factors. For example, a taxpayer who has no tax payable for a year, as a result of a loss carry-forward from a prior year will not be subject to a penalty for non-compliance, while an otherwise identical taxpayer, with no loss-carry forward could be subject to a penalty for identical non-compliance because the penalty is based on the percentage of tax due. There is no rational basis for penalizing one taxpayer and not the other in these circumstances.

(c) Have no impact on taxpayers who under-report or evade tax such that they report no tax payable for the year (or, under the revised Penalty Proposals tax payable for the

[3] For example, in the recent case of *R. v. Holsworth* (Prov Ct. of British Columbia, Nelson Docket 26418-1 & 26419-1, dated Oct 6, 2022), *aff'd* 2023 BCSC 1041, the taxpayer was convicted of four counts of failing to comply with a notice of requirement to file various corporate tax returns. He was sentenced to a global $4,000 fine for all counts. Similarly, in *R. v. Steeves* (Prov Ct. of British Columbia, Salmon Arm Registry 23302 and 23303, dated August 28, 2018), *aff'd* 2019 BCSC 1471, the taxpayer was convicted of 7 counts of failing to comply with a Notice of Requirement to file various personal and trust tax returns. She was sentenced to a fine of $1000 – the minimum fine – on each count. Based on our review of the caselaw, such sentences are common.

> year less than $50,000). The is, the taxpayers most likely to not comply with CRA information requirements. Indeed, the practical implication of the new exclusion for taxpayers having less than $50,000 tax payable for the year is that a large taxpayer who has a bona fide dispute with the CRA over the validity of an information requirement would be potentially subject to a far greater penalty than a taxpayer who underreported millions of dollars of income for the year, such that their tax payable for the year was less than $50,000 and who vexatiously refuses to comply with CRA information requirements. Such inconsistencies make a mockery of the government's rationale for the Penalty Proposals and bring the administration of the tax system into disrepute.

As we noted in the 2024 Letter, TEI supports the government's desire to sanction non-compliant taxpayers, but it must do so in a coherent and constitutionally compliant manner. Penalizing taxpayers for legitimately asserting their rights against the CRA does not accomplish that objective. The proper approach to achieving the government's objective is to: (i) provide the Federal Courts (or, as discussed below, the Tax Court of Canada) with sufficient resources to expeditiously resolve disputes over CRA information requirements, which would expedite audits and discourage frivolous objections to CRA information requirements, and (ii) significantly increase the range of potential sanctions for taxpayers who fail to comply with requirements once such disputes are resolved and the courts issue a compliance order. The Federal Court's Rules of Procedure should be amended so the Court can sanction taxpayers who make frivolous or vexatious arguments in compliance proceedings in lieu of giving the Minister the power to punish taxpayers advancing bona fide, if unsuccessful, arguments. This would better accomplish the government's objectives while respecting constitutional rights.

3. The Notice Proposal

Our concerns regarding the Penalty Proposal apply equally to the Notice Proposal. The lengthy and complicated appeal process, coupled with longstanding delays in the Federal Court (which will be aggravated by the Revised Proposals), means that any effort to assert a taxpayer's rights vis-à-vis the CRA under the Notice Proposal will result in taxpayers accruing the maximum possible penalty along with significant legal expenses.[4] This will deter taxpayers – particularly small or unsophisticated taxpayers for whom a $25,000 penalty is likely to be prohibitive – from asserting their rights against the CRA. A penalty regime which discourages taxpayers from contesting

[4] If it takes more than 500 days to resolve an NNC dispute the maximum penalty will accrue. The Notice Proposal contemplates that the initial administrative appeal may not be resolved until 270 days after the CRA issues an NNC. Given the further 90 day appeal period to the Federal Court and the corresponding delays in obtaining hearings at the Court, it is difficult to imagine any circumstance were an appeal could be fully heard without accruing the maximum penalty.

potentially unlawful CRA requirements will result in unreasonable searches and seizures under section 8 of the Charter.

