Canada-United States Law Journal

Volume 48 | Issue 1 Article 16

2024

Canadian Economic Sanctions and the Economic System

Stephen Burridge

Michael Milne

Jessica B. Horwitz

CANADIAN ECONOMIC SANCTIONS AND THE ECONOMIC SYSTEM

CHRISTOPHER SANDS: Good morning everyone, my name is Christopher Sands. I'm the Director of the Canada Institute here at Woodrow Wilson. I'm particularly pleased to have the chance now to focus on Canadian economic sanctions and the Canadian economic sanctions system. We have a tremendous panel here to take these issues on. On the far side, in the order that I'm going to ask them to speak: Stephen Burridge is Director of Sanctions Policy and Operations Division at Global Affairs, Canada—a relatively new unit put together. It's a small but very hearty team, and we'll hear from him first. After Stephen we'll go to Michael Milne—a partner and certified custom specialists with Cassidy, Levy, Kent, a firm that has offices in Canada, as well as the United States (including Washington, D.C). Then finally, Jessica Horwitz—partner in international trade and investment at Bennett, Jones LLP, one of Canada's leading law firms.

STEPHEN BURRIDGE: It's a real pleasure to be here. Thank you to the Wilson Center and to the Canada Institute for inviting me and for putting this event together. I'm really excited to be able to speak to you about Canadian sanctions, the cooperation that we have with our U.S. partners, and to be on a panel with such distinguished other speakers. There is an increased use of sanctions. Given the increased use of sanctions as a foreign policy tool to respond to recent and ongoing global events, there is an increasing focus internationally on strengthened compliance and strengthened enforcement of these measures. This really is a timely event and an opportune moment to reflect on Canada's sanctions regime, and we've heard about the U.S. sanctions regime.

We've had interactions at similar events like this; we've had bilateral discussions. My team and I are really keen to continue to build on this type of engagement and to further bolster these vital relationships. And I think we've heard that from others today too, how that kind of cooperation and collaboration is absolutely critical when it comes to sanctions' effectiveness and compliance, and to enforcement. It really is a hugely beneficial two-way dialogue when we have these opportunities. Hearing directly about your experiences and your preoccupations with regard to Canada sanctions and how they intersect with other sanctions regimes helps my team and I to make sure that we're best positioned in Canada to effectively and efficiently develop, impose, implement, and enforce those sanctions.

It's important just to start at the basics and explain the two pieces of legislation. Canada has two pieces of autonomous sanctions legislation. First, there's the Special Economic Measures Act. It is our oldest piece of autonomous sanctions legislation, dating back to the early 90s (~1992). Then, the Justice for Victims of Corrupt Foreign Officials Act (JVCFOA), or what's commonly known as the Magnitsky Act. This is the more recent piece of autonomous sanctions legislation that was enacted in late 2017. The Special Economic Measures Act

allows Canadians to pose sanctions against a foreign state or individuals and entities that are related to that foreign state. On the other hand, JVCFOA allows Canada to directly target foreign nationals, independent of state-related sanctions. There is a series of other nuances and other differences between the two tools, but as of now, I'm not going to give details. I'm always happy to talk further about them. We use both of these pieces of legislation to respond to grave breaches of international peace and security, gross violations of human rights, and acts of significant corruption. We also implement multilateral sanctions imposed by the United Nations Security Council, and we do that through our United Nations Act. In Canada, both our autonomous sanctions and our multilateral sanctions are enacted [through] orders in council. They are subject to the approval of the Governor in Council. On the advice and with the consent of the King's Privy Council for Canada or Cabinet. All of these sanctions enter into force upon the signature of the Governor General.

It's important to take a brief moment to contrast this with the process for imposing sanctions in the U.S. The U.S can impose sanctions under Executive and Congressional authorities. Often, it means that the U.S. is in a position to enact sanctions through a more direct process, particularly via Executive Orders. We've heard people mention alignment of measures and how important that is. I completely agree that acting in concert with our like-minded partners, with similar sanctions' tools, they can be more effective and have greater intended impact. However, given the differences in processes, sometimes things may not immediately align. Sometimes, one system may take longer than another. We strive to have as close collaboration and cooperation as we can. There will always be differences in systems and in listings, whether that be for foreign policy for national interest reasons. The cooperation between likeminded partners, G7 partners with autonomous sanctions tools, and Canada and the U.S. has been absolutely critical, especially over the last twenty to twenty-four months.

Despite these differences in process, we all do face similar sanctions demands and challenges. As we've all witnessed, the global landscape has changed dramatically. And with those demands and challenges associated with implementing, enforcing, and regulating Canadian sanctions has expanded exponentially. In this way, I would be remiss not to talk specifically about the increasingly significant role that the use of sanctions has played since February of last year, following Russia's invasion of Ukraine. Again, Michael had spoken a bit about the vital cooperation that's taken place since that time, and I would echo those comments wholeheartedly and really thank our U.S. colleagues for all of the excellent collaboration before that time, but certainly since that time as well, both from an info sharing perspective and a mutual learning perspective. Also, from being able to work cooperatively on enforcement and invasion evasion efforts.

