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November 21, 2014

Via email: enev@sen.parl.gc.ca; RNNR@parl.gc.ca

The Honourable Senator Richard Neufeld
Chair, Energy, the Environment and Natural Resources Committee
Senate of Canada
Ottawa, ON K1A 0A4

Mr. Leon Benoit, M.P.
Chair, Natural Resources Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Senator Neufeld and Mr. Benoit,

Re: Bill C-43, *Economic Action Plan 2014 Act*, No. 2, Part 4, Division 28 – *Extractive Sector Transparency Measures Act*

We write on behalf of the Anti-Corruption Team, the National Environmental, Energy and Resources Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association (CBA Sections) to comment on Part 4, Division 28 of Bill C-43, the *Economic Action Plan 2014 Act, No. 2* enacting the *Extractive Sector Transparency Measures Act* (the Act).

The CBA is a national association of 37,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Building on over a decade of CBA's work in the area of anti-corruption, the CBA Sections who have prepared this letter include many of Canada's most experienced lawyers working with the extractive sector and anti-corruption matters.

The CBA Sections support the government's commitment to raise global standards for transparency in the extractive sector. That said, there remain some gaps in aligning Canada's reporting requirements with those of the United States and the European Union. We believe that to achieve the objectives of the Act, harmonization in the reporting requirements among the Canadian, US and EU regimes is required. Entities covered by the Canadian rules should not be subject to different treatment from the EU and US counterparts, either in timing for implementing the rules or in content of the reporting requirements. This is particularly important as the legislation will impose costly reporting requirements and, as currently drafted, requires disclosure of information that may be confidential under local laws or binding contracts. In the US, similar legislation was deemed invalid[1] for failing to address conflicts with local law. Companies in Canada, the US and EU should be on equal footing when

[1] *American Petroleum Institute v SEC*, No. 12-1668 (D.D.C.), July 2, 2013.

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facing the risk of violations under local law. We believe that harmonization will best allow the Act to achieve its targeted objective.

We have a number of specific comments on different parts of the Act.

Definitions

The definition of "entity" is extremely broad and includes a corporation that "controls" a corporation engaged in the commercial development of oil, gas or minerals in Canada or elsewhere. However, there is no definition of the term "control" or the potential scope of "indirect control". This critical issue should be addressed in the Act and not left to the regulations.

The term "assets" is not defined in the Act yet is used throughout section 8(1)(b). We suggest it be clearly defined to mean recorded assets on a company's balance sheet, to avoid issues related to goodwill and other intangibles that do not appear on financial statements.

The term "employee" is similarly used in section 8(1)(b)(iii) but is undefined in the Act. We believe it should be given the same definition as in the *Canada Labour Code* Part 1.

Application of the Act

It is not clear to whom the act applies. Section 8 of the Act imposes broad reporting requirements on: (a) extractive companies whose shares are publicly listed in Canada and any entities controlled by the public company that are engaged in the commercial development of oil, gas or minerals; and (b) other extractive companies that meet certain size thresholds based on asset value, amount of revenue and number of employees and that have a place of business in Canada, do business in Canada or have assets in Canada. This latter category would include private companies and could also include companies whose shares are listed on an exchange outside Canada.

While the reporting requirements should cover the broadest possible number of extractive companies to create a level playing field, we recommend that consideration be given to limiting the Act's applicability, at least as an interim step, to publicly-listed extractive companies in Canada.

Section 8(1)(b) seems to capture a foreign company that has very small levels of sales and assets in Canada. It should be made clear whether the intention is that the thresholds apply to assets, sales and employees in Canada. Section 8(1)(b) could be redrafted to read:

> *(b) an entity that has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years:*
>
> > *(i) it has at least $20 million in assets <u>in Canada as at the last day of the relevant financial year,</u>*
> >
> > *(ii) it has generated at least $40 million in revenue <u>in Canada</u>,*
> >
> > *(iii) it employs an average of at least 250 employees <u>in Canada</u>*

Reporting Obligations

We support the use of reporting requirements as a means of enhancing transparency. However, we have a number of questions relating to the breadth of the Act.

Payments made to Public Employee Controlled Entities

The reporting obligations do not appear to extend to payments made to entities controlled by, or associated with, employees or public office holders of the payee (Public Employee Controlled Entities). For example, it appears that payments made to a shell company controlled by a Minister for "consulting services" related to the granting of exploration rights would not require reporting under

the Act. This is a significant gap given that two of the four prosecutions under the *Corruption of Foreign Public Officials Act* (CFPOA) involved Public Employee Controlled Entities.

