1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

May 29, 2024

The Honourable Chrystia A. Freeland, P.C., M.P.
Deputy Prime Minister and Minister of Finance
Department of Finance Canada
90 Elgin Street
Ottawa, Ontario K1A 0G5
Canada

Via email: chrystia.freeland@parl.gc.ca

RE: Budget 2024 Proposal to Expand CRA Audit Powers

Dear Minister Freeland:

Budget 2024, released on April 16, 2024, adds several new proposals to the Income Tax Act[1] (the "**ITA**") to enhance the capacity of the Canada Revenue Agency ("**CRA**") to compel production of information and effectively audit taxpayers who refuse to comply with CRA information requirements. In particular, the proposals would (i) impose a new penalty upon the issuance of a compliance order under subsection 237.7 (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**"); and (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**"). We refer to these various proposed new provisions of the ITA collectively as the "Proposals."

While Tax Executives Institute, Inc. ("**TEI**") understands – indeed, supports – the Government's overarching objective of enhancing "the efficiency and effectiveness of tax audits," we have serious concerns about the premises underpinning the new proposals and, consequently, the proposals based on them and the adverse consequences for taxpayers that may flow therefrom.

[1] All statutory references herein are to the ITA unless otherwise indicated.

About TEI

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 56 chapters across North and South America, EMEA, and Asia, including four chapters in Canada. Our nearly 6,300 members represent 2,800 of the world's leading companies, many of which either are resident or do business in Canada. Over 15 percent of TEI's membership comprises tax professionals who work for Canadian businesses in a variety of industries across the country. TEI members are responsible for tax affairs of their employers and must contend daily with provisions of the tax law relating to the operation of business enterprises. The following recommendations reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

As the preeminent association of in-house tax professionals worldwide, TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to the legislative proposals discussed herein.

TEI Comments

Budget 2024 describes the Proposals as the Government's effort to respond to the Auditor General's 2018 report which, *inter alia*, criticized CRA for tolerating longer response times from large corporate and, especially, multinational taxpayers than it did, for example, for an individual with employment income to provide a single receipt to support a claimed expense.[2] The obvious response to the Auditor General – which sadly does not appear to have been made by the Government – is that audits of large and multinational corporations are more complex, voluminous, and involved than audits of deductions by individuals which can be resolved with the provision of a single receipt.[3] They simply take longer. Demands for large quantities of complex data or documentation from large organizations will take longer to satisfy than requests for a single receipt. The greater complexity and time needed is a part of the structure of the existing statutory provisions for the normal reassessment period of four years for large corporations, compared to a normal reassessment period of three years for individuals. For corporations, the normal reassessment period can also be extended for an extra three years with respect to non-arm's length transactions with a non-resident. TEI is sure both CRA and the Department of Finance can appreciate these realities, given their typical timelines for responding to access to

[2] 2018 Fall Reports of the Auditor General of Canada – Report 7 *available at* https://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_07_e_43205.html ("**AG Report 7**").

[3] This is the comparison the Auditor General made in his report. *See* AG Report 7 at paragraphs 7.32 and 7.33.

information requests made by taxpayers.[4] Given that TEI's members include Canada's largest taxpayers, this is a point that is of fundamental importance for them and informs TEI's concerns with respect to the Proposals.

TEI questions the implicit belief underlying the Proposals that existing statutory provisions are inadequate to promote taxpayer compliance with the ITA. TEI does not believe that taxpayer non-compliance – properly understood – with information requests is a pervasive and imminent threat to the collection of government revenues. That it may take a long time to respond to CRA queries is not an example of non-compliance, it is often a reality that CRA needs to acknowledge and accept. That there may be instances where taxpayers disagree with CRA as to the extent of their obligations to produce requested information is undeniable. But again, those are not examples of non-compliance, but examples of taxpayers asserting their rights – often successfully, as many of the cases cited in this submission demonstrate. To the extent that these proposals target those circumstances, they are misguided (and likely unlawful). While there may well be instances of genuine non-compliance by taxpayers, TEI believes that such situations are the exception rather than the norm, and do not in themselves justify the radical changes contemplated by the Proposal.

Further, any efforts to enhance "the efficiency and effectiveness of tax audits" cannot merely involve providing CRA with more powers or additional resources. CRA should make better use of its current resources. Delays could often be avoided if the CRA complied with its own policy to avoid requests for "voluminous, duplicative material where a smaller subset of the information could serve to explain the taxpayer's filing position . . . ."[5] In other instances, better training could reduce or prevent unnecessary disputes and delay. That many disputes around information requirements between CRA and the taxpayer are resolved in favour of the taxpayer is a sign of problems with the CRA information gathering process,[6] not a lack of compliance by taxpayers.

Moreover, CRA is only one of the participants in the tax audit process, which also includes taxpayers, advisors, courts, and the Department of Justice. Providing expanded audit powers and resources to the CRA will create additional bottlenecks elsewhere in the system. In particular, and, of direct relevance to the Proposals, since 2019, while CRA has added 15,000 employees – a 34% increase – the number of judges in the Federal Court, who deal with audit disputes, and the Tax Court, who deal with substantive tax disputes, has not increased meaningfully (this despite a large backlog arising from

---

[4] In the experience of TEI's members, taxpayer access to information requests are almost never answered within the standard 30 day timeline mandated by section 7 of the Access to Information Act. Delays of a year or more are routine, and delays of years are not uncommon. TEI understands why it takes the Government so long to respond to such requests; our members face the same considerations in responding to CRA queries.

[5] CRA Policy Document #AD-19-02R – *Obtaining Information for Audit Purposes*, *available at* https://www.canada.ca/en/revenue-agency/services/tax/technical-information/compliance-manuals-policies/acquiring-information-taxpayers-registrants-third-parties.html.

[6] For example, badly drafted information requests or requirements, failures to obtain required judicial authorization, a lack of regard for solicitor-client privilege, *etc*.

the Covid pandemic and a significant increase in Canada's population).[7] Nor has the government provided the courts with sufficient additional resources to expedite their processes. For example, that, in 2024, the Tax Court is unable to hold virtual hearings is an embarrassment. Providing the CRA with more powers and creating new compliance mechanisms, which rely heavily on the Federal Court system, will only further strain an already overburdened court system, resulting in greater delays and undermining the efficacy of the audit process. This benefits no one.

Set against this background, TEI offers the specific comments below on the Proposals. As described in greater detail later in this letter, TEI believes:

(i) The Penalty Proposal, the Notice Proposal, and potentially, the Tolling Proposal, violate Section 8 (unreasonable search and seizure) of The Charter of Rights and Freedoms (the "**Charter**") by coercing taxpayers[8] into disclosing information to the CRA that the CRA is not entitled to obtain.

(ii) The Penalty Proposal contains penalties so disproportionate to any legitimate regulatory objective so as to constitute a "true penal consequence" engaging section 11 of the *Charter* (rights in criminal and penal matters) without actually providing for the constitutionally required procedural protections.

(iii) The Penalty Proposals contain technical defects which render them ineffective in many circumstances and may create perverse results which unduly penalize diligent taxpayers without penalizing dishonest or fraudulent taxpayers.

(iv) The Notice Proposal, far from accelerating compliance with CRA information requirements, proposes an administrative and judicial review process that will only create delays without resolving substantive disputes between the CRA and taxpayers.

(v) The Tolling Proposals are overly broad and unreasonably impact the rights of Canadians in inappropriate circumstances.

(vi) The Oath Proposal unnecessarily imports a formal evidence gathering process normally conducted under the supervision of a Court into the audit process without the procedural guidance and protections necessary to make such process effective and in a way that is only likely to delay responses to CRA requirements and audits, and could be abused by CRA.

