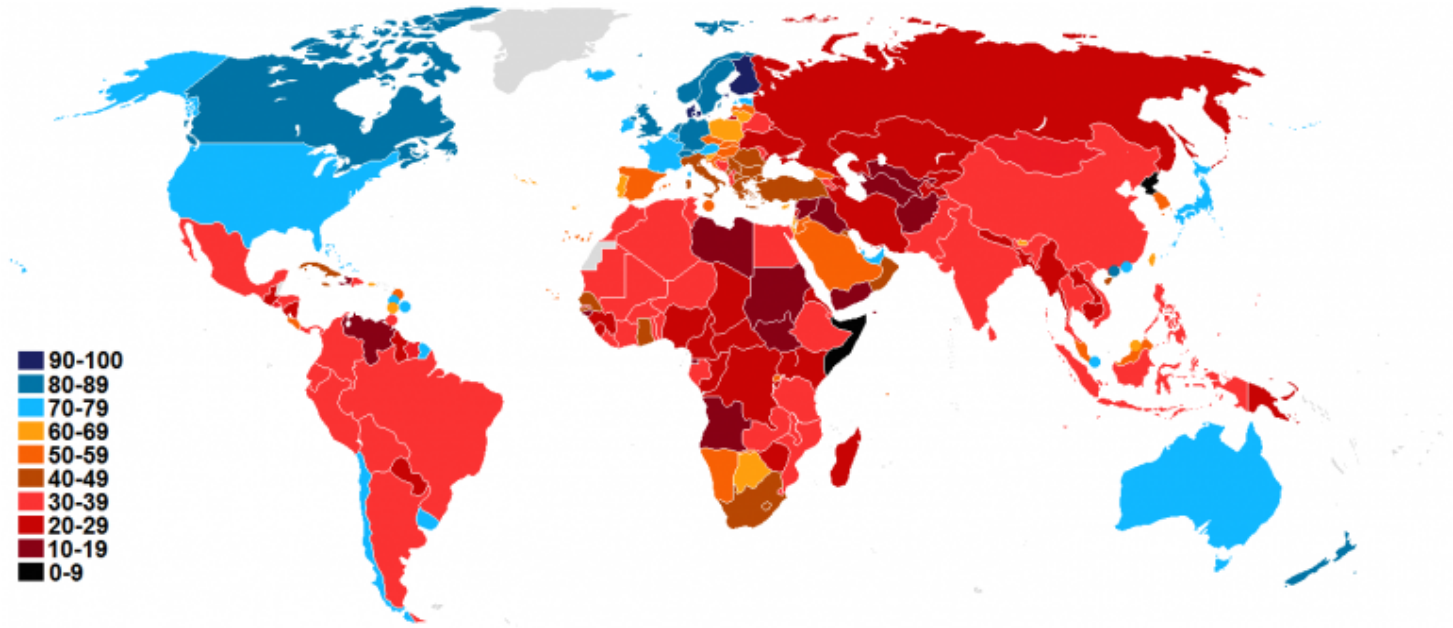

Developments in Statutory Sanctions Against Alleged Foreign Wrongdoers

January 17, 2019

Last month, in *Portnov v. Minister of Foreign Affairs*, 2018 FC 1248, Manson J of the Federal Court dismissed an application of a foreign national to review the Canadian government's refusal to lift sanctions imposed on him under the *Freezing Assets of Corrupt Foreign Officials Act*, (FACFOA), specifically the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, (Ukraine Regulations). That case and another referred to in Manson J's reasons for judgment, *Djilani v. Canada (Foreign Affairs)*, 2017 FC 1178, provide an interesting look at a kind of sanction that can be imposed on a foreign national for alleged specific kinds of wrongful actions anywhere in the world.Under FACFOA, the Governor in Council may make orders or regulations requiring persons in Canada or Canadians abroad to boycott transactions involving the foreign person's property, or indeed, freezing the person's property if it is in Canada, in certain situations. The recent *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* (Magnitsky Act) allows for similar sanctions against foreign nationals who are responsible for, or complicit in, gross violations of internationally recognized human rights and corruption. This Journal has already published two comments on it, here and here. But the *Portnov* case gives us a sense of how it might fare in the courts.