Since February of 2022, Canada has imposed over sixty new rounds of sanctions against Russia. That includes designating over 2,700 individuals and entities in Belarus, in Russia, Ukraine, and Moldova under the Special Economic Measures Act. We've also adopted new measures including import and export prohibitions, a shipping ban, [and] a prohibition on certain services to key Russian industries. In addition to responding to Russia's aggression over the last year,

Canada's also imposed sanctions in response to situations in Haiti, in Iran, in Myanmar, as well as in Sri Lanka. With the broadening use of a varying scope of sanctions to respond to different international security and human rights issues, we, like others, are fully seized with the importance of improving sanctions enforcement. As a starting point, I should be clear, and this was mentioned earlier as well, that Canadian sanctions prohibit Canadians anywhere in the in the world, as well as any person in Canada, from engaging in certain specified activities. The prohibitions are on Canadians themselves.

Importantly, contravening Canadian sanctions is a criminal offense. The consequences of which can encompass fines and include imprisonment, or it can include both, in the case of our autonomous sanctions' regimes, that can be a fine of up to $25,000 and a prison term of up to five years. For our multilateral sanctions, it can be a fine of up to $100,000 and a term of up to ten years in prison. We've already heard today, too, from a number of speakers that sanctions aren't simple. They're complex. We know that and we get that. As our sanctions measures grow in scope and complexity, so to muster efforts to enforce those sanctions, enforcement of sanctions truly is in Canada, a whole-of-government effort, with key players across the federal government family. Our efforts to enhance enforcement also include outreach to key stakeholders, both across the country, but also internationally. That's really with a view to enhancing understanding of sanctions, how they may apply to various activities and the obligations of Canadians as individuals and entities in Canada. These are the measures.

The engagement that we've undertaken with stakeholders has included Canadian financial institutions, the Canadian Bar Association, and various other sectors and industries. With the broadening of sanctions measures, and we really have, since February of last year, expanded what those look like and how we use these tools and stretched it in new ways. Because of that, we continue to identify new stakeholders, and are really focused on engaging with those partners, including the marine transportation sector, Canadian exporters, Canadian service providers. Our outreach is also seeking to enhance national understanding of the [2022 Russian] oil price cap. We recognize very well that two-way communication is key and that outreach and engagement activities with stakeholders are critical tools to foster knowledge and to bolster compliance with sanctions. It's important to highlight of course, the Government of Canada cannot provide legal advice. As we try to provide as much information on our sanctions measures as we can, we have that sort of area to navigate between providing as much information as possible, versus providing legal advice. I think we all know the challenges that we can face there.

I'd also like to touch briefly on another important initiative that we're undertaking to enhance the implementation of effective and efficient sanctions. This really is reflective of some of the comments around unintended consequences, humanitarian impacts. And this is something that's really top of mind for Canada in the design and implementation of our sanctions. We do have specific carve outs or non-application clauses exceptions for certain humanitarian activities in some of our sanctions regimes. We also have [a] permit process which allows for any

other unintended consequences on a humanitarian front that may not be captured by those exception whereby an organization that may be delivering humanitarian assistance can make an application to the Minister of Foreign Affairs to allow for those activities to take place that would otherwise be prohibited.

The other important initiative I want to talk about is that [since 2020] we manage a $100,000 pot of funding. It's a modest amount, but it's something and it does support projects in programming that improve our knowledge of potential impacts and effects of sanctions. This year, Canada supported the fourth Freedom Forum to complete a model checklist of factors to consider when mitigating against the unintended humanitarian impacts of sanctions. In past years, Canada supported the development of the UN sanctions app, an interactive analytical tool that disseminates knowledge about the use of effective and effectiveness of the United Nations sanctions. That's available to anyone to use. It's used by a number of permanent missions to the UN in New York. We've had really great feedback on the app and how useful it's been for those who are working on the ground on those issues. Canada's also supported the organization having a roundtable discussion hosted by the International Peace Institute, examining the difficulties faced by humanitarian actors when trying to effectively deliver assistance in areas where the UN, Al Qaeda, and Dinesh sanctions regime applies, as well as the development of an issue brief identifying concrete solutions for the UNSC to address these problems. Finally, we also supported the development of a research report and policy brief by Georgetown University's Institute for Women, Peace and Security, conveying key research insights on sanctions as a tool to address conflict related sexual violence. This has been particularly focused on the ongoing crisis in Myanmar.

I want to take a few minutes to discuss sanctions enforcement. Though Global Affairs Canada is the regulator for sanctions prohibitions, enforcement would not be possible without the Canadian Border Services Agency and the Royal Canadian Mounted Police. In addition to working closely with these enforcement agencies, we must also often engage with other government departments and agencies when sanctions intersect with certain sectors of the Canadian economy. We will work with Finance Canada, for instance, we may work with Transport Canada and Natural Resources Canada. Enforcement truly is a whole-of-government, frankly, a whole-of-Canada effort. Beyond the Government of Canada, sanctions enforcement is genuinely only possible through engagement of the Canadian public, and this is why I say it's a whole-of-Canada effort. This includes through those disclosures that are made by members of the public and particularly financial institutions, to the RCMP. In this way, we truly do recognize that Canadian financial institutions are at the frontline of sanctions enforcement.

