

LAWRENCE L. HERMAN

BARRISTER & SOLICITOR
ASSOCIATE COUNSEL, CASSELS BROCK & BLACKWELL LLP

SUITE 2200
40 KING STREET WEST
TORONTO, CANADA M5H 3C2

TEL: [416] 869-5983; 488-2696
FAX: [416] 640-3024
E-MAIL: lherman@casselsbrock.com

TRADE LAW MEMORANDUM

To: Clients and Friends

Re: TERRORISM -- EMBARGOES AND TRADE SANCTIONS

Date: September 30, 2001

Financial Assets and the Terrorist Crisis:

1. The recent terrorist attacks raise questions about the adequacy of Canada's existing laws on economic sanctions and embargos as well its laws permitting the freezing of financial and other assets belonging to or forming part of the activities of any international terrorist organization.
2. The present Canadian regime is divided among at least three different statutes and separate enforcement regimes. Sanctions are enforced mainly through the provisions of the *United Nations Act*, R.S. C. 1985, ch. U-2 and the *Export and Import Permits Act*, R.S.C. 1985, ch. E-19. The *Special Economic Measures Act*, S.C. 1992, ch. 17, has been little used up to now but is also relevant. Ottawa is reviewing all of these to determine their adequacy in dealing with the current crisis.
3. There is a wealth of information on Canada's sanctions and export controls available on the web-site of the Department of Foreign Affairs and International Trade.

and readers are advised to consult that site at: www.dait-maeci.gc.ca. Extensive information is also available on both the administration of Canada's export control regime and Canada's economic sanctions policy from the Export Controls Division (ECD) of the Department.

Afghanistan and U.N. Sanctions:

4. Canada applies U.N.-mandated sanctions under the *United Nations Act*. That Act gives the federal cabinet the authority to implement binding U.N. Security Council resolutions passed under Chapter VII, Article 41, of the U.N. Charter. Article 41 of the Charter requires members to apply sanctions, short of the use of armed force, in cases where international peace and stability are threatened. The *United Nations Act* allows the Canadian government to order measures as might appear "necessary or expedient" to meet Canada's obligations under these U.N. resolutions.

5. Most persons may be unaware of the fact that the Taliban and Osama bin Laden and his organization have been effectively outlawed by the international community since 1999. Security Council Resolution 1267, 15 October 1999, among other things, demands that the Taliban end its terrorist activities and deliver Osama bin Laden to international authorities following his indictment by an American court in connection with the bombing of U.S. embassies in Kenya and Tanzania.

6. Pursuant to Resolution 1267, the Canadian government issued sanctions under the *United Nations Afghanistan Regulations*, SOR/99-444, November 10, 1999. These were later amended in February 2001, by SOR/2001-86, to implement subsequent U.N. Security Council Resolution 1333 of 19 December 2000.

7. Resolution 1333 tightens the sanctions under Resolution 1267, among other things demanding that the Taliban end its sanctuary for terrorists and other support it gives to them and bring accused terrorists to international justice. It requires U.N. members to freeze the Taliban's assets and those of bin Laden's as well as all individuals and organizations associated with them.

8. Canada's Afghanistan sanctions are therefore almost two years old. While they stop short of giving the Canadian government or Canadian financial institutions the authority to actually seize assets, by preventing any kind of direct or indirect dealings in those assets and making it a penal offense for anyone knowingly to do so, they effectively freeze them.

9. The *Regulations* provide that:

“4. Except as may be authorized by the Committee of the Security Council on the grounds of humanitarian need, no person in Canada and no Canadian outside Canada shall knowingly

(a) deal directly or indirectly in any property that is owned or controlled by or on behalf of the Taliban or any entity owned or controlled by the Taliban;

(b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (a); or

(c) provide any financial services or any other services in respect of any property referred to in paragraph (a), to or for the benefit of, or on the direction or order of, the Taliban or any entity owned or controlled by the Taliban.”