Section 4 of FACFOA allows the Governor in Council to make orders or regulations prohibiting a person in Canada or Canadians outside Canada from dealing in any property, wherever it is, of a "politically exposed foreign person", or from entering into or facilitating a financial transaction or

providing financial services in respect of that property where:

- the Governor in Council receives a written assertion from a foreign government that a person has misappropriated property of that state or acquired property inappropriately by virtue of their office or personal or business relationship
- the state requests the Canadian government to freeze the person's property
- the Governor in Council is satisfied that the person is a "politically exposed foreign person" in the requesting state, where a "politically exposed foreign person" is a holder of a defined set of offices or positions in the foreign state, such as head or state, member of a legislature, high official, ambassador, general officer in the military, or, a person closely associated with such a person for personal or business reasons (including family members) (FACFOA, s. 2)
- the requesting state is suffering internal turmoil or where the political situation is uncertain
- the restrictions are in the interest of international relations

The order or regulation is valid for five years, but may be extended (FACFOA, s. 6). Section 13 of FACFOA states that a subject of the restriction may write to the Minister for removal of the sanctions because they are not a "politically exposed foreign person" and the Minister must recommend to the Governor in Council to remove the subject from the order or regulation if the Minister has reasonable grounds to believe this is the case (FACFOA, s. 13).

In *Portnov*, Manson J found that he is a citizen of Ukraine, elected to the Ukrainian Parliament in 2006, later serving as an adviser to President Yanukovych from 2010 until 2014. The Prosecutor General of the Ukraine under the new government of President Poroshenko wrote to the Prime Minister of Canada on March 3, 2014 stating that criminal investigations were commencing against former senior officials including Portnov and that, as a result, "…there have been established factors of embezzlement of state funds in sizable amounts and its further illegal transfer outside the territory of Ukraine." The Prosecutor General asked for Canada's assistance in the return of assets (para. 9). Portnov refuted the allegations as politically motivated and started fighting them. But the Governor in Council responded to Ukraine's request on March 5, 2014, by passing the Ukraine Regulations under FACFOA and added the names of the officials in the Prosecutor General's letter to the Schedule, effectively restricting their dealings in their property with persons in Canada or Canadians outside Canada. Portnov is listed in the Schedule to the Ukraine Regulations in the capacity of advisor to the former president (Sch. 1, no.9).

Since that time, Portnov tried to have the restrictive measures withdrawn against him. He made several requests to the Minister for his removal from the Schedule, attaching a Ministerial Certificate of 2017 that he had not been convicted of any criminal offences and letters from the Prosecutor General in 2017 saying there were no criminal proceedings or investigations involving him and another saying that the March 3, 2014 letter was unreliable and violated his non-property rights (para. 13). Canada refused to budge, at one point saying that the Ukraine must request his removal from the Schedule.

In the proceedings before Manson J, counsel for Canada suggested that despite Portnov's evidence, the Minister was satisfied by four letters from the Ukrainian Embassy in Canada written between 2016 and July 2018 that there was an ongoing investigation, submitting two affidavits deposing to the existence of the letters, but without producing them (para. 17). Manson J held that the production of the actual letters would have been preferable, but the failure to produce them (and presumably resolve the difference between what the Ukraine and its Embassy was saying) did not affect his conclusions. Portnov did not dispute that he was a "politically exposed foreign person".

Portnov was before Manson J seeking an order compelling the Minister to recommend to the Governor in Council to take his name out of the regulations or alternatively, a declaration that the addition of his name to the regulations was *ultra vires.*

In his reasons, Manson J observed that in 2015, the European Court of Justice (ECJ) held that Portnov should not have been the subject of similar restrictions imposed by the EU and that this was the most compelling evidence Portnov submitted with his requests (para. 12). I think that this deserves a digression from Manson J's reasoning because of the difference in the conditions for imposing sanctions. The EU had withdrawn the sanctions before the ECJ decision and Portnov was allowed to continue his litigation to vindicate his reputation (ECJ, paras. 31-32). The ECJ examined conditions imposed by an EU decision and its implementing regulations "…that restrictive measures are to be adopted against 'persons having been identified as responsible for the misappropriation of Ukrainian State funds'" (ECJ, para. 39). The EU sanctions were based on a letter of March 3, 2014 with seemingly much the same content as the one Canada received and his name had been added to the list because allegedly there were criminal proceedings underway (ECJ, para. 8). The ECJ found that the EU had insufficient evidence either of his responsibility for misappropriation or that there were genuine criminal proceedings or investigations pending. The ECJ held that the facts were for the EU to autonomously establish before imposing sanctions and were not to be based only a request from the affected state (ECJ, para. 45). Switzerland and Norway removed the restrictions they had imposed.