Given the nature of sanctions, successful implementation enforcement benefits from strong international cooperation, partnerships, and engagement. To this end, Canada regularly coordinates closely with allies and partners, including the U.S., our Five Eyes partners, our G7 partners, while designing and imposing sanctions to achieve common foreign policy objectives, whether it be addressing breaches of international peace and security [or] violations of human rights, for example, [or] also to tackle circumvention and sanctions evasion. For example,

Canada participates in the Russian Elites, Proxies and Oligarchs Repo Task Force alongside Australia, France, Germany, Italy, Japan, UK, U.S. and the European Union. The Repo Task Force works together to counter those individuals and entities that continue to enable and profit from the war economy with a view to fostering a resolution to the conflict. This year the Repo Task Force identified a report on typologies of Russian sanctions evasion and issued recommendations to combat these evasion tactics. In addition to participating in the Repo Task Force, Canada is also actively sharing information with allies and partners, including with the Five Eyes through the G7 Enforcement Coordination Mechanism and through enhanced collaboration between the Canadian Border Services Agency and other customs agencies. These broad engagements with global partners and stakeholders are at the core of our sanctions from their design to their implementation. Enforcing sanctions and addressing circumvention is a challenging task that will constantly evolve and is constantly evolving. The states, individuals, [and] entities targeted by our sanctions will, as we've seen, relentlessly shift their tactics. They'll [try to] find new partners. They'll find new jurisdictions; they'll find new opportunities to actively evade our sanctions measures. We have to be nimble, proactive, [and] reactive in order to thwart those evasion efforts. In recognition of this challenge, the Prime Minister last year announced funding of CAD $76 million to strengthen Canada's sanctions capacity This includes by creating a dedicated Sanctions Bureau within Global Affairs Canada to build on the existing team that's been there since 2018.

There's also funding from that that's going to be allocated to additional resources to law enforcement agencies to enhance the government's enforcement capacity in 2022, and in 2023, the Government of Canada made several legislative amendments to both the Special Economic Measures Act and to the Justice for Victims of Corrupt foreign Officials Act. In 2022, we amended our Autonomous Sanctions legislation to allow for the forfeiture of property subjected to a seizure restraint order that were made under either of those acts, and I'll go into that a little bit more in a moment. In 2023 we amended our legislation to improve the effectiveness of Canada's sanctions architecture, including to counteract sanctions evasion, by increasing information sharing authorities among federal departments and agencies.

I won't speak on behalf of law enforcement agencies but I can expand on a few areas that I consider to be priorities for government for Global Affairs Canada. One is implementing our new asset seizure and forfeiture regime and enhancing outreach to stakeholders. Canada was a first amongst the G7 to implement a regime to seize, forfeit, dispose, and redistribute sanctioned assets. Proceeds of forfeiture can be used for the reconstruction of affected states, for the restoration of international peace and security, or to compensate victims. These new authorities are really an important tool in ensuring accountability. It will be important for Canada to get it right. To this end we're working very closely with our colleagues and other departments. To date, Canada has used [the] new authorities twice—first in December of 2022 for the restraint of U.S. $26 million in funds belonging to Granite Capital Holdings Limited, which is a company believed to be owned or controlled by Roman Abramovich. Then, more recently in June of 2023, for the

seizure of a Russian registered cargo aircraft, an Antonov 124, that's believed to be owned or controlled by Volga Dnepr airlines. Core to our approach in this regime is procedural fairness. The regime itself includes a number of procedural safeguards, including for those whose property is the subject of a seizure or a restraint order or those who have third party rights or interests in the asset who can request an administrative review of the order. Finally, Canada continues to announce new sanctions. As these measures expand in both scope and complexity, we will continue to expand our engagement with stakeholders both within and outside government, particularly with those at the frontline of sanctions compliance. We will continue to engage partners, including the banking and legal sectors. Our list for plan targeted engagements is growing. Our goal is to develop national understanding of Canada's sanctions regimes and in turn, to enhance compliance for them. Internationally, we will continue to work with our allies and partners to mine data to share information and increase diplomatic efforts to inhibit sanctions evasion by state actors and designated entities.

I do appreciate your time and your interest. I'm really looking forward to hearing from the other panelists and from you, so that I can take your thoughts and reflections back to my team in Ottawa and think through those thoughts and action them accordingly. Thank you.

CHRISTOPHER SANDS: Thank you very much, Stephen. That was really useful in particular, conveying Canada's sincerity to get it right in so many different ways, which is really important. Let me turn now to the people who can give legal advice on these things, starting with Michael.

MICHAEL MILNE: Sure, thank you very much. To echo my thanks for being here, it's an honor as well. I am a lawyer advising private businesses in Canada and North America. I bring that perspective to things, and a lot of what I will say has already been echoed, or I will echo what Stephen said earlier. You can't speak about Canadian sanctions vis-à-vis U.S. sanctions without talking about, for lack of a better term, lack of guidance from the Canadian government on the sanctions issues. I won't dwell on it because the point has already been made. I just want to emphasize that and then take you to the logical conclusion about where that leaves us in Canada. While you're familiar in the U.S. of the OFAC guidance, in the thousands of issuances of guidance, there are less than twenty FAQ answers in Canada and none of them addressing how to interpret sanctions laws. To be fair to my friend here, they can't provide legal advice. That's where we come in.

It makes for good business for us. To take it further than just the FAQ, there's also very limited opportunity in Canada—although thankfully it's expanding—to directly engage with the government on issues as they come up. I understand from my U.S. colleagues in DC that if there's an answer that you need, that's not provided by an FAQ, you can reach out to an OFAC officer and get some preliminary guidance from them.

