Transparency and Public Accountability in Canadian Sanctions

WHEREAS the Canadian Bar Association (CBA) has engaged with Global Affairs Canada (GAC) to advocate for greater predictability and transparency in the application of sanctions, including requests for public guidance on Canadian sanctions;

WHEREAS limited public guidance provided by GAC- on sanctions risks undermining the sanctions regime, which imposes significant consequences such as entry restrictions, financial barriers, and property seizure for listed individuals and entities;

WHEREAS public guidance ought to allow Canadian individuals and entities to effectively set up compliance plans and procedures, and enhances the integrity and effectiveness of the sanctions regime;

WHEREAS Canada's allies provide detailed policy guidance to ensure sanctions are effective, and principles of justice and procedural fairness require timely and transparent explanations for listing individuals or entities under Canada's economic sanctions regime;

Transparence et responsabilisation publique dans les sanctions canadiennes

ATTENDU QUE l'Association du Barreau canadien (ABC) a engagé un dialogue avec Affaires mondiales Canada (AMC) pour demander l'amélioration de la prévisibilité et de la transparence dans l'application des sanctions, notamment les demandes de directives publiques sur les sanctions canadiennes;

ATTENDU QUE la paucité des directives publiques d'AMC risque d'affaiblir le régime des sanctions, qui impose de lourdes conséquences, comme des restrictions à l'entrée, des obstacles financiers et la saisie de biens aux personnes et entités inscrites;

ATTENDU QUE les directives publiques devraient permettre aux personnes et entités canadiennes d'établir efficacement des plans et procédures de conformité, et qu'elles améliorent l'intégrité et l'efficacité du régime de sanctions;

ATTENDU QUE les alliés du Canada donnent des directives précises sur les politiques pour garantir l'efficacité des sanctions, et que les principes de justice et d'équité procédurale exigent d'expliquer rapidement, avec transparence, l'inscription de personnes ou d'entités sur la liste du régime de sanctions économiques du Canada;

BE IT RESOLVED THAT the CBA urge GAC and the Minister of Foreign Affairs to:

1. Provide comprehensive guidance on the interpretation and application of economic sanctions, addressing the issues identified by the CBA Section of International Law (as appended herein);

2. Provide timely responses to sanctions permit applications, and institute service standards for responding to complete permit applications;

3. Provide publicly available reasons for listing individuals or entities under Canadian sanctions, including references to any open-source information relied upon and sufficient details to enable the effective use of review mechanisms available under Canadian sanctions law;

4. Respond to delisting applications within the statutory timeframe, and where there is no statutory timeframe, within a reasonable administrative timeframe; and

5. Provide transparent public reporting on sanctions activities, including i) the number of permit applications received, granted and denied, ii) the number of delisting requests received, granted and denied and iii) Court proceedings relating to sanctions.

Resolution carried at the Annual Meeting of the Canadian Bar Association held in Toronto, ON, February 4, 2025.

QU'IL SOIT RÉSOLU QUE l'ABC exhorte AMC et la ministre des Affaires étrangères à adopter les mesures suivantes :

1. Donner des directives complètes sur l'interprétation et l'application des sanctions économiques afin de régler les problèmes signalés par la Section du droit international de l'ABC (voir l'annexe ci-jointe);

2. Répondre rapidement aux demandes de permis relatives aux sanctions et instaurer des normes de service sur le traitement des demandes de permis complètes;

3. Produire des motifs, accessibles au le public concernant l'inscription de personnes et d'entités sur les listes des sanctions canadiennes, y compris les références aux sources générales consultées, avec suffisamment d'information pour permettre une utilisation efficace des mécanismes d'examen permis par la loi canadienne sur les sanctions;

4. Traiter les demandes de désinscription dans les délais prescrits par la loi, ou dans un délai raisonnable sur le plan administratif en l'absence d'un délai légal;

5. Communiquer au public des rapports transparents sur les activités liées aux sanctions, y compris i) le nombre de demandes de permis reçues, accordées et refusées; ii) le nombre de demandes de désinscription reçues, accordées et refusées; iii) les procédures judiciaires liées aux sanctions.

