Appendix A

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

CANADA

COMITÉ MIXTE PERMANENT
D'EXAMEN DE LA RÉGLEMENTATION

a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO PRÉSIDENTS

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GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

May 27, 2013

The Honourable Keith Ashfield, P.C., M.P.
Minister of Fisheries and Oceans
House of Commons
Confederation Building, Room 107
Ottawa, Ontario K1A 0A6

Dear Minister Ashfield:

Our File: SOR/89-93, Ontario Fishery Regulations, 1989

Subsection 4(2) of the *Ontario Fishery Regulations, 2007*(formerly subsection 36(2) of the *Ontario Fishery Regulations, 1989*) was, together with Ms. Tiffany Caron's letter of April 3, 2013, again considered by the Joint Committee at is meeting of May 9, 2013. At that time, members took note of the Department of Fisheries and Oceans' advice that amendments made to paragraph 40(3)(a) of the *Fisheries Act* by the *Jobs, Growth and Long-term Prosperity Act* , S.C. 2012, c.19, were not intended to have the effect of responding to the Committee's objection to subsection 4(2) of the Regulations.

The Joint Committee is of the view that in the absence of express authority, provisions in regulations that result in criminal liability for contravening the terms and conditions of a licence or permit are unlawful. A licence is an administrative document, and the terms and conditions attached to a licence will be imposed on a case-by-case basis by the official issuing the licence. The actual requirements that a licence holder must obey will therefore be set out in the licence, as opposed to the law itself. In short, the exercise of an administrative discretion by officials is enforced as if it were law. This is the basis of the Committee's objection to subsection 4(2) of the *Ontario Fishery Regulations, 2007*. Similar provisions are found in other fisheries regulations as well.

As amended, paragraph 40(3)(a) of the *Fisheries Act* provides that anyone commits an offence who

> in carrying on a work, undertaking or activity, fails to comply with a prescribed condition of an authorization under paragraph 35(2)(*a*) or (*c*), with a condition established by the Minister under paragraph 35(2)(*b*), or with a condition set out in the regulations or established under any other authorization issued under this Act.

This would directly create the offence of failing to comply with a condition of an authorization issued under the Act. If this would cover authorizations in the form of permits and licences, provisions like subsection 4(2) of the *Ontario Fishery Regulations, 2007* would no longer serve any purpose.

In a general sense, the term "activity" seems sufficiently broad to encompass fishing, or indeed anything else governed under the *Fisheries Act*. Similarly, "authorization" could certainly include permits, licences and other such mechanisms by which permission to do something is conferred under legislation. Indeed, some members of the Committee were inclined to interpret paragraph 40(3)(a) in this manner. On the other hand, the other offences created by section 40 deal specifically with the provisions of the Act concerning fish habitat protection and pollution prevention, and it might be thought that the scope of paragraph 40(3)(a) must be similarly restricted, notwithstanding the reference to a condition "established under any other authorization issued under this Act".

The Department's April 3, 2012 letter confirms that the latter was what was intended. In its words, "it was not the government's intent to have paragraph 40(3)(a) of the Act applied to fishing related activities". The word "activity" is apparently meant to capture "physical activities that may not qualify as works or undertakings". The Department gives as examples activities to maintain water flow, fish passage or the placing of barriers that might cause harm to fish habitat.

The context in which the words "any other authorization issued under this Act" are used tends to support this interpretation of paragraph 40(3)(a). Yet if the intent is to include only authorizations connected to protecting fish habitat and not to actual fishing activities, why does the provision refer to conditions established under "any other authorization issued under this Act" rather than, for example, to authorizations relating to works, undertakings or activities to which sections 35 to 37 of the *Fisheries Act* apply? Notwithstanding that the Department stated that it was not the government's intent to address the Committee's concern, confirmation that in the Department's view paragraph 40(3)(a) cannot, and ought not to be, read as having this effect nonetheless, would be valued. Particularly as paragraph 40(3)(a) creates an offence, it might be thought that there is a need for a further amendment to clarify its scope.

There have been a number of attempts over the years to resolve the Committee's objection by amending the *Fisheries Act*. Unfortunately, none of the bills

in question received passage. This continues to be a source of frustration for the Committee, and no doubt for the Department as well. At the same time, the occasion of the latest amendments to the Act might have been thought to have afforded another opportunity to resolve this matter. In past correspondence, the Committee has also suggested that a short bill specifically to deal with the Committee's concern might prove the most expeditious means of resolving the issue. In its most recent letter, the Department indicates that it is considering possible future amendments to the Act for, in its words, "the purposes of providing greater clarity". If it is concluded that paragraph 40(3)(a) of the Act cannot be read as applying to fishing related activities, we would value any further details you might be in a position to provide as to when this legislation could possibly be introduced.

We thank you for your attention to this matter, and look forward to receiving your reply.

Yours sincerely,

Senator Bob Runciman
Joint Chair

Chris Charlton, M.P.
Joint Chair

c.c.: Mr. Gary Breitkreuz, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

Mr. Massimo Pacetti, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

/mh

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CANADA

COMITÉ MIXTE PERMANENT
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VICE-PRÉSIDENTS

MAURIL BÉLANGER, DÉPUTÉ
GARRY BREITKREUZ, DÉPUTÉ

NOV 25 2013

The Honourable Gail Shea, P.C., M.P.
Minister of Fisheries and Oceans
House of Commons
Confederation Building, Room 107
Ottawa, Ontario K1A 0A6

Dear Minister Shea:

Our File: SOR/89-93, Ontario Fishery Regulations, 1989

We refer to our letter of May 27, 2013, to your Predecessor, the Honourable Keith Ashfield, to which a reply would be appreciated.

Yours sincerely,

Senator Bob Runciman
Joint Chair

Chris Charlton, M.P.
Joint Chair

c.c.: Mr. Mauril Bélanger, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

Mr. Gary Breitkreuz, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

Encl.

/mh

Minister of
Fisheries and Oceans

Ministre des
Pêches et des Océans

Ottawa, Canada K1A 0E6

SOR/89-93

FEB 2 6 2014

The Honourable Bob Runciman, Joint Chair
Ms. Chris Charlton, Joint Chair
Standing Joint Committee for The Scrutiny of Regulations
c/o The Senate
Ottawa, Ontario
K1A 0A4

Dear Senator Runciman and Ms. Charlton:

This is in response to your correspondence of November 25, 2013, referencing your previous letter addressed to my predecessor, the Honourable Keith Ashfield, concerning recent amendments to the *Fisheries Act* and how the changes would relate to subsection 4(2) of the *Ontario Fishery Regulations, 2007*.

In response to the Committee's letter, I would like to reaffirm that paragraph 40(3)(a) of the *Fisheries Act* is closely linked to Section 35 of the *Fisheries Act*. The section 35 prohibition and the protection regime offered under that section of the Act are meant to capture initiatives, other than fishing or harvesting related activities, that are likely to result in serious harm to fish. This section 35 regime does not, nor should it in our view, unnecessarily duplicate the fishing or harvesting management regime covered by licences under other provisions of the Act and its associated regulations. Thus, the forms of authorization contemplated in section 35 and in paragraph 40(3)(a) would not include fishing or harvesting activities carried out under licences. Section 35 and paragraph 40(3)(a) would, however, capture authorizations such as those contemplated under subsection 21(1) of the Act.

In the Department of Fisheries and Oceans Canada's view, subsection 4(2) of the *Ontario Fishery Regulations, 2007* is legally sound. However, for the purpose of providing greater clarity, I have directed the Department to explore possible future amendments to the Act, including provisions that would address the issues raised by the Committee.

The Department is also aware of the Committee's comments with respect to the words "any other authorization issued under this Act" in paragraph 40(3)(a) of the Act. For additional clarity, I will ask departmental officials to consider addressing this item in any future amendments to the *Fisheries Act*.

.../2

I note the issues set out in your letter and will take them into consideration. Once the Department is in a position to provide a suitable timeline, the Committee will be notified.

Thank you for taking the time to write.