That's not really possible in Canada. There is some opportunity to engage, but the answers are limited. On the on the legal side of things, there's really only a handful of judicial decisions that provide any sort of insight in Canada. That's certainly not the government's fault. We are limited as lawyers as to what we can draw on to actually give the legal advice that our clients so desperately need. It

really comes down to a place where when you're actually providing legal advice to clients in Canada, all you can do is give them a risk assessment. Very rarely are you able to say with certainty one way or the other. In those cases, great, they do happen, but they're rare. You're almost always in this nebulous middle zone, where you're describing the risk from something between "negligible" risk to "high" risk and using words in between that would fall in-between those which leaves clients unsatisfied in most cases; because what are you supposed to do with an assessment that leaves you with a "non-negligible risk," which is a "low risk" but not something that can be ignored?

Those types of opinions get issued, and it leaves clients in a super tough position. The unfortunate reality is that in the case of us as law firms, the clients are looking to us to take on the risk of the assessment, to say one way or the other. But we just can't do that because we will then face the wrath of the Canadian Government if somebody steps offside.

I just wanted to give just one example which my friend might be aware of because it's subject to a permit application at the moment, but there's a huge stack of permit applications on their desks. There's a company in Canada who was seeking this opinion, and they got a "non-negligible" risk assessment, but it led to a situation where they couldn't get audit services provided. So, they're not able to go through an end-of-year audit. The accounting companies wouldn't take on the risk themselves, which just leaves them totally hamstrung. What are they supposed to do? They can't issue financial statements to their investors. There's nothing to be done. They're waiting in the queue for, I think, it's now nine months and its continuing.

We've heard about this, but the only option that you're left with is to file these permit applications where you set out all the facts of what you're dealing with. Basically, go to the government and say, "hey, what do you think? can I do this?" And you get one of three responses back. They either come back and say, "go ahead. We don't think that this covers a prohibited activity," and you get that in writing, which is super helpful when you get that. Or they say, "that it is covered but here's your permit, and that requires the ministers signing authority to do that." Once you have the permit, you're allowed to conduct that activity, or yes, it's covered and you don't get your permit, in which case you should stop immediately. Those are super helpful answers, and you can take those to the bank, but anything short of that you are left wondering. The unfortunate reality is that there are, I don't know the exact number of permit applications at before the GAC team, but it's in the hundreds for sure. Wait times can exceed a year. I've heard some cases two years, which, for commercial businesses looking to undertake a deal with some party, it's just not realistic. You can't wait an indeterminate amount of time looking for that result. What this ultimately drives to is, well, you heard it earlier again from Steven: de-risking, but over-compliance amongst Canadian businesses.

The Canadian private sector is disadvantaged globally by this reality because they simply can't react as quickly as their American counterparts can [since] they would have the OFAC FAQ guidance. Oh, yes, like there's a general license, I can do that. But in Canada, you don't have that. It leaves Canadians, a lot of individual Canadians, in circumstances where they're almost certainly in violation of a

Canadian sanctions law. There's nothing they can do about it. Canadian citizens who may have, for instance, a telephone plan with MTS, which is a major Russian telecommunications company, not in Russia necessarily, but elsewhere in Europe. [A contract] [u]nder that company's telephone plan arguably could be in violation of Canadian sanctions, but there's nothing they can do. Whereas I understand in in the U.S., OFAC has issued a license specifically for that situation. Yes, super unfortunate for private corporations in Canada, but they just are at a disadvantage through this over-compliance reality.

Then I want to turn to the enforcement environment in Canada. Again, we heard a little bit about this from Stephen, but there's been very few instances of enforcement—at least public instances of enforcement—in Canada. He mentioned Lee Specialties. There are a couple other instances of charges having been laid under sanctions laws in Canada that I'm aware of— Yagafarov**,** under the UN Act and [Nader] Kalai. a Syrian businessman who was charged and ultimately acquitted of the charges. There have been a handful of other export control related enforcement actions in Canada, which are related but separate from sanctions obviously. This enforcement reality is driven by the fact that—we've heard it now a couple of times—but sanctions in Canada impose criminal liabilities. There's no scope in Canada for the government to impose administrative [or] civil liabilities. Just last night, I was on the OFAC website looking at the fines that have been issued through this year. I think it's in the U.S. $500 million [range] so far this year. There's been zero penalties of that type issued in Canada.

What this means for Canadian businesses in real time is that people don't spend a whole [lot of time on them.] I know there are institutions that have to. The banks, for sure, are very aware of all Canadian sanctions and such. [However,] for individual Canadian businesses who are faced with these sanctions risks they have a real business decision to make. They can either choose to over comply and forego the opportunity, or they can choose to take the risk. Even though they're getting advice from us that there is some level of risk involved with this activity, we can't tell you it's a certainty one way or the other. In many cases, they undertake those actions because the business opportunity is worthwhile to them and they have seen a relative lack of enforcement in Canada, publicly speaking, so they're taking on this risk knowingly in that context, which I think is not what anybody wants. I don't think it's what the Government of Canada intends [but] I don't work for the Government of Canada; I can't speak for them.

My sense is that it would be best if everyone knew the rules and complied with the rules as they are intended. They're not intending a complete embargo with Russia, although in many cases, that's what they're getting through this risk of [a] chilling effect. If they were intending a complete embargo, there's a tool for that. We have a tool called the Area Control List. If you put a country on that list, it's essentially a total block on dealings with that country. North Korea is on that list currently. Russia presumably could be added, but that's not [at the moment]. We want to continue to allow Canadian businesses to do business with Russia. In reality, that's not happening, or it's happening less than it should. So, that's a problem.