Section 1) of this letter addresses the Penalty Proposal, Section 2) addresses the Notice Proposal regime, Section 3) addresses the Tolling Proposal, and Section 4) addresses the Oath Proposal. Finally,

---

[7] As of April 1, 2019, there were 43 sitting judges in the Federal Court and 27 sitting judges on the Tax Court of Canada. As of May 1, 2024, those numbers are 44 and 23, respectively.

[8] For greater certainty, references to "taxpayer" in this letter includes anyone subject to the provisions of the ITA. This is particularly important in this context, since often third parties are subject to CRA information requests or requirements that relate to audits of other taxpayers.

in Section 5) TEI proposes amendments and alternatives to the Proposals which, in TEI's view, would better achieve the government's objectives, while respecting the rights of Canadians.

1) The Penalty Proposal

The Penalty Proposal would impose a penalty equal to ten percent of the aggregate tax payable by the taxpayer in respect of the taxation year or years to which the compliance order relates where CRA obtains a compliance order against a taxpayer. In TEI's view, while there may be a role for penalties for taxpayers who willfully fail to comply with CRA information requests, the Penalty Proposal is inappropriate, unfair, and raises serious concerns with respect to its constitutional validity.

To preface this discussion, Budget 2024 asserts that the existing sanction for failing to comply with a compliance order – a contempt of court finding under subsection 231.7(4) of the Federal Court Rules – does not impose "a material financial cost on the taxpayer . . . ." Apart from the significant financial costs of contesting a compliance order (and payment of CRA's costs if the taxpayer is unsuccessful), we note that the Federal Court Rules allow judges to impose both extensive prison terms and heavy fines on contemnors who fail to purge their contempt. Prison sentences of up to five years may be imposed on taxpayers who have failed to comply with such orders, and the courts retain a discretion to impose appropriate (and, in theory, unlimited) fines.[9] It is not apparent that these existing sanctions have been insufficient to compel compliance with information requirements under the ITA.[10] Further, to the extent the government's concern is well founded, it is unclear why a new administrative penalty is required, as the existing regime (which avoids the constitutional and practical concerns raised herein) could be modified to provide for more meaningful monetary sanctions (we return to this point in Section 5)).

a) The Penalty Proposal Fails to Distinguish Between Genuine Non-Compliance and Bona-Fide Disputes over a Taxpayer's Obligations.

The implicit assumption underpinning the Penalty Proposal is that taxpayer non-compliance with a CRA information requirement necessitating the issuance of a compliance order constitutes wrongful conduct, deserving of automatic sanction. This assumption is incorrect in TEI's view.

In many instances, CRA has sought compliance orders in circumstances where there were legitimate disputes between the parties regarding whether the CRA was entitled to the information sought in the underlying information requirement. There are many reasons why a taxpayer may legitimately refuse to comply with an information requirement, including that the information requirement:

---

[9] Section 472 of the *Federal Court Rules*.

[10] TEI is unaware of the purported large-scale failure to comply with compliance orders issued under section 231.7, which apparently necessitates this penalty. Based on TEI's review of the published case law, there appear to be fewer than 10 cases over the past decade involving taxpayers being held in contempt of court for failing to comply with a compliance order based on subsection 231.7(4).

(i) requests documents that are subject to solicitor-client privilege,[11]

(ii) is unclear as to what is requested and from whom,[12]

(iii) requests information about unnamed taxpayers for which the CRA is required, and has not, obtained judicial authorization under subsection 231.2(3),[13]

(iv) requests information that is not within the power, possession, or control of the subject of the requirement,[14]

(v) was not issued for bona fide purposes of administering the ITA and thus is *ultra vires* the CRA's information gathering powers,[15] or

(vi) requests information for the purpose of a criminal inquiry.[16]

These are all legitimate, and lawful, reasons for refusing to comply with a CRA information requirement. Furthermore, in many of those instances, there is uncertainty as to the scope of the taxpayer's obligations, and thus room for legitimate disagreement between the parties. Sometimes the taxpayer is correct, sometimes the CRA is correct.

The current compliance order regime distinguishes between *bona fide* disputes with CRA and frivolous non-compliance. The issuance of a compliance order (subject to potential appeals) provides for a final, independent, judicial determination of the taxpayer's obligations vis-à-vis an information requirement and provides the taxpayer with an opportunity to comply with their obligations, once finally determined. A taxpayer who complies with a compliance order, once issued, is not subject to any adverse consequences. It is only where taxpayers fail to comply with a final, independent, judicial

---

[11] *MNR v. Grant Thornton* 2012 FC 1313 ("***Grant Thornton***").

[12] See, for example, *Canada (Minister of National Revenue) v. SML Operations (Canada) Ltd.*, 2003 FC 868, *MNR v. Chamandy*, 2014 FC 354, and *Canada (National Revenue) v. Lin*, 2019 FC 646.

[13] *Canada (National Revenue) v. Zeifmans LLP*, 2023 FC 1000 ("***Zeifmans***").

[14] *MNR v. Amdocs Canadian Managed Services Inc.*, 2015 FC 1234.

[15] See, for example, *Canada (National Revenue) v. Hydro-Québec*, 2018 FC 622. While that case was decided in the context of CRA seeking judicial authorization for an unnamed person's requirement under subsection 231.2(2), one of TEI's members provided an example where they received an information requirement purportedly to assess their compliance with Part XIII of the ITA in respect of investments it held on behalf of certain unnamed clients. As those investments were not subject, in any circumstances, to withholding or reporting obligations under Part XIII of the ITA, the member had no Part XIII requirement obligations in respect thereof. Since the purported rationale for the information requirement, assessing compliance with Part XIII, was clearly invalid, that information requirement could not be for *bona fide* purposes of administering the ITA. The CRA never challenged the member's refusal, implicitly acknowledging the point. However, had the Minister not agreed, it could have sought a compliance order.

[16] In *R. v. Jarvis*, 2002 SCC 73, the court provided, at paragraph 88, that "where the predominant purpose of a particular inquiry is the determination of penal liability, CRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1)."

determination of their obligations, that is to say, where they are genuinely non-compliant, that they are subject to punitive (and penal) consequences.

By contrast, the Penalty Proposal effectively eliminates the distinction between frivolous non-compliance and *bona fide* disputes of a taxpayer's obligation to comply. By making the penalty automatic upon a final determination of a taxpayer's obligation in favour of the CRA, it discourages taxpayers from asserting their rights vis-à-vis the CRA. Moreover, it denies taxpayers an opportunity to comply with such obligations without penalty once those obligations have been finally determined. Instead, taxpayers are faced with the option to either comply with an information requirement that may be unlawful or face potentially enormous penalties if their assessment of its validity is incorrect.[17] By failing to distinguish between taxpayers who engage in frivolous non-compliance and taxpayers who, in good faith, assert their rights against the CRA, the Penalty Proposal creates a regime that is profoundly unfair and, as discussed in the following two sections, profoundly unconstitutional.

b) The Penalty Proposal Violates Section 8 of the Charter

As noted above, under the Penalty Proposal, faced with a legitimate disagreement between a taxpayer and the CRA as to the scope and/or validity of an information requirement, the taxpayer is presented with the option of either providing the requested information – notwithstanding that CRA may not be lawfully entitled to it – or risking a potentially enormous (we return to this below) automatic liability for a penalty if they are unsuccessful in asserting their rights vis-à-vis CRA. The effect of this regime is to discourage taxpayers from asserting their rights vis-à-vis the government. The use of a penalty to, effectively, coerce taxpayers into providing the CRA with information that it may not be entitled to receive constitutes an unreasonable search and seizure, contrary to section 8 of the *Charter*.