Manson J held that the idea that the Minister had to be satisfied of the fact of misappropriation would undermine the purpose of FACFOA, relying on the earlier case of *Djilani v. Canada (Foreign Affairs)*, 2017 FC 1178, para. 100, which is to enable states in precarious political situations to ask Canada to freeze property that might have been misappropriated until the situation normalizes and a full investigation made (para. 32). Though he agreed that s. 4 of FACFOA provided some support for Portnov's argument that the Ukraine had to do more than simply say that an investigation is underway, but must state that his alleged misappropriation was a fact, Manson J held that this would create too high a threshold for imposing sanctions and could render FACFOA nugatory (para. 31).

In light of its purpose, Manson J concluded that FACFOA required merely an assertion by a foreign state of impropriety of a foreign national (paras. 33 and 43). In this case, this was satisfied by the March 3, 2014, letter from the Ukrainian Prosecutor General. He added that even if the more stringent requirement argued by Portnov was correct, the March 3rd letter would satisfy it where it said "…there have been established factors of embezzlement of state funds…" (para. 33). Further, he noted that

Canadian government affidavits showed that the Minister was satisfied that the conditions were met. He held also that the conditions need only be satisfied at the time the regulations imposing the sanctions were promulgated and subsequent facts did not make them *ultra vires*. Thus, the exculpatory evidence offered by Portnov after the sanctions were imposed did not make them *ultra vires* (paras. 37 and 41).

Finally, and importantly, Manson J held that the Minister's failure to recommend the amendment of the regulations was reasonable because the matter was not justiciable. The court should not usurp executive power.

Nevertheless, Manson J expressed concern that the Minister showed a disregard for Portnov's serious concerns and had not considered Portnov's exculpating evidence and so did not award costs to the government.

The *Djilani* case, from which Manson J drew the purpose of FACFOA, shows how far Parliament wished to extend sanctions for potential interference with the property of troubled states by their nationals with political clout. In *Djilani*, the wife and children of Trabelsi, a brother of the wife of the ousted president of Tunisia, sought judicial review of the Minister's refusal of their s. 13 FACFOA request that they be removed from Schedule 1 of the *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations* (Tunisia Regulations). They had been determined to be refugees on the grounds that they had a reasonable chance of persecution due to their family connections (para. 17). Trabelsi's own refugee application was denied for serious non-political crimes. The Governor in Council added him and the applicants to the Schedule to the Regulations as "politically exposed foreign persons" with the attendant restrictions in dealings with property. The applicants' request to be removed from the Schedule and the judicial review application that followed the request's rejection was based on their allegation that they were not "politically exposed foreign persons" because of their lack of involvement in Trabelsi's affairs, the fact that they were not accused anywhere of economic crimes, they suffered undue hardship from the restrictions and were refugees. The Minister found that they were still "politically exposed foreign persons".

St-Louis J upheld the rejection based on Departmental findings that the applicants asserted their family connections in their application, because Tunisia had requested their names remain in the Schedule alleging their family ties were intact, they had unfairly benefited from the relationship with the former president, the Tunisian order for the seizure of the property of the principal applicant and Trabelsi remained in effect and that removal of the applicants' names would adversely affect relations between Canada and Tunisia.

St-Louis J also disposed of the applicants' arguments that the sanctions infringed their human rights.

