Standing Senate Committee on Foreign Affairs and International Trade

Public Hearing on Bill C-82, *An Act to implement a multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting* (May 28, 2019)

Opening Remarks of Bennett Jones LLP

Good afternoon Committee members. Thank you for inviting us to participate on this panel and talk about Bill C-82. By way of introduction, my name is Jared Mackey, and with me is Darcy Moch and Greg Johnson. We are lawyers at the law firm of Bennett Jones LLP, in Calgary, Alberta, and provide legal services to a number of multinational corporations and private equity funds with respect to their business and investment in Canada. While our clients are diverse, the bulk of our practice concerns investments in the Canadian oil & gas and energy sector.

As lawyers, we are not here to express a view on whether the enactment of Bill C-82 is right or wrong from an overall policy perspective. We understand our role here today as providing the Committee with insight into our perspective on how Bill C-82 could affect our clients' decisions to invest in the Canadian energy industry and the uncertainties created for current and future investors in Canadian energy.

It is clear that capital investment in Canada's energy industry is lagging behind other countries, particularly the United States. Many Canadian projects across the sector simply do not have the funding to proceed. In contrast, the United States has become more attractive for energy investments and Americans are reaping the economic benefits. Part of the reason for this trend is that the United States is reducing and streamlining regulations and reforming its taxes to be competitive, while Canada is doing the opposite. Unless there is a change in policy, we expect the shift of foreign capital out of the Canadian energy industry to continue.

Taxes are a key factor in evaluating the viability of an investment. Up to now, foreign investors have been able to structure their Canadian investments in a tax-efficient manner, promoting both initial interest and ongoing contribution to the Canadian energy industry and economy. These structures are sanctioned by Canadian courts and have kept foreign capital flowing into the industry, allowing Canada to remain competitive relative to other countries.

With the enactment of Bill C-82, and implementation of the MLI, we are certain that a number of our clients will divert their capital towards more profitable opportunities outside of Canada. We have already seen a number of our foreign-based clients divest their Canadian energy holdings and invest elsewhere. Tax uncertainty fundamentally affects theses key investment decisions.

In the specific context of Bill C-82, basic issues remain in how the MLI will apply in principle and in practice. Of the many provisions of the MLI, the most important are the preamble text in Article 6 and the general anti-avoidance provision, the so-called "principal purpose" test, in Article 7, which have been adopted by all signatories to the MLI. These provisions have been drafted broadly and will require analysis of ambiguous language, including "object and

purpose" and "principal purpose". Language of a similar nature has already created considerable uncertainty in the interpretation of domestic tax legislation.

Our clients will look to us for guidance on the intended ambit and application of these rules to individual circumstances. Yet, as drafted, there is significant gray area about how the rules will be applied, particularly to private equity and other collective investment vehicles. The current OECD guidance is ambiguous and open to different interpretations. If Bill C-82 is enacted, additional guidance from Finance will be necessary on these aspects of the MLI.

If Bill C-82 is enacted, there is also a need for an appropriate transitional rule. Many of the investors affected by this legislation have established relationships, structures and investments in reliance on current law. That reliance should be respected through a reasonable transitional process. Restructuring existing corporate relationships, including internal group structures, is a complex and expensive undertaking and often includes arm's length commitments and obligations. Looking to other Canadian bi-lateral treaties in this respect, we suggest that the Committee consider a form of "step-up" or valuation-day protection to protect gains that have accrued prior to the effective date of the MLI.

Finally, from our perspective, it is important to emphasize for the Committee that foreign capital invested in the energy sector is taxed much more aggressively in Canada than investments in other sectors. A foreign investor can grow and sell a Canadian business in the automotive, services, or IT sector, without being personally taxed in Canada on the capital gain. No similar exemption applies to foreign investors in the energy industry. While the Canadian tax system encourages investments in these industries, it disproportionately targets investments in Canadian energy at a time when those investments are needed most. Regardless of the overall merits of the MLI, we think it makes sense from a policy perspective to expand the scope of existing exceptions in our domestic tax legislation in order to improve foreign investment opportunities for Canadian energy. Such an expansion would not be for passive investments but invested capital that is directly used in carrying on business in Canada.

That concludes our opening remarks. We are available to the Committee to answer any questions.