THE CANADIAN BAR ASSOCIATION
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Via email: peter.fonseca@parl.gc.ca; FINA@parl.gc.ca

Peter Fonseca, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Fonseca

Re: Economic Sanctions, Division 10 of Part 4 of *Bill C-47, Budget Implementation Act, 2023, No. 1*

I write on behalf of the International Law Section of the Canadian Bar Association (CBA Section) to express concern with the proposed amendments to the *Special Economic Measures Act* (SEMA) and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* (*Magnitsky Act*) in Bill C-47, the *Budget Implementation Act 2023, No. 1* (Bill C-47).

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day. The CBA Section consists of experienced international trade lawyers who routinely counsel clients on economic sanctions law across Canada and have a deep understanding of Canada's economic sanctions regime.

We recognize the importance of Canada's economic sanctions as a foreign policy tool to respond to international crises, human rights violations and threats to international peace and security. We also appreciate the Government's efforts to refine the Canadian sanctions regime. Our comments aim to assist the Government achieve its policy goals, increase predictability and certainty of the sanctions regime, assist businesses with their compliance efforts and minimize enforcement challenges.

Importance of clarity

Given that Canada's sanctions regime is enforced by criminal law, clarity is essential to ensure that individuals are aware of their obligations and that any breaches of the sanctions are prosecutable, as any ambiguities will be construed in favour of the accused.

Our chief concern is that the amendments to the SEMA and the *Magnitsky Act* do not increase the predictability and certainty of Canada's sanction regime. Rather, they cause further confusion and compliance challenges. Further, certain parts of the amendments are not aligned with sanctions legislation in allied countries like the US, UK, and EU and put Canadian businesses at a competitive disadvantage.

We urge Parliament to reconsider these amendments, review our recommendations below and consult with relevant stakeholders.

Bill C-47 proposes to add the following after section 2 of the SEMA:[1]

> **Deemed ownership**
>
> 2.1 (1) If a person controls an entity other than a foreign state, any property that is owned — or that is held or controlled, directly or indirectly — by the entity is deemed to be owned by that person.
>
> **Criteria**
>
> (2) For the purposes of subsection (1), a person controls an entity, directly or indirectly, if any of the following criteria are met:
>
> (a) the person holds, directly or indirectly, 50% or more of the shares or ownership interests in the entity or 50% or more of the voting rights in the entity;
>
> (b) the person is able, directly or indirectly, to change the composition or powers of the entity's board of directors; or
>
> (c) it is reasonable to conclude, having regard to all the circumstances that the person is able, directly or indirectly and through any means, to direct the entity's activities.

The proposed "deemed ownership" rule includes a proposed "control test" that will be added to section 2.1 of the SEMA. This amendment attempts to clarify the concept of ownership. However, there are significant practical challenges to its application.

The rule does not create a rebuttable presumption of control, but rather deems control to exist where only one of the three criteria is satisfied (i.e., a person is deemed to have control over an entity if one of the criteria in section 2.1(2) (a), or (b) or (c) is met).

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[1] Bill C-47 proposes a similar addition to the *Magnitsky Act*. Our comments in this letter on deemed ownership in the SEMA also apply to the proposed amendments on deemed ownership in the *Magnitsky Act*.

Remove section 2.1(2)(b)

Criterion 2.1(2)(b) is broad, vague and likely to capture situations where a person has a minor or nominal role in the governance of an entity (e.g., voting on board composition, appointing a board member as a minority shareholder, or having contractual rights to nominate or remove directors). For example, if a Designated Person has the ability, directly or indirectly, to appoint one of six or twelve board seats, an entire business (and any of its subsidiaries) would likely be considered a sanctioned entity.

Given the current wording of proposed criterion (b), it is unclear how it will be interpreted and applied in practice, and whether it will take into account the actual or potential influence of the person on the entity's activities. Further, information relating to board composition and changes is often not public and even the most sophisticated screening tools do not detect this information. This may result in sanctions measures applying to entities that are not effectively controlled by Designated Persons.

As such, proposed section 2.1(2)(b) would create more uncertainty and penalize Canadian entities seeking to comply, without salutary effect. It should be removed entirely.

Alternatively, in section 2.1(2)(b) add "majority" to the board composition criteria

In the alternative, if section 2.1(2)(b) is found necessary, the word "majority" should be added before "composition." The section would read as follows:

> (b) the person is able, directly or indirectly, to change the majority composition or powers of the entity's board of directors."

Adding "majority" would be consistent with the approach taken by the UK and better reflect the ability to wield control over the entity.