Due to the lengthy and complicated appeal process, the Notice Proposal would subject any taxpayer contesting an information requirement in good faith to a substantial automatic penalty. This penalty would equal the maximum fine imposed for criminal non-compliance with an information requirement ($25,000), without any of the procedural protections afforded to persons accused of a criminal offence. This penalty is clearly penal in nature and violates section 11 of the Charter. Moreover, while the revised Penalty Proposal provides a duty not to impose a penalty that is unfair or disproportionate, no such duty exists under the Notice Proposal. Therefore, the Notice Proposal permits the imposition of unfair and disproportionate penalties. This is untenable.

The revised Penalty Proposal also includes an exclusion for privileged documentation disputes. The revised Notice Proposal, however, does not adequately address the same concerns with respect to privileged documents. Proposed subsection 231.9(13) provides that no penalty should be imposed if a reason for the taxpayer's information requirement noncompliance is a reasonable belief that the information sought was protected by solicitor-client privilege. However, we do not understand how this defence would work procedurally because the Notice Proposal provides no mechanism to obtain a judicial determination regarding the correctness of a privilege claims. This is in contrast to the existing compliance proceedings regime under subsection 231.7 on which the Penalty Proposal is based. A fundamental problem with the Notice Proposal is that it does not afford taxpayers an opportunity to obtain a final determination of the correctness of their refusal to comply with an information requirement, it merely allows taxpayers to administratively challenge the reasonableness of the issuance of an NNC.

Similarly, on appeal to the Federal Court, proposed subsection 231.9(9) merely permits a judge to assess the reasonableness of the Minister's decision not to grant the taxpayer's administrative appeal, it does not grant jurisdiction to assess the correctness of the taxpayer's claim. In a dispute over privilege, the Minister will never be allowed to review the relevant document, so we fail to understand how the Minister can assess the reasonableness of a taxpayer's privilege claim, or how a court can assess the reasonableness of the Minister's assessment that the document was not privileged. There is no opportunity to assess either whether the relevant document is in fact privileged or, if not, whether the taxpayer's belief that it was privileged was reasonable. Simply put the proposed relief for disputes over confidentiality does not work because the Notice Proposal does not provide an opportunity for a judicial determination whether the taxpayer's position is correct.

Moreover, as noted in the 2024 Letter and noted by other stakeholders,[5] this is a broader problem with the Notice Proposal's appeal process. In contrast with compliance proceedings under section 231.7, the Notice Proposal does not contemplate a judicial (or administrative) review of whether the taxpayer correctly refused to comply with an information requirement. Instead, the Notice Proposal merely provides opportunities to administratively review the reasonableness of the Minister's decision to issue the NNC, and to have judicial review of the reasonableness of the Minister's decision in that administrative appeal. This is profoundly unfair because it imposes penalties where the Minister's determination, while perhaps reasonable, is incorrect, thus punishing taxpayers for correctly asserting their rights. This raises further doubts about the constitutional viability of this proposal. Further, a reasonableness standard for judicial review of the Minister's decisions is completely inappropriate in circumstances where the issue is not the Minister's determination of a factual question (Did the taxpayer comply with an information requirement?) but the Minister's interpretation of a legal question (Did the taxpayer have a legal obligation to comply with the information requirement? Was the information requirement lawful?).

The Penalty Proposals expressly excludes third party information requirements from their application. The Revised Notice Proposal, in contrast, applies to third party information requirements. In particular, the Notice Proposal imposes penalties on the person described in proposed subsection 231.9(1), but subsection 231.9(2) contemplates the issuance of an NNC to a person in respect of each taxation year of the taxpayer under review, i.e., that the person who receives the notice of non-compliance (and is subject to the penalty) is not the taxpayer under review. It is not clear to us whether third party requirements were intended to be excluded from the application of this rule consistent with the Penalty Proposal – if so, the exclusion is not effective. If this is an intended application of the NNC regime, this is a particular concern for large organizations commonly subject to third party requirements in respect of their clients (e.g., online sales platforms, banks, insurance companies, securities dealers, accounting firms) who are often subject to legal or professional obligations to protect the privacy of their client's information. In such cases, where taxpayers in good faith contest the legality of a CRA requirement on behalf of their clients, consistent with their legal and professional obligations to client confidentiality, imposing a penalty is unjust.