Yours sincerely,

Gail Shea

Gail Shea, P.C., M.P.

Annexe A

TRANSLATION / TRADUCTION

Le 27 mai 2013

L'honorable Keith Ashfield, C.P., député
Ministre des Pêches et des Océans
Chambre des communes
Édifice de la Confédération, pièce 107
Ottawa (Ontario)
K1A 0A6

Monsieur le ministre,

NRéf.: Règlement de pêche de l'Ontario de 1989

Le Comité mixte s'est à nouveau penché à sa réunion du 9 mai 2013 sur le paragraphe 4(2) du *Règlement de pêche de l'Ontario (2007)* (anciennement paragraphe 36(2) du *Règlement de pêche de l'Ontario de 1989*) et la lettre de Mme Tiffany Caron du 3 avril 2013. Il a alors pris note de l'avis du ministère des Pêches et des Océans suivant lequel les modifications apportées à l'alinéa 40(3)a) de la *Loi sur les pêches* par la *Loi sur l'emploi, la croissance et la prospérité durable*, L.C. 2012, ch. 19, ne visaient pas à remédier à l'objection du Comité au paragraphe 4(2) du Règlement.

Le Comité mixte estime qu'en l'absence d'autorisation expresse, les dispositions du Règlement qui rendent criminellement responsables ceux qui enfreignent les conditions des permis sont illégales. Le permis étant un document administratif, les conditions dont il est assorti seront imposées au cas par cas par le fonctionnaire qui le délivre. Les obligations faites au titulaire du permis seront précisées dans le permis et non dans la loi. En bref, la discrétion administrative des agents vaut application de la loi. Voilà le fondement de l'objection du Comité au paragraphe 4(2) du *Règlement de pêche de l'Ontario (2007)*. Des dispositions semblables se retrouvent dans d'autres règlements de pêche.

Tel que modifié, l'alinéa 40(3)a) de la *Loi sur les pêches* prévoit que commet une infraction quiconque

> exploite un ouvrage ou une entreprise ou exerce une activité en contravention avec soit les conditions réglementaires dont est assortie l'autorisation visée aux alinéas 35(2)a) ou c), soit les conditions établies

> par le ministre au titre de l'alinéa 35(2)b), soit les conditions prévues par règlement ou toute autorisation délivrée sous le régime de la présente loi.

Cette disposition érige carrément en infraction le fait d'enfreindre les conditions d'une autorisation accordée aux termes de la Loi. Si elle s'étendait aux autorisations prenant la forme de permis, des dispositions comme le paragraphe 4(2) du *Règlement de pêche de l'Ontario (2007)* ne serviraient plus à rien.

Dans un sens général, le terme « activité » semble assez large pour englober la pêche, voire n'importe quoi d'autre qui soit régi par la *Loi sur les pêches*. De même, le terme « autorisation » pourrait certainement englober les permis et tous autres mécanismes par lesquels la permission de faire quelque chose est accordée aux termes de la loi. À vrai dire, certains membres du Comité étaient enclins à interpréter ainsi l'alinéa 40(3)a). Par contre, comme les autres infractions prévues à l'article 40 touchent expressément les dispositions de la Loi en matière de protection de l'habitat du poisson et de prévention de la pollution, on pourrait penser que la portée de l'alinéa 40(3)a) doit être semblablement restreinte nonobstant la mention de conditions prévues par « toute autre autorisation délivrée sous le régime de la présente loi ».

Dans la lettre du 3 avril 2012, le ministère confirme que tel est bien le cas, à savoir que « le gouvernement ne visait pas à ce que l'alinéa 40(3)a) de la Loi s'applique aux activités liées à la pêche ». Le terme « activité » vise apparemment à englober « les activités concrètes qui n'entreraient pas dans la définition d'ouvrage ou d'entreprise ». Le ministère donne comme exemples les activités pour maintenir le débit de l'eau, le passage des poissons ou l'installation de barrières qui risquent de nuire à l'habitat du poisson.

Le contexte dans lequel figure le passage « toute autre autorisation délivrée sous le régime de la présente loi » tend à conforter cette interprétation de l'alinéa 40(3)a). N'empêche que si l'intention est de n'inclure que les autorisations liées à la protection de l'habitat du poisson et non aux activités de pêche elles-mêmes, pourquoi la disposition mentionne-t-elle les conditions prévues par « toute autre autorisation délivrée sous le régime de la présente loi » plutôt que, par exemple, les autorisations relatives aux ouvrages, aux entreprises et aux activités visés par les articles 35 à 37 de la *Loi sur les pêches*? Le ministère affirme que le gouvernement ne visait pas les activités liées à la pêche, mais il serait bon qu'il confirme qu'à son avis l'alinéa 40(3)a) ne peut pas et ne doit pas avoir cet effet. Comme l'alinéa 40(3)(a) crée de surcroît une infraction, il pourrait s'avérer nécessaire de le modifier afin d'en clarifier la portée.

Il y a eu bien des tentatives au fil des ans pour remédier à l'objection du Comité en modifiant la *Loi sur les pêches*. Malheureusement, aucun des projets de loi en question n'a été adopté. C'est une source de frustration pour le Comité et sans doute pour le ministère aussi. En revanche, on aurait pu, semble-t-il, profiter du dernier projet de modification de la Loi pour régler cette question. Dans une lettre antérieure,

le Comité a suggéré que la façon la plus expéditive de le faire serait un bref projet de loi visant à remédier à l'objection du Comité. Dans sa dernière lettre, le ministère déclare qu'il envisage d'apporter à la Loi d'autres modifications pour, écrit-il, clarifier les choses. S'il est convenu que l'alinéa 40(3)a) de la Loi ne saurait être interprété comme s'appliquant aux activités liées à la pêche, nous vous saurions gré de nous indiquer dans la mesure du possible quand ce projet de loi pourrait être introduit.

Vous remerciant de l'attention que vous portez à cette affaire et dans l'espoir de recevoir bientôt votre réponse, je vous prie d'agréer l'expression de mes sentiments distingués.

Sénateur Bob Runciman
Coprésident

Chris Charlton, député
Coprésident

c.c.: M. Gary Breitkreuz, vice-président
Comité mixte permanent d'examen de la réglementation

M. Massimo Pacetti, vice-président
Comité mixte permanent d'examen de la réglementation

/mh

TRANSLATION / TRADUCTION

Le 25 novembre 2013

L'honorable Gail Shea, C.P., députée
Ministre des Pêches et des Océans
Chambre des communes
Édifice de la Confédération, pièce 107
Ottawa (Ontario) K1A 0A6

Madame la Ministre,

N/Réf.: DORS/89-93, Règlement de pêche de l'Ontario de 1989

Nous désirons simplement rappeler que nous n'avons toujours pas reçu de réponse à la lettre que nous avons fait parvenir le 27 mai 2013 à votre prédécesseur, l'honorable Keith Ashfield.

Vous remerciant de votre attention, nous vous prions d'agréer, Madame la Ministre, l'assurance de nos sentiments distingués.

Le coprésident,
Bob Runciman, sénateur

La coprésidente,
Chris Charlton, députée

c.c. M. Mauril Bélanger, vice-président
Comité mixte permanent d'examen de la réglementation

M. Gary Breitkreuz, vice-président
Comité mixte permanent d'examen de la réglementation

p.j.

/mh

TRADUCTION / TRANSLATION

Le 26 février 2014

L'honorable Bob Runciman, coprésident
Madame Chris Charlton, coprésidente
Comité mixte permanent d'examen
de la réglementation
a/s du Sénat
Ottawa (Ontario)
K1A 0A4

V/Réf. : DORS/89-93
DORS/93-332
DORS/2002-225

Monsieur le Sénateur, Madame,

La présente donne suite à votre lettre du 25 novembre 2013 concernant celle que vous avez adressée à mon prédécesseur, l'honorable Keith Ashfield, dans laquelle il est question de modifications récentes à la *Loi sur les pêches* et des liens qu'auraient ces changements avec le paragraphe 4(2) du *Règlement de pêche de l'Ontario (2007)*.

