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A COHERENT AND EFFECTIVE APPROACH TO

CANADA'S SANCTIONS REGIMES:

SERGEI MAGNITSKY AND BEYOND

42nd PARLIAMENT, FIRST SESSION

Hon. Robert D. Nault
CHAIR

APRIL 2017

A COHERENT AND EFFECTIVE APPROACH TO CANADA'S SANCTIONS REGIMES: SERGEI MAGNITSKY AND BEYOND

Report of the Standing Committee on Foreign Affairs and International Development

Hon. Robert D. Nault
Chair

APRIL 2017

42nd PARLIAMENT, 1st SESSION

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has the honour to present its

SEVENTH REPORT

Pursuant to the Order of Reference of Thursday, April 14, 2016, the Committee has proceeded to the statutory review of the *Freezing Assets of Corrupt Foreign Officials Act* and the *Special Economic Measures Act* and has agreed to report the following:

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The *Freezing Assets of Corrupt Foreign Officials Act* was enacted in 2011 to respond to the events of the Arab Spring, which saw long-standing autocratic governments in Egypt, Libya and Tunisia toppled by large-scale popular protests. Deposed regime officials, and their family members, were suspected of holding the proceeds of corruption in foreign jurisdictions. Thus, the Government of Canada determined that a new legislative mechanism was needed to prevent the flight or liquidation of any such assets found in Canada before the new governments could seek their recovery.[1]

The Act included a five-year review clause requiring a committee of the House of Commons and of the Senate to conduct a "comprehensive review of the provisions and operation" of the Act and of the *Special Economic Measures Act*. On 14 April 2016, the Standing Committee on Foreign Affairs and International Development (the Committee) received an order from the House of Commons designating it as the House Committee tasked with conducting the required review.[2]

The Committee began its review of these two Acts in October 2016. Over the course of 13 meetings, the Committee heard different views on the legislation. In addition, related policy issues from government officials, academics, researchers, stakeholders and practitioners were assessed. The Committee also received written briefs and other documents that helped it to formulate the observations and recommendations outlined in this report.

The *Special Economic Measures Act,* as well as the *United Nations Act,* is the legislation that allows the Government of Canada to impose economic sanctions against states, as well as individuals and entities within them. Through the issuance of regulations by the Governor in Council, the *Special Economic Measures Act* and the *United Nations Act* provide legal authority for the Government of Canada to impose restrictive measures and prohibitions on what are otherwise legitimate activities. Bank accounts can be frozen, financial dealings blocked and goods for export seized. These measures, among others, are what are commonly referred to as *sanctions*, and are imposed in the pursuit of foreign policy objectives related to international peace and security. These include, for example, ensuring the non-proliferation of nuclear weapons or defending another country's sovereignty. Such measures are an important tool of Canadian foreign policy, as they

1 For further information, see House of Commons Standing Committee on Foreign Affairs and International Development (FAAE), *Evidence*, 3rd Session, 40th Parliament, 7 March 2011.

2 House of Commons, *Journals,* No. 39, 1st Session, 42nd Parliament, 14 April 2016; and FAAE, *Minutes of Proceedings*, 1st Session, 42nd Parliament, 21 April 2016.

allow the government to take action, short of war, to respond to threats to international peace and security.

The *Special Economic Measures Act* and the *United Nations Act* are complementary pieces of legislation authorizing the government to impose sanctions either when called for by the United Nations Security Council (*United Nations Act*) or another international organization to which Canada is a member (*Special Economic Measures Act*). The *Special Economic Measures Act* also allows Canada to impose sanctions autonomously where "a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis."[3] Additionally, the government can take complementary action restricting exports through the *Export and Imports Permits Act*, for example by listing a country on the *Area Control List*.[4] Currently, Canada has autonomous sanctions regimes against nine countries through the *grave breach* provision of the *Special Economic Measures Act*. Furthermore, there are 16 UN authorized sanctions regimes under the *United Nations Act* and 2 export bans via the *Area Control List.*[5]

The *Freezing Assets of Corrupt Foreign Officials Act* also empowers the Government of Canada to impose prohibitions and restrictive measures against foreign nationals through the issuance of regulations. Upon the request of a foreign state, its officials and former officials who have misappropriated assets can be targeted. As departmental officials explained to the Committee, the *Freezing Assets of Corrupt Foreign Officials Act* is seen as "a responsive tool for Canada to support a foreign state that is in political turmoil and seeks to transition towards democratic rule and governance." The objective is "to allow this foreign state the opportunity to seek the ultimate seizure and recovery of assets through mutual legal assistance frameworks."[6] The Act should therefore be viewed as a complement to the system created by the *Mutual Legal Assistance in Criminal Matters Act,* and related *Criminal Code* provisions as they relate to cases involving foreign corruption.[7]

This report looks at the effectiveness of sanctions as a foreign policy tool, before considering the regulatory and administrative structures the Government of Canada has put in place to implement sanctions measures through the *Freezing Assets of Corrupt Foreign Officials Act*, the *Special Economic Measures Act* and related legislation. The report goes on to discuss issues related to private sector compliance with sanctions regulations as well as their enforcement by the government. Recommendations are made throughout, with a focus on promoting an effective and coherent Canadian sanctions program.

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3 *Special Economic Measures Act*, S.C. 1992, c. 17,s. 4(1).

4 *Export and Import Permits Act*, R.S.C., 1985, c. E-19.

5 For a full description of Canada's sanctions legislation and current sanctions programs, see Appendix A.

6 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

7 For a more detailed discussion of this topic, see Appendix A, and Stolen Asset Recovery Initiative, *Canada's Asset Recovery Tools: A Practical Guide*.

The last section of the report deals with recommendations for amendments to the two Acts under review, including the expansion of government authority to impose sanctions against human rights violators. The Committee heard compelling testimony from a number of highly respected human rights activists regarding how sanctions can be a potentially valuable tool in the promotion and protection of human rights. They recommended that Canada expand the legislative authority under which the government can impose sanctions against human rights violators. In advocating for a law in Canada similar to the one named after his late friend, Sergei Magnitsky, enacted in the United States (U.S.), William Browder stated:

> Effectively, with a Magnitsky act, whether it be a Russian act specifically or a global act, it would give people some hope that in Canada, the United States, and other places, people do care. My hope is that this would become eventually a sort of pedestrian thing where it doesn't even impact any kind of diplomatic relations, and you can be sanctioning human rights violators almost as a sort of process of criminal justice and can continue to carry on diplomatic relations as you choose, which is almost a separate area.[8]

This report also contains an appendix which provides a fuller description of the provisions of the two Acts under review, their regulations as well as related legislation. It also discusses in greater detail the sanctions regimes Canada currently has in place, with emphasis on sanctions targeting Iran, North Korea and Russia.

SANCTIONS AS A FOREIGN POLICY TOOL

A. The Evolution of Sanctions

While sanctions are a historical feature of relations between states, the term does not have a set definition. The *Special Economic Measures Act* and *United Nations Act* do not use the word *sanctions*. The same is true of Chapter VII of the *Charter of the United Nations* – which grants the UN Security Council the authority to enact sanctions measures – and the *International Emergencies Economic Powers Act* in the U.S.[9]

Instead, the term *sanctions* is commonly used to refer to a set of measures, all of which impose some form of restriction, disruption and/or prohibition in relation to a target. As one of the Committee's witnesses has written, rather than being a "homogenous tool," sanctions are in fact "a category of very different measures that can be applied in very different ways."[10] Most sanctions are economic or financial in nature, but also often include travel restrictions or bans. That said, states can also be sanctioned through diplomatic means not covered by legislation. A recent example is Russia's expulsion from the G8 – now G7 – group of industrialized democracies following its annexation of the Crimean peninsula.

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8 FAAE, *Evidence*, 1st Session, 42nd Parliament, 10 March 2016.

9 United Nations, *Charter of the United Nations*; United States, *International Emergencies Economic Powers Act*, 50 U.S.C. §§1701-1706.

10 Andrea Charron, *UN Sanctions and Conflict: Responding to peace and security threats,* Security and Conflict Management Series, Routledge, 2011, p. 2.

The use of sanctions has evolved over time. Between 1945 and 1990, the UN Security Council agreed to mandatory sanctions regimes on only two occasions. However, by the end of the 20th century, the Security Council's use of sanctions had expanded so significantly that two scholars, one of whom testified before the Committee, labelled the 1990s the "sanctions decade."[11]

The most prominent UN sanctions regime in the 1990s was the comprehensive trade embargo imposed on Iraq from 1991–2003 in response to that country's invasion of Kuwait and pursuit of weapons of mass destruction. The broad scope and prolonged nature of the measures against Iraq raised a number of concerns; chief among them were the severe humanitarian costs, particularly for young children.[12] Corruption and the generation of black market economic activity were other problems.

The experience of Iraq and other sanctions regimes from the early 1990s propelled a move away from comprehensive sanctions to *targeted* ones. *Targeted* means that sanctions are applied against specified individuals, entities, sectors and activities, rather than broad measures against an entire economy or population. Since the mid-1990s, all UN sanctions have been targeted in nature; and the same approach has been adopted by most states, including Canada. They are generally intended to affect elite members of a regime or organization, along with the resources and support bases that sustain their power and ability to carry out activities of concern, while minimizing the impact on ordinary citizens. As Daniel Drezner, Professor, International Politics, Fletcher School of Law and Diplomacy, Tufts University, explained to the Committee, the general idea is to "cause pain to presumably the most politically influential members of the target country." The measures are also intended to make "individual policy-makers or wealthy people who were considered close to policy-makers potentially liable for the implications of policy transgressions."[13]

Targeted sanctions include arms embargoes, travel bans, and asset freezes, as well as restrictions on financial transactions and technical assistance. With respect to trade, sanctions can be applied to specific commodities, such as a natural resource (e.g., diamonds) whose sale may be generating revenue for a regime or non-state armed group, or goods that have military applications. With investment and financial services, a specific sector – such as the defence or oil and gas industries – can be targeted for restrictions.[14]

Outside of action by the UN, sanctions have also become a favoured foreign policy tool for states, notably in the U.S. and European Union (EU). The U.S. currently has

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11 David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s,* Boulder, Colorado: Lynne Rienner Publishers, 2000.

12 Daniel W. Drezner, "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice," *International Studies Review,* Volume 13, 2011, p. 97.

13 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

14 Thomas J. Biersteker, Marcos Tourinho and Sue E. Eckert, "Thinking about United Nations targeted sanctions," in *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action,* Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, eds., Cambridge, United Kingdom: Cambridge University Press, 2016.

26 active sanctions regimes, while the EU has 38 sanctions regimes, and Canada has 20. Those figures include the UN's 14 sanctions regimes, which must be implemented by all member states.[15] In fact, Thomas Biersteker, Professor and Director of Policy Research, The Graduate Institute, Geneva, spoke to this point. He stated "there were twice as many UN sanction regimes in place in 2016 as there were at any point in the 1990s." When considering all of these UN and non-UN regimes, he remarked that: "Sanctions appear to have become a policy instrument of choice."[16]

B. Do Sanctions Work?

There is a long-standing debate in the foreign policy community about whether or not sanctions work; whether the measures are an effective foreign policy tool and achieve the objectives for which they are designed. Views tend to oscillate between outright pessimism and cautious optimism. In general, testimony indicated that sanctions should not be seen as a panacea, but more broadly as another foreign policy tool. They are effective some of the time and are more likely to be effective under certain conditions than others. In addition, even where they may not achieve their primary objective, they still have value in that they signal disapproval with the targeted behaviour, so called *naming and shaming.*

Witnesses emphasized that sanctions can have a variety of objectives. James Walsh, Senior Research Associate, MIT Security Studies Program, alerted the Committee to the tendency for discussions about sanctions to "mix together different goals and objectives" which leads to "poor analysis and faulty evaluations."[17] Sue Eckert, Adjunct Senior Fellow at the Center for a New American Security, identified three broad purposes for sanctioning a state:

- coercing it to change behaviour;
- constraining its ability to act; and,
- signalling disapproval of its violation of an international norm (i.e. *naming and shaming*).

Sanctions could, for example, be intended to compel a state to withdraw its forces from the territory of another (coerce), to deny a terrorist organization the ability to access financing (constrain), or to shame a regime that has violated international law (signal).

The Committee was told that, especially where one of the purposes of a sanctions regime is to stigmatize a target, the message – or signal – needs to be communicated

15 The number of UN sanctions regimes – 14 – cited here reflects the end of measures against Liberia and Côte d'Ivoire, which terminated on 25 May 2016 and 28 April 2016, respectively. The number of U.S. sanctions regimes – 26 – reflects the termination of U.S. sanctions against Burma, on 7 October 2016, and against the Côte d'Ivoire on 14 September 2016. Information on the EU's 38 sanctions regimes can be accessed here. Canada's sanctions regimes are detailed in a subsequent chapter entitled "The Legislative Approach in Canada."

16 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

17 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

effectively by the originating state. That includes coherent communication of the political message when names are added to or withdrawn from target lists. Put simply, the rationale for the application of a measure needs to be understood. Without such clarity, "the effectiveness of the signal is reduced."[18]

Whether applied multilaterally or by a single state, sanctions do not exist in a vacuum. That reality complicates the ability to determine causality, and attribute policy outcomes and behavioural changes directly to the intervention of a sanctions regime. States often employ other tools against a target in conjunction with sanctions, such as diplomatic measures (e.g., negotiations; advocacy; resolutions in multilateral bodies) and security operations. Moreover, factors independent of sanctions may be influencing a target's decision making and the circumstances confronting that target. Examples include a fall in global commodity prices, an altered regional balance of power, or changes in a country's domestic political environment and outlook. As Marc-Yves Bertin, Director General, International Economic Policy, Global Affairs Canada, commented in regards to isolating the effect that sanctions may be having on a target, "it is difficult to know what the tipping point is."[19]

When evaluating effectiveness, the characteristics of the targeted state must also be taken into account. For example, unlike Iran, which is partially integrated in the global economy and dependent on the global oil market for one of its primary exports, North Korea is isolated and mostly relies on the export of commodities like coal.[20] It is also highly dependent on a single country, China, for its external economic activity. Dr. Walsh indicated that those factors, in addition to other domestic considerations, made Iran more vulnerable to targeted sanctions. He observed that "Iran's government has authoritarian aspects, it cannot simply ignore the conditions of its citizens without political consequences." That situation contrasts with the North Korean regime, which "is a dictatorship unafraid to use any measure to suppress its population."[21]

The efficacy of sanctions on non-state actors is similarly case-dependent. It is entirely possible that designating an individual for a travel ban or asset freeze will have no concrete effect. Maya Lester, who is a Queen's Counsel in the Brick Court Chambers in London, raised this issue by pointing out that, "If the European Union freezes your assets and prevents travel, you're not going to care, other than perhaps by reputation or symbolically, if you don't hold assets in the European Union and you're not going to travel there."[22]

Not all states are able to bring the same pressure to bear through their sanctions programs. The effectiveness of measures will depend on the existing relations between

18 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

19 Ibid.

20 Iran's economic reliance on international markets prior to the imposition of sanctions made their impact greater when they were imposed and therefore were more effective compared to North Korea which was much less reliant on international trade when sanctions were brought in.

