

CAREFUL WHAT YOU WISH FOR! CANADA ISSUES LONG-AWAITED "GUIDANCE" ON ECONOMIC SANCTIONS

Posted on March 28, 2024

Categories: [Insights](#), [Publications](#)

Global Affairs Canada ("**GAC**") has provided its first guidance on the application of the economic sanctions in the *Special Economic Measures Act* ("**SEMA**") and regulations and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* ("**JVCFOA**").^[1]

Canadian and international businesses have long requested practical guidance on several key elements of Canada's sanctions regime. Unlike the sanctions authorities in other allied jurisdictions, GAC's lack of guidance made compliance efforts more difficult and uncertain for Canadian businesses.

The guidance just issued, despite being eagerly anticipated and helpful in some aspects, indicates that GAC is adopting an assertive approach to the interpretation and application of Canadian sanctions legislation. The guidance is likely to have far-reaching impacts relating to Canada's sanctions laws on Canadian businesses and non-Canadian businesses, alike, particularly with regards to facilitation offences.

Canadian and international businesses should seek the advice of international trade counsel to consider the effect of the guidance on advice they have previously received in respect of Canadian sanctions.^[2]

Overview of the Guidance

We outline GAC's position on key issues and discuss the various scenarios presented below.

1. Dealings with an entity that deals with a designated person (the facilitation offence)

Under the *Special Economic Measures (Russia) Regulations* ("**the Regulations**"), persons in Canada or Canadians outside of Canada (a "**Canadian Party**") are prohibited from directly or indirectly facilitating transactions related to dealings in property with sanctioned persons.^[3]

This prohibition was generally understood to require two Canadian Parties: a Canadian Party dealing in property of a sanctioned person, and a Canadian Party facilitating such a transaction (sometimes called the "double-Canadian" requirement).

However, the guidance asserts that this facilitation prohibition applies to the transactions of non-Canadians as

well. It states that the Regulations “prohibit[s] the direct or indirect facilitation of dealings between any person and a designated person.” [underlining added]

The guidance also provides the following example as “facilitating” a prohibited dealing:

Scenario 1: A Canadian company (“A”) is the end-user of a type of product that it purchases from a non-designated foreign supplier (“B”). Company B manufactures this product using materials that it sources directly from a company recently designated under the Special Economic Measures (Russia) Regulations (“C”).^[4] [underlining added]

Although it may be legal for Company B to deal with Company C in other jurisdictions, transactions resulting from a transaction between Company A and B are now considered to be prohibited under Canada’s sanctions laws. This is notable as Company B is a foreign supplier, and the scenario highlights the far-reaching impacts of GAC’s new interpretation of Canada’s sanctions laws.

2. When does a prohibition apply?

The guidance clarifies the timing of sanctions prohibitions, and the lack of retroactive effect.^[5] GAC provides illustrative examples which confirm that contracts and transactions entered into *prior* to a person being sanctioned will not contravene the dealings ban.

Most instructively, the guidance stipulates that receiving goods from a sanctioned entity *following* its designation will not violate the dealings ban so long as no subsequent transaction occurs with the listed person. In effect, GAC considers that it is not prohibited to receive goods from a sanctioned party if there are no further payments made, or benefits transferring, to the sanctioned party.

3. Dealing with the subsidiaries of a designated company

Both the SEMA and the JCVFOA subject property that is owned or controlled by a sanctioned company to the dealings ban. Historically, it was unclear whether the property of a subsidiary of a designated company was “property” of the sanctioned company, and thereby also subject to the dealings ban.

To address this issue, the Government of Canada introduced a deemed ownership provision^[6] for any entity that the designated company “controls”. If any of the following apply, a sanctioned company is deemed to “control” the subsidiary and any of its property is then deemed to be property “owned” by the designated company:

- the sanctioned person directly or indirectly holds at least 50% of the entity’s shares or ownership interests or at least 50% of the voting rights;
- the sanctioned person may directly or indirectly change the composition or powers of the entity’s board

of directors; or

- the sanctioned person may reasonably, directly or indirectly, through any means, direct the entity's activities.^[7]

This provision in fact added more doubt as well as substantial complexity for compliance efforts.