It is easy to contemplate scenarios where the effect of the penalty would result in the violation of a taxpayer's constitutionally guaranteed right against unreasonable search and seizure, as they seek to avoid the potential imposition of an enormous fine. For example, consider a public company with an annual tax payable of $1 billion. Suppose during an audit of a corporate reorganization, effected on a tax-deferred basis such that no tax is payable,[18] the CRA asks the taxpayer to produce a document prepared by in-house counsel that the taxpayer asserts is subject to solicitor client privilege. In that scenario, the potential penalty ($100 million – ten percent of $1 billion) if the taxpayer's determination that the document is privileged is incorrect is so exorbitant (both in absolute terms, and relative to the amount of tax at issue in the audit), that a taxpayer, even a taxpayer who is very confident as to the privileged status of the document at issue, might reasonably "choose" to waive their constitutionally

---

[17] In practice, the Federal Court could exercise its discretion to address this concern by providing taxpayers with a reasonable period to provide the CRA with the requested information as may be appropriate prior to issuing an order – although since that would effectively replicate the status quo that the government is proposing to amend, query whether that is an appropriate exercise of the Court's discretion. In any event, taxpayers cannot rely on the availability of such discretionary relief, nor can the constitutionality of the legislation be dependent on the exercise of judicial discretion.

[18] This is a common scenario, not a hypothetical one.

protected right to privilege rather than risk an enormous penalty if they are unsuccessful at court.[19] But a waiver of privilege in the face of a coercive penalty for failing to do is not a valid waiver of the taxpayer's section 8 rights, but an unreasonable search and seizure.[20] We note that that *bona fide* disputes over privilege claims are the source of many real life disputes between the CRA and taxpayers.[21]

Consider another readily conceivable fact pattern. CRA issues a requirement to an accounting partner at a large accounting firm, with annual tax payable of $200,000, asking for information about her unnamed clients, without prior judicial authorization as required under section 231.2(3). While the partner may be reasonably confident of success at court, the risk of fine of $20,000 over and above her costs of contesting such an order (which are unlikely to be fully recovered from the Crown even if she is successful) could have the effect of coercing her into producing documents to the CRA that the CRA is not entitled to obtain. Again, the effect of the penalty is to discourage a challenge of a CRA attempt to conduct an unreasonable search and seizure, in violation of the accounting partner's clients' constitutional right to privacy.[22]

Similar hypotheticals are readily conceivable for other circumstances where there are legitimate disputes between taxpayers and the CRA as to the nature of the taxpayer's obligation vis-à-vis an information requirement, where the effect of the Penalty Proposal is to coerce taxpayers – through the threat of enormous penalties – to produce information to the CRA that the CRA is not entitled to receive. Using threats to obtain information that the CRA is not entitled to obtain is inherently an unreasonable search and seizure, contrary to section 8 of the *Charter*.[23]

We note that the concern that the Penalty Proposal may permit the CRA to obtain information through unconstitutional means is not just a concern for taxpayers. Taxpayers who are coerced by the Penalty Proposal to produce information that the CRA is not entitled to obtain may pursue *Charter* remedies at a later stage of proceedings under section 24 of the *Charter* against the Crown for the breach of their *Charter* rights. Such remedies could include (i) damages; (ii) the exclusion of evidence (and/or evidence derived from it) from future proceedings; (iii) a stay of proceeding against the taxpayer (i.e.,

---

[19] That is, even if the taxpayer is 95 percent certain that they will succeed in their assertion of privilege over the relevant document, the expected value of the penalty, $5 million (i.e., five percent times $100 million) remains significant, given that no tax is at issue (i.e., the taxpayer effected a tax-free reorganization).

[20] *R. v. Wills*, 1992 CanLII 2780 (ON CA) ("***Wills***").

[21] See, for example, *Grant Thornton*, *supra* note 10; *Canada (National Revenue) v. BMO Nesbitt Burns Inc.*, 2022 FC 157; and *Canada (National Revenue) v. Moodys LLP*, 2011 FC 713

[22] Again, this is not a hypothetical scenario, see *Zeifmans*, *supra*, at note 12.

[23] In *Wills* Doherty J.A. explained that "the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that . . . the consent was voluntary . . . and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested . . . ."

in criminal prosecutions)[24]; or (iv) even the vacation of the CRA's re-assessment of the taxpayer[25] (if, for example, the effect of the breach would be to render the taxpayer appeal in the Tax Court unfair). It would be unfortunate for the government, if after spending years investigating a taxpayer, its efforts were frustrated (whether in the tax court or in criminal prosecutions) on technicalities because the evidence was procured through unconstitutional coercion under the Penalty Proposal. It would also be an enormous waste of government and taxpayer resources.

Nor does the Notice Proposal (which we discuss in greater detail below) resolve this concern. While conceivably it may provide an opportunity for taxpayers to resolve disputes over the substantive merits of an information requirement (although, as noted below, we have concerns on this point) prior to the issuance of a compliance order, we note that the CRA is not required to issue a notice of non-compliance prior to seeking a compliance order, so the Notice Proposal is not an effective safeguard. Furthermore, to the extent such an order is issued, it merely replicates the concerns set out above. For example, a taxpayer who asserts their rights risks a penalty of $25,000 in the event they are wrong, potentially deterring taxpayers, particularly unsophisticated taxpayers, from asserting their rights against unlawful CRA information requirements.

Similarly, while the Minister may exercise its discretion not to impose a penalty (i.e., as currently drafted, proposed subsection 231.7(9) provides that the Minister "may" reassess the taxpayer), the availability of discretionary relief from the penalty does not resolve the threat of unconstitutional coercion arising from the Penalty Proposal, since taxpayers cannot rely on the Minister to exercise its discretion and not apply the penalty.

c) The Penalty Proposal Imposes Penal Consequences Triggering Section 11 of the Charter

The constitutional implications of the Penalty Proposal go beyond a violation of section 8 of the *Charter*. The Penalty Proposal is essentially penal in nature and thus subject to the constitutional protections afforded Canadians under section 11 of the *Charter* to Canadians "charged with an offence" (in this instance, essentially, non-compliance with an information requirement, which is an offence under section 238). Such protections are not provided for by the draft legislation that would enact the Penalty Proposal.

First, we note that the existing consequences for failing to comply with an information requirement where a compliance order has been granted are penal in nature. For example, a finding of contempt of court under section 231.7(4) and the Federal Court Rules or, possibly, a criminal prosecution

---

[24] Such remedies are commonplace in the criminal context. For a recent example, in the tax context, consider the collapse in 2021 of a prosecution of one of Ontario's largest mafia bosses, because police and CRA investigators committed "significant breaches of solicitor/client privilege" by illegally intercepting phone conversations between the accused and their lawyers: https://www.cbc.ca/news/canada/toronto/sindacato-charges-stayed-mob-york-police-1.5925133.

[25] See, *O'Neill Motors Ltd. V. R,* 1995 CanLII 19035 (TCC), aff'd *Canada v. O'Neill Motors Ltd. (C.A.)*, 1998 CanLII 9070 (FCA), for the proposition that a CRA assessment can be vacated as a remedy for a breach of section 8 of the *Charter*.

under section 238(1). The Penalty Proposal is clearly intended to supplement (if not, in practice, replace) the existing penal consequence provided under the ITA without providing for any of the constitutionally mandated procedural protection associated with those penal sanctions.

Further, the magnitude of the penalty itself strongly suggests that the penalty is penal in nature. As the majority of the Supreme Court of Canada noted in *Guindon*:

> A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.[26]

Here, the nature of the Penalty Proposal strongly suggests that it is penal in nature. It is reasonably foreseeable that, in many circumstances, the penalty grossly exceeds the maximum criminal penalty for failing to comply with section 231 set out in section 238(1) of $25,000. Indeed, under the Criminal Code of Canada, the maximum penalty for corporations convicted of a criminal offence on summary conviction is $100,000, and while there is no limit for fines imposed for indictable offences (or for contempt of Court under the Federal Court Rules), nor is there a minimum. Further, the imposition of penalties, even for serious crimes, are not automatic but are computed based on a variety of sentencing considerations. By contrast, for large public companies, whose tax payable for a year may be hundreds of millions or billions of dollars, the proposed automatic penalty for non-compliance with a requirement is several orders of magnitude greater than the penalty that would apply had they been convicted of a serious criminal offence. Moreover, the Government clearly expects that penalties, in practice, would be significantly higher than the monetary penalties currently imposed for failing to comply with a compliance order, *e.g.*, penalties for criminal acts, since that is the rationale for the Penalty Proposal.