21 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

22 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

the states and the availability for the targeted state for alternative sources of trade and finance. China's relationship with North Korea, cited above, is probably the most extreme example of one state's ability to impose severe costs on another if it chooses to do so. But most targeted countries have a more diverse web of economic and political relationships. Andrea Charron, Assistant Professor at the University of Manitoba, and Director of the Centre for Security, Intelligence and Defence Studies at Carleton University, spoke about the actual effects of Canadian sanctions imposed through the *Special Economic Measures Act.* As she stated, "Canada's sanctions do not enter into the policy calculations of the leaders" of Russia, Syria and Zimbabwe, and "nor would more stringent Canadian sanctions."[23]

During its study, the Committee also became aware of an important distinction: imposing costs on a target is not the same thing as achieving an outcome. Costs, which can always be inflicted, should therefore not be taken as equating to the effectiveness of a sanctions regime. Yet, they often are. Dr. Walsh emphasized that policy-makers are prone to judging "the effectiveness of sanctions by triumphing the costs imposed, such as inflation and lost GDP, rather than whether one is any closer to achieving the policy goal of changed behaviour."[24]

A strategy that seeks to solely impose punitive costs raises other issues with respect to solving the problems that sanctions are meant to address. George Lopez, who is an expert in UN sanctions regimes and a professor at the University of Notre Dame, reminded the Committee that sanctions enacted to change the behaviour of their target should be designed to leave open a path or an incentive for "engagement between the international community or the imposers of sanctions and the target so you can persuade them to change the behaviour and show them the rewards that may be associated with that."[25] Simply imposing costs is unlikely to change behaviour without such opportunities.

While they may be a tool of choice to deal with many threats, witnesses stressed that sanctions are just that: a tool. In the words of David Kramer, Senior Director, Human Rights and Democracy, McCain Institute for International Leadership, sanctions "are not the be-all and end-all in and of themselves."[26] Throughout the Committee's study, testimony emphasized that sanctions are unlikely to be effective absent other measures, in particular diplomatic ones, as part of a broader strategy to achieve a particular result.

While that may be the view of the expert community, Dr. Walsh remarked that sanctions are currently presented as the answer "to virtually every problem". Nevertheless, he maintains that, rather than being a "wonder drug," sanctions are "one limited policy instrument that can be useful in combination with other tools as part of an integrated political strategy."[27]

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23 FAAE, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016.

24 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

25 Ibid.

26 FAAE, *Evidence*, 1st Session, 42nd Parliament, 14 November 2016.

27 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

Even when the underlying policy objectives of a sanctions program are clear and well-calibrated, testimony indicated that all sanctions have consequences, including unintended ones. They can have significant humanitarian consequences on the population in the targeted state. As will be discussed later, they also raise concerns regarding the rights of individuals targeted and the compliance burden they place on the private sector. There are also considerations related to the impact sanctions may have on the behaviour of a target state. Professor Drezner alerted the Committee to evidence indicating that, when sanctions are imposed against an authoritarian state, the state in question can become even more authoritarian, leading to further repression.[28]

There are also costs for countries that impose sanctions. These include foregone business opportunities, which may be lasting.[29] States can also face retaliation. In August 2014, the same year that sanctions were first imposed on it by western governments, Russia imposed an import ban on certain agricultural products (e.g., beef and pork) from Canada, the U.S. the EU, Australia and Norway, which was eventually expanded to include Iceland, Liechtenstein, Albania and Montenegro. That ban has been extended until 31 December 2017. The Committee learned that Canadian exports to Russia declined from around $1.4 billion in 2013 to just over $600 million in 2015. Global Affairs Canada attributes almost 57% of the decrease in Canada's overall exports to Russia to the agricultural import ban. That said, the department cautions that the "marginal impact" sanctions have had on Canadian firms is difficult to determine because firms may be "able to find alternative markets for their goods and services."[30]

As this discussion makes clear, the use of sanctions is a complex area of foreign policy. If they are to be effective, sanctions must be imposed in pursuit of a clear purpose as a tool in a broader international effort that takes into account the nature of the states targeted and the objectives it seeks to achieve.

THE COHERENCE OF CANADA'S SANCTIONS REGIMES

Testimony highlighted the complexity of Canada's sanctions system. Notably, testimony revealed the significant differences that exist between sanctions regimes and the variety of measures imposed. These range from blanket prohibitions to sectoral or geographic measures, and those targeting individuals and entities. The use of multiple pieces of legislation, namely the *Freezing Assets of Corrupt Foreign Officials Act,* the *Special Economic Measures Act,* the *United Nations Act,* the *Export and Import Permits Act,* further complicates the imposition of sanctions. A given sanctions regime can be

28 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

29 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016. Many studies on sanctions are focused on the measures imposed by the UN Security Council or the United States. There is comparatively less analysis available regarding the sanctions imposed by groupings of like-minded states. During his testimony, Dr. Biersteker alerted the Committee to a recently completed study on the impact and costs of sanctions against Russia. See Erica Moret, Thomas Biersteker, Francesco Giumelli, Clara Portela, Marusa Veber, Dawid Bastiat-Jarosz, and Cristian Bobocea, *The New Deterrent? International Sanctions against Russia over the Ukraine Crisis: Impacts, Costs and Further Action*, The Graduate Institute Geneva, Programme for the Study of International Governance, 12 October 2016.

30 Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, Robert Nault, to the then-Minister of Foreign Affairs, Stéphane Dion.

governed by a series of regulations, each with their own enabling Act, all of which must be read and interpreted together.

This complexity extends into the administration of Canada's sanctions system, which has both domestic and international elements, and involves law enforcement, financial regulation and border control. The Committee heard testimony or received submissions from Global Affairs Canada, the Royal Canadian Mounted Police (RCMP), the Canada Border Services Agency (CBSA), the Office of the Superintendent of Financial Institutions (OSFI), Immigration, Refugees and Citizenship Canada (IRCC) and Justice Canada, demonstrating the broad scope of government action required to enact and implement sanctions regimes.

Given all of this, it is imperative that Canada's sanctions system, and the legislative and other structures that underpin it, function in a coherent manner. Regulations must create a set of clear and understandable measures and they must be administered and enforced in a consistent fashion. This chapter will consider the internal governmental structures and regulatory processes of Canada's sanctions system and make recommendations aimed at ensuring that they function in a manner that promotes the effectiveness of measures imposed.

A. Legislative Coherence

As noted by witnesses who appeared before the Committee, the use of multiple Acts in the implementation of sanctions regimes complicates compliance and enforcement. Dr. Charron remarked on the complexity created by this *layering* of measures and pointed out that the Acts "have different penalties for non-compliance and different definitions for the measures applied, such as the definition for the seizure of property."[31]

Though enacting measures under multiple Acts increases complexity, it also broadens the range of situations in which the Government of Canada can take action and the measures at its disposal when it chooses to do so. The *United Nations Act* allows Canada to uphold its obligations as a member state of the United Nations and support that organization's role in the maintenance of international peace and security. The *Special Economic Measures Act* builds on this responsibility to respond to international threats and challenges, while recognizing that action through the UN may not always be possible given the political divisions and, at times, deadlock, that characterize relations among the Council's most powerful states: China, Russia and the U.S. *Area Control List* measures under the *Export and Import Permits Act* add further flexibility – and layering – preventing the export or transfer of any goods or technology without a permit; while the *Freezing Assets of Corrupt Foreign Officials Act* and related asset recovery legislation allows for action related to the ancillary issue of government corruption often present in situations where sanctions are used. Taken together, this legislation provides the Government of Canada with a versatile, albeit complex, set of tools.

31 FAAE, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016.

Despite the advantages of this suite of legislative authorities, the use of multiple Acts requires that attention be paid to the coherence of the measures that are imposed. When designed effectively, the regulations should be able to be read and interpreted together, setting out a single basket of measures – of various types – to be implemented and enforced.

Canada's sanctions on North Korea demonstrate both the usefulness of having different authorities to respond to international threats as well as the complications that can arise. With the regulations it adopted through the *United Nations Act* in 2006*,* Canada joined in the broad international condemnation of North Korea's nuclear weapons program, and furthered the UN multilateral sanctions regime. But Canada's legislative framework did not restrict it to the measures that had been adopted by the UN Security Council, which allowed the government to impose additional measures on North Korea following the sinking of the South Korean ship *Cheonan* in 2010. First, Canada listed North Korea under the *Area Control List*, using the lower threshold required by the *Export and Import Permits Act*, and then the government enacted stricter sanctions once it was deemed necessary through the *grave breach* provision of the *Special Economic Measures Act.*[32]

While this example demonstrates the complementarity and flexibility of Canada's legislative framework, the provisions of the three regulations under the three Acts also demonstrate the complexity that can result. Regulations under the *United Nations Act* and the *Special Economic Measures Act* for North Korea appear to create overlapping prohibitions or restrictions in some areas.[33] For example, both sets of regulations prohibit the provision and acquisition of financial services. The North Korea regulations under the *Special Economic Measures Act,* however*,* contain exclusions to this prohibition, including in relation to the work of international organizations and for non-commercial remittances under $1,000, which are not found in the *United Nations Act* regulations. This would suggest that one would need a permit under the *United Nations Act* regulations in order to carry out transactions specifically allowed under the *Special Economic Measures Act.*[34] Or, conversely, the *Special Economic Measures Act* regulations specifically allow for acts which are prohibited by the UN sanctions.

The *Special Economic Measures Act* regulations attempt to prevent overlap in relation to the export and import of goods by excluding goods already prohibited under the *United Nations Act* regulations. The former have not, however, been amended to account for changes to the latter. As a result, the exclusion provisions under the *Special Economic*

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32 Under *Export and Import Permits Act*, s. 4, countries can be listed where "the Governor in Council deems it necessary."For justification regarding the *Area Control List,* see Global Affairs Canada, *Export Control to the Democratic People's Republic of Korea*, 14 July 2010. For justification regarding the *Special Economic Measures Act*, see FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

33 *Regulations Implementing the United Nations Resolutions on the Democratic People's Republic of Korea* (DPRK), SOR/2006-287; *Special Economic Measures (Democratic People's Republic of Korea) Regulations*, SOR/2011-167.

34 Ibid., ss. 4 & 13 and & ss. 5 & 11, respectively. In the case of the *United Nations Act* regulations, the Minister may issue a permit if the requirements of the relevant Security Council resolutions have been met, and, if required, the Security Council Committee has approved the activity.

Measures Act regulations currently refer to sections of the *United Nations Act* regulations that do not deal with the export and import of goods, rendering their application unclear.[35] More generally, when considered from a non-technical point of view, the need for provisions under both regulatory regimes regarding the same subject matter is not readily apparent. The *United Nations Act* regulations include targeted prohibitions on specific products, including arms, luxury goods and aviation fuel, in addition to products that can be used as part of the development of ballistic missiles and nuclear weapons. But the *Special Economic Measures Act* regulations already prohibit the export, sale, supply or shipment of any goods, wherever situated, to North Korea (with some limited exceptions).

The *Special Economic Measures Act* regulations also overlap with the *Area Control List* in this area. Permits would be required under both Acts in order to export any goods to North Korea that are not covered by the exclusions in the *Special Economic Measures Act* regulations. Goods allowed by the exclusions under the *Special Economic Measures Act* regulations would still require a permit under the *Export and Import Permits Act.* Permission under the *United Nations Act* regulations would also be required for goods covered by its more limited prohibitions.[36] Global Affairs Canada's sanctions website does not explain the application process for permits in cases where permission under multiple regulations is required.

Without clear direction regarding how these regulations interact with each other – an issue dealt with later in the report – determining the exact measures that Canada has imposed on North Korea becomes difficult. The *Special Economic Measures Act* and *United Nations Act* are currently used conjointly to apply sanctions against four countries.[37] Determining the scope of any of these sanctions regimes therefore requires a complex comparative analysis of provisions across two or three sets of regulations, all of which are subject to amendment, along with their enabling legislation. This task is further complicated where apparent inconsistencies exist between the regulations, such as those found in the regulations targeting North Korea.

The Committee believes that regulatory complexity should be eliminated where possible. The Committee is also mindful of the testimony it received encouraging it to take a step back and examine the totality – or panoply – of sanctions measures and to consider the ways in which those measures are being used and whether they are working together as an effective and coherent whole.

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35 Ibid., ss. 3 & 5 & ss. 10(2) & 10(3), respectively. For the sections originally referred to by the exclusion provisions, see *Regulations Implementing the United Nations Resolutions on the Democratic People's Republic of Korea* (DPRK), SOR/2006-287 (from 2013-11-29 to 2016-10-20).

36 *Regulations Implementing the United Nations Resolutions on the Democratic People's Republic of Korea* (DPRK), SOR/2006-287, s. 6.

37 The four countries are Iran Libya, North Korea and South Sudan. See Appendix A for full list of current sanctions regimes and the related legislative framework.

Recommendation 1

The Government of Canada should ensure that sanctions imposed using more than one of the *United Nations Act*, the *Special Economic Measures Act* or the *Export and Import Permits Act* are imposed in a complementary and coherent manner, and amended concurrently when necessary.