Having said all of that, the RCMP has published—I don't think anyone has mentioned this—[information concerning] action against $140 million of assets frozen as a result of the Russian sanctions so far, and $305 million of transactions that have been blocked. I assume the RCMP is counting those based on reports from the banks. They're relatively robust. That's different, of course, from the penalty side of things. You're not able to conduct your transaction is one thing and the sanctions seem to be somewhat effective in that respect because the banks are taking it seriously. The penalty side is not for people who can exist outside of that financial system who have access to other banks around the world They're not facing much risk of enforcement in practical reality. I think that was all I wanted to comment on, actually. So, I'll turn it over to you. Over to you Jessica Horwitz.

JESSICA HORWITZ: Thanks, Chris. Thank you so much for the invitation. It's great to have opportunities to have dialogue like this with our government colleagues and share ideas and open forum. So I think this initiative is a really good one. I'll also just give a disclaimer that my views are my own. They don't represent the views of any of my clients or my firm. I'll also say that none of my comments represent legal advice—[Michael,] you're not the only one that can give that caveat, see.

I'll start with a few comments to respond to some of the other things that I've heard from colleagues today. On this theme about the risk analysis in making decisions about whether or not to proceed with a particular activity, Steven mentioned that the costs of compliance have been skyrocketing in recent years. As Rachel mentioned in the previous panel, the trend is [shifting] away from full embargo-style sanctions to targeted list-based sanctions. From a public policy perspective this is good. Theoretically, you're minimizing the unintended consequences to make the sanctions as targeted as possible to the particular actor whose behavior you want to affect, but they also make it a lot more complicated. It makes it a lot more difficult to navigate. The Russian sanctions that Canada has is a perfect example of that because you've got nine schedules that have various different purposes. There are export restrictions under about five or six different categories of the type of export restriction under the Russia regulations, depending on what the product is and what provision of the regulations it's restricted under. For average businesses that don't have a lot of sophistication, such as, for example, the banks do, in the area of sanctions compliance, it's a real challenge.

In general, I would say Canadian businesses want to be compliant. It's not like Canadian businesses or my clients are calling me and saying, "Jessica, how do I evade the sanctions?" That's not the conversation. The conversation is, we want to comply with the law. We want to be responsible corporate citizens and do what's right. But at the same time, we have obligations to our shareholders to maintain profitability, we have obligations to our counterparties under contracts to complete transactions that we've agreed to. For example, determining whether a transaction needs to be terminated on the basis of sanctions, the question of whether or not it actually is prohibited by law is an extremely relevant question. If you are over-compliant in the context of a corporate transaction or some kind of commercial arrangement where you have potentially termination penalties, then sometimes you can terminate on the basis of a force majeure; "there's been a

change in law, it's an impossibility, we can't complete the transaction because it's prohibited by Canadian law." If it's a gray area and it's not clear based on available interpretive information whether or not the transaction is prohibited, then you could, as the company that's making this decision, find yourself in the context of a contractual dispute. You could be sued by your counterparty for wrongful termination of the contract or failure to perform the contract.

Over-compliance is also not necessarily an option in all cases. I've had a client comment to me before, in the heat of a very complex transaction when we're trying to navigate all these questions and interpretive issues. And he said to me, "I wish the Canadian government would just impose an embargo, because that would just make it easy, because I could just tell my counterparty 'listen, I can't do it, it's very clear, it's a full no-go,' it's easy to point to, whereas with this ambiguity, the company is in this situation of having to navigate and thread that needle, which becomes very challenging." It becomes costly when you have to hire expensive outside lawyers. Not that we're expensive.

It's great value. [But compliance] becomes time consuming, which is also extremely costly. The delays in contract negotiation, or in the time that you need to consider the legal risks, might mean that opportunities pass by, and you miss opportunities that are fully permissible under the law. Because you had to do this deep dive on the on the compliance and you weren't able to maybe get timely guidance from Global Affairs to clarify, the opportunities are lost.

I just wanted to echo Michael's comment about the competitive disadvantage that this puts Canadian companies at as compared to, for example, similar companies in jurisdictions that have clearer guidance, like the U.S. and the EU and the UK.

I agreed that I would talk a little bit about some of the statutory amendments that we've seen recently in Canada and the changes to Canadian law. On the whole, they represent incremental improvements to Canada's sanctions laws. It strengthens the legal mechanisms available to the government. Also, some of the amendments have clarified some of the policy purposes behind the sanctions. It's still a work in progress. There have been improvements, particularly in the rounds of amendments that we've seen in the last two years under the two budget Implementation Acts in 2022 and 2023.

I'll run through some of these and maybe give comments as I go. In the 2022 amendments, an expanded definition of property, clarifying that it includes intangible assets such as cryptocurrencies, [was] added to the Special Economic Measures Act too. An emerging ground for sanctions evasion is using virtual currencies, and so that has clarified that property is not only physical property tangible goods, but also money, financial instruments, securities, virtual currencies, all those types of assets.

In 2023 there was an amendment that has given the Government of Canada the formal ability to restrict under sanctions regulations the making of property available to a listed person. Whereas before it was focused on goods, so you can't make goods available, that's expanded to now include the ability to restrict all property, which I think was the intention of the original sanctions, but that was identified as a gap. And so that's been closed.