Résolution adoptée à l'Assemblée annuelle de l'Association du Barreau canadien, à Toronto (ON), le 4 février 2025.

Steve Levitt, BA (Hons), LLB / B.A. (spéc.), LL.B.
Chief Executive Officer/Chef de la direction

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 12, 2023

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).

---

[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

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 12, 2023

Via email: aefa@sen.parl.gc.ca

Senator Peter M. Boehm
Chair, Senate Standing Committee on Foreign Affairs and International Trade
Senate of Canada
Ottawa ON K1A 0A4

Dear Senator Boehm:

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

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Conclusion

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Yours truly,

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

Ewa Katarzyna Gosal
Chair, CBA International Law Section

Top Issues on which Guidance from the Sanctions Policy and Operations Coordination Division of Global Affairs Canada is Requested

On behalf of the CBA/OBA International Law Sections

Submitted to Jennifer Graham, Deputy Director of the Sanctions Policy and Operations Coordination Division of Global Affairs Canada by email on October 26, 2022

Please note that while the issues below are framed with reference to the *Special Economic Measures (Russia) Regulations* ("SEMR"), it is our understanding that Global Affairs Canada's ("GAC") answers to these issues will be applicable *mutatis mutandis* to provisions in other *Special Economic Measures Act* ("SEMA") with equivalent wording.

(1) Please provide guidance on the terms "owned, held or controlled" by or on behalf of a designated person in relation to subsection 3(a) of the SEMR. More specifically, in addition to any general guidance please provide guidance on the following:

(a) Ownership threshold, if any, triggering section 3(a) of the SEMR.

(b) Under Section 2 of the SEMA, please provide guidance on whether it is GAC's view that subsidiaries and affiliates of listed entities are not included within the definition of a listed "entity". Further, please confirm that it is GAC's view that (i) the property of a subsidiary is not considered to be "owned" or "held" by a listed entity under section 3 of SEMR even if the subsidiary is wholly owned by the listed entity, and further that such property is not deemed to be "controlled" by the listed entity; and (ii) any financial or related services provided to the subsidiary are not considered to be "provided to for the benefit of" the listed entity.

(c) Please confirm that it is GAC's view that an entity that has minority non-controlling shareholders who are sanctioned is not subject to the prohibitions under section 3 because the sanctioned minority investor(s) do not own, hold, or control the property of the entity they hold shares in, and any financial or related services provided to such an entity are not considered to be "provided to or for the benefit of" its minority shareholders.

(d) Please identify the main factors that GAC considers in determining whether property is substantially controlled by a designated person under Subsection 3(a).

(2) Please provide guidance on facilitation within the SEMR as follows:

(a) Please confirm that it is GAC's view that subsections 3(b) and (c) of the SEMR apply only where the underlying dealing referred to in subsection 3(a) is by a Canadian or person in Canada (that is, please confirm that it is GAC's view that that the chapeau of section 3 should be read into the reference to subsection 3(a) contained in subsections 3(b) and (c)). In other words, please confirm whether, in GAC's view, there cannot be a

violation of subsections 3(b) or (c) where the underlying dealing referred to in subsection 3(a) is not by a Canadian or person in Canada.

(b) Please confirm whether it is GAC's view that the facilitation provision in Section 5 of the SEMR is only triggered where the activity referred to in sections 3 to 3.11 that is being "facilitated" contains the requisite nexus to Canada (i.e. that the underlying activity must constitute a violation of the Canadian sanctions in order for facilitation of the activity to also be a violation).

(3) Please confirm GAC's view on whether the term "deal" in any property under Subsection 3(a) of SEMR includes passive dealing in property such as continuing to maintain property previously obtained from a listed person without any listed person deriving direct benefit from it? For example, if a loan was obtained from a listed entity prior to the entity being listed, please confirm that it is GAC's view that it would not be a violation of Subsection 3(a) to keep using the loaned funds without repayment of the principal or payment of interest to the listed person.