The interpretation of sanctions regulations is further complicated by the necessity of consulting UN documents to determine the persons designated for asset freezes under the *United Nations Act* regulations, as well as to determine inadmissibility to Canada under section 35(1)(c) of the *Immigration and Refugee Protection Act.*[38] Legal uncertainty can also be created when the Security Council terminates sanctions regimes but Canada does not repeal the corresponding regulations under the *United Nations Act*, as is currently the case for regimes targeting Côte d'Ivoire and Liberia.[39]

Recommendation 2

The Government of Canada should implement the decisions of the United Nations Security Council regarding its mandated sanctions regimes through the timely enactment, amendment, and repeal of regulations under the *United Nations Act*.

B. Machinery of Government

Testimony also underscored the complexity involved in administering Canada's sanctions. In large part, that complexity stems from the essentially dual nature of sanctions as both a tool of international statecraft and a domestic regulatory system. These two, mostly separate, aspects of Canada's sanctions regimes place ongoing obligations on the government throughout the lifespan of a regime: from the decision to impose sanctions, the design of measures, the implementation, monitoring and enforcement of the regime, and its eventual conclusion.

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38 *United Nations Act* regulations do not list persons targeted by sanctions, instead enacting measures against all those listed by the UN, see Appendix A for fuller discussion. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The UN Security Council imposes "travel bans" against designated individuals under a number of its sanctions regimes. Those measures are given effect through Canada's admissibility framework, which is governed by the provisions of the Act. Section 35(1)(c) provides that a foreign national is inadmissible to Canada if that person's

> Entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

39 UN Security Council Subsidiary Organs, *Terminated Sanctions Regimes*; *Regulations Implementing the United Nations Resolutions on Liberia*, SOR/2001-261; and *United Nations Côte d'Ivoire Regulations* (SOR/2005-127).

1. International Coordination

Officials from Global Affairs Canada highlighted the diplomatic efforts involved in deciding to impose sanctions. As Mr. Bertin explained:

> If we're talking about a rapidly unfolding event that is the concern of the international community, there will be a lot of attention paid to this in New York City. The UN and our mission on the ground would work with other countries to identify and influence the course of action on how things are materializing.…
>
> At the same time, there may be instances where an area or an issue of concern isn't playing out at the UN because, for example, one of the Security Council members won't agree with the others. Within that context, the conversation will be pursued in different venues. It could be in the Commonwealth. It can be in other such venues where the international community will come together.…
>
> Invariably, what that means is that it takes a degree of entrepreneurial spirit on the part of Canada's diplomatic corps and the diplomatic corps of other countries in the way that they'll make their arguments and have positions brought forward—that is, the arguments and positions of their governments.[40]

Where sanctions are envisioned under the *Special Economic Measures Act,* Global Affairs Canada must undertake the process of designing the measures to be implemented. That involves a range of actors within the department, including, the division responsible for Canada's political and economic relations with the potential target state, the department's legal bureau and the relevant embassy or high commission. If the decision is taken to impose sanctions,

> … this same group will undertake an exercise to identify key decision-makers in the target State, as well as their associates, that might be targeted for an asset freeze. The responsible divisions will also examine the trade relationship between Canada and the target State to determine the nature and volume of trade and assess the potential effects the sanctions may have on the target State and on Canadians.[41]

Once sanctions measures are in place, Global Affairs Canada must monitor their implementation on an ongoing basis to determine if they are having the desired effect and working to achieve their purpose; making changes where necessary. That is an ongoing process meant "to better target the sanctions or to mitigate unintended consequences."[42] It involves coordination with Canada's international partners, including the EU and the U.S, which, again, requires the involvement of personnel at departmental headquarters and in Canada's missions abroad.

As testimony indicated, the Government of Canada must continuously collect and analyze information in countries where sanctions are, or may be, imposed. This is done in order to ensure that the measures are appropriate, are working to achieve their purpose

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40 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

41 Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, Robert Nault, to the then-Minister of Foreign Affairs, Stéphane Dion.

42 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

and that they take into account the position of like-minded states and the situation on the ground in the targeted state. That exercise will inevitably be more limited in cases like Iran and Syria where Canada does not have an embassy.

2. Roles and Responsibilities

At the same time that the government must manage its sanctions regimes at the international level, it must also implement the corresponding domestic regulatory regimes. Global Affairs Canada personnel "provide advice and recommendations to the Minister of Global Affairs, who is responsible, under the [*Special Economic Measures Act*], for making decisions and for recommending to the Governor in Council the establishment of sanctions."[43] Once the decision is taken to impose sanctions, the department must make a recommendation to the Minister of Foreign Affairs regarding the measures to be implemented, including proposed regulations.[44] Global Affairs Canada generally consults with other departments regarding its recommendation and works closely with Justice Canada's Legislative Services Branch in the development of the proposed regulations. Global Affairs Canada undertakes this consultation to ensure the regulations have the desired effect and meet legal and drafting requirements.[45]

Once regulations become law, the sanctions regime must be administered and its provisions enforced, ensuring the domestic regulation of the measures implemented. In its role as a regulator, Global Affairs Canada is responsible for responding to enquiries and providing information to the public, including via the department's website; and, providing analysis and advice to the Minister of Foreign Affairs regarding permit applications made pursuant to sanctions regulations. Speaking about the North Korea sanctions, officials indicated that such applications are addressed on a case-by-case basis so as to consider the impact "of the imposition or non-imposition, on humanitarian grounds, of the sanctions, in each case where an exemption to the regulations is requested."[46] Global Affairs Canada also collaborates with other government departments in related aspects of the domestic regulation of sanctions measures.

As the independent agency responsible for supervising federally regulated financial institutions,[47] OSFI has a role in the implementation of relevant monitoring (i.e., the duty to determine) requirements. Christine Ring, a Managing Director at OSFI, explained that,

> Although OSFI does not have a legislative role under [the *Special Economic Measures Act*] or [the *Freezing Assets of Corrupt Foreign Officials Act*], it assesses the quality of

43 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

44 Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, Robert Nault, to the then-Minister of Foreign Affairs, Stéphane Dion.

45 Ibid; and Correspondence from the Department of Justice in reply to a letter, dated 15 November 2016, from the FAAE Chair, Robert Nault, to the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould.

46 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

47 For the list of financial institutions regulated by the Office of the Superintendent of Financial Institutions (OSFI), see OSFI, *Who We Regulate*.

> controls in place at federally regulated financial institutions to comply with criminal anti-terrorist sanctions under the United Nations Act and the *Criminal Code*.[48]

That work on anti-money laundering and anti-terrorist financing[49] is leveraged "to address similar controls that are required to comply with" Canada's other sanctions legislation.[50]

Controls on the import and export of goods are primarily the responsibility of the CBSA, which coordinates with Global Affairs Canada and the RCMP. Andrew LeFrank, Director General of Enforcement and Intelligence Operations at the CBSA, told the Committee that,

> Border Services officers review declarations and other shipping documents to determine if goods are subject to prohibition or restriction. Goods that appear to contravene sanctions may be detained by [an officer] based on the authority of the Customs Act. The agency will then notify Global Affairs Canada of a possible infraction. Global Affairs Canada will determine whether the transaction falls within the scope of the legislation on trade and economic sanctions.[51]

In such cases, the Department of Justice and the RCMP are notified. The CBSA, in collaboration with IRCC, is also responsible for enforcing Canadian law in relation to admissibility, pursuant to the *Immigration and Refugee Protection Act*. That includes denying access to and removing persons who are inadmissible to Canada. The IRCC is responsible for related processes that occur prior to someone's arrival in Canada, such as visa applications, and for Canada's overall immigration policy. A foreign national can be denied entry to Canada for a number of reasons, including being subject to a travel ban under UN sanctions and for involvement in human or international rights violations.[52] Lesley Soper, Acting Director General of the CBSA's Enforcement and Intelligence Programs, described the coordination between Global Affairs Canada, the CBSA and the IRCC in relation to Canada's admissibility framework as involving "a challenging balance of considering diplomatic interests, upholding what is a principles-based immigration framework, and trying to protect the security and integrity of Canada's immigration system."[53]

The RCMP has general responsibilities for enforcing the *Special Economic Measures Act,* the *Freezing Assets of Corrupt Foreign Officials Act* and the *United Nations Act.* These responsibilities include conducting investigations of possible criminal violations

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48 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

49 Another independent agency, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), is mandated to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. It receives financial transaction reports and voluntary information on such activities. While related to issues discussed in this report, the Committee believes the work of FINTRAC lies outside the scope of the current review.

50 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

51 FAAE, *Evidence*, 1st Session, 42nd Parliament, 24 October 2016.

52 Ibid., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

53 Ibid.

of sanctions laws, and engaging in outreach activities involving industry groups. The RCMP also works with the CBSA, which is responsible for border control, to prevent the proliferation of strategic goods and technology. When the RCMP receives information from individuals, companies, government sources or law enforcement partners related to a possible federal offence, the information "is assessed to determine whether it is within the law enforcement mandate and what the appropriate next steps may be."[54] If, following an investigation, it is determined that sufficient evidence exists to lay charges, criminal prosecutions are conducted by the Public Prosecution Service of Canada.

During its appearance before the Committee, the RCMP emphasized that it uses a "prioritization process" in determining where to allocate its investigative resources. In this respect, the Committee was told that the highest priority files are generally "*Anti-terrorism Act* investigations."[55] In reference to the *Special Economic Measures Act,* the RCMP stated its role "could potentially be in the disruption, which is part of our mandate as well, to prevent crime, that the answer lies, rather than the prosecution."[56] Issues related to the enforcement of sanctions measures are discussed further in a subsequent chapter.

The complexity involved in the domestic regulation of Canada's sanctions policy and legislation was apparent from the testimony of these government departments and agencies. In a number of instances, questions posed to them related to issues they deemed wholly or partially outside their mandate. No one witness could answer questions regarding Canada's sanctions system as a whole with respect to policy, administration and enforcement, and no testimony suggested any formal inter-departmental structure for the coordination of all aspects of the sanctions system. That said, Global Affairs Canada emphasized that the regulatory process under the *Special Economic Measures Act* and the *United Nations Act* flows from decisions made by the Governor in Council. That means that the concerned ministers should all be involved and the departments under their authority should work together "to ensure the coherence of advice provided in support of the decision-making within those processes."[57]

The Committee concluded that this complex landscape of departmental roles and responsibilities is suffering from the added strains of limited resources and lack of a proper mandate as a domestic regulator. Those issues will be addressed in the next chapters of this report that deal specifically with regulatory administration and enforcement.

PRIVATE SECTOR COMPLIANCE WITH CANADA'S SANCTIONS REGIMES

While the government enacts and administers Canada's sanctions regimes, its effectiveness ultimately rests with the private sector. It is private sector compliance with the prohibitions and restrictions placed on its activities that determine how these measures work in reality. In practice, the sanctions regimes that Canada puts in place are not

54 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

55 Ibid.

56 Ibid.

57 Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, the Hon. Robert Nault, to then-Minister of Foreign Affairs, Stéphane Dion.

always regimes crafted by government regulation, and in fact, the divergence between law and practice can be significant.

Private sector firms must have a clear understanding of the scope of sanctions measures – including clear understandings of both the restriction put in place and related exceptions. Vagueness and lack of clarity are contributing factors in *over-compliance,* wherein firms and individuals choose to follow the safest or broadest interpretation of a measure in order to avoid risking punishment for non-compliance.

The cost of complying with sanctions regulations also affects how the private sector chooses to implement sanctions measures. Currently, financial institutions have the obligation to use elaborate monitoring and reporting systems in order to engage in transactions with targeted states.[58] For exporters, conducting business in a country subject to sanctions can mean significant increases in legal costs, as well as delays where permits must be obtained. This problem is compounded when a lack of clarity also exists around the range and scope of the sanctions regime in place. These compliance costs can vary greatly depending on measures implemented and how they are administered; with different firms facing different costs. These costs are then factored into private sector decision making – something which may lead to outcomes not envisioned by policy-makers.

These implementation issues must be at the heart of any consideration of Canada's sanctions regime. Taken to an extreme, problems in implementation could not only alter the measures the government intended to enact, but also frustrate the very purpose of the sanctions regime itself. Where firms over comply with regulations, targeted measures against specific individuals and entities could become quasi-blanket embargoes. The real costs would shift from those listed in regulations to the private sector and ordinary citizens in both the targeted state and Canada. Thus the legitimate activity that targeted measures were designed to exclude would become the very activities that end up being prevented.

In testimony by its officials, Global Affairs Canada demonstrated awareness of these issues and the important role played by the private sector. Marc-Yves Bertin noted the need to "balance the foreign policy objectives associated with the use of the sanctions, with the implications for Canadian stakeholders, Canadian businesses, and Canadians more generally,"[59] and that the department seeks ongoing feedback from "the private sector, which might have views in terms of trying to do business in a given context or market."[60]

Testimony from the private sector, as well as academia, however, was critical of government efforts to support private sector implementation of sanctions regimes. John Boscariol, a partner and leader of the International Trade and Investment Law Group with McCarthy Tétrault LLP stated that Canada's sanctions system is "broken" as "the government has failed to devote even the most basic resources to assisting the business

58 For explanation of duty to determine requirement, see Appendix A.

59 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

60 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

community in complying."[61] Kim Nossal, Professor at the Centre for International and defence policy, Queen's University, agreed with this assessment, stating "the federal government has downloaded the costs of implementing its enthusiasm for this highly questionable public policy tool onto [the private sector]."[62]

This section will look at the issues of over-compliance and the compliance costs placed on the private sector in Canada by sanctions regimes while discussing three key policy reforms the Committee believes can be made to mitigate these effects and improve the implementation of Canada's sanctions measures.