The new guidance adds more uncertainty. The FAQ states that where a designated company “exercise[s] considerable influence over [the subsidiary’s] strategic decision-making” the deemed ownership rule applies.^[8] It is unclear whether and to what degree “exercising considerable influence” is attempting to broaden the plain meaning of the “directing the subsidiary’s activities” threshold contained in the statute.

Conclusion

It is unclear whether GAC will release further guidance to clarify the first set of Frequently Asked Questions. In a world of complex, global supply chains, this new language will have an acute impact on Canadian businesses or individuals wherever they are, as well as foreign-owned businesses operating within Canada. McMillan’s International Trade Group has published extensively on changes to Canada’s sanctions regime and remains available to assist Canadian and international businesses navigate evolving compliance obligations.

- [Canada Strengthens Its Economic Sanctions and Export Controls Against Russia and Supports Russia's Removal from SWIFT](#) (February 25, 2022);
- [Canada Ratchets Up its Sanctions in Response to the Russia-Ukraine Crisis](#) (March 4, 2022);
- [Canada Further Expands its Sanctions Regime Against Russia](#) (March 29, 2022);
- [Canada Expands Sanctions on Russia and Proposes Broad Legislative Changes to its Sanctions Regime](#) (June 1, 2022);
- [Canada Clamps Down on Services Provided to Russia](#) (June 13, 2022);
- [Services, Sensitive Technologies, Luxury Goods, Gold and Disinformation Sanctions – Plus a Forfeiture Regimes: Canada's Latest Responses to the Russian Invasion of Ukraine](#) (July 13, 2022);
- [Canadian Sanctions Revisited: More Russian and New Iranian Sanctions, Including Price Cap on Russian Oil](#) (October 4, 2022);
- [Sanctions Pivot: Canada Seeks Forfeiture of Russian-Owned Assets to Fund Reconstruction of Ukraine and Adds Oil Price-Cap Restrictions](#) (December 22, 2022);
- [One Year On: Economic Sanctions Have Become a Primary Tool of Canadian Foreign Policy and New Russian Sanctions are Imposed](#) (March 1, 2023);
- [Caught in the Sanctions Crossfire: Canada's New Control Test Has Broad Repercussions on Businesses with Any Nexus to Russia](#) (April 26, 2023);
- [Russian Telecoms Newest Target of Canadian Sanctions and Canada's \(non-\)Approach to General](#)

[Permits](#) (August 16, 2023);

- [Sanctions Update: Countering Russian Evasion of Export Controls and New Sanctions Designations](#) (October 3, 2023); and
- [Two-Year Anniversary of Russia's Illegal Invasion of Ukraine: New Sanctions Designations and Expansion of Export Prohibitions](#) (February 28, 2024).

[1] Canadian Sanctions - Frequently Asked Questions, [online](#).

[2] This bulletin forms part of our broader series of sanctions bulletins in which we describe the steadily evolving Canadian sanctions regime. McMillan's sanctions publications are listed following the conclusion of this bulletin.

[3] *Special Economic Measures (Russia) Regulations*, subsections 3(a) and (b), [online](#).

[4] Canadian Sanctions - Frequently Asked Questions, [online](#).

[5] Canadian Sanctions - Frequently Asked Questions, "Q: When does a prohibition apply?", [online](#).

[6] See *Caught in the Sanctions Crossfire: Canada's New Control Test Has Broad Repercussions on Businesses with Any Nexus to Russia*, [online](#).

[7] See section 2.1(2) of the SEMA and section 2.01(2) of the JCVFOA.

[8] See Scenario 2 under "Q: Can I deal with the subsidiaries of a designated company?", [online](#).

by [Neil Campbell](#), [Jonathan O'Hara](#), [William Pellerin](#), [Jamie Wilks](#), [Tayler Farrell](#), [Brigid Martin](#) (Articling Student)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2024