In addition, the computation of the penalty is not based on regulatory considerations but is arbitrarily determined in several different ways. While significant penalties based on underreported taxes, for example, may be rationally connected with ensuring compliance with tax reporting rules, a penalty based on tax payable in no way reflects regulatory considerations in the context of a tax information reporting regime, where the information being sought may have nothing to do with the amount of tax payable or may have immaterial implications for the taxpayer's tax payable.[27] Again consider a large public company – say a bank or an insurance company – with annual tax payable of $1 billion. It receives an information requirement that it refuses to respond to on the basis that it reasonably believes the requirement is asking for information relating to four taxation years of unnamed third parties (e.g., its clients) without judicial authorization. If it is wrong, under the Penalty Proposal, it could be subject to a penalty of $400 million (i.e., $100M for each year to which the requirement

---

[26] *Guindon v. Canada*, 2015 SCC 41 (CanLII), at para. 76.

[27] This concern will become more pointed to the extent a similar penalty regime is introduced, as proposed in Budget 2024, with respect to other tax statutes.

relates), notwithstanding that the requirement has nothing to do with its tax payable. Indeed, in that example, the magnitude of the penalty could reasonably be expected to dwarf the amount of tax payable by the clients whose information is sought.[28]

Second, the penalty is arbitrary in that it results in very different penalties for identical misconduct. Consider two self-employed individual taxpayers, who receive identical requirements in respect of an identical issue and fail to comply in identical ways, but one of whom has tax payable for the year of $100,000, while the other has no tax payable in the year as a result of claiming additional discretionary deductions. Under the Penalty Proposal, the first taxpayer is subject to a penalty of $10,000, while the second is not subject to a penalty at all for the same behaviour.

Third, the Penalty Proposal is arbitrary in that it is triggered by the mere issuance of a compliance order, notwithstanding that the order may be significantly narrower than the original information request in respect of which it was sought. Consider the application of the Penalty Proposal in the context of a compliance order which results in a "split decision" for the taxpayer and the CRA. Say, a taxpayer and the CRA dispute whether 10 documents are subject to solicitor-client privilege. In the Federal Court, the Court agrees with the taxpayer that 9 documents are privileged, but finds that 1 document is not privileged, and issues a compliance order requiring the production of the latter. In that case the taxpayer has substantially "won" vis-à-vis the CRA but is subject to the same automatic penalty that would have been imposed had its case been wholly without merit. The taxpayer is being punished for successfully asserting his rights. In other instances, a taxpayer who has provided CRA all but one of the documents CRA has requested, over which it asserts privilege, would be subject to the same penalty as a taxpayer who has steadfastly refused to provide any documents or information to the CRA.

In that light, the penal purpose of the Penalty Proposal becomes clear – it supplements an existing penal sanction, it is potentially enormous in magnitude and punitive in nature, and it does not reflect any regulatory considerations (in particular, it bears no relation to the nature of the taxpayer's non-compliance and is computed by reference to arbitrary considerations). By virtue of its arbitrary nature, and disproportionate magnitude, it likely also fails to reflect criminal sentencing principles, though it is unlikely that this would be considered a good fact in assessing its constitutionality. In addition to violating section 8 of the *Charter*, the proposed Penalty Proposal clearly runs afoul of section 11 of the *Charter*, since it does not provide for the constitutionally mandated protections afforded by section 11 of the *Charter*.

---

[28] This is very similar to the fact pattern of *Canada (Minister of National Revenue) v. Toronto Dominion Bank*, 2004 FCA.359, where a compliance order was sought in respect of the identity of an account holder who deposited a $10,000 cheque at the bank. It is hard to see how a penalty based on the TD Bank's tax payable could be justified in those circumstances.

d) The Penalty Proposal is Technically Defective and may give rise to Perverse Results

Finally, apart from raising constitutional issues, the Penalty Proposal, in its current form, presents practical issues as to both its workability and effectiveness, and may give rise to perverse results for both taxpayers and the CRA.

The penalty applies differently to different legal entities. Consider two otherwise identical accounting firms, with identical income and expenses, subject to a compliance order, one structured as a corporation, the other as a partnership. Under the Penalty Proposal, the corporate firm is potentially liable to the penalty, based on its tax payable for the year. On the other hand, because partnerships are not taxpayers, the partnership firm has no amount payable of tax payable for the year, rendering the penalty meaningless.

As noted above, the Penalty Proposal, apart from arbitrarily treating otherwise identical non-compliant taxpayers differently based on tax payable, provides no incentive to comply for taxpayers whose tax payable for a year is nil or immaterial. Since taxpayers who engage in abusive tax planning, or more concerningly outright tax evasion, are likely to have nil or immaterial tax payable for a year (at least at the time the compliance order is given), the penalty appears to have no impact on those taxpayers with the greatest incentive for non-compliance. Having rationalized the Penalty Proposal on the basis that existing penal consequences are inadequate to promote compliance by such taxpayers, this exclusion is both inconsistent with that rationale and perverse.

Furthermore, there seems to be a technical problem with basing the penalty on tax payable for a year. The whole point of the CRA audit process is that a taxpayer's tax payable for a given year can vary from time to time. This will have perverse results. Consider two fact patterns:

(i) A taxpayer fraudulently fails to report any of its income for the year and frivolously refuses to comply with CRA information requirements. In that case, at the time the compliance order is issued, tax payable for the year is zero, so no penalty is payable if assessed at that time. It is only after the taxpayer is reassessed, which normally occurs after CRA has reviewed the information that a compliance order is intended to produce, that that taxpayer's tax payable for the year is re-determined. This would seem to result in the Penalty Proposal either not applying to the class of taxpayers that the government almost certainly intends to catch, or not applying until they are assessed for such penalty years later.[29]

(ii) A taxpayer conservatively reports its tax based on a CRA administrative position with which it disagrees, and subsequently files an objection, which is ultimately vindicated (such that its ultimate tax payable for the year is less than the amount for which it is initially assessed). The taxpayer subsequently has a separate

[29] Perversely, it also provides the non-compliant taxpayer with further disincentive to cooperate with the CRA to frustrate the imposition of the penalty.

dispute with the CRA over the status of certain documents as privileged, and is unsuccessful, such that the Penalty Proposal applies. In this case, if the taxpayer is assessed immediately, it will be subject to a penalty based on an amount of tax payable for a year that is greater than the amount of tax payable for the year that it ultimately owes – but the minister has no obligation to reassess the penalty at the future time based on the lower amount. Here, the taxpayer is effectively penalized for having reported their taxes as conservatively as possible.

Finally, the Government should strongly consider the effect the Penalty Proposal may have on Federal Court judges considering whether or not to grant a compliance order. Ultimately, Federal Court Judges retain discretion to refuse to issue a compliance order in appropriate circumstances. In close cases, or where the potential penalty is so disproportionate to the taxpayer's wrongdoing, the prospect of an enormous penalty against the taxpayer if a compliance order is issued may sway judges to exercise their discretion to not do so.

2) The Notice Proposal

Pursuant to the Budget 2024 Notice Proposal, the Minister may issue a NNC to a taxpayer if the Minister determines that the taxpayer has failed to comply with an information requirement issued under sections 231.1 or 231.2 or subsection 231.6(2). A person to whom an NNC is issued is subject to a penalty of $50 per day, up to a maximum of $25,000. The Notice Proposal provides for an administrative appeal to the Minister, within 90 days, under which the issuance of the NNC is reviewed on a reasonableness standard, and for which a decision must be made by the Minister within 180 days of receipt of the request for review. A further appeal can be made to the Federal Court, again, on a reasonableness standard, which appeal must be filed within 90 days of notification of the Minister's decision.