A. Over-Compliance and Compliance Costs

As explained by a number of witnesses, the problem of over-compliance stems from the risk or perceived risk for private firms created by sanctions regimes. Thomas Biersteker explained how:

> … the translation—from … government legislation, and to the interpretation of that legislation, the way it's communicated to firms and the way firms then through compliance implement the measures—can lead to a significant distortion. It could mean a narrowing, but most often it means a widening or broadening of the sanctions … the phenomenon of widespread derisking because firms were simply concerned that if they didn't divest virtually all activities … they could be in trouble with their own governments, and with other governments as well in terms of fines and penalties.[63]

Canadian practitioners confirmed that this has indeed been occurring in Canada. According to Vincent DeRose, a partner with Borden Ladner Gervais LLP, "there have been too many situations where a Canadian company … has had to turn away from opportunities simply because of uncertainty and because they didn't want to take on that risk."[64] G. Stephen Alsace, Senior Director, Sanctions, Global AML Group, Canadian Imperial Bank of Commerce (CIBC), came to the same conclusion, stating "[i]t happens fairly frequently. Where there is ambiguity, where there is any kind of vagueness, banks—and I think credit unions would act the same way—err on the side of caution. You're conservative and you're more reluctant to complete transactions."[65]

This issue links with the regulatory complexity discussed in the previous chapter. The more difficult they are to interpret, the greater the uncertainty regarding sanctions regulations and the higher the risk for over-compliance issues. The cost of complying with a sanctions regime further amplifies this problem, as firms unwilling to bear the cost will turn away legitimate business from a country targeted by sanctions. As noted by

61 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

62 FAAE, *Evidence*, 1st Session, 42nd Parliament, 31 October 2016.

63 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

64 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

65 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

Mr. Boscariol, firms "find the process expensive and time consuming, and often they simply decide not to do business with that country."[66]

These compliance costs are significant. For example, G. Stephen Alsace stated that CIBC "spend[s] millions of dollars a year in compliance. We're constantly cognizant of having to upgrade our systems, our processes. We have significant numbers of people and resources devoted just to reviewing sanctions and processes."[67]

While significant, large sophisticated institutions like banks can carry the burden of compliance, smaller businesses, however, often lack the resources and expertise to do so. According to Vincent DeRose, "[m]any companies in Canada, particularly small and medium-sized enterprises, do not have sophisticated, and what by necessity are often expensive, control systems in place to ensure that they remain compliant with Canada's economic sanctions."[68]

If not completely avoidable, witnesses emphasized that these problems can be ameliorated by improvements on the part of the government. In particular, increased guidance, the provision of a consolidated sanctions list and an improved permits process, discussed below, would aid the private sector to effectively implement sanctions measures.

B. Guidance on Sanctions

The most often cited criticism by witnesses of the government's administration of sanctions regimes is the lack of guidance regarding the interpretation and application of regulations. According to John Boscariol, "[t]here are no officials within Global Affairs Canada or elsewhere in the government who will provide guidance or assistance on economic sanctions" and "[w]hen the business community reaches out to [the government] for even the most seemingly straightforward questions, they're told by Global Affairs to retain legal counsel."[69]

As Milos Barutciski, a partner with Bennett Jones LLP, noted, government agencies fulfilling similar roles in other areas provide such guidance on a regular basis as part of their mandates as regulators: "I deal with the Competition Bureau. I deal with CBSA. I deal with the Ontario Securities Commission. I deal with any number of agencies, and I will get their take or interpretation of how they administer the act" but "[i]f I call the sanctions people … the answer I get is, "Oh, we can't interpret the law"", "we're not regulators."[70]

Witnesses were quick to note that the problem was not with officials at Global Affairs Canada or elsewhere, but with the lack of resources and mandate provided to them. Mr. Boscariol stated "[i]n my view, the government lawyers within Global Affairs are

66 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

67 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

68 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

69 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

70 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

hard-working, very competent and knowledgeable, but the [E]conomic [L]aw [S]ection remains understaffed and under-resourced."[71] Mr. Barutciski observed that the Global Affairs Canada's Economic Law Section's ability to function as a regulator was further undermined by the scope of the other duties assigned to it: "Do I blame those officials? Absolutely not. Those 12 people cannot advise the minister properly on the things the Minister of Foreign Affairs … needs to be advised on in relation to human rights, UN issues, and process permit applications for gas turbines."[72]

The Committee is convinced of the need to restructure the administration of Canada's sanctions regimes. This will better reflect their essentially dual nature – as both a tool of international statecraft and a domestic regulatory system – and to ensure that the proper resources are provided to fulfil both elements of their administration. The decision to impose sanctions – to determine the types of measures which should be enacted in pursuit of a clear purpose, to collaborate with Canada's international partners, and to monitor the outcome in the targeted state – requires different capacities than does the administration of the domestic regulatory system.

Recommendation 3

The Government of Canada should properly resource and reform the structures responsible for its sanctions regimes, in order to effectively impose sanctions on targeted states and persons.

In terms of the type of guidance required from government, Mr. DeRose requested "written guidance on how programs for compliance with Canadian economic sanctions can be developed and how Canadian companies that have already developed compliance programs could determine whether their existing compliance programs are adequate from the perspective of the Canadian government."[73]

Mr. Alsace highlighted the need for guidance when new regulations are introduced, especially when they are new or complex forms of sanctions, such as the sectoral and debt measures enacted against Russia: "We really could have used outreach when the Russian sanctions came.… when the Russian sanctions came down it was, quite frankly, almost pandemonium. They were a completely different type of sanction. They're not list-based per se.… they separate credit and debt issuance transactions.… It's very complicated."[74]

Sandy Stephens, Assistant General Counsel, Canadian Bankers Association, reminded the Committee that the only written guidance from the government on sanctions compliance is a guide published by OSFI – an agency whose representative testified "does not have a legislative role under [the *Special Economic Measures Act*]"[75] – and

71 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

72 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

73 Ibid.

74 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

75 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

which has not been updated since 2010. She further stated that the provision of "comprehensive guidance" by the government would not only "assist financial institutions in complying with the laws and regulations" but "be consistent with the approach used in other jurisdictions such as the U.K., the U.S., and the EU."[76]

Several other witnesses highlighted the difference between the regulatory approach taken in Canada versus other countries, including John Boscariol, who stated: "Other jurisdictions, including Australia, the United States, and the European Union, provide significant guidance and tools for their exporters to effectively compete and allow them to do that while still complying with these measures. Canadian businesses don't get the benefit of that direction or guidance from our government, and we're at a competitive disadvantage internationally."[77]

The Committee believes the provision of guidance to the private sector is critical to the proper implementation of Canada's sanctions regimes. This will ensure that the measures designed to achieve a specific foreign policy objective are understood and complied with faithfully by the private sector. The domestic regulatory system for sanctions measures should be consistent with the administrative standards established by domestic regulators in other areas as well as sanctions regulators in foreign jurisdictions.

Recommendation 4

The Government of Canada should provide comprehensive, publically available, written guidance to the public and private sectors regarding the interpretation of sanctions regulations in order to maximize compliance.

C. Consolidated Sanctions List

Another issue where Canadian practice diverges from that of other jurisdictions is the provision of a consolidated list of individuals and entities subject to sanctions. Australia, the EU, the UN and the U.S. all provide a consolidated list of individuals and entities targeted by sanctions to the public via the Internet.[78] Justifying the government decision not to provide such a list, Hugh Adsett, Legal Adviser and Director General, Global Affairs Canada, stated: "I would say that one of the challenges with a consolidated list is that it is essentially an administrative list. At the end of the day, in order to have a fully solid sense of what the binding list is, it is necessary to return to the Department of Justice regulations themselves."[79]

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76 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

77 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

78 Australian Government, Department of Foreign Affairs, *Consolidated List*, Australia and Sanctions; European Open Data Portal, *Consolidated list of persons, groups and entities subject to EU financial* sanctions; U.S. Department of the Treasury, *Specially Designated Nationals List (SDN)*, 6 January 2017; UN Security Council Subsidiary Organs, *Consolidated United Nations Security Council Sanctions List*.

79 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

Vincent DeRose, however, explained to the Committee the additional work, and therefore cost, created by the government in not providing such a list, particularly whenever existing regulations are amended:

> … without the consolidated list that we have urged be created at least for a week, two weeks, or a month, it's tough to figure it out. Quite frankly, the way you need to go through it is to find the latest consolidated regulations with the last known list, and then go through all the amendments that have been issued, and you literally have to have someone remake the list.… We had a team at our law firm going through and doing it, and these are people who are used to it. A Canadian company out there that does not have that experience, quite frankly, would be at a loss.[80]

Sandy Stephens similarly testified in reference to the need for a consolidated list: "The absence of a systematic method of communicating the continuous updates to these lists imposes an unnecessary burden on the private sector and creates greater risk of non-compliance, which undermines the entire regime."[81]

A related issue raised in testimony was the need to provide additional information when an individual or entity is listed in sanctions regulations. Sue Eckert noted with approval the evolution of UN sanctions regime towards providing more identifying information: "In the early days … there was actually a case in which the UN listed "Big Freddy"—no identifying information.… We've come a long way since then. The UN actually has identifiers to the extent that there's passport … date of birth. Whatever information they can, they put out. I think that's important."[82]

Canadian practice has not demonstrated the same evolution. Some of the current regulations under the *Special Economic Measures Act* include the date of birth along with the name of the listed individual, for example in regulations for Burma and Zimbabwe, while others only provide a name, such as regulations for Iran and Russia.[83] John Boscariol described how the lack of identifying information can lead to compliance problems: "When names are put on the Canadian list, often it's just a name that's added to the list, and no other detail.… We act for a company that was thinking of engaging in transactions with a company by [a listed] name in Burma. There were slight differences [between the name of the company and the name on the regulations list]. We had a suspicion that it could be that entity, so we called up Global Affairs, but they could not give us any assurance as to whether that was the entity named or not. It's a crazy situation … if we can't properly identify who these parties are on these lists and enable companies and banks to identify them, it's not going to have any practical effect."[84]

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80 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

81 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

82 FAAE, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016.

83 *Special Economic Measures (Burma) Regulations*, SOR/2007-285; *Special Economic Measures (Iran) Regulations*, SOR/2010-165; *Special Economic Measures (Russia) Regulations*, SOR/2014-58; and *Special Economic Measures (Zimbabwe) Regulations*, SOR/2008-248.

84 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

The Committee believes that the government should follow similar efforts in other jurisdictions to maintain a consolidated list of persons targeted by sanctions and provide greater identifying information to assist the private sector in identifying them.

Recommendation 5

The Government of Canada should produce and maintain a comprehensive, public and easily accessible list of all individuals and entities targeted by Canadian sanctions containing all information necessary to assist with the proper identification of those listed.

D. Permit Issuance

Testimony from practitioners also highlighted the permit application process as an area where improvements could assist the private sector in complying with sanctions measures. According to G. Stephen Alsace: "We have a number of clients who have been basically in limbo for the last 16 months because we've actually submitted a permit application without any answer. We don't even get an answer regarding the timing of when we can expect an answer."[85]

Milos Barutciski noted the difference between seeking guidance and applying for permits through the Economic Law Section for regulations under the *Special Economic Measures Act* and the *United Nations Act* versus the Trade Controls Bureau under the *Export and Import Permits Act*: "the [Trade Controls Bureau] has 50 people, with engineers and technical people who assess products.… They have the capacity. They also have an administrative arm that processes permits. There's an online permit processing vehicle that they use, so it's structured to regulate and administer what is a regulatory act. If you call the [Trade Controls Bureau], and you ask for advice, you get advice from informed public servants who are there to administer a regulatory statute."[86] This difference is evident when consulting the websites of the two sections. The economic sanctions' permit page features a prominent warning recommending applicants seek legal advice prior to applying for a permit and offers brief application instructions; while the export controls page offers links to a handbook, a guide and advisory opinions on export controls as well as to online permit application services, among other information.[87]

The Committee believes that the issuance of permits under sanctions regulations should meet standards similar to those maintained by other regulators in similar areas as well as sanctions regulators in foreign jurisdictions.

85 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

86 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

87 Global Affairs Canada, *Permits and Certificates*; Global Affairs Canada, *Export Controls*.

Recommendation 6

The Government of Canada should transfer responsibility for the issuance of permits under the *Special Economic Measures Act* and the *United Nations Act* to the section of Global Affairs Canada that already issues similar permits under the *Export and Import Permits Act*.

While testimony from private sector practitioners was critical of the government's administration of Canada's sanctions regimes, it was also noted that improvements were possible and, if brought about, could have a significant positive impact on how these measures are implemented by the private sector. The Committee agrees with Mr. Barutciski when he prefaced his testimony by saying: "The comments I'm going to make are negative, but they are not "the sky is falling". It really doesn't take a huge amount to fix it, but the system is fundamentally incoherent."[88]

The Committee believes that the implementation of sanctions measures – and by extension the effectiveness of Canada's sanctions regimes – can be greatly improved by recognizing the need to create a dedicated section that acts as a domestic regulator for sanctions measures and learns from the best practices already established by other Canadian regulators and similar agencies in other countries.

THE ENFORCEMENT OF SANCTIONS LEGISLATION

Having already considered the design, administration and implementation of regulations under the S*pecial Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act*, this report now turns to the enforcement of their regulations. Of all the aspects of the review undertaken by the Committee, enforcement proved the most difficult in which to acquire information and therefore to come to conclusions. Simply put, there has not been a great deal of enforcement activities related to these two Acts. Since its enactment in 1992, there has only been one conviction for the violation of regulations under the *Special Economic Measures Act,* with similarly few prosecutions under related legislation and the *Freezing Assets of Corrupt Foreign Officials Act*. CBSA reported that it has prevented a significant number of exports to countries targeted by sanctions, but suggested few cases demonstrate the willful contravention of regulations required to be a criminal offence. The Committee, however, is of the opinion that criminal violations are likely occurring and going uninvestigated and believes that more should be done to enforce Canada's sanctions measures.

The different issues raised by the enforcement of these two Acts are a product of their differing purposes. Enforcement of regulations under the *Special Economic Measures Act* strives to uphold the effectiveness of measures enacted to achieve a desired foreign policy objective, while enforcement of *Freezing Assets of Corrupt Foreign Officials Act* regulations looks to ensure that misappropriated funds are preserved to allow for their eventual recovery as part of broader efforts to combat global corruption. As such, enforcement of the two Acts should be considered separately.

88 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

A. Enforcement of the *Special Economic Measures Act*

Testimony from the RCMP, CBSA and IRCC, described the robust systems and procedures in place to enforce regulations under the *Special Economic Measures Act,* as well as the *United Nations Act*.[89] This includes not only the investigation, and potential prosecution, of violations of sanctions measures, but also prevention and border control – preventing the export of prohibited goods and the entry of inadmissible persons. This testimony demonstrated the competence and professionalism of these agencies, and the Committee did not hear any testimony suggesting procedures currently in place require improvement.