Pour répondre à la lettre du Comité, j'aimerais réaffirmer que l'alinéa 40(3)*a*) et l'article 35 de la *Loi sur les pêches* sont étroitement liés. L'interdiction et le régime de protection prévus à l'article 35 de la Loi concernant les activités de capture du poisson, autres que celles liées à la pêche ou à la récolte, qui sont susceptibles de causer des dommages sérieux aux poissons. Le régime de l'article 35, comme il se doit, à notre avis, ne reproduit pas inutilement le régime de gestion de la pêche ou de la récolte régi par des permis dans d'autres dispositions de la Loi et de son Règlement. Ainsi, les formes d'autorisation envisagées à l'article 35 et à l'alinéa 40(3)*a*) ne comprendraient pas les activités de pêche ou de récolte pour lesquelles des permis ont été émis. Cependant, l'article 35 et l'alinéa 40(3)*a*) engloberaient les autorisations telles que celles envisagées au paragraphe 21(1) de la Loi.

Selon le ministère des Pêches et des Océans du Canada, le paragraphe 4(2) du *Règlement de pêche de l'Ontario (2007)* est juridiquement fondé. Toutefois, par souci de clarté, j'ai demandé au Ministère d'examiner la possibilité d'apporter d'autres modifications à la Loi, y compris des dispositions qui tiendraient compte des préoccupations soulevées par le Comité.

Le Ministère a en outre été informé des commentaires du Comité au sujet de l'expression « toute autorisation délivrée sous le régime de la présente loi », à l'alinéa 40(3)*a*) de la Loi. Par souci de clarté, je demanderai aux responsables du

Ministère de tenir compte de cette question dans d'autres modifications éventuelles à la *Loi sur les pêches.*

J'ai pris note des problèmes présentés dans votre lettre et je les examinerai. Lorsque le Ministère sera en mesure de produire un calendrier convenable, le Comité en sera informé.

Je vous remercie d'avoir écrit et je vous prie d'accepter, Monsieur le Sénateur, Madame, mes salutations distinguées.

Gail Shea, C.P., députée

Appendix B

STANDING JOINT COMMITTEE
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COMITÉ MIXTE PERMANENT
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CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 30, 2012

Mr. Robert Fry
Director General and Corporate Secretary
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A OG2

Dear Mr. Fry:

Our File: SOR/2012-85, Regulations Amending the Special Economic Measures (Burma) Regulations

I have reviewed the referenced instrument prior to placing it before the Joint Committee. I note that it replaces sections 4, 7(2), 7(3)(*b*)(i) and 19(*c*) of the *Special Economic Measures (Burma) Regulations*, in relation to which the Joint Committee had raised concerns about drafting. Those matters now appear to be moot.

I also note that the concerns raised by the Committee in respect of sections 13 and 16(3) of the Regulations are continued in the amended versions of these provisions. For convenience, those matters will continue to be addressed in connection with SOR/2007-285.

In addition, I would draw your attention to the following matters.

1. Section 18(*c*)

This provision sets out exceptions to the prohibitions, set out in section 3, on dealing in property or providing financial or related services in relation to a designated person. Pursuant to this provision, section 3 does not to apply to any goods made available, or services provided, to or by the specified international organizations for the purpose of "democratization" or "stabilization". These terms

appear vague and may be open to wide interpretation. Your advice would therefore be appreciated as to what is intended by the use of these terms, preferably with specific examples. Additionally, how are the specified international organizations expected to know in advance precisely which goods and services will fall under these exceptions?

2. Section 18(*c*)(iv)

This provision provides that the prohibitions set out in section 3 do not apply to goods made available, or services provided, to or by a non-governmental organization "that has entered into a grant or contribution agreement" with the Department of Foreign Affairs and International Trade (DFAIT) or the Canadian International Development Agency (CIDA). As currently worded, this provision would exempt from the prohibitions set out in section 3 any non-governmental organization that has entered into any grant or contribution agreement whatsoever with DFAIT or CIDA, not merely a grant or agreement relating to Burma or persons designated by these Regulations. Is it intended that this exception apply so broadly?

3. Section 19(b), French version

The drafting of the French version of this provision would appear to be defective. Either the word "ni" in the phrase "ni l'aide et la formation techniques correspondantes » should be replace with "et" or the word "le" at the commencement of the paragraph should read "au".

I look forward to receiving your comments concerning the foregoing.

Yours sincerely,

Shawn Abel
Counsel

/mn

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JOINT CHAIRS

SENATOR BOB RUNCIMAN
FRANÇOISE BOIVIN, M.P.

VICE-CHAIRS

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TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
FRANÇOISE BOIVIN, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 31, 2013

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A OG2

Dear Mr. Fry:

Our File: SOR/2009-92, Regulations Implementing the United Nations Resolutions on Somalia, as amended by SOR/2012-121

I have reviewed the above instruments prior to placing them before the Joint Committee, and would appreciate your advice with respect to the following points.

1. Section 1, definitions of "paragraph 3 designated person" and "paragraph 8 designated person" (SOR/2009-92)

As defined, a "paragraph 3 designated person" is a person designated and listed by the Committee of the Security Council under paragraphs 3 and 11 of Security Council Resolution 1844, while a "paragraph 8 designated person" is a person designated and listed by the Committee under paragraphs 8 and 11 of that same Resolution. There are potentially serious consequences, including imprisonment, for a person who has various dealings with a "paragraph 3 designated person" or a "paragraph 8 designated person," and so it must be clear who such persons are in order to provide fair notice of what conduct is prohibited. Since the prohibition in section 4 of the Regulations relates to dealings with a "paragraph 8 designated person" but not to a "paragraph 3 designated person," it further must be clear under which paragraph a person has been designated.

I was able to find, on the website of the Committee of the Security Council, a list alternately referred to as the "Consolidated List" and the "List of individuals and entities subject to the measures imposed by paragraphs 1, 3, and 7 of Security Council Resolution 1844 (2008)" (http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf). It is not clear from this list, however, which paragraph a person has been designated under. Is there a list that distinguishes between paragraph 3 designated persons and paragraph 8 designated persons? If so, could you please advise as to the steps the Department has taken to ensure that it is readily accessible to the public?

2. Section 1, definition of "Security Council Resolution 1725," and section 12 (SOR/2009-92)

It is not clear what the intended legal effect of section 12 of the Regulations is. The exception to liability in section 12 of the Regulations relates to supplies and assistance provided to the protection and training mission established under paragraph 3 of Security Council Resolution 1725. It seems, however, that Resolution 1744 (2007), adopted by the Security Council on 20 February 2007, supplanted Resolution 1725 (2006) in this regard. According to paragraph 12 of Resolution 1744 (2007), "having regard to the establishment of AMISOM [the African Union Mission to Somalia, a subsequent mission], the measures contained in paragraphs 3 to 7 of resolution 1725 (2006) shall no longer apply." Since there could not be liability in relation to activities that took place prior to the coming into force of the Regulations on 12 March 2009, it is unnecessary to have an exception to liability that could only relate to activities that took place prior to that date. Section 12 and references to Resolution 1725, including the separate definition, should be repealed.

3. Section 1, definition of "Security Council Resolution 2036" (SOR/2012-121)

This defined term is not used anywhere in the Regulations.

4. Section 1, definition of "Security Council Resolutions" (SOR/2012-121)

The nine different resolutions referred to in this definition are not described in a manner that is consistent with the rest of the Regulations.

For example, the definition assumes that the reader will be able to understand what "Resolution 733 (1992) of January 23, 1992" refers to. Yet a separate definition was considered necessary for other resolutions. If there is sufficient clarity in simply referring to "Resolution 733 (1992) of January 23, 1992," why was this not done throughout the Regulations rather than creating separate definitions?

In addition, some resolutions that have been separately defined (such as "Security Council Resolution 1772") are not referred to by their defined terms. If it

is considered necessary to provide separate definitions in order to clearly convey which resolution is meant, why are those definitions not used?

Finally, it is not clear that all of the listed resolutions should be included. For example, as noted above, it appears that Resolution 1725 (2006) ceased to have effect before the Regulations came into force.