The Notice Proposal should be eliminated because it does nothing to resolve legitimate disputes between CRA and taxpayers. Worse, it provides taxpayers who frivolously refuse to comply with information requirements with further opportunities to delay and squander limited judicial and CRA resources. If the government insists on pursuing the Notice Proposal, the 2024 Letter contains specific proposals to mitigate these concerns, including that:

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[5] See, for example, the submission of The Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada, dated September 11, 2024 at pages 7 and 8: https://www.cba.org/getmedia/aac294a3-9dff-443c-b161-682804c2c5ca/24-36-eng.pdf.

(a) Penalties only accrue following the final determination (whether by the Minister or a court) that the taxpayer must (on a correctness standard) respond to an information requirement. This would protect against the effective coercion of taxpayers into "waiving" their Charter rights against unreasonable search and seizures by disclosing information to avoid the accrual of penalties.

(b) Any administrative and judicial review of a NNC should assess the correctness of the taxpayer's position that it is not required to respond to the requirement, rather than the reasonableness of the Minister's decision to issue an NNC. Such an approach will avoid duplicative litigation and inconsistent decisions at the Federal Court and, more importantly, uphold the rule of law.

In addition, as noted above, the revised Notice Proposal does not properly deal with disputes over solicitor-client privileged. Absent some mechanism for a substantive resolution of such disputes, perhaps by providing both taxpayers and the CRA a right to obtain a judicial determination regarding the merits of their respective positions, the proposed language in the revised Notice Proposals is not viable.

Finally, any amendment to the Notice Proposal should ensure taxpayers are not subject to greater administrative penalties for non-compliance with an information requirement then would be imposed for a criminal conviction for such non-compliance. The current regime does not contain any such protection.

4. The Oath Proposal

The Draft Legislation does not address any of the concerns we raised with respect to the Oath Proposal in the 2024 Letter.[6] The Oath Proposal is unnecessary, ineffective, and likely to delay, rather than accelerate, CRA audits. Further, it provides a pathway for the CRA to improperly effect discovery during the audit process without the procedural protections afforded by the Tax Court of Canada Rules and in a way that improperly circumvents the cost consequences to the government when it loses a case. The Oath Proposal should be abandoned for those reasons.

To the extent the Oath Proposal is retained, it should be significantly amended to address the concerns set out in detail in the 2024 Letter. It should be subject to clear legally binding rules, not CRA administrative guidelines. Such rules should dictate who and under what circumstances a person may be required to answer questions under oath, how such examinations are to be conducted, and how to resolve disputes that arise during such examinations. Any amendments should remedy the possible overlap of the Notice Proposal and the Penalty Proposal regarding disputes of statements given under oath. In addition, taxpayers should be entitled to recover costs arising from such

[6] See the discussion at pages 18 to 21 of the 2024 Letter.

examinations equivalent to what they would have recovered in respect of discovery in the Tax Court. The overarching spirit of such rules should be that the circumstances under which Canadians are compelled to answer questions under oath as part of an audit should be limited and exceptional, with adverse cost consequences to the CRA if these powers are abused.

5. Delays in Audit Disputes

We share the government's objective to enhance the efficiency and effectiveness of tax audits. However, the various proposals discussed above provide more opportunities for disputes and delay in the audit process, which does not advance the government's objective. If there is a disagreement between a taxpayer and the CRA regarding the taxpayer's obligation to comply with an information requirement, the means to expedite the audit is to speedily resolve the dispute, not to spend years arguing over the validity of an NNC or fighting compliance orders and penalty assessments.