Remove section 2.1(2)(c)

Criterion 2.1(2)(c) appears to be the "basket" or residual clause. This test is highly subjective and may lead to inconsistent outcomes. It also means that situations involving minority share ownership may qualify as "control" even when criteria (a) and (b) are not met.

Given the uncertainty surrounding "control" in the proposed amendment, we believe this section should be removed entirely.

Alternatively, section 2.1(2)(c) should be accompanied by guidance

In the alternative, given that the control test is highly subjective and may lead to inconsistent outcomes, proposed criterion (c) should be implemented only if formal interpretative guidance on the SEMA and the *Magnitsky Act* are given concurrently with the amendment.

To date, no guidance has been issued by Global Affairs Canada despite repeated and longstanding requests from the CBA Section, trade lawyers and the business community.

We understand the Sanctions Policy and Operations Coordination Division of Global Affairs Canada is currently overwhelmed with several sanctions applications, delisting requests and drafting guidance. Implementing section 2.1(2)(c) without interpretative guidance would create more questions from stakeholders and exacerbate the situation.

Revise section 2.1(2)(a) to include a "more than 50%" rule

Proposed section 2.1(2)(a) should be amended to include a "more than 50%" rule rather than simply a 50% rule.

This is consistent with the practice in several allied jurisdictions including the UK and EU. It is also consistent with other relevant Canadian legislation. For example, section 2(4)(a) of the *Competition Act* includes a controlling provision:

> For the purposes of this Act,
>
> **(a)** a corporation is controlled by an entity or an individual other than Her Majesty if
>
> **(i)** securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that entity or individual
>
> […]
>
> Similarly, section 112(6)(b) *Income Tax Act* contains the following control definition:
>
> (b) one corporation is controlled by another corporation if more than 50% of its issued share capital (having full voting rights under all circumstances) belongs to the other corporation, to persons with whom the other corporation does not deal at arm's length, or to the other corporation and persons with whom the other corporation does not deal at arm's length.

Consistency with Canada's allies promotes business continuity and Canadian competitiveness. Further, aligning the control test with existing Canadian legislation allows individuals and businesses to draw on existing compliance standards and gives more certainty on the interpretation of these laws.

Additional comments on proposed amendment to deemed ownership that should be clarified in legislation or guidance

The "control test" does not make the entity itself a Designated Person, but only deems its property to be owned by the Designated Person who controls it. This may create confusion and ambiguity on whether the sanctions prohibitions apply to other dealings with the entity – such as providing financial or related services, or making goods available – which are only prohibited when done to (or for the benefit of) a Designated Person, in accordance with the SEMA.

Bill C-47 does not address the practical scenarios where: (i) multiple Designated Persons collectively own 50% or more of an entity or control an entity but individually would not; or (ii) where a non-sanctioned entity is deemed to own property of a Designated Person but is not itself a Designated Person.

If the proposed amendments are enacted, existing country-specific regulations under the SEMA and the *Magnitsky Act* will need to be revised to reflect the new rules and ensure consistency and coherence of the sanctions regime. For example, many exemptions from the sanctions prohibitions in each country-specific regulation apply to Designated Persons rather than the property owned by Designated Persons (e.g. payments made to Canadians by Designated Persons pursuant to contracts entered into before they were designated). It will be necessary to amend the sanctions regulations to ensure the exceptions continue to apply.

Conclusion

Bill C-47's proposed amendments will have serious implications for Canadian businesses, especially those engaged in cross-border transactions or operations involving entities. The proposed amendments to the SEMA and the *Magnitsky Act* expose Canadian businesses to increased sanctions risks, liabilities and costs and puts them at a competitive disadvantage vis-à-vis their US and European counterparts.

Section 2.1(2)(b) and (c) will make it extremely difficult and resource-intensive for the Government to administer and enforce the regime. It will be challenging to obtain relevant information and evidence to assess and prove ability to affect board composition or powers and the general ability to direct activities of foreign entities not clearly controlled through the ownership of voting shares.

We urge Parliament to carefully review the proposed amendments and their potential impacts on the Canadian legal and business environment.

The CBA Section also recommends that Global Affairs Canada give clear and comprehensive guidance on the application of the proposed changes and amend the country-specific regulations.

We appreciate the opportunity to share our views and concerns and we would be pleased to offer further assistance as needed, including by appearing before your Committee.

Yours truly,

(original letter signed by Marc-André O'Rouke for Ewa Katarzyna Gosal)

Ewa Katarzyna Gosal
Chair, CBA International Law Section