We have a purpose statement that was added to the Special Economic Measures Act in 2022 that clarifies the policy grounds under which Canada can impose sanctions, which include four grounds, basically if an international organization has given a directive to do so. The implication being the United Nations General Assembly. If there's been a grave breach of international peace and security, which, that's always been in there. Then we have the two relatively newer grounds that were added, I think, in 2018, along with the [Canadian] Magnitsky Act 2017 to implement sanctions in the event of gross and systemic human rights abuses or significant acts of corruption on the part of public officials in a particular location.

That's helpful to clarify the scope of the policy imperative that underpins the sanctions, although I'll have another couple of comments about how that's implemented in practice in a second. There's been improvements in information sharing with other government departments. In the recent amendments in 2022 and 2023, there were additional government departments added that Global Affairs is allowed to share information with and that can share information with Global Affairs to take the whole-of-Canada approach, whole-of-government approach to policy development and enforcement. [This includes] notably FINTRAC, which is the regulator that's responsible for anti-money laundering and receiving reports of suspicious transactions from financial institutions and other categories of reporting entities that have specific regulatory anti-money laundering obligations.

FINTRAC, unlike Global Affairs, has a long history of experience being a regulator. My view is that information sharing and support will be ultimately beneficial. The other thing that we saw on the most recent amendments is that reporting entities to FINTRAC also now have to report frozen assets to FINTRAC. Instead of going to the RCMP, you go through FINTRAC. It's clearer how that reporting mechanism is supposed to work. This is before I get to the two big ones, which is the Deemed Ownership Rule and the Forfeiture provisions. Just another comment about the most recent round of amendments [to the] 2023 Budget Implementation Act. There was a change to the wording in SEMA that gives Canada the power to impose list-based sanctions on a person outside Canada who is not Canadian. That's a change from the previous wording, which focused on the target country—the jurisdiction under which the regulations were being implemented. Theoretically, this gives Canada the ability to impose effectively secondary sanctions because it allows, as long as the grounds for listing in the particular sanctions regulation are met, the person being targeted doesn't necessarily have to be in that jurisdiction anymore or a citizen of that jurisdiction. It can be a third country person that is perhaps supporting the gross violations of human rights. It's not clear, and maybe Steven will have some comments in the Q&A section about this. It's not clear exactly how the government plans to use this power, but it is an expansion, which is an interesting development.

Okay, so one of the two big changes that we've seen in the last couple of years has been the Deemed Ownership Rule, which Steven spoke about in his presentation. That came into effect in June of this year. It has caused a lot of consternation. In some sense, it is helpful, because at least we have a role now. There was probably more consternation before, along with this comment of "I wish

there was a full embargo." It sometimes is better to have clarity, even if the clarity is not exactly what you would have picked better than ambiguity. The deemed ownership rule, we have a 50% rule.

In addition to that, we have an effective control rule. What we don't have is guidance from Global Affairs about how the government intends to interpret the scope of effective control. This is a relevant question for businesses, with the question being: what due diligence is sufficient due diligence? What documents do I need to request from my counterparty to ascertain whether a minority shareholder that is subject to sanctions has the ability to change the composition of the board of directors? The information that you need to be able to determine that is sometimes confidential; it's in the shareholders agreement, or it's in the bylaws of the corporation? If it's not a publicly traded corporation, that wouldn't be public information. It becomes a negotiation with your counterparty [about] whether they [are] willing to disclose this information to help you get across your due diligence threshold and obtain a reasonable level of comfort with the transaction to demonstrate due diligence in the event that there [is] some kind of enforcement action later. Some guidance would be very helpful to businesses for clarification. This is not the first time that that legal community has made this comment to Global Affairs. We've engaged routinely, mainly through the Canadian Bar Association and other organizations. I understand they're working on it.

The other big change that we've seen in the last couple of years—Stephen touched on [it] in his presentation—is this forfeiture regime. This is a really interesting one. It is a bit of a test case, for the rest of the world or at least the G7 states, in whether this idea of the ability or the moral justification or the international law justification of confiscating assets from sanctioned persons is going to be feasible in practice. By feasible, it can happen without being blocked by applicable domestic or international laws. So constitutional challenges or challenges under state immunity principles under international law and things of that nature [could happen]. Canada is a bit of a trailblazer, and the other colleagues in the G7 are watching the two example cases that Steven mentioned with great interest. This is why he mentioned that Canada has been very careful about making sure that they do it right and compliantly with applicable laws.

I'll just add a few comments—my own thoughts about the forfeiture regime. The key question [as to] why it's controversial is the question of whether the expropriation of private property is acceptable under established legal norms, being either domestic property protections or international law principles in investor protection [treaties]. Under the Canadian Charter of Rights and Freedoms, we don't have a formal protection of property rights, the way that exists in some other jurisdictions like the U.S.. I think the Canadian Bill of Rights (of 1960) does have a property protection but that right does not constrain the government from being able to expropriate property through legislation. There's been Supreme Court cases that have confirmed that [expropriation is okay] so as long as the legislation is clear that that is the intention. The government is able to do that, and it's not constrained under constitutional principles. The main question becomes international law considerations.