10. With respect to bin Laden, the *Regulations* provide,

“4.1. Subject to section 4.5, no person in Canada and no Canadian outside Canada shall knowingly

(a) deal directly or indirectly in any property that is owned or controlled by or on behalf of Usama bin Laden or his associates or any entity that is owned or controlled by or on behalf of Usama bin Laden or his associates;

(b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (a); or

(c) provide any financial services or any other services in respect of any property referred to in paragraph (a), to or for the benefit of, or on the direction or order of, Usama bin Laden or his associates or any entity owned or controlled by Usama bin Laden or his associates.”

11. Section 4.5 excludes supplies to be used for humanitarian purposes, which must first be approved by the Special Sanctions Committee of the Security Council.

12. Note the broad effect of the prohibition in respect of dealing “directly or indirectly with any property” owned or controlled by or on behalf of the Taliban and bin Laden or his associates or any entity owned or controlled by or on behalf of the Taliban and bin Laden or his associates. It is an offence for any person to knowingly do anything “that causes, assists or promotes, or is intended to cause, assist or promote, any such act” relating to this property.

13. As a penal measure, any prosecution under the Regulations would require evidence that the person concerned dealt knowingly with persons or assets in or owned by the Taleban and bin Laden. This would be a matter of evidence. The criminal law standard of proof beyond reasonable doubt would apply to obtain a conviction.

14. Even if a conviction were obtained, penalties for breaching the Regulations range up to only five years imprisonment or a \$5,000.00 fine or both. Given the severity of the September 11th atrocities and their implications for Canadian society at large, these penalties probably need to be increased.

Other Economic Sanctions:

15. Other measures relevant to the present crisis include the *United Nations Iraq Regulations*, SOR/90-531, 7 August 1990, also made under the *United Nations Act* in the context of the Gulf War.

16. As with the *United Nations Afghanistan Regulations*, the Iraq Regulations impose an asset freeze and an investment ban as well as a prohibition on all imports to and exports from Iraq. The only exception is for goods authorized by the U.N. Sanctions Committee under the Oil for Food Programme. Like the *Afghanistan Regulations*, there is no right of seizure but the effect of the asset freeze is to allow financial and other institutions to *de facto* take control by preventing all dealings in such assets.

17. The Iraq sanctions are somewhat more specifically defined in terms of the banned activity:

“6. (1) No person in Canada and no Canadian outside Canada shall knowingly send, pay, transfer or remit, directly or indirectly, any money, cheques, bank deposits or other financial resources, or cause any money, cheques, bank deposits or other financial resources to be sent, paid, transferred or remitted, directly or indirectly, to any person in Iraq or to any other person on the direction or order of any person in Iraq.

(2) No person in Canada and no Canadian outside Canada shall knowingly send, transfer, remit or assign any money, cheques, bank deposits or other financial resources held by, on behalf of or on account of the Government of Iraq or any agencies of or bodies controlled by Iraq.

(3) No person in Canada and no Canadian outside Canada shall knowingly make available to or permit the use by the Government of Iraq or any commercial, industrial or public utility undertaking in Iraq of any funds, monetary resources, credit, extension of credit or deposit facilities.

(4) No person shall knowingly transfer, sell, assign, dispose of, export, endorse or guarantee the signature on any security held by, on behalf of or in the name of the Government of Iraq or any agencies of or bodies controlled by Iraq.

(5) No person shall knowingly transfer, pay for, export, dispose of or otherwise deal with any property or any interest in property held by the Government of Iraq or any agencies of or bodies controlled by Iraq.”

18. As with the Afghanistan regulations, there is the requirement for evidence that a person knowingly performed the prohibited act. The ban applies to assets of the Iraqi government or any of its agencies and this kind of tracing may be factually difficult to establish. As well, the penalties appear to be too light, topping out at 5 years imprisonment or a \$5,000.00 fine or both.

19. In addition to the forgoing, the *United Nations Libya Regulations*, SOR/92-222, 15 April 1992, imposed an asset freeze, investment ban, arms embargo and certain restrictions on exports of goods for the oil and gas sector respecting Libya. Pursuant to Security Council Resolution, these Regulations have been suspended but not lifted.

20. Other similar sanctions under the *United Nations Act*, though not directly relevant here, include arms embargos against Liberia, Rwanda, Ethiopia, Eritrea and a rough diamond embargo against Sierra Leone.