5. Paragraph 4(a), French version (SOR/2009-92)

There is a comma missing in the French version of paragraph 4(a), between "connexe" and "quel." I refer you to paragraph 3(a) in this regard.

6. Paragraph 5(e) (SOR/2009-92)

The English version of this paragraph prohibits persons in Canada and Canadians outside Canada from knowingly "mak[ing] any property or any financial or other related service available for the benefit of any person referred to in paragraph (*d*)." Paragraph (*d*) prohibits persons in Canada and Canadians outside Canada from knowingly "mak[ing] any property or any financial or other related service available, directly or indirectly, to a paragraph 3 designated person or to a paragraph 8 designated person." What activities are targeted by paragraph (e) that are not captured by paragraph (d), which prohibits making property and financial services indirectly available to these persons? In other words, is this paragraph redundant?

I note that the French version of paragraph (e) prohibits persons in Canada and Canadians outside Canada from knowingly allowing the use of property and financial services ("permettre ... l'utilisation"), rather than making such property and services available ("mettre ... à la disposition"). What does it mean to allow the use of property and services other than by making them available? Does this paragraph essentially create a duty on any person in Canada or Canadian outside Canada to intervene if he or she becomes aware that someone is using such property or services, since otherwise he or she is "allowing" it?

7. Paragraph 5(f) and section 6 (SOR/2009-92)

These provisions prohibit persons from knowingly doing "anything that causes, assists or promotes, or is intended to cause, assist or promote, any act or thing prohibited" by other specified provisions. Given the breadth of prohibited activity that could be punished by imprisonment, I would question whether these provisions conform to section 7 of the *Canadian Charter of Rights and Freedoms,* in particular in relation to vagueness and overbreadth. I note, for example, that the combined operation of paragraphs 5(f) and 5(b) of the Regulations would prohibit knowingly doing anything that is intended to assist in indirectly facilitating any financial transaction related to dealing indirectly in property in Canada that is controlled indirectly by a designated person. In addition, as noted in connection with similar provisions in other regulations, there appear to be potential arguments

related to section 2(b) of the *Charter* as well, given that the word "promote" would seem to encompass forms of expression. I would value your advice in this regard.

Finally, I note that both paragraph 5(f) and section 6 refer to "any act or thing prohibited" under various other paragraphs and sections. Could you provide an example of a "thing" that is prohibited under these provisions that is not also an "act"?

8. Sections 7 and 8 (SOR/2009-92)

Section 7 imposes a duty on various entities to determine on a continuing basis whether they are in possession or control of property owned or controlled by designated persons, while section 8 requires various persons to disclose to the Commissioner of the RCMP "the existence of property in their possession or control that they have reason to believe is owned or controlled by" a designated person, and information about transactions or proposed transactions in respect of that property.

As has been raised in regard to other regulations enacted to implement United Nations resolutions, requiring a person in control or possession of property to furnish information concerning that property may compel that person to incriminate him or herself where that information reveals a dealing in contravention of the regulations. Section 8 in particular may be seen to violate the Committee's scrutiny criteria as unduly trespassing on rights and liberties and may not be in conformity with the *Canadian Charter of Rights and Freedoms.* I would value your advice as to the basis upon which it has been concluded that section 8 does not infringe the right against self-incrimination.

With respect to section 7 specifically, I note that the English and French versions are discrepant. While the English merely refers to property owned or controlled by designated persons, the French refers to property owned or controlled "directly or indirectly" by such persons.

Finally, subsection 8(2) states that no person contravenes subsection 8(1) by disclosing in good faith under that subsection. Subsection 8(1) simply requires a person to disclose, so it is unclear how a person who does disclose under that subsection could have contravened it, whether that disclosure was made in good faith or not. In other words, it appears that subsection 8(2), as currently worded, has no legal effect. Should this subsection instead, like subsection 83.1(2) of the *Criminal Code,* protect against criminal or civil liability for good faith disclosure under subsection (1)?

9. Section 9 (SOR/2009-92)

This section sets out a process by which any Canadian or person in Canada who has been designated by the Committee can petition the Minister to have that designation revoked. This appears to respond to the "Delisting" provisions in

Resolution 1844 (2006), which in turn refer to the annex to Resolution 1730 (2006), which states that "[p]etitioners seeking to submit a request for de-listing can do so either through the focal point process outlined below or through their state of residence or citizenship." Although a footnote to the annex to Resolution 1730 (2006) indicates that a state can decide that "as a rule, its citizens or residents should address their de-listing requests directly to the focal point," it does not appear to allow the state to decide that, as a rule, de-listing requests must be sent to the state and not to the focal point. Subsection 9(1), however, gives the impression that there is only one option for the delisting of designated Canadians and persons in Canada, namely petitioning the Minister. As a result, this section should be amended to give fair notice to designated persons of their rights and options with respect to delisting.

Subsection 9(2) states that the Minister "shall notify the petitioner, within 60 days after receiving the petition, of his or her decision on whether to submit the petition to the Committee of the Security Council." Would it be possible to set out, at least in general terms, the factors for the Minister to consider in making this decision? I note also that, at least with respect to petitions submitted to the focal point rather than directly to the Minister, Resolution 1844 (2008) anticipates a timely response from the state indicating either support for or opposition to delisting a designated individual. On what basis is the Minister permitted to refuse to submit a petition, rather than to submit a petition either indicating support for or opposition to it?

Under subsection 9(3), "[i]f there has been a material change in circumstances since the last petition was submitted, a person may submit another petition under subsection (1)." This appears to allow the petitioner to decide whether there has been a material change in circumstances. In fact, it is not clear how the petitioner could be precluded from merely submitting a new petition, whether there has been a material change in circumstances or not. It seems that the intention behind this provision is to authorize the Minister to refuse to review a subsequent petition unless the Minister is satisfied that there has been a material change in the petitioner's circumstances since the previous petition. If this is the case, subsection 9(3) should be amended to reflect this, and to indicate what is required of the petitioner in order to demonstrate a material change in circumstances.

10. Section 13 (SOR/2009-92)

In the English version, the word "to" before "Security Council Resolution 1744" is grammatically incorrect and should be removed.

11. Section 14 (SOR/2009-92)

This section sets out an exception to liability under section 3 with respect to supplies of arms and related material or technical assistance "intended solely for the purpose of helping develop security sector institutions." This appears to be

intended to implement paragraphs 6(b) of Resolution 1744 and 11(b) of Resolution 1772. Those paragraphs only exempt such supplies and technical assistance when provided by states. The Regulations, however, do not explicitly limit the application of this exception to those circumstances. In other words, it should be made clear on the face of the Regulations that this exception only applies to states.

12. Subsection 15(2) (SOR/2009-92)

Pursuant to subsection 15(1), a person may apply to the Minister for a certificate stating that he or she is not a designated person. Subsection 15(2) reads as follows:

> If it is established that the applicant is not a [designated person], the Minister shall issue a certificate to the applicant within 15 working days after receiving the application.

As the provision is currently worded, nothing requires the Minister to actually make a decision. Moreover, if the Minister were to issue a certificate after the 15-day period had elapsed, he or she would be in contravention of this provision. Presumably this was not the intended effect. I suggest that the provision be reformulated to clearly indicate that the Minister must make a determination on the application within 15 days after it is received and must also issue a certificate if the necessary conditions are met. By way of example, the provision could be formulated as follows:

> (2) Within 15 days after the day on which the application is received, the Minister shall
> (a) determine whether the applicant is a designated person; and
> (b) if it is established that the person is not a designated person, issue a certificate to the applicant.

13. Section 16 (SOR/2009-92)

This section allows a person whose property has been affected by the application of section 5 to apply to the Minister for a certificate exempting that property "if that property is necessary for meeting basic or extraordinary expenses or if it is the subject of a judicial, administrative or arbitral lien or judgment, a hypothec, mortgage, charge, security interest or prior claim." This appears to be based on section 4 of Resolution 1844 (2008), although paragraph (c) of that section refers only to property that is the subject of a "judicial, administrative or arbitral lien or judgement." What is the basis for the Regulations to also exempt property that is the subject of a hypothec, mortgage, charge, security interest or prior claim?

