

SANCTIONS PIVOT: CANADA SEEKS FORFEITURE OF RUSSIAN-OWNED ASSETS TO FUND RECONSTRUCTION OF UKRAINE AND ADDS OIL PRICE-CAP RESTRICTIONS

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This is McMillan's eighth update on Canadian sanctions since Russia's illegal and unprovoked invasion of Ukraine.^[1] We focus on Canada's path-breaking forfeiture regime as well as its implementation of the G7 + Coalition price-cap mechanism for limiting sales of petroleum products from Russia.

FIRST FORFEITURE PROCEEDING

(a) Court application to forfeit funds owned by sanctioned Russian oligarch

On December 21, 2022, the Governor-in-Council ("**Cabinet**") ordered Citco Bank Canada to restrain US\$26 million believed to be owned, held, or controlled by Roman Arkadyevich Abramovich, a Russian oligarch with ties to the Putin regime. Mr. Abramovich was added to Canada's sanctions list in March 2022 and his Canadian property has been subject to an asset freeze and dealings prohibition since that time.^[2] The funds in question are reportedly credited to a bank account held by Manticore Fund (Cayman) LTD and relate to Granite Capital Holdings Ltd. ("**Granite**"),^[3] an entity owned by Mr. Abramovich.^[4]

This seizure order begins the process by which Mr. Abramovich's assets may be forfeited to the Government, with the proceeds to be used for reconstruction in Ukraine and compensation of victims of Russia's invasion. The next step is for Foreign Affairs Minister Mélanie Joly to submit a court application for an order that the funds be forfeited.

Canada is the first G7 nation to seek the forfeiture of assets held by a sanctioned person for the purposes of funding the reconstruction of Ukraine.^[5] The legal authority to do so was enacted through amendments to the *Special Economic Measures Act* ("**SEMA**") in June 2022.^[6] Once the application for forfeiture is made by the Minister, a provincial court judge must grant the order if (i) the seized property is as described in the order, (ii) the property is shown to be owned, held or controlled by Mr. Abramovich, and (iii) subject to certain notice and due process safeguards to protect third parties that may have interests in the property (e.g. secured creditors).^[7] This constitutes a very low bar to successful forfeiture.

While it is unclear whether there are any other parties with interests in these funds, we expect that the Government will have performed significant diligence to ensure that the assets are indeed under Mr. Abramovich's ownership or control. The test for ownership and control under Canadian law is undefined, but a recent Alberta court decision has indicated that control should be interpreted in a manner that considers both formal, structural control and "de facto control" in order to ensure the effectiveness of Canada's sanctions regime.^[8]

(b) The Forfeiture May Face Legal Challenges

While the test for forfeiture under the SEMA is straightforward, the SEMA provisions allowing for forfeiture may face two constitutional challenges and could also give rise to investment treaty proceedings.

First, section 8 of the *Canadian Charter of Rights and Freedoms* right protects Canadians, including Canadian corporations such as Citco Bank Canada, against unreasonable seizure, such that Citco Bank Canada may have standing to object to the seizure of Mr. Abramovich's Canadian-held assets should it wish to do so.^[9] Section 8 provides protection for privacy rights, which have been recognized as essential to the functioning of a democratic society. Nonetheless, it permits reasonable seizures, recognizing that the state's legitimate interest in advancing societal goals or enforcing laws may require a degree of intrusion into the private sphere.^[10] The limited nature of the financial institution's interest as a custodian rather than an owner of the funds could also be relevant to the reasonableness assessment.

Second, the forfeiture regime may be challenged under the constitution's division of powers. Criminal law matters fall under the federal government's jurisdiction.^[11] To be considered a valid exercise of its criminal law power, legislation must have a valid criminal law purpose, such as public peace, order, security, health or morality; be connected to a prohibition; and be backed by a penalty for violations.^[12] If the criminal law power were to be found to be insufficient for the scope of the SEMA forfeiture regime, the provincial power over "property and civil rights" gives provinces the authority to regulate trade and commerce within their respective territories and has been interpreted broadly.^[13] However, the federal government also has specific jurisdiction over the regulation of international and interprovincial trade and commerce and defense matters, as well as residual general powers related to "peace, order and good government" and international affairs.^[14]

Finally, a forfeiture may raise issues under the *Foreign Investment Protection Agreement* entered into between the USSR and Canada in 1991, which now applies to Russia ("**Russia FIPA**"). Russian investors are entitled to fair and equitable treatment (an international investment law standard of treatment by host states); additionally, "investments" and "returns of investors" shall not be "expropriated or subjected to measures having an effect equivalent to nationalization or expropriation", unless accompanied by "prompt, adequate, and effective compensation."^[15] Mr. Abramovich may argue that the forfeiture constitutes an expropriation for

which he must be compensated, absent which he may exercise rights to bring an investor-state dispute against Canada that would be adjudicated by an arbitral panel.

(c) The Seeking of Forfeiture by Canada Marks a Profound Policy Shift by Canada

By seizing and forfeiting to the Crown blocked and frozen assets rather than allowing them to remain frozen until the cessation of hostilities by Russia, Canada has moved beyond the traditional design of sanctions laws.