In terms of concrete examples, the RCMP made reference to two specific cases that led to a conviction, one involving a violation of the *Special Economic Measures Act* and another of the *United Nations Act.* Both cases involved the shipment of prohibited material to Iran, however, only one, the Yadegari case, demonstrated a concerted and well-planned attempt to circumvent sanctions measures.[90] CBSA reported having prevented the export of approximately 250 prohibited shipments to countries targeted by sanctions in the last five years, the majority of which had "no indicators of criminality and, therefore, the CBSA simply [took] a regulatory action to address the non-compliance."[91] In such cases, CBSA will prevent the shipment from being exported as well as potentially imposing an administrative penalty or seizing the goods. While CBSA did not specify the number of cases referred for criminal investigation, correspondence with the Committee implied such cases are infrequent.[92]

The reasons why so few criminal investigations and prosecutions for sanctions violations have occurred was not fully answered by testimony. Neither the RCMP nor CBSA representatives suggested that any aspect of the legislation impeded prosecutions, nor was this suggestion made by any other witness.

When asked about the lack of prosecutions, Vincent DeRose stated: "In terms of why there have been so few prosecutions, again, I would personally suggest that it is more because of a lack of investigations, a lack of resources, and the lack of an ability to investigate."[93] This view is supported by statements by the government. CBSA stated "it would not be practical or even desirable to investigate all cases of sanctions violations."[94] The RCMP emphasized the prioritization of investigations, with focus placed on

89 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016; FAAE, *Evidence*, 1st Session, 42nd Parliament, 24 October 2016.

90 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

91 Correspondence from CBSA in reply to letter from the FAAE Chair, Robert Nault, to the Minister of Public Safety and Emergency Preparedness, Ralph Goodale.

92 Ibid. Correspondence from CBSA discusses in detail 3 types of regulatory actions taken in cases of non-compliance, including a percentage of cases where such action is taken. For criminal investigations, correspondence only mentions the possibility of it occurring.

93 FAAE, *Evidence*, 1st Session, 42nd Parliament, 30 November 2016.

94 Correspondence from CBSA in reply to letter from the FAAE Chair, Robert Nault, to the Minister of Public Safety and Emergency Preparedness, Ralph Goodale.

anti-terrorism and violent crime.[95] Additionally, Global Affairs Canada stated: "[t]here's an expectation that Canadian companies operating abroad will comply with Canadian law; it's a general expectation and assumption that Canadian companies will do so."[96]

The Committee is convinced that the proper enforcement of sanctions measures is critical to the overall effectiveness of Canada's sanctions regimes and the government should make enforcement a priority.

Recommendation 7

The Government of Canada should ensure that law enforcement agencies highly prioritize the enforcement of sanctions measures and are given the necessary resources to fulfil their duties.

Testimony raised a related enforcement issue at the international level. Several witnesses noted that the effectiveness of sanctions regimes must be considered on a global scale.[97] Where countries work together to implement sanctions, through the UN or elsewhere, the effectiveness of one country's regime depends on the effectiveness of all countries' regimes as a whole. Speaking of sanctions against North Korea, Andrea Berger, Deputy Director, Proliferation and Nuclear Policy, Senior Research Fellow, Royal United Services Institute, called countries that lack capacity to implement and enforce sanctions "the holes in the sieve … that North Korea continues to be able to operate in and conduct its illicit activity."[98]

The Committee believes that Canada should cooperate with its sanctions-implementing partners to the fullest extent possible. The government should encourage their enforcement of sanctions measures, in order to ensure the overall effectiveness of sanctions regimes.

B. Enforcement of the *Freezing Assets of Corrupt Foreign Officials Act*

Testimony regarding the enforcement of the *Freezing Assets of Corrupt Foreign Officials Act* suggests that it has had very limited use since its enactment in 2011. As previously discussed, the Act is a tool to freeze the proceeds of foreign corruption; to allow for their eventual recovery by the affected state. To date, the Act has been used in reference to Egypt, Tunisia and Ukraine.[99] The RCMP testified that they were not aware of any asset seizures under the Act, while Global Affairs Canada stated that they are aware of over $2.5 million in assets having been frozen since the Act's inception.[100] Global Affairs

95 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016.

96 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

97 FAAE, *Evidence*, 1st Session, 42nd Parliament, 28 November 2016; *Evidence*, 19 October 2016.

98 FAAE, *Evidence*, 1st Session, 42nd Parliament, 28 November 2016.

99 See Appendix A for fuller description of regulations made under the Act.

100 FAAE, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016; Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, Robert Nault, to the then-Minister of Foreign Affairs, Stéphane Dion.

Canada further stated that no assets have been recovered by Tunisia, and no evidence was presented to suggest that assets have been recovered by Egypt or Ukraine.[101] The Committee is aware of only one court case involving the Act, in relation to a person listed by the Tunisia regulations.[102] No testimony suggested that violations of the Act were occurring and going unpunished and the Committee is of the view that the Act is a limited tool which has not had a significant impact in the short time it has been in effect.

The Committee did, however, hear compelling testimony regarding the larger issue of global corruption and asset recovery to which the *Freezing Assets of Corrupt Foreign Officials Act* forms a part of Canada's response. Testimony from Gerry Ferguson, Distinguished Professor of Law, Faculty of Law, University of Victoria, and Gretta Fenner, Managing Director, Basil Institute on Governance, highlighted the scope and importance of the fight against global corruption and the need for Canada to do more. In particular, both witnesses emphasized the value of some form of beneficial ownership registry to prevent corrupt officials and their abettors from hiding their illegal activities behind the veil of legal entities.

RECOMMENDED AMENDMENTS TO THE *SPECIAL ECONOMIC MEASURES ACT* AND THE *FREEZING ASSETS OF CORRUPT FOREIGN OFFICIALS ACT*

To this point, this report has focused on the policy and administrative issues raised by the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* as they are and have been used within the broader context of Canada's sanctions program. In the final section of this report, the Committee considers how these Acts should be amended. Specifically, the Committee believes there are three areas where this legislation can be improved:

- Protecting the procedural rights of listed persons;
- Ensuring a meaningful role for Parliament in sanctions administration;
- Expanding the scope of the *Special Economic Measures Act* to better protect human rights.

Testimony regarding the procedural rights of persons listed by sanctions regimes in the EU, and at the UN, and the efforts to improve the protection of these rights demonstrated to the Committee the need for similar reforms in Canada. Persons targeted by Canadian sanctions regimes must be offered a meaningful opportunity to defend themselves against what are essentially punitive measures. The Committee believes the Acts should be amended to provide for a more robust opportunity to challenge sanctions listings through administrative means.

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101 Correspondence from Global Affairs Canada in reply to letters, dated 15 November 2016 and 1 December 2016, from the FAAE Chair, Robert Nault, to the then-Minister of Foreign Affairs, Stéphane Dion.

102 Djilani v. Canada (Foreign Affairs and International Trade), 2014 FC 631.

As this report has demonstrated, sanctions have taken on an increasing role in the pursuit of Canadian foreign policy objectives in the last two decades. There are more sanctions regimes than ever and many are kept in place over extended periods of time. Given this, the Committee believes Parliament should have a formalized opportunity to scrutinize the use of these critical tools of statecraft, throughout their lifespan, not only once they have concluded. The *Special Economic Measures Act* should, therefore, be amended to require an annual report be presented to Parliament on the use of sanctions measures.

The increasing use of sanctions as a foreign policy tool has come, in part, due to their use in response to an expanding variety of international situations. At the UN Security Council, as well as in partner countries, sanctions are now used to deal with more than just cases of armed conflict or grave breaches of international peace and security. In particular, they have come to be seen as a useful tool in dealing with cases of human rights violations. Testimony, notably from respected human rights advocates, has convinced the Committee of the need to expand the reasons under which sanctions measures may be enacted through the *Special Economic Measures Act,* specifically allowing for their use in cases of serious human rights violations.

A. Procedural Rights of Listed Persons

The restrictions and prohibitions placed on persons targeted by sanctions measures, by design, limit their ability to carry out otherwise acceptable activities and can have a potentially significant impact on their lives. While short of criminal punishment, these measures are, therefore, essentially punitive in nature and should not be used arbitrarily or without providing the targeted person an opportunity to defend themselves.

To date, the ministerial review mechanisms within both the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* have not been challenged on the basis of procedural fairness.[103] In the EU, however, a series of successful court challenges to sanctions listings based on procedural fairness concerns have had a significant impact on how the EU administers its sanctions program. As Maya Lester described, "the [European Court of Justice] has taken the view that, since these are restrictive measures that have an impact on the fundamental rights of people … they should have access to judicial review to be able to challenge their designations. There have been literally hundreds of these cases in Luxembourg, many successful.… [T]he basic initial challenges were due process challenges, where the European Court said that if you are going to impose restrictive measures on individuals and entities, you … have to comply with basic standards of due process."[104]

Clara Portela, professor at Singapore Management University, testified that these legal challenges have affected EU sanctions-related decision making: "The European Union currently has a very big problem with blacklisting individuals. It is actually quite

103 See Appendix A for a description of the ministerial reviews mechanisms found in both Acts.

104 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

reluctant to expand legislation along these lines, because it has faced important difficulties in bringing evidence that could be made public to the court in order to support its cases."[105]

The ramifications of these cases have extended beyond the EU, according to Ms. Lester, as the successful challenge of EU listings based on UN sanctions "led directly to the creation of the office of the ombudsperson for the UN Al-Qaida Sanctions Committee."[106] In her testimony, the first ombudsperson, Canadian Kimberly Prost, discussed how UN sanctions had been:

> … called into question in terms of its credibility and its strength. There are three principles that certainly the Security Council has been criticized for.… The first point I would make is that there are very specific purposes and policy reasons that underlie the use of sanctions.…
>
> The second and very related question is that when you're using a sanction power, it needs to be very carefully crafted, and that's particularly the case when you're targeting individuals.…
>
> The third point, of course, is that while it is at a much lower standard than in criminal proceedings, there must be very clear procedures that ensure fair process is given to those targeted individuals and entities, those listed. That includes the fundamentals of fair process: notice, although it can be after the freezing or the action is taken or the economic measure is taken; specific reasons that the individual has been listed: an opportunity to address those reasons and to be heard by the decision-maker; and, most importantly, an independent review by a body that can provide an effective remedy.[107]

Ms. Prost further noted that the mechanism for ministerial review of sanction listings currently found in both Acts "is not going to meet the criteria of an objective and independent review as contemplated in fair process."[108] This was echoed in testimony by Ms. Lester, who called for a "very responsive administrative system" in addition to a legal remedy through the courts.[109]

In its testimony, Global Affairs Canada recognized the importance of procedural fairness, though it believes the current protections are adequate. Hugh Adsett stated: "I think the due process question is an important one. I would say it has been central to the way we have approached sanctions in our own existing legislation to date.…I think we have established means by which individuals who are on the list or on a list under the *Special Economic Measures Act*, for example, can apply to be removed from the list.… Certainly, there is the possibility in Canadian law that individuals who believe they are not properly on the list would apply. If the individuals are not satisfied with the reply they get or

105 FAAE, *Evidence*, 1st Session, 42nd Parliament, 31 October 2016.

106 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

107 FAAE, *Evidence*, 1st Session, 42nd Parliament, 23 November 2016.

108 Ibid.

109 FAAE, *Evidence*, 1st Session, 42nd Parliament, 2 November 2016.

the decision of the minister on that application, they can always potentially seek a judicial review as well."[110]

John Boscariol, however, presented a different picture of current Canadian practice: "I can tell you from my experience in representing companies on Canada's lists that the process for getting them off when you know there's been an error is very difficult. You have no insight, no transparency into that. There's no due process … we need to have a better mechanism in place to protect people against wrongful designations."[111]

The Committee believes that the current mechanisms within the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* allowing persons targeted by sanctions to challenge their designation are insufficient and should be amended to provide a more robust administrative review in conformity with the principles of procedural fairness.

Recommendation 8

The Government of Canada should amend the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* to allow for an independent administrative process by which individuals and entities designated by these Acts can challenge that designation in a transparent and fair manner.

An important element of procedural fairness, highlighted by several witnesses, is the requirement that persons targeted by sanctions measures be informed of the reasons why sanctions have been imposed on them. This issue was also raised in the previous discussion about the effectiveness of sanctions, where it was pointed out that sanctions are more likely to be effective when the target understands the purpose for which they were enacted and what actions are required for their removal. Simply put, transparency regarding why sanctions are imposed improves both the effectiveness and fairness of the measures.

The Committee believes that the transparency of Canada's sanctions regimes should be improved. Currently, when sanctions regulations are enacted or amended, the government publishes a press release, which generally provides a brief explanation of the rationale for the measures imposed, and posts an unofficial version of the regulations (or their amendment) on the Global Affairs Canada sanctions website. Days or weeks later, the regulations are published in the *Canada Gazette* along with the required regulatory impact analysis statement which provides a more in-depth rationale and explanation of the measures.

The recent amendment of *Special Economic Measures Act* regulations regarding Ukraine in November 2016 provides a representative example. On 28 November 2016, the government issued a press release stating it had added 15 individuals to sanctions regulations in response to the election of Crimean representatives to Russia's State

110 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

111 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

Duma, contrary to Russia's international obligations regarding Ukraine.[112] The press release stated that 6 of the 15 individuals are State Duma members from Crimea but did not identify the other 9. A link was provided to the Global Affairs Canada website for Ukraine sanctions where an unofficial version of the amendment was posted.[113] On 14 December 2016, the amendments were published in the *Canada Gazette*.[114] The included regulatory impact analysis statement stated that 9 individuals are "so-called representatives of the self-recognized government of Crimea" and 6 were "illegally elected to the Russian State Duma", all 15 are listed pursuant to section 2(e) of the regulations and subject to asset freezes and dealing prohibitions, because "they contribute to the violation of the sovereignty and territorial integrity of Ukraine by illegally serving in the self-recognized government of Crimea or by illegally representing the self-recognized government of Crimea in the Russian Duma."[115]

The Committee believe that information regarding the rationale for listing and delisting persons should be more easily available – potentially on the Global Affairs Canada sanctions website and through press releases – at the time of the sanctions coming into effect.

Recommendation 9

The Government of Canada should provide a clear rationale for the listing and delisting of persons under the *Special Economic Measures Act* and ensure that the information is easily accessible to the public through the Global Affairs Canada sanctions website.