As well, although paragraph 4(c) of Resolution 1844 (2008) requires the relevant state or states to notify the Committee, paragraph 16(2)(c) of the

Regulations refers also to bringing property to the attention of the Security Council of the United Nations. Is this an error?

I note also that paragraphs 4(a), (b) and (c) of Resolution 1844 (2008) each require the Committee to be notified in order for property to be exempted. As currently formulated, however, paragraphs 16(2)(a), (b) and (c) of the Regulations do not actually state that the Minister is required to notify the Committee. For the purposes of clarity, it would seem that these paragraphs should be amended to require the Minister to notify the Committee within a specified timeframe after receiving the application, and to issue the certificate within an established timeframe after the Committee has been notified (e.g., within X days after receipt of the Committee's approval under paragraph (b)).

Finally, the Minister is required to issue the certificate within 15 days under paragraph 16(2)(a), within 30 days under paragraph 16(2)(b), and within 90 days under paragraph 16(2)(c). Could you please advise as to the reasons for the significant differences in these timeframes?

14. Section 17 (SOR/2009-92)

Section 17 states that no person contravenes the regulations "by doing an act or thing prohibited by any of sections 3 to 6 if, before the person does that act or thing, the Minister issues a certificate to the person stating that (a) the Security Council Resolutions do not intend that such an act or thing be prohibited; or (b) the act or thing has been approved by the Security Council of the United Nations." What provision of which Security Council resolution does section 17 implement?

As well, as this section is currently drafted, it appears that a person would have to obtain a certificate from the Minister even if the act or thing had already been approved by the Security Council of the United Nations. Is it intended that a person could be liable for contravening the Regulations despite the prior approval of the Security Council of the United Nations if the Minister has not issued a certificate stating that the act or thing has been approved by the Security Council of the United Nations?

Finally, I note that section 17 of the Regulations does not establish either a process for applying for these certificates or a deadline for issuing them, unlike sections 15 and 16.

I look forward to receiving your comments with respect to the foregoing.

Yours sincerely,

C Kirkby

/mn

Cynthia Kirkby

Affaires étrangères et Commerce international Canada
Foreign Affairs and International Trade Canada

Ottawa, Canada
K1A 0G2

May 28, 2013

Ms. Cynthia Kirkby
General Counsel
Standing Joint Committee for the Scrutiny of Regulations
c/o The Senate
Ottawa ON K1A 0A4

Dear Ms. Kirkby:

Subject: SOR/2009-92 Regulations Implementing the United Nations Resolutions on Somalia, as amended by SOR/2012-121

Thank you for your recent letter pertaining to the above-referenced regulation. We will be continuing our work to address the issues raised by the Committee throughout the summer of 2013 and hope to have substantive responses for the Committee later in the year. We expect these responses to address both the common and individual concerns raised in this file.

Yours sincerely,

Robert Fry
Director General and Corporate Secretary

Canada

Affaires étrangères et Commerce international Canada
Foreign Affairs and International Trade Canada

Ottawa, Canada
K1A 0G2

May 28, 2013

Mr. Shawn Abel
General Counsel
Standing Joint Committee for the Scrutiny of Regulations
c/o The Senate
Ottawa ON K1A 0A4

Dear Mr. Abel:

Subject:

- **SOR/2012-85 Regulations Amending the Special Economic Measures (Burma) Regulations;**
- **SOR/2007-44 Regulations Implementing the United Nations Resolution on Iran;**
- **SOR/2005-306 Regulations Amending the United Nations Democratic Republic of Congo Regulations;**
- **SOR/2009-232 Regulations Amending the Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea;**
- **SOR/2007-204 Regulations Implementing the United Nations Resolution on Lebanon;**
- **SOR/2010-84 Regulations Implementing the United Nations Resolution on Eritrea;**
- **SOR/2005-127 United Nations Côte d'Ivoire Regulations;**
- **SOR/2009-23 Regulations Amending the United Nations Liberia Regulations and the Regulations Implementing the United Nations Resolution on Lebanon;**
- **SOR/2006-164 Regulations Amending the United Nations Afghanistan Regulations;**
- **SOR2008-248 Special Economic Measures (Zimbabwe) Regulations;**
- **SOR/2007-285 Special Economic Measures (Burma) Regulations.**

Thank you for your recent letters pertaining to the above-referenced regulations. We will be continuing our work to address the issues raised by the Committee throughout the summer of 2013 and hope to have substantive responses for the Committee later in the year. We expect these responses to address both the common and individual concerns raised in these files.

Yours sincerely,

Robert Fry
Director General and Corporate Secretary

Canada

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

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MASSIMO PACETTI, DÉPUTÉ

May 30, 2013

The Honourable John Baird, P.C., M.P.
Minister of Foreign Affairs
House of Commons
Centre Block, Room 418-N
Ottawa, Ontario K1A 0A6

Dear Minister Baird:

Our Files:	SOR/2005-127,	United Nations Côte d'Ivoire Regulations
	SOR/2005-306,	Regulations Amending the United Nations Democratic Republic of the Congo Regulations
	SOR/2006-164,	Regulations Amending the United Nations Afghanistan Regulations
	SOR/2007-44,	Regulations Implementing the United Nations Resolution on Iran
	SOR/2007-204,	Regulations Implementing the United Nations Resolution on Lebanon
	SOR/2007-285,	Special Economic Measures (Burma) Regulations
	SOR/2008-248,	Special Economic Measures (Zimbabwe) Regulations
	SOR/2009-23,	Regulations Amending the United Nations Liberia Regulations and the Regulations Implementing the United Nations Resolution on Lebanon
	SOR/2009-232,	Regulations Amending the Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea
	SOR/2010-84,	Regulations Implementing the United Nations Resolution on Eritrea
	SOR/2011-114,	Special Economic Measures (Syria) Regulations, as amended by SOR/2011-220 and SOR/2011-330
	SOR/2012-107,	Regulations Amending the Special Economic Measures (Syria) Regulations

We refer to the enclosed correspondence concerning the above-mentioned instruments. In each instance, letters from the Joint Committee's counsel have remained unanswered despite a number of subsequent reminders. Your cooperation in ensuring that replies are forthcoming without further delay would be appreciated.

As the correspondence illustrates, there are frequent instances in which replies to correspondence sent on behalf of the Committee to the Department of Foreign Affairs and International Trade remain outstanding until multiple reminders have been sent. While there may be particular considerations in a given instance that complicate matters, it seems that the Department has greater difficulty than most other regulation-making authorities in providing timely replies to the Joint Committee.

This is by no means a new state of affairs. On the Committee's instructions our General Counsel met with the Department's Corporate Secretary in January of 2012 to discuss communication between the Department and the Committee. Unfortunately, this appears to have had little result.

We thank you for your attention to this matter.

Yours sincerely,

Senator Bob Runciman
Joint Chair

Chris Charlton, M.P.
Joint Chair

Encl.

c.c.: Mr. Garry Breitkreuz, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

Mr. Massimo Pacetti, Vice-chair
Standing Joint Committee for the Scrutiny of Regulations

/mn

FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
FRANÇOISE BOIVIN, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

April 25, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2005-127, United Nations Côte d'Ivoire Regulations
Your File: DCD-0004

I refer to Ms. Roxanne Dubé's letter of January 11, 2011, which indicated that the promised amendments to the *United Nations Côte D'Ivoire Regulations* were expected to be forthcoming in the weeks ahead. As it appears that the Regulations have still not been amended, your advice would be appreciated as to when the promised amendments will be made.