This regime shares many of the same faults of the Penalty Proposal. In particular, it penalizes taxpayers who unsuccessfully assert their rights against unreasonable search and seizure vis-à-vis the CRA. However, it also fails to resolve substantive disputes between CRA and taxpayers and will unnecessarily delay the resolution of such disputes.

a) Unreasonable Search and Seizure

The effect of the Notice Proposal, as with the Penalty Proposal, is to penalize taxpayers who in good faith assert their rights against the CRA. Taxpayers may be deterred from asserting their rights out of fear of significant penalties in the event they are unsuccessful in cases where there is genuine disagreement and uncertainty as to the scope of those rights. This is particularly true for smaller or unsophisticated taxpayers for whom a $25K penalty, over and above their costs of pursuing their appeal, is likely to be prohibitive.

Perversely, the nature of the Notice Proposal regime is such that taxpayers who genuinely believe in the merits of their position are likely to be subject to more significant penalties than taxpayers whose non-compliance is frivolous, since the latter are (if the regime works as intended) likely to comply

immediately, while the former will engage in a time-consuming appeals process, during which the proposed penalty under the Notice Proposal continues to accrue. The Notice Proposal contemplates that an appeal to the minister may take up to 270 days to resolve, during which time $13,500 in penalties would accrue. If a taxpayer were to further assert their right to appeal to a Court, the legislation contemplates a 360-day timeline to simply appeal to the Federal Court, during which time and additional $4,500 in penalties would accrue. Given current delays in the Federal Court for obtaining a judgement (e.g., up to a year), it is likely that taxpayers who choose to exercise their rights vis-à-vis the CRA would accrue the maximum possible penalty under the Notice Proposal before their case is even heard by a judge.

We also note that, in the above circumstances, a penalty is hardly necessary to discourage taxpayers from frivolously asserting their rights against the CRA, given that the cost of contesting a NNC (in addition to any costs awarded in favour of the Crown on appeal to the Federal Court) will, in many instances, be equal or greater than the penalty imposed.

b) Improper Standard of Review Gives Rise to Unjust and Absurd Results

The foregoing concerns are aggravated by the proposed standard of review set out in the legislation in proposed section 231.9(6):

> A notice of non-compliance shall be vacated under subsection (5) if the Minister determines that it was unreasonable to issue the notice of non-compliance, or that the person had, prior to the issuance of the notice of non-compliance, done everything reasonably necessary to comply with each requirement or notice in respect of which the notice of noncompliance was issued.

Similarly, on appeal to the Federal Court, proposed subsection 231.9(8) provides "[o]n hearing an application under subsection (7) in respect of a decision by the Minister, a judge may . . . vary or vacate the notice of non-compliance if the judge determines that the Minister's decision was not reasonable."

In TEI's view, this is the wrong standard of review, one which fails to address or resolve the substantive dispute as to the taxpayer's obligation to comply with an information requirement. The relevant legal question is not "was it reasonable for the minister to issue a notice of non-compliance", but rather "is the taxpayer correct that he or she is not required to respond to the underlying information requirement".

In contrast to the current compliance order regime, which assesses the correctness of the taxpayer's assertion of their rights against the CRA, the appeals process set out in the Notice Proposal does not assess the merits of the taxpayer's substantive position but would simply consider whether the CRA was reasonable in assessing whether the taxpayer had failed to comply with the requirement. Consider how this regime will play out in privilege cases. Where a taxpayer refuses to provide a document in response to a requirement on the basis that it is privileged, the taxpayer has not complied, at least in part, with the requirement. It is unclear how a taxpayer in this case could ever successfully challenge an NNC under the appeal process set out in the Notice Proposal – it has not complied with

the requirement, and the Minister's conclusion that it has not done so is reasonable. Under the Notice Proposal, the question of whether the taxpayer is required to respond to the requirement is irrelevant to the imposition of the penalty. The only question is whether it is reasonable for the Minister to determine that the taxpayer has not done so. This is untenable. To subject taxpayers to such a penalty regime to compel production of information that the taxpayer is not required to produce constitutes an unreasonable search and seizure for purposes of the *Charter*.

Worse, in the scenario described above (where CRA reasonably determines the taxpayer has not complied with a requirement, but where the taxpayer asserts that they are not required to do so), it is conceivable that the CRA could be successful in upholding an NNC penalty against a taxpayer, but unsuccessful in obtaining a compliance order in respect of the same information requirement and taxpayer, if the Federal Court ultimately determines that the taxpayer was entitled to not respond. We note that this is not a hypothetical possibility, but it is the facts in the *Zeifmans* case, currently before the Federal Court of Appeal, where the Minister's decision to issue a requirement under subsection 231.2(1) without judicial authorization (rather than obtaining prior judicial authorization under subsection 231.2(3) to issue an unnamed persons requirement under subsection 231.2(2)) was upheld as "reasonable" on judicial review by the Federal Court, but was subsequently found to be incorrect by the Federal Court when the Minister sought a compliance order because the Minister was incorrect in her conclusion that prior judicial authorization was not required.[30] That is, even though the taxpayer's position was ultimately vindicated by the Federal Court, it would nevertheless be penalized under the Notice Proposal because the Minister's decision was "reasonable" even though wrong.

The spectacle of penalizing a taxpayer under the Notice Proposal for asserting rights that the Federal Court subsequently determines are well-founded would undermine confidence in the fairness and integrity of the tax system and promotes contempt for the rule of law. It also creates duplicative and time-wasting procedural wrangling, as discussed in the next section.

c) Delay and Judicial Backlog

As noted above, by merely considering the reasonableness of the Minister's determination that a taxpayer has not complied with a requirement, and not the correctness of the taxpayer's assertion that they have no obligation to do so, the Notice Proposal, rather than streamlining the resolution of disputes between taxpayers and the CRA, simply creates more procedural delays to resolving such disputes and more opportunity for delay.

At present, it can often take up to a year from the date the CRA brings an application for a compliance order to the issuance of a compliance order by the Federal Court.[31] But consider the timeline contemplated by the Notice Proposal. It creates a 270-day administrative appeals process (i.e., 90 days

---

30 *Zeifmans*, *supra*, note 12.

31 Assuming the Federal Court's decision is not further appealed. Further appeals to the Federal Court of Appeal and/or the Supreme Court could take up to a year each.

for taxpayers to file an appeal, 180 days for the Minister to consider),[32] followed by potential review by the Federal Court (up to 90 days to file an appeal and however long it takes the Federal Court to resolve the issue – i.e., up to another year). The effect is to double the current timeline with a process that does not resolve the substantive dispute between the parties.[33] If, at this point, the CRA were to pursue a compliance order against the taxpayer, it could take another year to secure production of the relevant information, effectively tripling the timeline under the current process, imposing a significant burden on the resources of the CRA, the Department of Justice, and the Federal Court (to say nothing of taxpayers).[34]

In effect, the proposed changes, on their face, can be expected to significantly delay the resolution of *bona fide* disputes between taxpayers and the CRA while providing taxpayers who frivolously refuse to comply with information requirements further opportunities to delay production of documents sought by the CRA. Further, the additional draw on government and court resources required by the Notice Proposal risks aggravating existing backlogs in the Federal Court. In effect, the Notice Proposal is an "improvement" that makes things worse.