The core question is seizure of the assets. [That is] because there's two steps to the forfeiture regime. One is that the assets are seized—actually there's three steps. The first step is that the assets are frozen or restrained under the applicable sanctions restrictions. The second step is that the government actually issues an order or takes action to seize the assets, which puts them in a formal category of seized assets that are subject to management by the federal government, as opposed to being in property in private hands. Then, the third step is, once the Canadian government gets approval from a court, they can actually treat those assets as forfeited, which means that they can be they can be sold or they can be disposed of, and the proceeds can be used to put towards the designated grounds in the legislation or the designated purposes in the registration legislation, which is effectively reconstruction efforts, compensation of victims, or the restoration of international peace and security. The government can't just put the money into its general coffers and use it like tax revenue. It has to be used [for] very specific purposes.

The question is: *is this seizure an unreasonable seizure*? Possibly not, as long as due process is followed. The government does have a right of seizure that is not subject to a criminal standard of proof. One of the criticisms is that what you're doing is you're essentially seizing as forfeited assets of a private individual where there has been no criminal conviction. There's been no criminal process with evidence on a standard of beyond a reasonable doubt to demonstrate that there's been a criminal offense committed; therefore, that you're not justified in taking these assets from the person. That's not exactly right. Canada does have an ability to seize assets. For example, under domestic proceeds of crime legislation the federal government does have the ability to seize, sell, and forfeit assets. The standard of proof is balance of probabilities. Were the assets in question derived from the commission of an offense? It's a bit analogous to the sanctions context. All of that is subject to due process. That becomes the difficulty in this new forfeiture legislation because court approval or the approval from the Superior Court in the applicable province, where the property is located, is only required to confirm that the property is in fact property owned, held, or controlled by or on behalf of a listed person.

The question that a court has to look at is: *is this property owned by this person*? Then there's the process that Steven mentioned for third parties that have an interest in the property, or a debt or lien or something and in the property can try and assert that. What the law doesn't do is ask whether the listing in the first place was justified. There are separate procedures under Canadian law whereby those types of decisions can be challenged. The decision to list a person on a sanctions list is subject to judicial review in Canada. There are currently a number of cases before the Federal Court in which individuals have challenged the listing decisions in various different respects. We don't have any published decisions yet. We'll be watching that space very closely to see what the Federal Court says about those cases. There's also a mechanism to apply for delisting from Global Affairs; that decision is subject to judicial review as well. The difficulty with that process that we've seen in recent cases is that there's a lack of information. There's a lack of transparency available to the person that has been targeted by the listing

measure as to the grounds for listing and the evidence that underpins the listing. The government can't just list people indiscriminately. It has to list individuals or entities that meet the requirements in the applicable regulations.

As an example, I'm looking at the Russian regulations. Section Two says "a person that's listed on schedule One is a person that the Governor in Council is satisfied, there are reasonable grounds to believe"—and again, it's a reasonable grounds test, it's not a proof beyond a reasonable doubt, test—"it's a person engaged in activities that directly or indirectly facilitate support, provide funding for or contribut[ing] to a violation, or attempted violation of the sovereignty or territorial integrity of Ukraine, or that obstruct[s] the work of international organizations in Ukraine."

The second type of individual or entity added by amendment was "a person has participated in gross and systemic human rights violations in Russia." The rest of them are former government officials and associates of persons listed in AMB entities wholly owned and controlled by persons listed in "a" and "b." It all flows back to—that a person is involved, who engages in activities that directly or indirectly supports the war in Ukraine or that involves human rights abuses. That's the evidentiary thread that is opaque to a lot of individuals and entities that have been the target of sanctions. I'm not going to name any names, but we've been approached by various different individuals and entities at various points saying: "How do I challenge this?" "I have no influence with Putin." "I have no involvement in the war in Ukraine, all I am is a rich Russian person." "I'm not engaging in human rights abuses." This is what they say.

Starting from the assumption that maybe this person is telling the truth and is not involved in any way, how do they prove their lack of involvement to Global Affairs in a way that's going to encourage a delisting decision? How do you prove a negative? It's even more difficult when you can't get disclosure of the evidentiary basis for the listing in the first place, because it's protected by Cabinet confidence. It's protected. It's withheld from disclosure, which I think the one of the U.S. speakers was mentioning this morning is also the case in the U.S. [because] it's a national security issue, it's highly sensitive.

It becomes a question of how do you ensure that that due process and procedural fairness are followed to make sure that you're not arbitrarily or illegally imposing sanctions on an individual entity or forfeiting their assets and then seizing and confiscating their assets without sufficient evidence. What is the evidence? What's the standard of evidence to be met? I don't have an answer for that question, an important question that needs to be asked. I'll pause it there, I went over my time.

CHRISTOPHER SANDS: I feel like lawyers are interested in justice. The structure of this panel really had the both of you—Michael, and Jessica—talking about what Stephen does every day and his presentation. I want to turn it to Stephen and ask very specific questions, but maybe, we'll close with everyone jumping on this question. What can the U.S. do to help Canada do what it's trying to do? How can the U.S. either be leaned on or supportive in terms of sharing information, or what have you? Yes, perhaps they can give legal advice. All right over to you, Stephen.