In addition, I would draw your attention to section 12 of these Regulations, which prohibits the doing of anything that "causes, assists or promotes, or is intended to cause, assist or promote" any act or thing prohibited by sections 3 to 5 and 11. Clarification has been sought in respect of section 13 of the *Special Economic Measures (Burma) Regulations*, registered as SOR/2007-285, which is substantially similar to this provision. Absent a contrary indication, I will assume that your forthcoming reply to my letter of April 25, 2012 in connection with SOR/2007-285 may be taken to apply here as well.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
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CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 30, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2005-127, United Nations Côte d'Ivoire Regulations
Your File: DCD-0004

I refer to my letter of April 25, 2012 concerning the above-mentioned instrument, to which your reply shall be appreciated.

Yours sincerely,

Shawn Abel
Counsel

/mh

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FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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CHRIS CHARLTON, M.P.

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GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

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SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 25, 2013

Mr. Robert Fry
Corporate Secretary & Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
Lester B Pearson Building, Tower A, Room A6-139
125 Sussex Drive
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2005-127, United Nations Côte d'Ivoire Regulations
Your File: DCD-0004

Once more I refer to my letter of April 25, 2012 concerning the above-mentioned instrument, to which a reply shall be appreciated.

Yours Sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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SENATOR BOB RUNCIMAN
FRANÇOISE BOIVIN, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

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SÉNATEUR BOB RUNCIMAN
FRANÇOISE BOIVIN, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 24, 2012

Mr. Robert Fry
Director General and Corporate Secretary
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A OG2

Dear Mr. Fry:

Our File: SOR/2005-306, Regulations Amending the United Nations Democratic Republic of the Congo Regulations
Your File: DCD-0008

Reference is made to Ms. Roxanne Dubé's letter of January 19, 2011, which indicated that the promised amendment to section 6 of the *United Nations Democratic Republic of the Congo Regulations* was expected to proceed within the following weeks. It would appear that the amendment has not yet been made, and I would therefore value your advice as to when it is currently expected to be completed.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mn

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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SENATOR BOB RUNCIMAN
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MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

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SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

August 9, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2005-306, Regulations Amending the United Nations Democratic Republic of the Congo Regulations
Your File: DCD-0008

I refer again to Ms. Roxanne Dubé's letter of January 19, 2011, which indicated that the promised amendment to section 6 of the *United Nations Democratic Republic of the Congo Regulations* was expected to proceed within the following weeks. While over a year has passed since the amendment was agreed to, it has neither been made nor has an update concerning progress towards its making been provided to the Joint Committee, despite my letter of January 24, 2012. Your advice as to when the amendment is expected to be made would be appreciated.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 16, 2012

Mr. Robert Fry
Director General and Corporate Secretary
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A OG2

Dear Mr. Fry:

Our File: SOR/2005-306, Regulations Amending the United Nations Democratic Republic of the Congo Regulations
Your File: DCD-0008

I once more refer to Ms. Roxanne Dubé's letter of January 19, 2011, which indicated that the promised amendment to section 6 of the *United Nations Democratic Republic of the Congo Regulations* was expected to proceed within the following weeks. While over a year has passed since the amendment was agreed to, it has neither been made nor has an update concerning progress towards its making been provided to the Joint Committee. I trust you will agree that a response concerning when the amendment is expected to be made is overdue.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mn

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

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COMITÉ MIXTE PERMANENT
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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 8, 2013

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2005-306, Regulations Amending the United Nations Democratic Republic of the Congo Regulations
Your File: DCD-0008

Reference is again made to Ms. Roxanne Dubé's letter of January 19, 2011, which indicated that the promised amendment to section 6 of the *United Nations Democratic Republic of the Congo Regulations* was expected to proceed within the following weeks. While over a year has passed since the amendment was agreed to, it has neither been made nor has an update concerning progress towards its making been provided to the Joint Committee. I trust you will agree that a response concerning when the amendment is expected to be made is overdue.

I look forward to receiving your reply.

Yours Sincerely,

Shawn Abel
Counsel

Encl.

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
FRANÇOISE BOIVIN, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

CANADA

COMITÉ MIXTE PERMANENT
D'EXAMEN DE LA RÉGLEMENTATION

a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
FRANÇOISE BOIVIN, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

April 25, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2006-164, Regulations Amending the United Nations Afghanistan Regulations
Your File: DCD-0007

I refer to Ms. Dubé's letter of January 12, 2011, which indicated that the promised amendments to the *United Nations Al-Qaida and Taliban Regulations* had been postponed pending the resolution of an application before the Federal Court concerning the validity of the Regulations. At this time, an update concerning the status of that judicial application would be valued.

In the interim, I would draw your attention to sections 5.2(1) of the Regulations. This provision is substantially similar to section 15(1) of the *Special Economic Measures (Burma) Regulations*, registered as SOR/2007-285. Concerns have been raised as to the purpose of that provision, as to whether there is statutory authority to make such a provision, and also as to whether this provision infringes the right against self-incrimination. As correspondence continues to be exchanged on that matter in connection with SOR/2007-285, I will in the absence of a contrary indication take your reply on this matter in relation to SOR/2007-285 to apply to this instrument as well.

Finally, I note that concerns have been raised in relation to the nature and scope of the discretion granted to the Minister to decide whether to submit a petition to the United Nations pursuant to section 15(2) of the *Regulations Implementing the United Nations Resolution on Iran*, registered as SOR/2007-44, which is substantially similar to section 5.3(2) of these Regulations. Unless indicated otherwise, I will assume that your forthcoming reply on this issue to my letter of April 25, 2012 in connection with SOR/2007-44 may be taken to apply here as well.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

CANADA

COMITÉ MIXTE PERMANENT
D'EXAMEN DE LA RÉGLEMENTATION

a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 30, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2006-164, Regulations Amending the United Nations Afghanistan Regulations
Your File: DCD-0007

I refer to my letter of April 25, 1012 concerning the above-mentioned instrument, to which I shall appreciate a reply.

Yours sincerely,

Shawn Abel
Counsel

/mh

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FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

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SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

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MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
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SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 25, 2013

Mr. Robert Fry
Corporate Secretary & Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
Lester B Pearson Building, Tower A, Room A6-139
125 Sussex Drive
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2006-164, Regulations Amending the United Nations Afghanistan Regulations
Your File: DCD-0007

I again refer to my letter of April 25, 1012 concerning the above-mentioned instrument, to which a reply shall be appreciated.

Yours sincerely,

Shawn Abel
Counsel

/mh

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FRANÇOISE BOIVIN, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

April 25, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-44, Regulations Implementing the United Nations Resolution on Iran
Your File: DCD-0006

I refer to Ms. Dubé's letter of January 12, 2011 concerning the above-mentioned Regulations. Prior to placing this file again before the Joint Committee, your further advice concerning the following points would be valued. I regret the delay in following up on these matters.

In addition to the matters below, I would bring to your attention sections 10, 11 and 12 of these Regulations, which are substantially similar to sections 13, 14 and 15, respectively, of the *Special Economic Measures (Burma) Regulations*. Concerns have been raised in connection with those provisions and, in the absence of a contrary indication. I assume that your correspondence in relation to the *Special Economic Measures (Burma) Regulations* may be taken to apply here as well.

For convenience, the points below are numbered as in my letter of October 9, 2007.

2. Subsection 15(2)

In relation to the power of the Minister to decide under this provision whether to forward a person's petition to the Security Council of the United Nation, Ms. Dubé's letter contended that it is not desireable to set out, even in general terms, the factors the Minister should consider, such as whether the information provided with the petition is sufficient, relevant and reliable. It was suggested that this would be so general as to not be a check upon the Minister's discretion beyond the general principles of administrative law that would apply in any event. Ms. Dubé's reply only seems to underscore, however, how broad the Minister's discretion appears to be, which remains at odds with the fact that the Minister's role is merely to forward the petition to the actual decision-maker. If anything, setting out expressly what considerations should guide the Minister would clarify his intended role. In addition, the Joint Committee has always taken the view that it is preferable to set out procedural rights expressly, so as to avoid the possibility that a person may need to resort to the time and expense of judicial proceedings in order to determine that exact nature of their rights. Doing so would seem to promote consistency, certainty and the perception of fairness. In this light, is there any reason not to set out factors that the Minister should consider?