In other words, the problem that both the Penalty Proposal and the Notice Proposal fail to address (and, in the case of the Notice Proposal, may aggravate), is the absence of a means to resolve information requirement disputes between the CRA and taxpayers in a timely fashion. Our 2024 Letter recommended several ways the government might achieve its objective, including:

(a) Appointing more Federal Court judges. The Federal Court's is currently composed of 46 judges with one vacancy. The number of judges has barely moved since 2015, when it consisted of 42 judges and 2 vacancies. During that time, Canada's population increased significantly, and the resources devoted by the CRA to audit activities ballooned. The Federal Court currently lacks the resources to resolve procedural tax disputes in a timely manner. Creating opportunity for further disputes over penalties will merely aggravate the issue.[7]

(b) Creating a "tax list" of specialized judges tasked with dealing with procedural tax disputes.

(c) Amending the Tax Court of Canada Act to move jurisdiction to hear procedural tax disputes to the Tax Court of Canada and providing the Corut with sufficient resources to assume those responsibilities.

(d) Creating a statutory right for taxpayers and/or the CRA to seek, at any time, a final determination of the merits of a taxpayer's compliance obligation vis-à-vis a particular information requirement.

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[7] Please also see TEI's recent recommendations for the 2025 Pre-Budget Consultation, dated August 28, 2025, which made a similar point. See https://www.tei.org/advocacy/submissions/tei-submits-comments-canadian-2025-pre-budget-consultation-and-tax-reform.

Without such changes, neither the Penalty Proposal nor the Notice Proposal will meaningfully accelerate the audit process. Instead, they will exacerbate the Federal Court backlog, which will be exploited by vexatious, non-compliant taxpayers to further delay their audits. Rather than trying to use the threat of penalties to bludgeon taxpayers into conceding disputes over CRA information requirements, the government should provide taxpayers and the CRA with better and faster means to resolve their disputes.

6. Unclear Appeal Process Under the Penalty and Notice Proposals

It is unclear how the judicial appeal process functions under the Penalty and Notice Proposals. The Penalty and Notice Proposals give the Minister significant discretion (i) to decide the magnitude of the penalty and whether such a penalty is "disproportionate or unfair" (under the Penalty Proposal), and (ii) to relieve the penalty (under the Notice Proposal). We expect the Federal Court would conduct the judicial review contemplated explicitly in the Notice Proposal[8] and implicitly in respect of the exercise of Ministerial discretion under the Penalty Proposal[9], consistent with current law giving the Federal Court, and not the Tax Court, jurisdiction for judicial review of Ministerial decision making.

However, proposed subsections 231.7(9) and 231.9(14) provide that assessments of penalties under the Notice and Penalty Proposals are governed by Divisions I and J of Part I of the ITA (the "ITA Assessment and Appeal Process"). Because those divisions contemplate appeals of assessments to the Tax Court of Canada, is the intention that the exercises of ministerial discretion be reviewed by the Tax Court of Canada? The current language gives rise to significant uncertainty on which court will review ministerial discretion under the Penalty and Notice Proposals.

There are two possible interpretations. First, consistent with current jurisprudence, judicial review of the Minister's decisions is heard by the Federal Court. Thus, a taxpayer challenging the Minister's decision to levy or uphold a penalty under either the Penalty or Notice Proposal must seek judicial review of that decision at the Federal Court. If the Minister's decision is upheld, the penalty itself is assessed under the ITA Assessment and Appeal Process based on the Minister's decision, with the Tax Court's jurisdiction, on an appeal from that assessment, limited to whether the computation of the penalty is correct given the Minister's decision. This interpretation is consistent with the current practice for reviewing the Minister's discretion regarding penalties and is consistent with the text of the Notice Proposal, which contemplates a process of administrative and judicial review distinct from the ITA Assessment and Appeal Process.

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8 *See* proposed subsections 231.9(8) and (9).

9 *See* proposed subsections 231.7(6) and (10).