B. The Role of Parliament

As this report has demonstrated, there are many policy complexities attached to sanctions. The importance of carefully considering their purpose, efficacy and potential implications is underlined by what sanctions are and what they are meant to do: coerce, constrain and stigmatize foreign states and foreign nationals. Sanctions are, therefore, inherently disruptive. That would suggest that there should be nothing automatic about their use, overlooked about their management, or superficial about their scrutiny.

The Committee is mindful that there are no sun-setting provisions in the *Special Economic Measures Act*. Regulations made pursuant to the Act continue indefinitely until they are either amended or repealed by the government. Subsection 7(9) of the Act, which requires reporting to Parliament on the operation of a sanctions regime, is only triggered when the entire regime has been terminated (i.e., when the regulations cease to have effect). That is why only two such reports exist at present. Canada's sanctions against

112 Government of Canada, *Canada adds Crimean officials to sanctions list*, News Release, 28 November 2016.

113 Global Affairs Canada, *Regulations Amending the Special Economic Measures (Ukraine) Regulations*.

114 Canada Gazette, "Regulations Amending the Special Economic Measures (Ukraine) Regulations", SOR/2016-304, vol. 150. No. 25, 14 December, 2016.

115 Ibid.

Burma, for example, remain on the books, even if many of the measures have been lifted or eased.

The lack of ongoing reporting obligations in the *Special Economic Measures Act* stands in contrast to the *Corruption of Foreign Public Officials Act*.[116] Under section 12 of that statute, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada must jointly prepare an annual report on the enforcement of the Act and table it in each House of Parliament. The most recent edition of that report, which covers activities between September 2015 and August 2016, includes such information as the number of active investigations and a description of cases being pursued under the Act, as well as an overview of the mandates and responsibilities of federal departments, agencies and Crown corporations that play a role in the Act's implementation.[117]

The Committee believes that such reporting would make valuable information available on the public record, given that foreign policy – including decision making related to sanctions – is an executive purview.

Recommendation 10

The Government of Canada should amend the *Special Economic Measures Act* to require the production of an annual report by the Minister of Foreign Affairs, to be tabled in each House of Parliament within six months of the fiscal year end, which would detail the objectives of all orders and regulations made pursuant to that Act and actions taken for their implementation.

The Committee further believes that the mandatory review clause in the *Freezing Assets of Corrupt Foreign Officials Act,* which instigated the current legislative review, was a valuable addition to the legislation. Given the increasing importance and evolving nature of sanctions, a subsequent review of the two Acts considered here is warranted in the future. The Committee believes that the Acts should be amended to require another legislative review by a parliamentary committee in 5 years.

Recommendation 11

The Government of Canada should amend the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* to require a mandatory legislative review of the Acts by a parliamentary committee within 5 years of the amendments becoming law.

116 Justice Laws, *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.

117 Global Affairs Canada, *Seventeenth Annual Report to Parliament: Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Enforcement of the Corruption of Foreign Public Officials Act*.

C. Protecting Human Rights through Sanctions: The Magnitsky Debate

During the course of its study, the Committee heard testimony from a number of human rights activists advocating for the expanded use of sanctions measures against perpetrators of human rights violations. A number of these witnesses have been vocal advocates for similar measures elsewhere, as part of what has become a global movement to push for the use of sanctions as a tool in the advancement of human rights. While originally focused on addressing the human rights situation in Russia, catalyzed by the tragic case of Sergei Magnitsky, this movement now calls for the application of sanctions against human rights violators globally, and was instrumental in the passing of the *Global Magnitsky Human Rights Accountability Act* in the U.S.[118]

In advocating for similar legislation in Canada, the Hon. Irwin Cotler, former Minister of Justice, Member of Parliament and Founding Chair of the Raoul Wallenberg Centre for Human Rights, listed the objectives of such legislation as follows:

> The first is to combat the persistent and pervasive culture of corruption, criminality, and impunity. The second is to deter thereby other would-be or prospective violators. The third is to make the Parliament of Canada a pursuant of international justice, just as we seek to be the pursuant of domestic justice. The fourth is to uphold the rule of law and justice and accountability in our own territory through visa bans and asset seizures and the like.…Fifth is to protect Canadian businesses operating abroad.… Sixth, it would operate so as to name and shame the human rights violators … Seventh, such legislation would not bind the Canadian government; rather, it would empower the Canadian government. It would allow us to be a protector of human rights, and not an enabler of the violators of human rights…Finally, and most importantly, it tells the human rights defenders … that they are not alone, that we stand in solidarity with them, that we will not relent in our pursuit of justice for them, and that we will undertake our international responsibilities in the pursuit of justice and in the combatting of the culture of impunity and criminality in these respective countries.[119]

Garry Kasparov, Russian pro-democracy advocate and former world chess champion, further stated an additional rationale for taking strong measures against human rights abusers:

> Money is always looking for safe harbour. We are talking about hundreds of billions of dollars, if not more, of this money that will definitely be looking for a place to be invested.… I would not be surprised if you eventually see Canada as a potential destination, especially if the Canadian government demonstrates a willingness to make a deal, any kind of deal, with Russia. That could be a signal to look at Canada as another safe haven.[120]

The case for such legislation in Canada was made, perhaps most convincingly by Andrei Sannikov, who attributed both his ability to survive in prison and his eventual release to the effects of sanctions on Belarus. “[I]t probably saved my life” he stated while also testifying that he is “strongly in favour of the global Magnitsky law. Those who commit

118 Congress.gov, *S.2943 - National Defense Authorization Act for Fiscal Year 2017*.

119 FAAE, *Evidence*, 1st Session, 42nd Parliament, 7 December 2016.

120 Ibid.

crimes against their own citizens, those who abuse human rights grossly and regularly, for a long time, enjoy immunity because they're high officials and no international law makes it possible to bring charges against high officials of the state, no matter how bad it is. Impunity is a driving force of further repression, so the global Magnitsky law of course will be a very powerful instrument."[121]

Testimony from sanctions experts suggested that even if human rights sanctions are unable to change the behaviour of their targets, they nonetheless play an important symbolic role in signalling that human rights violations are unacceptable. Sue Eckert believed that the *Sergei Magnitsky Rule of Law Accountability Act* of 2012 has not "been particularly effective in coercing. It is serving the purpose of stigmatizing those individuals. I think that's important. It's sending a signal that the kind of activities they're pursuing are inconsistent with norms."[122]

As noted by several witnesses, many current sanctions regimes seek to achieve human rights objectives. George Lopez noted that "in terms of human rights protection and advancement, the Security Council currently mandates 15 total sanctions regimes, with 11 of them having some form of human rights or humanitarian law dimension."[123] From a Canadian perspective, Marc-Yves Bertin from Global Affairs Canada stated that "it's important to note that [the *Special Economic Measures Act*], the current legislation, can allow sanctions in relation to human rights violations. As we've mentioned previously, that's either where one of the organizations or associations of states that we're party to calls upon its membership to take action or where the Governor in Council deems there's a serious breach of international peace and security that has or may result in an international crisis. It's not a theoretical construct. We've done so in the case of Burma, Zimbabwe, and Syria."[124]

While Global Affairs Canada stated that human rights violations could be considered in determining if a grave breach of international peace and security had occurred under the *Special Economic Measures Act* and gave the examples quoted above, they were unable to provide the Committee with a clear definition of this threshold. The previous invocations of this provision, along with a plain language reading of it, suggest to the Committee that the threshold for *grave breach* is a high one that would exclude many of the human rights violations covered by the U.S. legislation.

The *Global Magnitsky Human Rights Accountability Act,* which became law in December 2016 in the U.S., builds on the *Sergei Magnitsky Rule of Law Accountability Act* passed in 2012.[125] Speaking of the 2012 Act, Zhanna Nemtsova, Founder of the Boris

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121 FAAE, *Evidence*, 1st Session, 42nd Parliament, 14 November 2016.

122 FAAE, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016.

123 FAAE, *Evidence*, 1st Session, 42nd Parliament, 31 October 2016.

124 FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

125 United States, *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Public Law 112-208, 126 Stat. 1496, 14 December 2012.

Nemtsov Foundation for Freedom – named after her father, a Russian pro-democracy advocate murdered in 2015 – stated:

> … that law … established a groundbreaking precedent by introducing for the first time ever personal accountability for human rights abuses. These are not sanctions against a country or even a government. These are sanctions against specific individuals responsible for corruption and for abusing human rights. That law introduced visa sanctions and asset freezes against people involved in the arrest, torture, and death of Moscow lawyer Sergei Magnitsky, who uncovered a large tax fraud scheme involving state officials … and also against people involved in other human rights abuses.[126]

Garry Kasparov believed the value of the legislation was evident by the response of the Russian government to it:

> That's why Putin and his cronies and his agents and his lobbyists were so aggressive in trying to repeal the Magnitsky Act. It is because it will hurt the very foundation of his so-called social contract with the Russian elite.[127]

This response has also included more sinister actions. Speaking of his hospitalization and near-death from multiple organ failure in 2015, Russian pro-democracy and human rights activist Vladimir Kara-Murza stated:

> I have no doubt that this was deliberate poisoning intended to kill, and it was motivated by my political activities in the Russian democratic opposition, likely including my involvement in the global campaign in support of the Magnitsky Act.[128]

Quoting from an op-ed he wrote with Boris Nemtsov for the *National Post* in December 2012, Mr. Kara-Murza also testified that:

> Canada has an opportunity to lead — just as it has led on the Universal Declaration of Human Rights – by adopting the Magnitsky legislation…. The task of democratic change in our country is ours and ours alone. But if Canada wants to show solidarity with the Russian people and stand for the universal values of human dignity, the greatest help it could give is to tell Kremlin crooks and abusers that they are no longer welcome.[129]

The *Global Magnitsky Human Rights Accountability Act* provides authority to the President of the U.S. to impose sanctions against two types of individuals:

- Persons responsible for the extrajudicial killing, torture or other gross violation of the human rights of government whistleblowers or human rights activists; and
- Persons responsible for acts of 'significant' corruption.[130]

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126 FAAE, *Evidence*, 1st Session, 42nd Parliament, 10 March 2016.

127 FAAE, *Evidence*, 1st Session, 42nd Parliament, 7 December 2016.

128 FAAE, *Evidence*, 1st Session, 42nd Parliament, 10 March 2016.

129 Ibid.

130 Congress.gov, *S.2943 - National Defense Authorization Act for Fiscal Year 2017*, s. 1263.

The U.S. Act therefore targets specific types of human rights violations and corruption cases and lies mostly outside the international peace and security context to which sanctions are generally reserved.

The Committee believes that sanctions measures are a useful tool in the protection and promotion of human rights and the *Special Economic Measures Act* should be amended to allow for the expanded use of sanctions against human rights violators. This expanded threshold should allow for the imposition of sanctions in cases not already covered by the legislation while continuing to place a meaningful limit on government's ability to use this coercive foreign policy tool. The Committee notes that the term *gross human rights violations* already appears in Canadian immigration law, which may provide a useful basis for defining the new threshold.[131] The government should use this new authority as part of a host of measures that promote the protection of human rights as a central pillar of Canadian foreign policy.

Recommendation 12

In honour of Sergei Magnitsky, the Government of Canada should amend the *Special Economic Measures Act* to expand the scope under which sanctions measures can be enacted, including in cases of gross human rights violations.

Testimony advocating for the expanded use of sanctions against human rights violators often included the imposition of visa or travel bans among the recommended measures. The equivalent of a travel ban in the Canadian system is the designation of an individual as inadmissible under the *Immigration and Refugee Protection Act,* which, for example, is how travel bans required by UN sanctions are enforced in Canada.[132] Unlike with UN sanctions, individuals listed by regulations under the *Special Economic Measures Act* are not automatically deemed inadmissible under the *Immigration and Refugee Protection Act*, though the rationale for their listing in sanctions regulations would potentially also constitute grounds for inadmissibility – for example, individuals are inadmissible to Canada for involvement in certain types of criminal activities or if they are proscribed senior officials in a government that, in the opinion of the Minister of Immigration, Refugees and Citizenship, engages in the commission of gross human rights violations.[133] The Minister of Immigration also has the discretionary authority to prevent listed individuals from entering Canada.[134]

The Committee agrees with Meredith Lilly, Associate Professor, Norman Paterson School of International Affairs, Carleton University, who testified that "there's no convincing rationale that the Canadian government would want to impose economic sanctions against

131 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 35(1)(b).

132 Ibid., s. 35(1)(c).

133 Ibid., s 35(1)(b).

134 Ibid., s. 22.1. Guidelines for the use of the Minister's negative discretionary authority specifically mention those listed in sanctions regulations, see Government of Canada, *Guidelines for the Negative Discretionary Authority*.

an individual yet still allow that person to come to Canada."[135] The Committee believes that individuals targeted by sanctions measures should also be inadmissible to Canada.

Recommendation 13

The Government of Canada should amend the *Immigration and Refugee Protection Act* to designate all individuals listed by regulations under the *Special Economic Measures Act* as inadmissible to Canada.

CONCLUSION

The use of sanctions as a tool of foreign policy has evolved significantly since the *Special Economic Measures Act* was created in 1992. As this report has discussed, sanctions measures have been adapted and refined to deal with an increasingly diverse set of international situations. Today, a greater variety of measures are in place in response to a larger number of situations than ever before; expanding into related areas, such as the fight against global corruption through the *Freezing Assets of Corrupt Foreign Officials Act.*

The expanded use of sanctions has led many to question whether they work, whether they achieve their purpose? The Committee heard testimony from numerous experts on sanctions, and came away with the opinion that sanctions can be a useful foreign policy tool but should not be seen as a solution to every problem. Sanctions should be imposed for a clear purpose and tailored to the relevant state and situation as a tool within a broader effort to promote international peace and security.

The Committee also heard testimony regarding the domestic regulation of sanctions measures, and believes that the coherent domestic implementation of sanctions measures constitutes an additional factor in promoting the effectiveness of this tool. The departmental unit responsible for the administration of sanctions needs to act like the regulator that it is and learn from the experience of similar regulators in Canada as well as sanctions regulators in other jurisdictions.

While the Committee is of the opinion that the *Freezing Assets of Corrupt Foreign Officials Act* and the *Special Economic Measures Act* are useful pieces of legislation, it believes that both could benefit from amendments in certain areas; notably relating to the procedural rights of those targeted by the legislation and the information provided to Parliament regarding their use. Additionally, the Committee believes that the *Special Economic Measures Act* should take on new purpose as a tool in the promotion and protection of international human rights, building on Canada's long-standing international leadership in this area.