Seizure of Assets and other Extraordinary Measures:

21. The *Special Economic Measures Act* (“SEMA”) gives the government extraordinarily broad powers to act in times of peril and international crisis, including where the federal cabinet determines that “a grave breach of international peace and

security has occurred that has resulted or is likely to result in a serious international crisis”.

22. Included is the virtually unrestricted authority of the cabinet to order property of a foreign State or persons in that State seized or sequestered, to prohibit all persons inside or outside of Canada from dealing in property of that State, from shipping or supplying any kind of goods and technical data and from dealing in any manner with that State and its agencies, residents or nationals. To date, the only measures under SEMA were cabinet orders imposing a financial embargo on Yugoslavia and Serbia, which has since been lifted.

23. A hurdle in implementing measures under SEMA is the unusual requirement that every order imposing seizure of assets or other form of sanction must be laid before Parliament within 5 days. Any such order may be subject to a debate to amend or revoke it, upon the signature of at least 50 members of Parliament and 20 senators. While not an insurmountable problem, this requirement may not respond to the need for immediate and effective action in the context of the present crisis.

Other Crisis-Related Developments:

24. There have been critical U.S. developments in the area of sanctions that bear watching in the context of the present crisis. First, work has been postponed on the U.S. bill (Sudan Peace Act) that was in the last stages of conference in the Congress and which would bar companies working in the Sudan (i.e., Talisman Energy Inc.) from access to U.S. capital markets.

Capital markets sanctions had been gathering momentum on the Hill. With the current crisis and the need to develop international support for counter-terrorist actions, the Bush administration has requested deferral on that legislation. The Bill may be resurrected at a later stage, however, and is far from a dead issue.

25. Action in the Congress to totally revamp the U.S. export controls regime is also stalled. Up to the current crisis, there were ongoing efforts to ease U.S. export controls, particularly for so-called mass-market products. Supported by the Bush Administration, the Senate passed the *Export Administration Act of 2001* (S-149) on September 6th.

26. The House had refused to pass similar legislation, however, notwithstanding considerable pressure from the business community to relax export controls. With the present crisis, it can be expected that these initiatives will die and be subsumed in a major re-examination and a substantial tightening up of U.S. export controls and trade sanctions in the context of the ongoing terrorist threat.

Other Canadian Export Controls:

27. Together with U.N. sanctions, Canada participates in a multilateral arrangement with like-minded countries, most of whom are members of NATO, to control exports of dangerous military and strategic goods to undesirable destinations. Formerly known as the Coordinating Committee or COCOM, this is now called the Wassenaar Arrangement for Export Controls.

28. To comply with Wassenaar, over the years Canada has revised and up-dated its complex set of export controls. With the recent terrorist attacks on the U.S., these

controls may take on greater relevance, particularly as they concern shipments to countries like Iraq, Afghanistan and other rogue States.

29. So far, the terrorist crisis does not appear to involve a direct failure of the export controls regimes that Canada and other like-minded countries have in place. On the other hand, as with all governmental measures involving potential security risks, Canada's export controls are being examined to see what degree changes might be needed to tighten up the system.

30. Canada's core export control regime is maintained under the *Export and Import Permits Act*, R.S.C. 1985, ch. E-19 ("EIPA"), administered by the Export Controls Division in DFAIT. EIPA is aimed at controlling of exports (and imports) of dangerous and strategically sensitive products (military goods, munitions, biological and chemical weapons, technology, etc.) as well as illicit goods (narcotics and other dangerous drugs and the like).

31. Under EIPA, an export permit is mandatory for all goods:

- ?? destined for a country listed in Canada's Area Control List or "ACL";
- ?? included in Canada's Export Control List or "ECL"; or
- ?? of U.S. origin.

32. As of this date, the ACL includes only Angola and Libya, both of whom are under U.N sanctions, discussed previously. All goods, regardless of their nature, destined to these countries, require a permit. The ACL restrictions are in addition to the trade embargos under U.N. resolution.

33. From a business perspective, the most important of the two lists is the ECL. All goods on the ECL require an export permit, regardless of their destination. That does not necessarily mean individual permits for every shipment. The legislation permits General Export Permits (“GEPs”) covering multiple exports to different destinations in many cases.