A second interpretation is inconsistent with existing jurisprudence on the jurisdiction of the Tax Court but a potential interpretation of the language in subsection 231.7(9).[10] Specifically, review of a Minister's decision to levy or uphold a penalty would be appealed, under the ITA Assessment and Appeal process, to the Tax Court of Canada, with the Court reviewing the reasonableness of the Minister's decisions. This Given the current split jurisdiction between the Federal and Tax Courts on tax matters, this would be an inappropriate outcome. Indeed, in the context of the Penalty Proposal, there would be a benefit, in terms of judicial economy and consistency, to have the judge who granted the underlying compliance order also review the exercise of the Minister's penalty discretion in respect of the same order.[11]

Taxpayers need clarity to protect and ensure their right to seek judicial review. At present, jurisdiction for resolving tax disputes is split between the Federal and Tax Courts. The Penalty and Notice Proposals should clarify the Federal Court is tasked with hearing judicial review of the Minister's decisions contemplated by those proposals. This is particularly important given the tight filing deadlines for appeals under the Notice Proposal, which means that an appeal initiated at the wrong court would preclude taxpayers from seeking judicial review of the Minister's decision.

7. <u>The Information Exchange Proposal</u>

The Information Exchange Proposal raises serious concerns for TEI members. If passed, this proposal will allow foreign governments either with tax treaties with Canada or who are signatories to listed international agreements to compel Canadian companies to supply personal private information about their clients, with little if any safeguards to protect against inappropriate and insecure use of such information.

Under current sections 231.1 and 231.2, the CRA can require a Canadian company to surrender information about clients, but only if (*inter alia*) the information is sought for purposes of enforcing compliance with the ITA. The proposed amendment would relax this requirement so the CRA can compel the information for purposes of enforcing a listed international agreement (as defined in subsection 248(1) or tax treaty). The Supreme Court of Canada has held that the CRA's

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10 It might also be a potential interpretation of subsection 231.9(14), although in that context, the explicit provision for a separate appeal process in subsections 231.9(4) – (9) would seem to override subsection 231.9(14) to the extent of any inconsistency.

11 Although, as noted above in our comment on the Penalty Proposal, it would be even better if that Judge were given the power to sanction frivolous or vexatious litigants, rather than giving the Minister the power to punish merely unsuccessful litigants

powers under sections 231.1 and sections 231.2 are akin to a government seizure which triggers a taxpayer's section 8 Charter rights.[12]

The proposed amendment will allow these countries to get the benefit of the search and seizure power of the ITA. Canada currently has tax treaties or listed international agreements with over 140 foreign governments, including countries with questionable governments and human rights records. This result is highly problematic and unlikely the intention of the drafters of the legislation.

The Information Exchange Proposal will permit foreign governments to use Canadian tax laws to access the personal, private, information of Canadians, including clients of our members, without their knowledge. Such information may include social insurance numbers, bank records, employment information, information about membership in Canadian recreational or religious organizations, among other things.[13] Not all of these foreign governments with whom Canada has a tax treaty or who are signatories to listed international agreements share our democratic values. Not all are friendly with Canada. Some are known to use personal, private information for illicit purposes. Once the information is in the possession of a foreign government, Canada loses the ability to control how it is used, and Canadian taxpayers may have no meaningful protection against the misuse of their information under the laws of the foreign country. This is not simply a technical issue of tax legislation. This raises significant policy concerns for TEI and indeed all Canadians.

Canadian taxpayers should not expect their personal information to be handed over to a foreign government. The Supreme Court of Canada stated in *McKinley Transport* that the taxpayer's reasonable expectation of privacy in his or her tax records vis-à-vis the Minister is relatively low. However, the Court was clear to point out that individuals have "different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful."[14] It is uncontroversial to posit that Canadians have a very different expectation of privacy vis-à-vis the Minister where the Minister is collecting information for the purposes of administering Canadian tax law, subject to all the legal and constitutional protections afforded by

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12 *R. v. McKinlay Transport Ltd*., [1990] 1 SCR 627 ["*McKinley Transport*"]

13 The foregoing list is based on information that the CRA deems relevant in assessing a taxpayer's residence in Canada (see Income Tax Folio S5-F1-C1 *Determining an Individual's Residence Status*: https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-5-international-residency/folio-1-residency/income-tax-folio-s5-f1-c1-determining-individual-s-residence-status.html#p1.10). If Canadian tax authorities ask for such information in assessing whether a taxpayer is resident in Canada, why would we not expect that foreign tax authorities might ask for similar information to assess (or to purport to assess) whether a taxpayer is resident in their country.