STEPHEN BURRIDGE: Thank you very much. Thanks to both to Michael and to Jessica, as well. I take away most from this conversation the importance of these kinds of conversations. As Jessica said, we do have these conversations regularly, and we plan to have them even more regularly. Here, you want guidance. We know that very, very well. It is a tricky one because of that fine line between legal advice and providing the kind of granularity on guidance. I would say that we already undertake a lot of outreach to explain our sanctions measures. There are FAQs, [which] may be limited , but they are available on the website. There is a mechanism to contact people within my team to be able to discuss things that fall outside of what's available right now publicly. Finally, there is a permit process. I certainly don't want to make any sort of excuses. Since February of 2022, the world has changed. The sanctions world has changed. That's what we've been talking about, primarily here. Complexity has changed; the sheer volume has changed. My very, very small team has been working tirelessly to try to engage with stakeholders and offer as much information as they can on these measures. It is a work in progress, and the government has committed additional funding to expand that capacity. Part of that capacity, in terms of being able to have better enforcement and better compliance, means being able to dedicate some of those resources to digging into some of these questions that you asked and trying to tackle this question around further information and guidance. We hear you loud and clear. We want to continue to have that discussion. Please, as you've done, continue to flag where these sticky points are so that we can think through the best advice that we can give. I'd say that first.

Otherwise, Canada has been very, very clear, especially when in the Russia context. We have taken very, very robust measures, with the intent of stopping the Russian war machine and bringing about an end to the conflict. Both the Deputy Prime Minister and the Prime Minister have been very, very clear that there will be impacts on Canadians. The example you used, Michael, was of the telecommunications company. The intent was to cut off people using that telecommunications company. When we talk about the permit process, permits are meant to be issued in exceptional circumstances; activities are prohibited for a reason. If there are national interests, if there are foreign policy reasons why [a] permit should be granted, then that's something that the Minister of Foreign Affairs can consider. In interpreting the prohibitions and the regulations right now, bearing in mind the very robust approach that the Government of Canada has taken, I would encourage you to interpret the regulations very broadly as well.

Maybe very quickly, on deemed ownership, as I just mentioned, we've taken a very clear stance in response to Russia's breaches of international peace and security. The measures that we've developed have hit a number of different sectors. They're meant to be broad in scope. We've purposely targeted key parts of the Russian economy with the objective of financially constricting Russia so that it's unable to afford its war. In the case of deemed ownership, I would just underscore, its broad. Take a very broad approach to its interpretation.

As to seizure forfeiture, Jessica, it was really helpful how you outlined some of the finer points on that. I do want to emphasize the procedural fairness piece, and because it is really an important element of this regime and those procedural

safeguards, that you did outline some of them as well, right, the consideration of proposed forfeiture by a judge in accordance with court process, the provision of notice to any person with an interest of right in the property is determined by the court, the ability of a person whose property is the subject of a proposed forfeiture to make an application to the court asserting their interest or right in the property, and the opportunity for affected persons to seek financial relief. Really, really important elements, I think you [Jessica] made a very important point that we know that others are watching how we do this. There isn't jurisprudence on this yet, but there is a court process. We want to make sure that we do have very robust cases that go before any court.

Finally, on the evidentiary piece, we're reflecting really carefully on what kind of information we're able to make public on listings. It is important just to note that all of the evidentiary packages that accompany any listings rely on open-source material, right. It's not that the process is hidden or relying on intelligence. All the listings are based on open-source material; we cannot use intel to list. To your point, you've said yourself Jessica that the regulations actually spell out precisely why individuals are listed. It's very clear within the regulations, under what sections, people can be listed. If we do receive a de-listing application, then there are certain bits of information that we are able to point out to [concerning] an applicant, including where they may have been listed. I'll leave it there.

JESSICA B. HOROWITZ: Can I make a comment? What would be very helpful from the perspective of lawyers, who can help sanction targets to challenge those decisions or to apply for de-listings in accordance with their procedural rights, [is] if Global Affairs could disclose which grounds under the regulations (for example, subparagraph under Section Two in the Russia Regulations) was the legal ground for the listing. It would be very helpful—even without getting into the underlying evidence that was used to establish that—if it tells the person why they're being listed under a legal mechanism.

You can make guesses based on the publicly available information in the REAS (Regulatory Impact Analysis Statements) and other places on the Global Affairs website. Disclosure of that is just a suggestion which might be useful.

STEPHEN BURRIDGE: Thank you for that. You actually raise a really good point that I should have mentioned. There is the Regulatory Impact Analysis Statement that accompanies all the listings, which outlines why individuals are being sanctioned. There's often news releases or other statements that are issued as well, whether it's the Department or the Minister—in some cases, the Prime Minister. There is information out there. We're reflecting really carefully on what that looks like in the future.

CHRISTOPHER SANDS: Michael, anything?

MICHAEL MILNE: I was just thinking about your question: what can the U.S. do to help Canada?

STEPHEN BURRIDGE: I apologize, Chris. I missed that point when I was responding there. I would say that our U.S. colleagues have been nothing short of extraordinary when it comes to having conversations about anything sanctions-related, including the provision of guidance and how they're doing it. We have

learned a lot from them. We will continue to learn a lot from them, and we're looking forward to continuing that dialogue.

CHRISTOPHER SANDS: If we can support it in any way, we're happy to do so. Ladies and gentlemen, this has been an amazing conference. I want to thank our partners in the Canada-U.S. Law Institute and the Wahba Institute for Strategic Competition.

I want to thank Rick Newcomb. Rick, you were the inspiration for us taking this on, you lead us into a real thicket of issues. That's what we like here at a think tank. We really like to delve into them. We couldn't have done it without you. I dare say, where Canada is today and the U.S. is today, we would never have got there without your public service. Thank you very, very much, ladies and gentlemen. We are adjourned.