First, she rejected the claim that the applicants' inability to open a bank account or seek employment infringed their s. 7 right to liberty to make fundamental personal choices. She noted that economic rights are not protected by s. 7 unless they affect life and security which was not proved. The

applicants were able to pay their living expenses and could apply for an exemption for expenses or the deposit of paycheques from the FCAFOA restrictions under s. 5 and 15, if necessary. Further, she rejected their claim of serious psychological harm caused by state treatment rather than media and social attention or their ties to the former Tunisian government or indeed that it was serious. In any event, the restrictions were not arbitrary nor overbroad because they were connected to the objective of the Tunisian Regulations which were meant to fight corruption, protect potentially misappropriated property when a state in in an unstable political situation until it normalizes and carries out proper investigations (para. 75). The definition of "politically exposed foreign persons" was not too broad because it prevented frustration of the objective of FACFOA by encompassing a broad category of associations: here the applicants were closely associated with the former president by their family's connection and influence, the consequences of which were the basis for granting their refugee claim (para. 76). Further, the effects of FACFOA and the Tunisian Regulations were not sufficiently "draconian" to be unreasonable and grossly disproportionate to their objective. The terms of FACFOA and the Tunisian Regulations provided a sufficient basis for legal analysis and so were not too vague. Thus, any infringement of a s. 7 right would accord with the principles of fundamental justice. Finally, St-Louis J decided that, even if there were a breach of s. 7, it would be saved by s. 1 because the means used to achieve the pressing and substantial objective of FACFOA and the Tunisian Regulations were proportionate.

Second, St-Louis J rejected the s. 2(e) Canadian Bill of Rights argument that the applicants did not receive a fair hearing from the Minister. FACFOA provides for an administrative process that does not require the same fairness and impartiality as a judicial process that did not require a formal hearing. In any event, there was no evidence of Ministerial bias. Perhaps most signifcantly, St-Louis J held that the applicants simply had not provided any evidence that they were not "politically exposed foreign persons" (para. 94) engaging the Minister's duty to recommend removal of sanctions.

Finally, St-Louis J held that the Minister's decision was reasonable given the government objective and the facts. The applicants appeared to be closely connected to the former president and the young age of some of the applicants did not make the decision unreasonable because of the propensity of Trabelsi's to use "dummies" in transactions (paras. 98 and 15). While the applicants claimed that the property they wanted to access was legitimately acquired, St-Louis J held that it was not up to the Minister to ascertain the lawfulness of transactions based on the objectives of FACFOA (para. 100).

Djilani and Trabelsi had been to Federal Court before at 2014 FC 631. While their refugee applications were pending, they had sought judicial review of the refusal of the Minister of an exception to the Tunisian Regulations to transfer $109, 680 to their lawyers' trust accounts for living and luxury expenses. Gagné J rejected their claim that there was a breach of their dignity contrary to s. 7 of the Charter because their claim to open a bank account for purposes including potential employment were economic rights and not protected. Further, the money was coming from Djilani's father to the lawyers and so did not need a FACFOA exception. Even if the s. 15 FACFOA living expenses exception were engaged, the expenses would have to be reasonable and necessary. She noted that the applicants

lived a somewhat luxurious lifestyle without need for a s. 15 exception, so the request was not reasonable. Given the fact the money was coming from Djilani's father, the application before the court was superfluous.

Conclusion

These cases both deal with issues arises under FACFOA which is similar in structure, wording and sanctions to the Magnitsky Act and other statutes that enable personal sanctions. The main difference is that the Magnitsky Act is also a tool to sanction individuals for their interference or breach of the expression of human rights and may be invoked by the Canadian government through the Governor in Council without the need of a foreign request. Under FACFOA, the Governor in Council must be satisfied of certain conditions before making an order, while under the Magnitsky Act, the Governor in Council need only be of the opinion that a foreign national has been in breach of international human rights. The opinion of the Governor in Council is very hard to impeach on the basis of conflicting evidence, see for example Syncrude Canada Ltd. v. Canada, 2016 FCA 160, para. 100. The Portnov case particularly shows that the sanctions do have an effect on the reputation of those subject to them and not their business interests alone. They also show that the courts are willing to ensure the evidentiary burden in these international cases does not undermine the purpose of the sanctions.

Please cite this article as: J. Hendry, "Developments in Statutory Sanctions Against Alleged Foreign Wrongdoers" (2018) 2 PKI Global Just J 36.

James Hendry ***About the Author***

James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.