135 FAAE, *Evidence*, 1st Session, 42nd Parliament, 26 October 2016.

APPENDIX A
THE LEGISLATIVE APPROACH IN CANADA

This appendix provides an overview of Canada's sanctions legislation and the current measures that are in place. To illustrate how this legislation works in practice, a more detailed look at regimes against Iran, North Korea and Russia is provided. This appendix also looks at the *Freezing Assets of Corrupt Foreign Officials Act* and other legislation relating to global corruption and asset recovery.

A. The Special Economic Measures Act

The *Special Economics Measures Act* is enabling legislation that allows the Governor in Council to make orders and regulations restricting or prohibiting certain activities in relation to a foreign state, any person (individual or entity) in a foreign state or a national of that foreign state who does not normally reside in Canada, as well as to seize or freeze related property.[1] The Minister of Foreign Affairs is responsible for the administration and enforcement of the Act, and regulations made under it can be amended or revoked by Parliament.[2] The Act also makes it a criminal offence to willfully contravene or fail to comply with regulations made under the Act.[3]

Section 4(1) of the Act defines the two conditions under which regulations can be enacted:

- for the purpose of implementing a decision, resolution or recommendation of an international organization of states or association of states, of which Canada is a member, that calls on its members to take economic measures against a foreign state; or

- where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.

All current sanctions regimes under the *Special Economic Measures Act* invoke the second of these conditions, the "grave breach" provision.

If either of these two conditions is met, the Governor in Council is authorized to order the freezing, seizure or sequestration of property, or to restrict or prohibit any activity

1 The phrase "individuals and entities" is used throughout this text in accordance with the interpretation provided in the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act*, which are substantially the same. Both Acts make frequent reference to "person", which is defined as "an individual or an entity." "Entity" is defined by the *Special Economic Measures Act* as "a corporation, trust, partnership, fund, an unincorporated association or organization or a foreign state."

2 *Special Economic Measures Act*, S.C. 1992, c. 17, ss. 7(2) – 7(9).

3 Ibid., s. 8.

listed in section 4(2) in relation to a designated target. Those activities fall under five categories:

- dealings in property;
- the import and export of goods;
- the transfer of technical data;
- the provision of financial services; and
- transportation – docking or landing of Canadian ships or aircraft in the targeted state as well as the passing, docking or landing of targeted ships or aircraft in Canada.

Where property located in Canada is ordered seized, frozen or sequestrated, the target property must be held by or on behalf of a foreign state, a person in that foreign state, or a national of that foreign state who does not reside in Canada.

Orders and regulations made under section 4 can also provide for exclusions to the restrictions put in place. Moreover, the Minister of Foreign Affairs can be authorized to issue permits allowing individuals or entities to engage in otherwise prohibited activities.[4]

1. Regulations

One of the challenges in understanding and monitoring sanctions in Canada is that all of the country-specific details are contained in regulations. In other words, it is the regulations that establish the sanctions "regimes" referred to in this report.

Regulations made under the *Special Economic Measures Act* not only set out the measures to be implemented, they also enact related administrative provisions. While these provisions vary, all current regulations contain certain elements in common, demonstrating a standard practice in the enactment of such measures.[5]

Regulations that target specific individuals and entities include a general provision, which sets out the criteria by which the Government of Canada determines who should be listed – generally either for being connected to prohibited activities or for holding a certain position within a government or group. The regulations also include one or more

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4 Ibid., ss. 4(3) & 4(4).

5 *Special Economic Measures (Democratic People's Republic of Korea) Regulations*, SOR/2011-167 are the only current regulations under the *Special Economic Measures Act* that do not include targeted sanctions to be imposed against a designated list of individuals or entities (named in a Schedule). Provisions discussed in this section refer to all other current regulations: *Special Economic Measures (Burma) Regulations*, SOR/2007-285; *Special Economic Measures (Iran) Regulations*, SOR/2010-165; *Special Economic Measures (Russia) Regulations*, SOR/2014-58; *Special Economic Measures (South Sudan) Regulations*, SOR/2014-235; *Special Economic Measures (Syria) Regulations*, SOR/2011-114; *Special Economic Measures (Ukraine) Regulations*, SOR/2014-60; and *Special Economic Measures (Zimbabwe) Regulations*, SOR/2008-248.

schedules listing the actual individuals and entities subject to the specified prohibitions and restrictions. Commonly, prohibitions placed on individuals and entities include a set of measures often referred to as 'dealing prohibitions' and 'assets freezes.'[6] These prohibitions are generally accompanied by corresponding exclusions, for such things as transactions related to diplomatic missions, humanitarian operations or for activities necessary to fulfill contractual obligations entered into prior to the imposition of sanctions.

Regulations typically place a "duty to determine" on certain financial institutions, requiring them to ensure, on a continuing basis, that they do not possess or control property related to a designated individual or entity. There is also a general disclosure requirement on anyone in Canada with information regarding such property or related transactions, which must be reported to the Royal Canadian Mounted Police.

Individuals and entities designated under the regulations can apply in writing to the Minister of Foreign Affairs to have themselves removed from the relevant schedule. Where they do so, the Minister must determine if reasonable grounds exist to recommend removal to the Governor in Council and provide notice to the applicant of the decision taken.[7] New applications can be made where a "material change in circumstances" has occurred.[8]

2. Related Legislation

Sanctions regimes created by the Government of Canada utilize two other legislative frameworks in addition to the *Special Economic Measures Act*: the *United Nations Act* and the *Export and Import Permits Act.*[9] Those three pieces of legislation are often used in a complementary fashion, providing the Government of Canada with authority to enact a range of sanctions measures in response to international events.

The *United Nations Act* is the enabling legislation through which the Government of Canada gives effect to sanctions measures imposed by the UN Security Council, in fulfillment of its obligation under the *Charter of the United Nations*.[10] The *United Nations Act* allows the Governor in Council to enact regulations to implement UN sanctions and creates an offence for contravention.[11] Regulations made under the Act vary according to

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6 For an example of standard targeted prohibitions enacted, see *Special Economic Measures (Ukraine) Regulations*, SOR/2014-60, s. 3.

7 All regulations except those relating to Burma and Zimbabwe require the Minister to make a decision within 90 days. Burma regulations create a presumption of approval by the Minister where no decision is taken after 90 days, as do the Zimbabwe regulations after 60 days.

8 The phrase "material change in circumstances" is common to all regulations.

9 *United Nations Act,* R.S.C., 1985, c. U-2; *Export and Import Permits Act,* R.S.C., 1985, c. E-19. Sanctions related to anti-terrorism are also implemented through provisions of the *Criminal Code,* as discussed in the next section.

10 *United Nations Act*, s. 2.

11 Ibid., ss. 2 & 3.

the Security Council regimes, but often contain provisions similar to those found in *Special Economic Measures Act* regulations.[12]

Unlike the *Special Economic Measures Act,* regulations made under the *United Nations Act* do not include schedules listing individuals and entities subject to sanctions; instead, the prescribed measures are automatically placed on all those designated by the UN Security Council and its subsidiary organs.[13] When the UN Security Council imposes sanctions, a committee is created to oversee their implementation, which generally has delegated authority to designate or delist individuals or entities based on the criteria set out in the relevant Security Council resolutions. Those UN committees are usually assisted by an expert panel or monitoring group.[14]

Under the *Export and Import Permits Act,* the Government of Canada maintains lists of goods for which it deems the imposition of import and export controls to be necessary. That includes the export of military goods and technology to "any destination where their use might be detrimental to the security of Canada."[15] Global Affairs Canada may provide guidance to potential exporters regarding how this authority will be utilized in reference to specific countries, as is currently the case in regards to Iran.[16] Additionally, the government can control the export or transfer of goods and technology to specific countries through the *Area Control List,* which is established pursuant to the Act.[17] Residents of Canada who wish to export or transfer any goods or technology to countries listed on the *Area Control List* must receive a permit from the Minister of Foreign Affairs to do so, who must in turn consider whether the issuance of such a permit is contrary to the "safety or interests of the State" or the "peace, security or stability in any region of the world or within any country."[18]

3. Canadian Sanctions Regimes

Canada currently has sanctions regimes targeting 20 states using one or a combination of the three Acts discussed above:

- *Special Economic Measures Act* (5): Burma, Russia, Syria, Ukraine and Zimbabwe;

12 Regulations set out the prohibitions enacted, along with any exclusions, and may include obligations such as the duty to determine and disclosure similar to the *Special Economic Measures Act.*

13 For example, see the definition of "designated person" in *Regulations Implementing the United Nations Resolutions on Libya*, SOR/2011-51, ss. 1 & 7(2).

14 UN Security Council Subsidiary Organs, *Sanctions.*

15 *Export and Import Permits Act*, s. 3(1)(a).

16 Global Affairs, *Exports of items listed on the Export Control List to Iran,* 5 February 2016.

17 *Export and Import Permits Act*, s. 4; *Area Control List*, SOR/81-543.

18 Ibid., s. 7(1) & 7(1.01).

- *United Nations Act* (10): Côte d'Ivoire, Democratic Republic of Congo, Iraq, Eritrea, Lebanon, Yemen, Liberia, Somalia, Central African Republic and Sudan;

- *Special Economic Measures Act* and *United Nations Act* (3): Iran, Libya and South Sudan;

- *Special Economic Measures Act, United Nations Act* and *Export and Import Permits Act* (1): North Korea; and

- Export and Import Permits Act (1): Belarus.[19]

In addition to these country-specific regimes, a transnational anti-terrorism sanctions regime exists under the *United Nations Act* and related provisions of the *Criminal Code.* The *United Nations Al-Qaida and Taliban Regulations* place dealings prohibitions and asset freezes on individuals and entities listed under the two terrorism-related UN sanctions regimes, while provisions in the *Criminal Code* authorize the Minister of Public Safety and Emergency Preparedness to maintain a list of entities related to terrorist activities, whose property is subject to restraint, seizure and forfeiture.[20]

Documents submitted to the Committee by Global Affairs Canada list 992 individuals and entities subject to asset freezes and dealings prohibitions under the *Special Economic Measures Act*, in addition to 12 Russian entities subject to restrictions on the provision of debt and equity financing.[21] The Consolidated United Nations Security Council Sanctions List, covering all sanctions regimes required by UN Security Council resolutions and which Canada implements through the *United Nations Act*, contains 640 individuals and 379 entities subject to restrictions or prohibitions.[22]

A more detailed look at the sanctions regimes targeting Russia, Iran and North Korea demonstrates how the Government of Canada has enacted sanctions regimes in the past decade using the legislative frameworks described above.

a. Russia Sanctions

In response to Russia's violation of the territorial integrity of Ukraine, including the annexation of the Crimea region, Canada imposed sanctions against Russia and its allies in Ukraine on 17 March 2014 through two regulations made pursuant to the *Special Economic Measures Act*. The regulations invoked the "grave breach" provision under

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19 Global Affairs Canada, *Current sanctions imposed by Canada*. In May 2016, the Government of Canada indicated that it would be initiating "the regulatory process to remove Belarus from the Area Control List (ACL), thereby lifting sanctions that have been in place since December 14, 2006."

20 *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444; *Criminal Code*, R.S.C., 1985, c. C-46, ss. 83.05, 83.08, 83.13 & 83.14.

21 The list was provided for the Committee's information as part of its statutory review. It reflects regulations as they existed on 29 November 2016, and is administrative in nature.

22 UN Security Council Subsidiary Organs, *Consolidated United Nations Security Council Sanctions List*, accessed 13 December 2016.

section 4(1)(b) of the Act.[23] The initial regulations – one targeting individuals in Russia, the other, individuals in Ukraine – passed dealings prohibitions and asset freezes on seven and three individuals, respectively.[24]

The Russia regulations have since been amended 14 times, including twice in the first week after they were issued, and ten times in the first year.[25] Currently, 93 individuals and 53 entities are subject to dealings prohibitions and asset freezes, while 12 entities are subject to restrictions on the issuance of debt and equity. A prohibition on goods and any financial, technical or other services relating to oil exploration and production is also in place, covering offshore areas at a certain depth, the Arctic, and shale.[26]

The regulations targeting individuals and entities in Ukraine have been amended 12 times, including eight times in the first year.[27] The current regulations list 107 individuals and 39 entities for dealings prohibitions and asset freezes. There is also a prohibition on economic and financial transactions and activities in the Crimea region, including with respect to investment and exports.[28]

b. Iran Sanctions

In response to Iran's nuclear program and the proliferation risks that had been identified by the International Atomic Energy Agency, the UN Security Council imposed a series of measures against Iran beginning in December 2006.[29] In accordance with its obligations, Canada passed corresponding regulations under the *United Nations Act,* imposing prohibitions related to the products cited, and individuals and entities listed by the resolution.[30] Canada expanded sanctions on Iran under the *United Nations Act* three times in response to new UN Security Council resolutions. By 2010, these measures had expanded the existing prohibitions considerably and had also imposed new prohibitions related to military equipment and ballistic missiles.[31]

After the Joint Comprehensive Plan of Action was agreed, the UN Security Council passed a resolution terminating existing sanctions measures while imposing new, lesser,

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23 *Special Economic Measures (Russia) Regulations*, SOR/2014-58 (from 2014-03-17 to 2014-03-18); *Special Economic Measures (Ukraine) Regulations*, SOR/2014-60 (from 2014-03-17 to 2014-03-18).

24 Ibid.

25 Justice Laws Website, "Full Documents available for previous versions", *Special Economic Measures (Russia) Regulations (SOR/2014-60),* 2 December 2016.

26 *Special Economic Measures (Russia) Regulations*, SOR/2014-58.

27 Justice Laws Website, "Full Documents available for previous versions", *Special Economic Measures (Ukraine) Regulations (SOR/2014-60),* 2 December 2016.

28 *Special Economic Measures (Ukraine) Regulations,* SOR/2014-60.

29 UN Security Council, *S/RES/1737 (2006),* 27 December 2006.

30 *Regulations Implementing the United Nations Resolution on Iran*, SOR/2007-44 (from 2007-02-22 to 2007-05-16).