3) Tolling of Statute Bar Dates

Under the Tolling Proposal, the computation of the statute bar date is suspended where (i) a taxpayer seeks judicial review of an information requirement under subsection 231.1, subsection 231.2 or paragraph 231.6(2); (ii) a taxpayer is served with an NNC; or (iii) an application for a compliance order is commenced against a taxpayer (collectively, "**Relevant Proceedings**"). Remarkably, the tolling of statute bar dates applies not just to the taxpayer, but to any person not dealing at arm's length with the taxpayer. This proposal raises several concerns.

TEI sympathizes with the government's desire to ensure that statute bar dates do not pass while CRA and taxpayers engage in procedural disputes. Certainly, we can envision circumstances where a taxpayer may seek to delay compliance with an information requirement to delay detection of improper tax reporting by a related party. For example, a taxpayer who refuses to disclose to the CRA information about trusts or corporations that he controls, to prevent effective audits of such entities, or a taxpayer who refuses to disclose information about transactions entered into with family members, to frustrate

---

[32] It is unclear from the draft legislation what the consequences to the Minister are of failing to make a decision within the 180-day window. The experience of some TEI members faced with similar timelines for Ministerial decision making is that the CRA is often unable to comply with such deadlines.

[33] This was, in substance, the experience of the CRA in the *Ghermezian* series of cases, where the Minister first successfully resisted an application for judicial review in the Federal Court of an information requirement on a reasonableness standard (*Ghermezian v. Canada*, 2020 FC 1137), and then had to go back to the Federal Court for a compliance order in respect of the same information requirements a year later (*Canada (National Revenue) v. Ghermezian*, 2022 FC 236).

[34] Mind, as noted above, the Notice Requirement is not a prerequisite to the issuance of a Compliance Order, so it is conceivable that CRA might proceed with both an NNC and a compliance order in parallel. This may mitigate the delay concerns but raises the question of what purpose the Notice Proposal serves that is not already served by the existing compliance order regime.

audits of those family members. Collectively we describe such circumstances and similar ones as "**Frivolous Delay Scenarios**."

On the other hand, other than a compliance order, none of the procedural disputes addressed by the Proposals (e.g., judicial review of information requirements, administrative or judicial review of an NNC) provide a means to substantively resolve the issues between the parties.[35] If the government is concerned about statute bar dates it should provide a pathway for rapidly resolving substantive disputes over taxpayers' obligations vis-à-vis an information requirement order, rather than creating more opportunities for procedural disputes – which fail to resolve the substantive issues and result in more delays (we return to this point in Section 5) below).

More concerning, the effect of the Tolling Proposal is to toll the statue bar date not just for taxpayers whose tax affairs are under audit by the CRA or for taxpayers engaged in Frivolous Delay Scenarios (with which we sympathize), but also for taxpayers whose tax affairs are wholly unrelated to the subject matter of the information requirement, NNC, or compliance order triggering its application. Under the Tolling Proposal, the statute bar date for a taxpayer or a non-arm's length person is postponed whenever a Relevant Proceeding is commenced or issued regardless of whether the information sought by the underlying requirement has anything to do with that taxpayer. The inappropriate scope of this rule should be obvious.

For example, consider an NNC issued to an individual taxpayer, which is appealed to the Minister. That NNC will postpone the statute bar date not just for the taxpayer, but for their spouse, parents, grandparents, siblings, children, grandchildren, in-laws, etc.[36] It would also toll the limitation period for any corporations controlled (directly or indirectly) by any member of their family.[37] In many instances, of course, persons affected by this rule would have no way of knowing that their statute bar date was being tolled (nor, in many instances, would the CRA).[38] Similarly, in a large corporate group, an application for judicial review of a requirement by one company would toll the statute bar date for every company in the group.

While such results might be reasonable in the Frivolous Delay Scenario, in most instances where CRA issues information requirements, this is not the case. Moreover, in many cases where the CRA has legitimate concerns that the information sought from one taxpayer may be relevant to the affairs of other taxpayers, they could issue information requirements directly to those other taxpayers (e.g., if the CRA were to ask about inter-company transactions entered by a company with related companies, it can always issue identical requirements to other members of the corporate group). There is no need to automatically toll the statute bar date for all persons who do not deal at arm's length with a taxpayer.

---

35 Compliance order proceedings are already subject to a narrower tolling rule in current section 231.8.

36 *See* subsections 251(1), (2) and (6).

37 *See* paragraphs 251(2)(b) and (c).

38 Disputes over CRA information requirements are unlikely to be a common topic at family dinners.

In addition, this rule would apply to taxpayers (and any non-arm's length parties with such taxpayers) where the information sought relates to audits of third parties. The CRA will often, for example, deliver an information requirement to a bank or an accountant, asking for information about their clients. Such information has no relevance whatsoever to the tax filings of the taxpayer subject to the requirement, nor is it relevant to any potential assessment of the taxpayer. In those circumstances, there is no rational basis for tolling the taxpayer's statute bar date with respect to a dispute over information that is not relevant to their taxes.

Worse, these two concerns interact. In the prior example, in a dispute over an information requirement served on an accountant for information about her clients – similar to the facts in *Zeifmans* – would toll the statute bar date for her, members of her family, and any corporations they control. The dispute has no relevance to the tax affairs of any of those persons. Similarly, a bank which disputes an information requirement relating to its clients would have the statute bar date tolled for its subsidiaries, again, where the information sought has nothing to do with their tax affairs.

In that light, the absence of any rational connection between the information sought by the CRA and the tax affairs of the persons whose statute bar dates are tolled, suggests that the purpose of the Tolling Proposal is less to protect the CRA's legitimate interests in being able to assess related parties of taxpayers who fail to comply with requirements, and more to penalize taxpayers (and their families) who have the audacity to assert their rights vis-à-vis the CRA. The use of such coercive tactics to compel compliance in the face of legitimate disputes over the nature of the taxpayer's obligations, is profoundly unfair and raises serious concerns under section 8 of the *Charter*.

4) The Oath Proposal

Budget 2024 also includes new section 231.41, pursuant to which CRA will be entitled to require persons to provide any answers to questions, information, or documents sought by the Minister orally, under oath or affirmation, or by affidavit. We have several concerns with the Oath Proposal.

First, the Oath Proposal appears to be an attempt to import the discovery process of a tax dispute, typically conducted by skilled litigators under the supervision of a Tax Court judge, into the audit process, without providing for any of the processes or protections normally associated with discovery under oath. We note that while proposed section 231.41 consists of 1 sentence and 2.5 lines of text in the Budget document, the discovery procedures in the Tax Court occupy approximately 30 separate sections in the Tax Court of Canada Rules (General Procedure) (the "TCC Rules") with detailed guidance as to how such discovery, whether oral or in writing, is to be conducted. Indeed, the contrast with the TCC

Rules is telling. Among other issues that the TCC Rules cover, on which proposed section 231.41 is silent, are:

(i) Limits on examination: The TCC Rules limit who can be examined,[39] how often, how, and when a person can be required to answer questions.[40]

(ii) Recording of the examination: The TCC Rules generally provide that an examination shall be recorded by a court reporter.[41] They also contain provisions governing the videotaping or recording examinations.[42] This point is particularly important given that a statement under oath is meaningless if it is not accurately recorded – we are aware, from access to information requests, of circumstances where CRA auditors have failed (no doubt inadvertently) to accurately record discussions with taxpayers in a manner that has undermined the integrity of the audit process and distorted CRA decision making.

(iii) Costs: Under the TCC Rules, a person summoning another person for an examination in person must pay a witness fee and any relevant expenses, in accordance with the Tariff.[43] The TCC Rules generally provide that the party conducting the examination bear the expense of the court recorder who transcribes the examination.[44] The TCC Rules also provide for recovery of costs in circumstances where, *inter alia*, a party's right to examine is being abused or where the examination is being conducted in bad faith, or in an unreasonable manner.[45] Typically, the party who succeeds at trial can expect that their adversary will bear at least some portion of their costs of discovery under the TCC Rules, which is not contemplated by the Oath Proposal.