I note that this same concern was also raised in connection with the *Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea*, the *United Nations Al-Qaida and Taliban Regulations*, the *Regulations Implementing the United Nations Resolution on Eritrea* and the *Regulations Implementing the United Nations Resolution on Liberia*. Absent a contrary indication, I will take your reply to apply to those instruments as well.

3. Subsections 16(2), 17(2) and 19(2)

These provisions require that the Minister issue certain certificates within 15 days after receiving an application, if the necessary conditions are "established". It was noted that the wording of these provisions does not actually require the Minister to make a decision on the application within 15 days after it is received. If the Minister's determination as to whether the necessary conditions are established were to take longer than 15 days, the requirement to issue a certificate would no longer apply. This would seem to have been confirmed by Ms. Dubé's letter, which stated among other things that the Minister "may only discharge the obligation to issue a certificate within a specified number of days from a date certain (sic) if he had made the decision on the application within that time period." If, for example, it was not until 20 days after an application was made that the Minister determined that the necessary conditions are established, would he be obligated to issue a certificate? If not, should there not be an actual requirement that the Minister attempt to make a decision on the application within the time frame, if at all possible?

I note that this same concern was also raised in relation to subsections 14(2) and 15(2) of the *Regulations Implementing the United Nations Resolution on the Democratic People's Republic of Korea*, and in the absence of a contrary indication I will take your reply as relating to both instruments.

8. Paragraph 20(2)(j)

This provision requires a person applying for a certificate under subsection 20(1) to provide a declaration that the information provided under subsection 20(2) in support of the application is "true, complete and correct." Ms. Dubé's letter indicated that to the Department's knowledge, no one has been convicted of providing a false declaration. Her reply, however, did not address the underlying issue put forward by the Committee and outlined in my letter of November 2, 2010: is it recognized that requiring a person to sign a declaration is not the same as actually requiring that complete and correct information be provided? Providing false or incomplete information would not contravene this provision so long as the required declaration was signed. In order to require that complete and correct information be provided on an application, that actual requirement must be set out directly.

Incidentally, Ms. Dubé's letter dwelt upon the question of whether providing a false application would constitute a forgery under the *Criminal Code*. This question is beside the point, as the Committee's concern revolves around the intended and actual effect of paragraph 20(2)(j) of these Regulations and any potential liability for the contravention of this particular provision.

I look forward to receiving your reply concerning the foregoing.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

CANADA

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 30, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-44, Regulations Implementing the United Nations Resolution on Iran
Your File: DCD-0006

Reference is made to my letter of April 25, 2012 concerning the above-noted Regulations, to which your reply shall be appreciated.

Yours sincerely,

Shawn Abel
Counsel

/mh

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CHRIS CHARLTON, DÉPUTÉE

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MASSIMO PACETTI, DÉPUTÉ

January 25, 2013

Mr. Robert Fry
Corporate Secretary & Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
Lester B Pearson Building, Tower A, Room A6-139
125 Sussex Drive
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-44, Regulations Implementing the United Nations Resolution on Iran
Your File: DCD-0006

Reference is once more made to my letter of April 25, 2012 concerning the above-noted Regulations, to which a reply shall be appreciated.

Yours sincerely,

Shawn Abel
Counsel

/mh

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VICE-PRÉSIDENTS

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MASSIMO PACETTI, DÉPUTÉ

April 25, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-204, Regulations Implementing the United Nations Resolution on Lebanon

I have taken note that section 4 of these Regulations was amended by SOR/2009-23, which corrected an incorrect statutory reference identified by the Joint Committee.

I would, however, also wish to draw your attention to section 7 of the Regulations. This provision prohibits the doing of anything that "causes, assists or promotes, or is intended to cause, assist or promote" any act or thing prohibited by sections 3 to 5. This provision is substantially similar to section 13 of the *Special Economic Measures (Burma) Regulations*, registered as SOR/2007-285, in relation to which questions have been raised as to the intended meaning of that provision. A concern was also raised that this provision may prohibit individual expression in a manner that contravenes the criteria of the Joint Committee and may not be in conformity with the *Canadian Charter of Rights and Freedoms*. Absent a contrary indication, I will assume that your forthcoming reply to my letter of April 25, 2012 in connection with SOR/2007-285 may be taken to apply here as well.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
MASSIMO PACETTI, M.P.

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a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

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CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

October 30, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-204, Regulations Implementing the United Nations Resolution on Lebanon
Your File: DCD-0002

Reference is made to my letter of April 25, 2012, which in part noted that an issue arising from the above-noted Regulations is substantially similar to an issue raised by the Joint Committee in connection with SOR/2007-285 and that a response in connection with that file could be taken to apply here as well. However, as no reply has been received concerning that file, your acknowledgement, at the least, of receipt of my April 25, 2012 letter relating to this instrument would be valued.

Yours sincerely,

Shawn Abel
Counsel

/mh

STANDING JOINT COMMITTEE
FOR
THE SCRUTINY OF REGULATIONS

c/o THE SENATE, OTTAWA K1A 0A4
TEL: 995-0751
FAX: 943-2109

JOINT CHAIRS

SENATOR BOB RUNCIMAN
CHRIS CHARLTON, M.P.

VICE-CHAIRS

GARRY BREITKREUZ, M.P.
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COMITÉ MIXTE PERMANENT
D'EXAMEN DE LA RÉGLEMENTATION

a/s LE SÉNAT, OTTAWA K1A 0A4
TÉL: 995-0751
TÉLÉCOPIEUR: 943-2109

CO-PRÉSIDENTS

SÉNATEUR BOB RUNCIMAN
CHRIS CHARLTON, DÉPUTÉE

VICE-PRÉSIDENTS

GARRY BREITKREUZ, DÉPUTÉ
MASSIMO PACETTI, DÉPUTÉ

January 25, 2013

Mr. Robert Fry
Corporate Secretary & Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
Lester B Pearson Building, Tower A, Room A6-139
125 Sussex Drive
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-204, Regulations Implementing the United Nations Resolution on Lebanon
Your File: DCD-0002

Reference is again made to my letter of April 25, 2012, which in part noted that an issue arising from the above-noted Regulations is substantially similar to an issue raised by the Joint Committee in connection with SOR/2007-285 and that a response in connection with that file could be taken to apply here as well. However, as no reply has been received concerning that file, your acknowledgement, at the least, of receipt of my April 25, 2012 letter relating to this instrument would be valued.

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mh

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MASSIMO PACETTI, DÉPUTÉ

April 25, 2012

Mr. Robert Fry
Corporate Secretary and Director General
Corporate Secretariat
Department of Foreign Affairs
and International Trade
125 Sussex Drive,
Tower A, Room A6-139
OTTAWA, Ontario K1A 0G2

Dear Mr. Fry:

Our File: SOR/2007-285, Special Economic Measures (Burma) Regulations
Your File: DCD-0021

Thank you for your letter of December 15, 2011 concerning the above-mentioned Regulations, in which you noted that a substantive reply to point 7 of my letter of September 19, 2008 has been delayed and will yet be forthcoming.

In the meantime, I would refer you to Ms. Roxanne Dubé's letter of January 11, 2011 concerning these Regulations. Prior to placing this file before the Joint Committee, your further advice concerning the points discussed in Ms. Dubé's letter would be valued.

1. Section 2

This provision explains the reason why the persons listed in the schedule to the Regulations ("designated persons") have been so listed. It was noted that this provision does not appear to achieve any legal effect and, as such, seems to be included for informational purposes only. Ms. Dubé's letter suggested that the provision sets out "guidelines" and "criteria" under which the Governor-in-Council may list individuals and entities pursuant to the Regulations. Persons are not

designated, however, under authority of the Regulations, as the Regulations do not empower anyone to do so. Rather, persons are designated as part of making or amending the Regulations themselves. Were section 2 intended to govern the designation of persons, it would amount to a fettering of the Governor-in-Council's statutory powers by way of subordinate legislation. It must follow that section 2 cannot be legally binding and only provides information as to why the Governor-in-Council decided that persons listed in the Schedule should be so designated and may inform such further decisions. As such, this information is more suited for inclusion in the Regulatory Impact Analysis Statement or an administrative bulletin or circular. Section 2 should therefore be removed from these Regulations.