31 *Regulations Implementing the United Nations Resolution on Iran*, SOR/2007-44 (from 2010-06-17 to 2016-11-21); and UN Security Council, *Resolution 1929 (2010)*, S/RES/1929(2010).

measures in line with the agreement.[32] Current regulations under Canada's *United Nations Act* implement the new prohibitions related to nuclear, military and ballistic missile products, as well as those which apply to the 23 individuals and 61 entities listed by the UN Security Council.[33]

Shortly after the final expansion of UN sanctions in 2010, Canada began imposing additional sanctions against Iran under the *Special Economic Measures Act* using the "grave breach" provision.[34] Building on the pre-existing sanctions under the *United Nations Act*, the regulations imposed prohibitions on an additional 42 individuals and 279 entities, while also expanding sectoral prohibitions to include oil and gas, and financial services.[35] Measures were significantly amended following the "implementation day" of the Joint Comprehensive Plan of Action, which led to the removal of sectoral prohibitions and a reduced list of targeted individuals (41) and entities (161).[36]

c. North Korea Sanctions

Canada's sanctions on North Korea were initiated in 2006 following the imposition of UN sanctions in response to North Korea's nuclear test conducted in violation of the *Treaty on the Non-proliferation of Nuclear Weapons.*[37] Canada implemented the UN measures through regulations made under the *United Nations Act* in November of 2006, imposing prohibitions related to military equipment, luxury goods and material for nuclear and ballistic missile programmes, in addition to prohibitions targeting designated individuals and entities.[38]

The UN Security Council modified and strengthened its measures in response to subsequent nuclear tests carried out by North Korea in 2009, 2013 and 2016.[39] Current regulations under the *United Nations Act* build on the previous measures, adding prohibitions related to financial services, natural resources, aviation fuel and transportation.[40] Restrictive measures are also imposed on the 39 individuals and 42 entities listed by the UN Security Council.[41]

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32 UN Security Council, *S/RES/2231 (2015),* 20 July 2015.

33 *Regulations Implementing the United Nations Resolutions on Iran*, SOR/2007-44; and UN Security Council, *Resolution 2231(2015): 2231 List*, accessed 14 December 2016.

34 *Special Economic Measures (Iran) Regulations*, SOR/2010-165 (from 2010-07-22 to 2011-10-16).

35 Ibid.

36 *Special Economic Measures (Iran) Regulations*, SOR/2010-165.

37 UN Security Council, *S/RES/1718 (2006),* 14 October 2006.

38 Ibid; *Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea*, SOR/2006-287 (from 2006-11-09 to 2009-07-29).

39 The relevant UN Security Council resolutions are: 1874 (2009); 2087 (2013); 2094 (2013); 2270 (2016); and 2321 (2016).

40 *Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea*, SOR/2006-287.

41 UN Security Council Subsidiary Organs, Sanctions, *Sanctions List Material: 1718 Sanctions List*, accessed 15 December 2016.

Following the sinking of a South Korean naval ship – the *Cheonan* – by a North Korean submarine in 2010, the *Area Control List* under the *Export and Import Permits Act* was amended to include North Korea.[42] In response to the results of an international investigation, which documented North Korea's role in the incident, Canada also imposed sanctions in 2011 under the *Special Economic Measures Act* through the invocation of the "grave breach" provision. Those measures, which are intended to "complement and expand upon" measures under the *United Nations Act,* currently impose blanket prohibitions on dealings in goods, property, financial services, technical assistance and transportation.[43]

B. The *Freezing Assets of Corrupt Foreign Officials Act*

The *Freezing Assets of Corrupt Foreign Officials Act* is similar in structure to the *Special Economic Measures Act*, though the scope of the authority granted is significantly narrower. The Act sets out the conditions under which the Governor in Council can enact orders and regulations to freeze or seize property and restrict or prohibit certain activities in reference to designated persons, and creates a criminal offence for contraventions of the Act.[44] Exclusion and permit authorities similar to those found in the *Special Economic Measures Act,* as well as duty to determine and disclosure provisions similar to those found in the *Special Economic Measures Act* regulations, are also included.[45]

According to section 4 of the *Freezing Assets of Corrupt Foreign Officials Act*, orders and regulations can be enacted when a foreign state asserts in writing to the Government of Canada that a person has property which was misappropriated from the state or acquired "inappropriately by virtue of their office or a personal or business relationship," and requests that the property be frozen. Additionally, the Governor in Council must be satisfied that:

- the person is a "politically exposed foreign person" related to the state in question;
- the state is experiencing "internal turmoil" or an "uncertain political situation"; and
- making the order would be in the "interest of international relations."[46]

The Act defines a "politically exposed foreign person" as a current or former holder of one of the listed senior government positions or their close personal and business associates, including family members.[47]

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42 *Area Control List*, SOR/81-543 (from 2010-07-13 to 2012-04-23).

43 *Special Economic Measures (Democratic People's Republic of Korea) Regulations,* SOR/2011-167; and FAAE, *Evidence*, 1st Session, 42nd Parliament, 21 November 2016.

44 *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10, ss. 4 & 10.

45 Ibid., ss. 4(4), 5, 8 & 9.

46 Ibid., s. 4(2).

47 Ibid., s. 2.

In addition to the freezing or seizure of property, the Act allows for orders to restrict or prohibit related financial transactions as well as the provision of financial services.[48] Unless extended by the Governor in Council, orders cease to have effect five years after coming into force.[49]

The Act also provides an opportunity to apply for removal from an order or regulation. Persons subject to such measures can apply to the Minister of Foreign Affairs and the Minister must determine if reasonable grounds exist to recommend removal, but only on the basis that the applicant does not meet the definition of a "politically exposed foreign person."[50]

1. Related Legislation

The *Freezing Assets of Corrupt Foreign Officials Act* is intended to implement temporary measures protecting assets believed to be the proceeds of foreign corruption so that the affected state can seek their eventual recovery under the *Mutual Legal Assistance in Criminal Matters Act.* The *Mutual Legal Assistance in Criminal Matters Act* implements the Government of Canada's obligations under the mutual legal assistance treaties it has signed and allows Canadian authorities to provide assistance to foreign law enforcement agencies in the investigation and prosecution of crimes.[51] Where allowed for under the relevant treaty or administrative agreement, the Act provides the government with authority to enforce orders issued by a competent court in a foreign jurisdiction for the seizure, restraint or forfeiture of property in Canada.[52] For seizure or restraint of property, the Attorney General of Canada must be satisfied that the person has been charged with an offence in the foreign jurisdiction which would be an indictable offence had it been committed in Canada.[53] For forfeiture, a conviction not subject to appeal is required for the related offence, and the order must not meet any of the listed grounds for refusal.[54] Forfeited assets can only be returned to a foreign state under the terms of a bilateral sharing agreement, "which allows the Contracting Parties to share between themselves assets that have been forfeited as criminal proceeds or offence-related property." Canada currently has 16 such asset sharing agreements in force.[55]

In addition, domestic criminal charges may be possible in relation to proceeds of foreign corruption located in Canada. Both the offences of laundering proceeds of crime,

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48 Ibid., s. 4(3).

49 Ibid., s. 6.

50 Ibid., s. 5(1). *Special Economic Measures Act* regulations do not limit the grounds under which the Minister can recommend removal.

51 *Mutual Legal Assistance in Criminal Matters Act*, R.S.C., 1985, c. 30 (4th Supp.). For a list of current mutual legal assistance treaties signed by Canada, see Global Affairs Canada, *Treaty List Search*.

52 *Mutual Legal Assistance in Criminal Matters Act*, ss. 9.3 & 9.4.

53 Ibid., s. 9.3(3).

54 Ibid., s. 9.4. The list of grounds for refusal under s. 9.4(2) include public policy rationales such as the order having a discriminatory intent or prejudicing Canada's security, national interest or sovereignty.

55 Correspondence from the Department of Justice in reply to a letter, dated 15 November 2016, from the FAAE Chair, Robert Nault, to the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould.

under s. 462.3(1) of the *Criminal Code*, and possession of property obtained by crime, under s. 354(1) of the Code, contain an extraterritorial provision. The law is applicable even if the crime in question was committed outside Canada so long as the underlying act would be considered an indictable offence had it been committed in Canada.[56] Where a conviction is obtained, the property could then be subject to forfeiture as domestic proceeds of crime.[57] The potential also exists for foreign states to seek the recovery of their misappropriated assets through civil court where allowed by the civil forfeiture laws in the province where the property is located.[58] The *Freezing Assets of Corrupt Foreign Officials Act* allows the Government of Canada to act quickly to preserve assets believed to be the proceeds of foreign corruption, while allowing time for these complementary legal actions to occur.

2. Regulations

Since it was introduced in 2011, two regulations have been enacted under the *Freezing Assets of Corrupt Foreign Officials Act* – one in relation to Egypt and Tunisia in March 2011 and one in relation to Ukraine in March 2014.[59] The Egypt and Tunisia regulations have been amended five times, initially listing 48 politically exposed foreign persons for Tunisia and 21 for Egypt.[60] In total, 123 such individuals from Tunisia and 148 from Egypt were listed over the course of subsequent amendments.[61] However, the current regulations list only eight politically exposed foreign persons for Tunisia and no longer applies to Egypt;[62] those regulations were extended for a further five years in March 2016.[63] To date, regulations for Ukraine have not been amended and currently list 18 individuals.[64]

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56 *Criminal Code*, R.S.C., 1985, c. C-46.

57 Ibid., s. 462.37.

58 For an example in Ontario, the *Civil Remedies Act*, 2001, S.O. 2001, c. 28, definition of "unlawful act" includes an extraterritorial provision similar to the *Criminal Code* provisions previously cited and allows for forfeiture of the proceeds of such acts.

59 *Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations*, SOR/2011-78; *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44.

60 *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78 (from 2011-03-23 to 2011-12-15).

61 For the complete list of persons see, *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78 (2011-12-16 to 2012-12-13); and *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78 (from 2012-12-14 to 2014-02-27).

62 *Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations*, SOR/2011-78.

63 *Order Extending the Application of the Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations*, SOR/2016-42.

64 *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44.

APPENDIX B
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Foreign Affairs, Trade and Development	2016/10/17	26
Hugh Adsett, Director General Legal Affairs and Deputy Legal Adviser		
Marc-Yves Bertin, Director General International Economic Policy		
Office of the Superintendent of Financial Institutions		
Christine Ring, Managing Director		
Royal Canadian Mounted Police		
Peter Hart Federal Policing Criminal operations		
Steve Nordstrum, Director Federal Policing Criminal Operations, National Security		
As an individual	2016/10/19	27
Andrea Charron, Assistant Professor, University of Manitoba Director of the Centre for Security Intelligence and Defence Studies at Carleton University		
Sue E. Eckert, Adjunct Senior Fellow Center for a New American Security		
Canada Border Services Agency	2016/10/24	28
Andrew LeFrank, Director General Enforcement and Intelligence Operations		
Lesley Soper, Acting Director General Enforcement and Intelligence Programs		
Department of Citizenship and Immigration		
Maureen Tsai, Director Migration Control and Horizontal Policy, Admissibility Branch		
As an individual	2016/10/26	29
Thomas Biersteker, Professor Director of Policy Research, The Graduate Institute, Geneva		
John Boscariol, Partner Leader of International Trade and Investment Law Group, McCarthy Tétrault LLP		
Meredith B. Lilly, Associate Professor Norman Paterson School of International Affairs, Carleton University		
As an individual	2016/10/31	30
Zachary K. Goldman, Executive Director Center on Law and Security, New York School of Law		

Organizations and Individuals	Date	Meeting
As an individual	2016/10/31	30
George A. Lopez, Professor University of Notre Dame		
Kim Richard Nossal, Professor Centre for International and Defence Policy, Queen's University		
Clara Portela, Professor Singapore Management University		
As an individual	2016/11/02	31
Daniel Drezner, Professor of International Politics Fletcher School of Law and Diplomacy at Tufts University		
Thor Halvorssen, President and Chief Executive Officer Human Rights Foundation		
Maya Lester, Queen's Counsel Brick Court Chambers		
As an individual	2016/11/14	32
David J. Kramer, Senior Director, Human Rights and Democracy McCain Institute for International Leadership		
Andrei Sannikov		
Perseus Strategies		
Jared Genser, Managing Director		
Department of Foreign Affairs, Trade and Development	2016/11/21	34
Hugh Adsett, Legal Adviser and Director General		
Marc-Yves Bertin, Director General International Economic Policy		
Mark Glauser, Acting Assistant Deputy Minister Europe, Middle East and Maghreb		
Alison LeClaire, Senior Arctic Official and Director General Circumpolar Affairs and Eastern Europe & Eurasia Relations		
Sarah Taylor, Director General North Asia and Oceania		
As an individual	2016/11/23	35
Kimberly Prost		
Canadian Bankers Association		
Sandy Stephens, Assistant General Counsel		
Canadian Imperial Bank of Commerce		
G. Stephen Alsace, Senior Director Sanctions, Global AML Group		
As an individual	2016/11/28	37
Andrea Berger, Deputy Director, Proliferation and Nuclear Policy Senior Research Fellow, Royal United Services Institute		

Organizations and Individuals	Date	Meeting
As an individual	2016/11/28	37
Thomas Juneau, Assistant Professor University of Ottawa		
Richard Nephew, Senior Research Scholar Center on Global Energy Policy, Columbia University		
As an individual	2016/11/30	38
Milos Barutciski, Partner Bennett Jones LLP		
Vincent DeRose, Partner Borden Ladner Gervais LLP		
Melissa Hanham, Senior Research Associate James Martin Center for Nonproliferation Studies, META Lab, Middlebury Institute of International Studies		
James Walsh, Senior Research Associate MIT Security Studies Program		
As an individual	2016/12/05	39
Gerry Ferguson, Distinguished Professor of Law Faculty of Law, University of Victoria		
Basel Institute on Governance		
Gretta Fenner, Managing Director		
As an individual	2016/12/07	40
Garry Kasparov		
Raoul Wallenberg Centre for Human Rights		
Irwin Cotler, Founding Chair		

APPENDIX C
LIST OF BRIEFS

Organizations and Individuals

Boscariol, **John**

Ferguson, **Gerry**

Lilly, **Meredith**

Sills, **Mark**

Ukrainian Canadian Congress

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos 26, 27, 28, 29, 30, 31, 32, 34, 35, 37, 38, 39, 40, 41, 42, 43, 48, 49, 50 and 52) is tabled.

Respectfully submitted,

Hon. Robert D. Nault
Chair