(4) Please confirm GAC's view on whether trading in secondary markets in shares or debt securities of listed entities, including global depositary receipts or special depositary receipts, as well as bonds or Russian sovereign debt, are considered a dealing in property for purposes of section 3, or a dealing in "new" securities or "new" debt prohibited under Subsections 3.1 and 3.2 of SEMR. For example, are dealings/trades in securities (both debt and equity) issued previously by a sanctioned entity that take place between two non- sanctioned third parties on secondary markets permitted, provided that no funds or property accrues to or from the sanctioned issuer as part of the transaction?

(5) Please provide guidance on whether the payment of taxes and/or to pay regulatory fees, such as fees pay to local Russian agents to apply for, prosecute and/or enforce intellectual property rights, royalties for the use of Russian owned intellectual property rights, or other licensing fees, as required by Russian law is permissible under Section 3 of the SEMR, including payments made to or processed by the Ministry of Finance, the Central Bank of the Russian Federation, and other listed entities.

(6) In defining "any ship that is registered in Russia or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of Russia, a person in Russia or a designated person" under SEMR Section 3.4, please confirm whether it is GAC's view that a ship not owned or operated/chartered by a Russian person, but that is simply transporting Russian goods (dealings in which and the export of which are not otherwise prohibited by Canadian sanctions) would be captured under this provision. Further, to the extent a ship contains only a portion of Russian goods please confirm how GAC views this situation.

(7) Please provide guidance on the terms "in a foreign state" / "from a foreign state" as referenced throughout the SEMA and “in Russia” and “from Russia” throughout the SEMR:

(a) Does the term “in Russia” as used in SEMR include entities formed/constituted in Russia that are doing business outside the physical territory of the Russian Federation? For example, a Russian corporate entity that owns an interest in a capital project in a third country that is operated by a local entity, or a Russian corporate entity that provides services in a third country with employees residing outside the Russian Federation.

(b) Please confirm whether it is GAC's view that the prohibitions included in subsections 3.5, 3.8, and 3.11 of the SEMR, including the term “from Russia”, extend to goods that originate in Russia but have been substantially transformed outside of Russia.

(8) In regard to the Schedules of the SEMR that contain a table with a Goods description in Column 1 and a Harmonized Commodity Description and Coding System (HS) Code in Column 2 , see for example Schedule 6 (relating to Subsections 3.8(1) and (3)) and Schedule 7 (relating to Subsection 3.9(1)) of SEMR), please confirm that it is GAC's view that the descriptions under Column 1 in such tables take interpretive precedence over the HS Codes set out in Column 2. Specifically, the Notes in Schedules 4 and 5 indicate that the HS Codes “set out in column 2 are provided for reference purposes only.” In other words, please confirm that it is GAC's view that a good is classified under an HS Code listed in Column 2 but *not* described in column 1 is not subject to the relevant prohibitions.

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(9) Please provide guidance on the circumstances in which a Canadian person employed outside the territory of Canada could be considered liable for sanctions violations when their non-Canadian employer outside of Canada engage in an act that, if engaged in by a person in Canada or a Canadian entity, would violate Canadian sanctions. In particular, please provide specific guidance in relation to board members, directors, executives, and employees, on what GAC considers to be appropriate conduct by the Canadian person to mitigate potential sanctions exposure in this scenario. For example, is recusal from decision-making sufficient?

(10) Please confirm whether it is GAC's view that the services prohibition in section 3.10 of the SEMR only applies to covered services provided directly to Russia or persons in Russia and does not apply where the covered services provided to non-Russians may benefit persons in Russia or could subsequently be used to support services provided by those non-Russians to persons in Russia. Unlike other sanctions measures under SEMA, section 3.10 does not make explicit reference to services provided “directly or indirectly” to, or “for the benefit of”, Russia or persons in Russia.

References:

Special Economic Measures Act (S.C. 1992, c. 17) ("SEMA")

Special Economic Measures (Russia) Regulations (SOR/2014-58) ("SEMR")