Section 3 of the Act does not appear to capture payments made to Public Employee Controlled Entities. Section 3(a) deems payments made to an employee or public office holder of a payee, to have been made to the payee. It does not appear to cover payments to an employee or public office holder of a payee that are made indirectly, through an entity controlled by or associated with that individual. Section 3(b) deems payments that are due to a payee and received by a body that is not the payee, to have been made to the payee. Payments made to a Public Employee Controlled Entity would not fall under this provision because they would not be due to a payee, but rather due to the shell company.

Explicit recognition of a reporting obligation for payments made to Public Employee Controlled Entities would remove uncertainty or ambiguity and align the language of the Act with the purpose set out in section 6 of detecting and deterring corruption. However, we caution that it could be difficult to determine whether any particular entity is a Public Employee Controlled Entity. Consideration must be given to the possibility that the directors, officers or other persons of an entity may be held liable for a good faith mistake or failure to identify a payment to a Public Employee Controlled Entity.

Taking into account these important considerations, we believe the Act should either:

- add a provision in section 3 that a payment made to an entity controlled by or associated with an employee or public office holder is deemed to have been made to the payee; or
- define a payee to include Public Employee Controlled Entities.

Civil Resolution Mechanism

As with the CFPOA, the absence of civil or administrative provisions that can be invoked on a lower balance of probabilities standard places a significant evidentiary burden on cases prosecuted under this Act. The introduction of civil enforcement authority over these violations will enable governments to take effective action against organizations while avoiding the length and cost of a full scale criminal prosecution.

Parliament should consider giving securities regulators civil enforcement authority over this Act. These types of prosecutions fall squarely within the mandate of securities regulators. For example, the Ontario Securities Commission's mandate is to "provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets." Securities regulators also have the requisite expertise to deal with violations of reporting obligations.

Other reporting provisions

Section 9(4) requires an attestation of accuracy by auditors or officers. However, auditors often work with samples and only deal with material misstatements. They often cannot certify absolute accuracy. We believe this should be amended to require an attestation that the information <u>appears to be accurate</u> in all material respects.

Under section 10, it may be useful to provide a mechanism for an entity to apply to the Minister to substitute a report it has made or will be making elsewhere.

Section 11 allows parties to provide reports for their wholly owned subsidiaries, but not affiliates that are not wholly owned. This relates to the question of control (section 4). We believe it would be appropriate to allow firms which "control" others to file reports on behalf of the controlled firms, even if ownership is not 100%.

Section 12 seems overly broad without knowing what information will be required under the regulations made pursuant to section 23(1)(f).

The Act is also unclear on how to disclose payments made under joint venture arrangements.

Record Keeping

Section 14 requires a company to provide an extensive amount of information upon the Minister's order. We believe this is overeaching and may require an entity to create evidence for which they can be prosecuted. Section 14 of the Act should mirror the requirements in section 4 of the CFPOA.

Under section 14(1) the Minister can set the period in which entities have to provide documentation or information to verify compliance. Without any guidelines, this seems arbitrary and could be prove difficult to respond to depending on the entity and the time period chosen by the Minister.

Designated Person's Powers

Section 16(2)(c) raises issues of off-shore computer searches involving access to data which may be stored internationally. We suggest more study be done on this matter as the jurisdictional implications seem incomplete in the current form of the Bill.

Section 16(4) requires the provision of "any documents or information" to a designated person that may be reasonably required for that purpose. We question the breadth of this provision. It does not contemplate claims of solicitor-client privilege, relevance or proportionality and fails to consider the potentially burdensome costs of production.

Section 21 does not contain a general provision, such as section 10(3) of the *Competition Act*, that investigations are to be conducted in private. It also does not ensure that no information is to be provided to others, except for the purpose of administration or enforcement of the Act, in contrast to section 29 of the *Competition Act*. These protections are necessary and the Act should specifically prevent disclosure under the *Access to Information Act*. The information provided under this Act will be commercially sensitive. By complying with the Act, firms should not be at risk of weakening their competitive position.

Offences and Punishment

We are concerned with the wording in section 24(3). If an entity is structured legitimately in a way that it is not reportable under the Act, we do not believe it should be an offense under the Act.

Conclusion

We commend the government on their commitment to transparency in the extractive sector and believe the goals of the legislation are laudable. With the above mentioned clarifications, we believe the Act will be better placed to achieve those goals.

We appreciate the opportunity to comment on this portion of Bill C-43 and trust that our comments are helpful. We would be pleased to provide any further support and assistance.

Yours truly,

(original letter signed by Noah Arshinoff for Leah Fitzgerald, Stuart W. Chambers and Heather Innes)

Leah Fitzgerald, Member CBA Anti-Corruption Team	Stuart W. Chambers, Chair National Environmental, Energy and Resources Law Section	Heather Innes, Chair Canadian Corporate Counsel Association

cc. Mr. James Rajotte, MP, Chair, House of Commons Finance Committee