14 *Supra*, note 12 at p.645

Canadian law, than they have in a context where the Minister is collecting information at the request of a foreign dictatorship or human rights abuser.[15]

This privacy concern is particularly relevant for third party information requirements. A taxpayer who receives an information requirement on behalf of a foreign government regarding their affairs knows whether they have cause to fear abuse by that government (for example, if they are a well-known government critic) and thus they may challenge the requirement at the Federal Court. In contrast, a third party who receives such an information requirement regarding the same taxpayer likely has no way of knowing that the taxpayer fears the foreign government and no way of knowing that the taxpayer's Charter rights may be violated by production of the information to the CRA. Moreover, considering the Notice and Penalty Proposals, a person who properly resisted compliance with an improper request for information by a foreign government would risk enormous penalties for standing up for the legitimate rights of their clients. For our members, the prospect of being used by foreign governments to collect information for improper purposes is also an enormous reputational risk.

Further, deputizing Canadian companies to collect tax information on behalf of foreign governments will put them at a competitive disadvantage in the global market. Clients may not want to do business with companies who may be compelled to deliver their information to foreign governments of questionable character. Moreover, the cost of responding to such requirements will put Canadian companies at a disadvantage relative to foreign competitors not burdened with similar obligations. At a time when Canadians are increasingly focused on improving productivity, burdening Canadian companies with a new, and disturbing, compliance obligation undermines that objective.

We thus recommend Finance pause the Information Exchange Proposals and advance them as a separate legislative proposal subject to proper oversight – instead of being minor provisions of a broader technical tax bill. However, if Finance proceeds with the Information Exchange Proposals, third party information requirements on behalf of foreign governments should require: (i) judicial oversight (similar to the existing process for unnamed information requirements); (ii) notification of the "named taxpayer" where the requirement is in respect of such a taxpayer; and (iii) that the Minister establish that the laws of the requesting country have effective protections of taxpayer information substantially similar to those afforded to Canadians under Canadian law. Absent such procedural protections, in our view the use of the CRA's audit/requirement powers to collect

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[15] This is not to suggest that the CRA would knowingly assist a foreign government misuse taxpayer information, like our members, it may have no way of knowing that what is ostensibly a bona fide request for assistance is actually an effort to collect information for improper purposes

information for foreign governments constitutes an unreasonable search and seizure, which violates section 8 of the Charter.

8. Other Legislation

Finally, Budget 2024 also would extend the Proposals to other statutes administered by the CRA with similar provisions. These statutes the *Excise Tax Act*, *Air Travellers Security Charge Act*, *Excise Act, 2001*, the *Underused Housing Tax Act*, and the *Select Luxury Items Tax Act* (collectively, the "Other Statutes").

The concerns set forth in the 2024 Letter reiterated herein would apply equally to many of the Revised Proposals if they were to be implemented in the Other Statutes. Indeed, there may be specific challenges in respect of the Other Statutes that would make many of the Revised Proposals, even if amended to address our concerns, problematic.

For example, audit queries for statutes such as the Excise Tax Act often bring additional unique challenges given its nature as a transactional tax, particularly as many audit requests require additional time to produce large quantities of transactions. Taxpayer delays in responding to such voluminous requests are generally purposeful non-compliance by the taxpayer. The potential for the CRA to use these proposed new audit powers in such circumstances risks turning audits adversarial, which will lessen the Government's overarching objective of enhancing "the efficiency and effectiveness of tax audits."

As above, TEI believes that many of the Revised Proposals should not be enacted in their proposed form for the Other Statutes. The alternatives and amendments set forth above are equally applicable to the Revised Proposals as they relate to the Other Statutes

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TEI appreciates the opportunity to provide our comments on the Revised Proposals and would welcome an opportunity to further discuss our concerns and recommendations. Please do not hesitate to contact Sandy Shanks, Chair of TEI's Canadian Income Tax Committee, at sandy.shanks@conocophillips.com, or Benjamin R. Shreck of TEI's legal staff at bshreck@tei.org or +1 202 464 8353 with any questions.

Respectfully submitted,

Walter B. Doggett

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