Canada's sanctions policy is premised on the notion that sanctions may "bring about a change in policy or behaviour by the target state, individuals, or entities."^[16] As one tool in the government's foreign policy tool-belt, sanctions aim to create pressure on the sanctioned entities such that they will reverse course. Given that the blocked property will become property of the Government and the proceeds will then be distributed in or for the benefit of the Ukraine, it will no longer provide a specific incentive for the designated person to change behaviour. However, the existence and use of the forfeiture mechanism adds a further level of general deterrence for persons who have been, or may in the future be, designated under Canada's sanctions regime. The seizure and application for forfeiture of Mr. Abramovich's assets in Canada therefore marks an inflection point in Canada's sanctions policy vis-à-vis the war in Ukraine, which has now progressed beyond incentivizing Russia to end its invasion to include punishing designated persons and using their property to support rebuilding in Ukraine and compensating victims of Russia's invasion.^[17]

CANADIAN PRICE CAP ON RUSSIAN PETROLEUM PRODUCTS

As we previously reported,^[18] the G7 countries agreed in September 2022 to impose a price cap on Russian-origin crude oil and petroleum products.^[19] Products sold above the price cap would be subject to transportation and other prohibitions. The goal of the cap is to apply downward pressure on global energy prices while also limiting the funds available to Russia for its war efforts.

On December 7, 2022, Canada introduced its price cap implementing measures in the form of a new prohibition against the provision of certain services relating to the maritime transport of Russian crude oil.^[20] The same prohibitions will come into force for refined petroleum products on February 5, 2023. The prohibited services include trading and commodities brokering, financing, financial assistance, shipping, insurance and reinsurance, protection and indemnity, flagging, and customs brokering.^[21] The prohibition applies when the oil is purchased above the price set by the G7+ Coalition Oil Price Cap List (\$60USD per barrel as of December 22, 2022).^[22]

Canada's existing ban on imports of crude oil and refined petroleum products from Russia, and prohibitions on supplying certain services to the Russian petroleum industry, remain in force.^[23] As a result, Canada's added price cap prohibitions are likely to have only an incremental effect on trade flows. Nonetheless, the actions

reflect Canada's commitment to act in conjunction with its G7 allies and to continue taking steps to restrict the Putin regime's ability to finance its war efforts in Ukraine.

[1] [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).

[2] [Special Economic Measures \(Russia\) Regulations](#), SOR/2014-58, item 541. Mr. Abramovich was sanctioned on March 10, 2022, see *ibid* (March 10, 2022 amendment); Global Affairs Canada, "[Sanctions – Russian invasion of Ukraine](#)" (Mr. Abramovich was sanctioned as a "former Russian senior official" and "associate of the regime" for his "complicity in President Putin's choice to invade a peaceful and sovereign country").

[3] Global Affairs Canada, "[Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch](#)" (Dec 19, 2022).

[4] [Government of Canada, Privy Council Order 2022-1361](#), online (last modified Dec 21, 2022).

[5] Global Affairs Canada, "[Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch](#)" (Dec 19, 2022).

[6] *Budget Implementation Act, 2022*, No. 1, SC 2022, c 10, ss 437, 439 (adding ss 4(1)(b) and 5.4(1) to the *Special Economic Measures Act*: "by order, cause to be seized or restrained in the manner set out in the order any property situated in Canada that is owned — or that is held or controlled, directly or indirectly — by [foreign state, national, or person residing in foreign state] [...] [o]n application by the Minister, a judge shall order that the property that is the subject of the application be forfeited to Her Majesty in right of Canada if the judge determines, based on the evidence presented, that the property (a) is described in an order made under paragraph 4(1)(b); and (b) is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person"); this amendment also expanded the definition of property to give Global Affairs Canada broader powers to freeze assets, *ibid* s 436 (amending s 2 of the *Special Economic Measures Act*: "property means any type of property, whether real or personal or immovable or movable, or tangible or intangible or corporeal or incorporeal, and includes money, funds, currency, digital assets and virtual currency"); for the provisions themselves, see [Special Economic Measures Act, SC 1992, c 17](#), ss 4(1)(b), 4(1.1); this new power is mirrored in the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), SC 2017, c 21 ss 4, 5.

[7] *Budget Implementation Act, 2022*, No. 1, SC 2022, c 10, s 447 (amending ss 4.1-4.4 the *Special Economic*

Measures Act).

[8] *Angophora Holdings Limited v Ovsyankin*, 2022 ABKB 711 paras 33, 34.

[9] *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[10] *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 S.C.R. 250, para 55.

[11] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91(27).

[12] *Reference re Firearms Act (Can.)*, 2000 SCC 31, para. 27. See also: [Centre for Constitutional Studies, Property and Civil Rights, Chatterjee v. Ontario \(Attorney General\): Provincial Law on Proceeds of Crime \(2009\)](#).

[13] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(13).

[14] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91.

[15] UNCTAD Investment Policy Hub, [Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments](#), 1991 No 31 (signed Nov 20, 1989, entered into force Jun 6, 1993), art VI.

[16] Government of Canada, "[Canadian Sanctions: Frequently Asked Questions](#)" (When does Canada impose sanctions?).

[17] See *Special Economic Measures Act*, SC 1992, c 17, ss 5.3, 5.6, 7(1); [House of Commons Debates, 44-1, Vol 151 No 141](#) (December 5, 2022) at 10427 (Hon Robert Oliphant).

[18] [Canadian Sanctions Revisited: More Russian and New Iranian Sanctions, Including Price Cap on Russian Oil](#) (October 4, 2022).

[19] Department of Finance Canada, [G7 Finance Ministers' Statement on the united response to Russia's war of aggression against Ukraine](#), 2 September 2022.

[20] *Regulations Amending the Special Economic Measures (Russia) Regulations*, SOR/2022-261 ("SEMR"), Section 3.12.

[21] SEMR, Schedule 10.

[22] This list is published on the Government of Canada's website, see Global Affairs Canada, "[G7+ Coalition Oil Price Cap List](#)".

[23] SEMR, ss 3.5 and 3.10; See also our earlier bulletin on the subject, [Canadian Sanctions Revisited: More Russian and New Iranian Sanctions, Including Price Cap on Russian Oil](#) (October 4, 2022).

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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.

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