(iv) Translation: The TCC Rules provide that if the party being examined understands neither English nor French – a reality for many in a diverse and multi-cultural Canada – or is deaf or mute, the party conducting the examination will provide, and pay for, an appropriate translator.[46] Where the examination is to be conducted in one official language, and the party being examined prefers to be examined in the other official language, the TCC Rules provide that the Registrar of the Tax Court shall make available a translator at no charge.[47]

---

[39] For example, non-parties can only be examined with leave of the Court.

[40] TCC Rules at Section 92, 93, 94, and 95.

[41] *Id*. at Subsection 102(1) and (3).

[42] *Id*. at Section 109.

[43] *Id*. at Subsection 103(5).

[44] *Id*. at Subsection 102(3).

[45] *Id*. at Section 108.

[46] *Id*. at Subsection 102(4).

[47] *Id*. at Subsection 102(5).

(v) Re-examination: The TCC Rules allow the party being examined to be re-examined by their own counsel.[48] Such re-examination may be necessary to clarify answers previously given and will be particularly important in oral examinations if questions are asked by unskilled examiners.

(vi) Notice: The TCC Rules provide a minimum of 10 days' notice of the time and place of discovery.[49] On its face, the Oath Proposal, coupled with section 231.1, would enable CRA auditors to enter a place of business and demand that employees provide answers under oath then and there.

(vii) Use of evidence obtained in discovery: The TCC Rules provide detailed guidance as to how and when evidence obtained under oath or by affidavit can subsequently be used by a party to the case.[50]

(viii) A mechanism for resolving disputes: The TCC Rules provide a mechanism for the person being examined to object to an improper question, with mechanisms for resolving such objections.[51] As noted above, the TCC Rules provide sanctions where the right to examine is abused or conducted in bad faith or in an unreasonable manner. They also provide remedies where the person being examined fails to comply with their obligations.[52]

None of the foregoing are contemplated by the Oath Proposal nor are they "nice to haves." They are the sort of procedural guidelines and safeguards necessary to make oral or written discovery effective and meaningful. We are also concerned that CRA will use this new power to effect discovery outside of the TCC Rules, both avoiding the procedural safeguards provided by the TCC Rules and the significant cost consequences to the government when they are unsuccessful at trial.

Moreover, examination of taxpayers under oath is conducted by Crown counsel – trained lawyers with the experience and expertise to effectively, and appropriately, examine taxpayers or other witnesses. CRA auditors are typically not trained lawyers, and typically do not have either the experience or the expertise to conduct an effective examination – nor should they be expected to have such experience or expertise; that is not the role of CRA auditors. As it is, poorly drafted CRA queries or requirements are often a source of frustration for taxpayers,[53] who often struggle to understand what is being asked of them or how they are expected to respond to such questions. Answering such queries or requirements under oath would be unworkable.

---

[48] *Id*. at Section 106.
[49] *Id*. at Section 104.
[50] *Id*. at Section 100.
[51] *Id*. at Sections 107, 115, and 117.
[52] *Id*. at Section 110.
[53] Poorly drafted requirements are also the source of numerous, unsuccessful, applications for compliance orders. *See*, *for example*, *supra* note 11.

Finally, requiring taxpayers to answer questions under oath (either orally or in writing), will result in further delays in responding to queries and requirements. If the Government's expectation is that the heightened formality and risk of legal consequences of responding to questions under oath will improve the quality of such responses (which, based on the experience of TEI members, is implausible), that same heightened formality and risk will also result in taxpayers, reasonably, taking more time to respond to CRA inquires. Asking taxpayers to answer questions under oath is more likely to result in the engagement of legal counsel by taxpayers as such counsel is, in practice, necessary to respond to questions by way of affidavit. Taxpayers are likely to devote significant time preparing to respond to questions under oath. Again, the contrast with the discovery process is telling – persons being examined for discovery whether taxpayers or CRA employees will often spend weeks or months preparing to respond to oral examination. Indeed, they are expected to do so prior to discovery to meaningfully respond to questions. TEI's expectation is that in most (if not all) instances, the responses will be substantively the same as they would have been if not given under oath.

As some of Canada's largest taxpayers, our members are concerned about the implications of this proposal that their responses to CRA inquiries are somehow less truthful than they would be if given under oath. Put bluntly, it is unnecessary, and inserts an atmosphere of hostility and suspicion into the audit process.

5) Alternatives and Amendments

Considering the serious constitutional and practical problems with the Penalty Proposal, Notice Proposal, Tolling Proposal and Oath Proposal, described in detail above, TEI believes that none of these proposals should be enacted in their proposed form.

Nevertheless, in recognition of the government's legitimate interest in enhancing the efficiency and effectiveness of tax audits, we propose the following alternatives to the foregoing proposals to address the concerns we have set out in this letter while better achieving the government's legitimate policy objectives.

a) Eliminate the Penalty Proposal and Amend the Existing Criminal Sanctions for Failing to Comply with a Compliance Order

If the government wishes to retain a penalty for non-compliance with information requirements, any such penalty should apply only to willful non-compliance, not good faith disputes between taxpayers and the CRA regarding the nature of the taxpayer's compliance obligations. Such a penalty should only be imposed after: (i) an independent judicial determination of the nature of the taxpayer's substantive obligations, and (ii) the taxpayer's failure to comply in a timely fashion with those obligations as finally determined. Taxpayers should be entitled to assert their rights against unreasonable search and seizure without the fear of punitive penalties. A constitutionally valid penalty must penalize non-compliance, and it should not penalize taxpayers who assert their rights in good faith against the government.

Further, for any penalty to survive constitutional scrutiny, it must either be carefully tailored to advance regulatory considerations so as not to constitute a "true penal consequence" or must be imposed only pursuant to a criminal conviction, in accordance with criminal sentencing principles (as under the existing compliance order regime).

In that light, if the government truly believes that existing criminal sanctions for non-compliance are inadequate, it should instead amend the ITA to change the existing criminal sanction for failing to comply with a compliance order under section 231.7(4) to provide for a range of punishments that the government considers to be adequate. For example, rather than relying on the Federal Court's contempt powers, the Government could create a separate offence of failing to comply with a compliance order and provide clear legislative guidance to the Courts as to what sanctions (whether fines or imprisonment) are considered appropriate for such non-compliance.[54] Such a regime could provide for significantly higher fines, and other appropriate sanctions for non-compliant taxpayers, commensurate with the nature of their non-compliance, without violating the fundamental *Charter* rights of Canadians. Furthermore, the significant stigma associated with a criminal conviction for failing to comply with a compliance order is likely to be an effective deterrent for many taxpayers.[55]

b) Eliminate or Amend the Notice Proposal

As noted above, the Notice Proposal does not help resolve legitimate disputes between taxpayers and the CRA and will only drag out the resolution of such disputes, while potentially violating the fundamental *Charter* rights of Canadians. Worse, it will provide further opportunities for taxpayers who frivolously refuse to comply with information requirements to delay and squander limited public resources. The judicial resources required to oversee this regime will further tax an already over-burdened Federal Court system. In that light, the Notice Proposal should not be enacted in its current form.

However, if the Government wishes to retain the Notice Proposal, we have several recommendations for its improvement. First, it should provide that penalties only accrue following the final determination (whether by the Minister or a Court) that the taxpayer is required to respond to the requirement. This would protect against the effective coercion of taxpayers into "waiving" their *Charter* rights against unreasonable search and seizures by disclosing information that they are not required to produce to avoid the accrual of penalties. While the Government may be concerned that delaying the accrual of penalties until after any appeals are resolved would reward frivolous non-compliance, in practice, the legal costs (including costs in favour of the CRA) associated with any such appeals – especially in frivolous cases – would likely be a more significant deterrent than the proposed penalty amount.