34. The ECL is a lengthy document comprising eight groups of goods. The groups list many kinds of strategic and military goods noted above, as well as goods that could be used for production of chemical and biological weapons and for illicit drugs. There are other goods on the list, however, such as raw logs and pulpwood.

35. Both the ACL and the ECL are relevant to the current crisis. While it appears that no immediate changes are being contemplated to EIPA and the lists, it can be expected that Canadian authorities will be more vigilant in their administration of the legislation.

36. Exporters, therefore, must take special care to ensure that their particular goods are not covered by the ECL. In some cases, this is reasonably easy to determine. In other cases, it may not be clear. In all cases of possible ECL listing, consultation with the ECD is advised.

U.S. Origin Goods:

37. Exporters should note that the export of all goods of U.S. origin, regardless of their nature and destination, require a Canadian export permit. U.S. origin goods are listed as famous item 5400 on the ECL. It covers “all goods that originate in the United

States”, other than those that have been further processed outside the U.S. to result in a “substantial change in value, form or use”.

38. This dates back to agreements reached during and just after World War II (often called the Hyde Park understandings), whereby it was agreed that, to avoid Canada being used as a conduit for the export of banned U.S.-made products, Canada would require all Canadian-based exporters of all such U.S. goods to obtain a Canadian export permit.

39. In cases of such goods being exported to countries under U.S. embargo, even if these countries are not under Canadian trade sanction, Canada will refuse to grant an export permit. The best example is Cuba. An export permit is required for all U.S. goods destined to that country and Canadian authorities will refuse to grant such permit where it would have been refused in the United States.

40. Whether goods are of U.S. origin under item 5400 is not always clear. The U.S. regards goods containing 10% or greater U.S. content to be of U.S. origin. Canada applies a different criterion and (since the ECL is a Canadian measure), as a rule of thumb, requires U.S. content to be 50% or greater, even in cases where there has been a “substantial transformation”. Exporters again are advised to consult closely with ECD in Ottawa where there is a potential problem.

Conclusions:

41. The combination of Canada’s two sets of special regulations regarding Afghanistan and Iraq, issued under the *United Nations Act*, may be broad enough to “freeze” assets and prevent dealings by or on behalf of the parties identified as being implicated in the September 11th attack.

42. The regulations do not actually seize assets, however. Nor do they actually set out names or provide criteria to identify the parties or entities associated with the Taliban or bin Laden, leaving it up to the financial institutions themselves to make such a determination. The penalties in each case are likely too lenient and may not be truly effective under the circumstances.

43. Moreover, the two sets of regulations are confined to implementing specific Security Council resolutions under Article 41 regarding Iraq and Afghanistan and, as with all measures under the *United Nations Act*, do not provide a general blanket for prohibiting transactions involving governments, entities and activities that are not the subject such resolutions.

44. The present crisis may necessitate consideration of a more comprehensive sanctions and/or embargo law to allow independent action by Canada, without having to wait for U.N. Security Council action. The *Special Economic Measures Act* allows for such comprehensive sanctions in crisis periods and for the seizure of assets but contains a provision that could open up divisive debate in Parliament and therefore may not be entirely appropriate under present circumstances.

45. The ECL and ACL under the *Export and Import Permits Act* deal with the outbound goods only. Moreover, to this point EIPA has not been used to prevent international transactions in money, banking, securities, financial services or other kinds of intangibles to problem destinations.

46. All of the above lead to the conclusion that, while Canadian measures may be adequate to make asset dealings by terrorists and their agents more difficult, each has

shortcomings that may make it necessary to urgently examine more comprehensive sanctions and enforcement measures.

47. Finally, it needs to be stressed that the present international situation is extremely fluid. There are many initiatives underway at the U.N. and in the international arena, including the conclusion of more powerful multilateral treaties to require governments not only to apply economic and trade sanctions against rogue States and terrorist organizations but also to ensure the speedy arrest, prosecution and/or extradition of persons engaging in terrorist activities.

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Disclaimer Notice: These Memoranda are prepared purely as information pieces of interest to clients and friends and are not intended to convey legal advice on any particular matter.