I note that similar concerns have been raised in connections with the *Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply to that instrument as well.

3. Subsection 7(2), English version

Ms. Dubé's letter suggested that it was unnecessary to add a comma before the words "other than a national of Burma" in the English version of this provision because the meaning of the provision is clear. While this may be the case, it is only so because to read the provision as written would produce an absurdity. The drafting is grammatically incorrect and reads poorly. If amendments to other provisions of these Regulations are to be pursued, why should this drafting error not also be corrected?

5. Section 13

This provision prohibits the doing of anything that "causes, assists or promotes, or is intended to cause, assist or promote" any act or thing prohibited by sections 3 to 12. My letter of September 19, 2008 sought advice as to the intended meaning of "promote", and particularly whether forms of expression are included within that meaning. Ms. Dubé's letter stated that "promote" would mean to "encourage" or "support actively". "Encourage" would seem to primarily involve forms of expression, both public and private, whereas "support actively" would presumably require actual aid in some physical or financial form or by way of rendering a service. Is it actually intended that the word "promote" include both of these meanings? If so, how does "support actively" differ meaningfully from "assist", which is separately prohibited under this provision?

In addition, if it is intended to prohibit anything that would "encourage" an act or thing prohibited by sections 3 to 12, precisely what type of encouragement would fall under this provision? The prohibition of expression, even of the encouragement to violate a regulation, may potentially contravene the Committee's scrutiny criteria in that it may unduly trespass upon individual rights of and liberties and may not be in conformity with the *Canadian Charter of Rights and Freedoms*. I

would therefore appreciate your advice as to the basis upon which it was concluded that section 13 does not infringe the freedom of expression.

Ms. Dubé's letter also noted that similar terms "are used widely" in regulations made pursuant to the *United Nations Act* and *Special Economic Measures Act* and should remain "in order to ensure consistency in Canadian legislation." It should be evident that whether similar terms are used in other subordinate legislation does not speak to the validity or prudence of the usage of those terms. If there are reasons to amend or remove such terms from these Regulations, then it follows that this should be done in similar regulations as well. In this vein, I note that similar concerns arise in connection with the *United Nations Côte D'Ivoire Regulations*, the *Regulations Implementing the United Nations Resolution on Liberia*, *Regulations Implementing the United Nations Resolution on Eritrea*, the *Regulations Implementing the United Nations Resolution on Lebanon*, and the *Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply to those instruments as well.

6. Section 14

This provision requires the specified entities to determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a designated person. Ms. Dubé's letter indicated that this obligation is distinct from the freeze on dealing with the assets of designated persons imposed under section 5, and also noted that any specified entity that failed to continuously determine whether they were in possession or control of the specified property would be liable to prosecution under section 8 of the *Special Economic Measures Act*. If the duty imposed by this provision is indeed distinct from the prohibition against dealing in prohibited property, and given that no one is prohibited from merely possessing or controlling property under these Regulations, what purpose does this provision serve? To what end are certain entities required, on pain of penal sanction, to monitor whether they are doing something they are lawfully permitted to do? Are these entities required to report the results of their determinations to any official, and if so, under what provision? Additionally, if these entities are required under some provision to disclose whenever they are in possession or control of the specified property, are these entities then not already obligated, by practical implication, to continually determine whether that disclosure requirement applies? In other words, would the requirement imposed by section 14 not be superfluous?

Additionally, I note that this same concern arises in connection with the *Regulations Implementing the United Nations Resolution on Liberia*, the *Regulations Implementing the United Nations Resolution on Eritrea and the Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply to those instruments as well.

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8. Subsection 16(3)

Section 16 sets out the procedure by which a designated person may apply to have their name removed from the schedule to the Regulations. If the Minister fails to make a decision on the application within 60 days, subsection 16(3) deems the Minister to have refused the application. Ms. Dubé's letter stated that deeming an application to be refused after 60 days is necessary in the event that the Minister cannot reach a decision within that time frame due to the complexity of the facts or the circumstances of the application. No actual reason was given, however, as to why it is necessary to deem the application to be refused as opposed to providing for some other mechanism. I note, in particular, that Ms. Dubé's letter stated in relation to point 9 that it is the practice of the Department to allow an application deemed to be refused under this provision to be resubmitted. Why, then, is it at all necessary to deem such an application to be refused?

More importantly, this provision effectively removes any duty upon the Minister to actually make a decision. For example, if an application were for whatever reason left unconsidered for 60 days, it would simply fail. If a person were then to reapply, the next application may also languish until it is deemed to be refused, and so on. Presumably this is not intended and it is expected that the Minister must consider each application and arrive at a decision within a certain time frame. If this is so, however, then it should be stated in the Regulations. Where a decision cannot be completed within that time frame, perhaps some mechanism for extending the time in which the Minister may make a decision could be set out along with specific criteria for doing so.

I note that similar concerns arise in connection with the *Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply that instrument as well.

9. Subsection 16(5)

Subsection 16(5) allows a person to submit a new application "if there has been a material change in circumstances since the last petition was submitted." Ms. Dubé's letter stated that in the event a person's application was deemed to be refused under subsection (3), the Department's practice would be to invite the applicant to submit a new application and treat it as though there had been a material change in circumstances. It is not at all apparent upon the wording of subsection 16(5), however, that this is permissible, as it is difficult to see how a deemed refusal of an application constitutes a material change in the facts underlying the application. So long as subsection (3) deems certain applications to be refused, subsection 16(5) should be amended to expressly set out that a new application may be submitted following a deemed refusal.

I note that similar concerns arise in connection with the *Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply to that instrument as well.

10. Subsection 17(2)

Pursuant to subsection 17(1), a person may apply to the Minister for a certificate stating that they are not a designated person. Subsection 17(2) reads:

> If it is established that the person is not a designated person, the Minister shall issue a certificate to the applicant within 15 days after the day on which the application is received.

Due to the manner in which this provision is written, it does not actually require the Minister to consider an application made under subsection (1). It only requires the Minister to issue certificate if and when the Minister determines that the applicant is not a designated person, providing that the Minister actually comes to a conclusion within 15 days. If the Minister does not consider or arrive at a conclusion on the application within 15 days, the Minister is not required to do anything at all.

Ms Dubé's letter confirmed that it is intended to require that the Minister make a determination within the 15 day time frame and also, if it is warranted, issue a certificate within that time frame. Subsection 17(2) is clearly deficient in this regard and should be reformulated. As I noted by way of example in my letter of September 19, 2008, the provision could be drafted as follows:

> Within 15 days after the day on which the application is received, the Minister shall
>
> > (a) determine whether the applicant is a designated person; and
> > (b) if it is established that the person is not a designated person, issue a certificate to the applicant.

Ms. Dubé's letter suggested that subsection 17(2) should not be amended because it is consistent with other regulations dealing with similar matters. Again, however, the fact that other regulations have employed substantially similar wording does not speak to the adequacy of that wording. If it is necessary that this provision be amended to properly achieve its aims, then it follows that substantially similar provisions employed elsewhere should be amended in a similar fashion. I note that this same concern arises in connection with the *Regulations Implementing the United Nations Resolution on Liberia*, the *Regulations Implementing the United Nations Resolution on Eritrea*, and the *Special Economic Measures (Zimbabwe) Regulations*. Absent a contrary indication, I will take your reply on this file to apply to those instruments as well.

12. Paragraph 19(c)

Ms. Dubé's letter stated that the use of "to" in the English version of this provision is deliberately intended to limit the scope of the provision to transactions to the listed entities. If this is so, then the French version should be amended to reflect its English counterpart.

Finally, I note that Ms. Dubé's letter agreed that discrepancies between the French and English versions of section 4 and subparagraph 7(3)(h)(i) of the Regulations should be addressed. Can the Committee take this to mean that amendments to these provisions will be forthcoming?

I look forward to receiving your reply.

Yours sincerely,

Shawn Abel
Counsel

/mh