---

54 Indeed, in the absence of section 231.7(4), failing to comply with a compliance order would be an offence under section 238(1), though we expect that the Government considers the existing criminal penalties under that provision inadequate.

55 As appears to be the case now.

Second, 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. As discussed above, and amply demonstrated by the *Zeifmans* and *Ghermezian* series of cases, the flaw with the existing process for judicial review of the Minister's decision to issue a requirement is that it considers only the reasonableness of the Minister's decision to issue the requirement, not whether the taxpayer is legally required to comply with it. The Minister's decision that a taxpayer is non-compliant with an information requirement may be reasonable, but it does not mean that the taxpayer is legally required to comply with the information requirement. Imposing a penalty in those circumstances is inappropriate. Any appeal process failing to assess the latter issue is simply wasting time and resources and can result in significant injustice to the taxpayer.

Further, having NNCs reviewed by the Federal Court on the merits of the taxpayer's position, rather than on the reasonableness of the Minister's decision to issue an NNC, would expedite any future compliance order proceedings, since it would represent a final – substantive – determination of the taxpayer's obligations vis-à-vis the relevant information requirement. Any attempt to relitigate that issue in a compliance proceeding would be subject to the doctrine of *res judicata*. Having a court determine the substantive merits of the taxpayer's position avoids duplicative – and absurd – proceedings before the Federal Court and allows for the more efficient use of scarce Government, Court, and taxpayer resources.

c) Accelerate Resolution of Disputes between CRA and Taxpayers

Neither the Penalty Proposal nor the Notice Proposal addresses what is clearly a problem with the existing information requirement regime: the absence of means to resolve disputes with respect to information requirements in a timely fashion. This is as much a concern for taxpayers as it is for the CRA. Neither the Notice Proposal nor the Penalty Proposal address that concern, except in so far as they may unconstitutionally induce taxpayers into providing information that CRA is not entitled to receive. Worse, by creating a whole new administrative process with new judicial appeals, the Notice Proposal risks bogging down the process further and tying up existing, already inadequate, judicial and Government resources.

If the Government truly wishes to expediate taxpayer compliance with information requirements, in addition to the alternatives discussed above, it should provide additional resources to the Federal Court including, as necessary, appointing more judges. While the government has provided significant new resources to the CRA over the past decade, the resources provided to the Federal and Tax Courts have not kept pace. In addition to increased resources, the Government should also consider working with the Federal Court to create a "tax list" – similar to the "Commercial List" in Ontario's Superior Court – of specialized judges tasked with dealing with tax disputes. Alternatively, it could amend the Tax Court of Canada Act to move jurisdiction to hear procedural tax disputes to the

specialized Tax Court rather from the generalist Federal Court[56] and provide more resources for the Tax Court to resolve these cases in a timely fashion.

Providing sufficient resources to allow for more timely resolution of procedural disputes between taxpayers and CRA would allow for a rapid resolution of good-faith disputes over the nature of taxpayer's obligations, accelerating compliance with such obligations. It would also discourage frivolous non-compliance, by meaningfully reducing the "benefit" (i.e., delay) achieved from such non-compliance.

Finally, perhaps as an alternative to the Notice Proposal, the Government should consider creating a statutory right for taxpayers and/or the CRA to seek, at any time, a judicial determination as to the nature of a taxpayer's compliance obligation vis-à-vis a particular information requirement, rather than the existing right to merely seek judicial review of the Minister's decision to issue such requirement. Coupled with increased judicial resources and a streamlined judicial process, this would allow parties to seek a determination as to the taxpayer's obligations at an early stage, rather than waiting for the CRA to pursue a compliance order. As noted above, such a right would avoid duplicative litigation and would likely expedite the existing compliance order process (owing to the doctrine of *res judicata*).

d) Rework the Tolling Proposal

As discussed, the Tolling Proposal is unreasonably, and inappropriately, broad, and unduly impacts the rights of Canadians whose tax affairs are wholly unrelated to the requirements, NNCs, or compliance proceedings which trigger their application.

As a starting point, the Tolling Proposal should be amended to reflect the comments above with respect to the Notice Proposal. Further, the reference to non-arm's length persons in those proposals should be deleted. An amended Tolling Proposal should only apply to taxpayers where the information sought is potentially relevant to an assessment of their taxes. Information requirements asking for third party information should not be subject to the Tolling Proposal.

To address legitimate concerns around Frivolous Delay Scenarios, a further amendment could be drafted to provide that: (i) where there is a delay in production of information by a taxpayer owing to a dispute over that taxpayer's obligation to disclose such information, and (ii) where such information, when produced, is reasonably determined to be relevant to the tax affairs of a related taxpayer, then the limitation period of that related taxpayer is extended by the period of delay occasioned by the original dispute over production of that information.[57] Such a tailored rule would

---

[56] This is not to disparage the competence of the Federal Court, rather it simply recognizes Canada has a specialized court to deal with tax matters and it makes sense to have judges who are experts on Canadian tax law to hear all matters relating to their area of expertise.

[57] A complementary rule could provide that, if such information is not produced as required, in addition to whatever other sanctions may be imposed, the statute bar date of any related taxpayer is extended if it is reasonable

provide CRA with a tool sufficient to combat attempts to frivolously delay production until limitations periods expire, without inappropriately suspending limitation periods for innocent taxpayers whose tax affairs are unrelated to those of other members of their families or corporate groups.

e) Eliminate or Amend the Oath Proposal

In TEI's view the Oath Proposal is unnecessary, ineffective, and likely to delay, rather than accelerate, CRA audits. Further, it provides a pathway for CRA to improperly effect discovery during the audit process, without the procedural protections afforded by the TCC Rules and in a way that improperly circumvents the cost consequences to the Government when it loses a case. In that light, it should be abandoned.

To the extent the Oath Proposal is retained, it should be significantly amended to address the concerns raised here. 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. In addition, in appropriate cases, taxpayers should be entitled to recover costs arising from such 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.

6) Extension of Proposals to Other Statutes

In closing, we note Budget 2024 would extend the Proposals to other statutes administered by the CRA which have similar provisions, including 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**").

While some of the examples cited above deal with situations specific to the application of the ITA, TEI has similar concerns if the Proposals were to be implemented for the Other Statutes. In addition, there may be specific challenges to applying the Proposals to the Other Statutes that are not obvious from Budget 2024 because Budget 2024 only detailed how the Proposals would apply to the ITA.

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 not exercises in non-compliance by the taxpayer. The potential for the CRA to use these

---

to expect that the requested information, if provided, may have been relevant to their tax affairs. TEI expects that this would be a relatively easy threshold for CRA to satisfy in any *bona fide* audit and would undermine attempts at deliberate non-compliance to protect related persons, without impacting related persons having no connection to the relevant dispute.

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 none of the Proposals should be enacted in their proposed form for the Other Statutes. The alternatives and amendments set forth above are equally applicable to the Proposals as they relate to the Other Statutes

• • •

TEI appreciates the opportunity to comment on the Proposals. TEI's comments were prepared under the aegis of its Canadian Income Tax Committee, whose Chair is Steve Saunders of Atco. Should you have any questions regarding TEI's letter, please do not hesitate to contact Mr. Saunders at Steve.Saunders@atco.com or Benjamin R. Shreck of TEI's legal staff at 202.464.8353 or bshreck@tei.org.

Respectfully submitted,

Sandhya Edupuganty

Sandhya Edupuganty
International President
TAX EXECUTIVES INSTITUTE

Cc: Trevor McGowan, Associate Assistant Deputy Minister, Tax Policy, Finance Canada
Rob Demeter, Director General – Tax Legislative Division, Finance Canada
Gervais Coulombe, Acting Director General, Sales Tax Division, Finance Canada
Pierre Mercille, Director General, Sales Tax Legislation, Sales Tax Division, Finance Canada