

Canada - Forfeiture Orders

Presentation to 7th Asset Recovery Working Group
UNCAC Coalition

Alesia Nahirny July 28, 2022

Amendments to Canada's Sanctions Legislation

Special Economic Measures Act (SEMA)

Justice for Victims of Corrupt Foreign Officials Act
(Sergei Magnitsky Law)

Purpose

To enable Canadian government to take economic measures against certain persons in circumstances where an international organization of states or associates of states of which Canada is a member calls on its members to do so, a grave breach of international peace and security has occurred, gross and systemic human rights violations have been committed in a foreign state or acts of significant corruption involving a national of a foreign state have been committed.

Forfeiture Orders

Added to both Acts; effective June 23, 2022

SEMA

Forfeiture

5.4 (1) On 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.

Sergei Magnitsky Law

Forfeiture

4.2 (1) On application by the Minister, a judge must 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 foreign national referred to in that order or is held or controlled, directly or indirectly, by that foreign national.

Minister of Foreign Affairs

Power to Seize

- If the Minister is “of the opinion” that one of the circumstances listed in (1.1) has occurred, the Minister can
 - by order, cause to be seized any property situated in Canada that is owned, or that is held, or controlled, directly or indirectly by
 - (i) a foreign state,
 - (ii) any person in that foreign foreign state, or
 - (iii) any national of that foreign state that does not ordinarily reside in Canada.

The Circumstances

Minister is “of the opinion” that one of the below has occurred

- (1.1) “Circumstances”
 - An international organization of states or associates of states, of which Canada is a member, has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign state
 - A grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis
 - Gross and systemic human rights violations have been committed in a foreign states; or
 - A national of a foreign state who is either a foreign public official or an associate of such an official is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption which amounts to acts of significant corruption

Ownership and Control

Ownership and Control

UK, US, and Canada

- Minister has broad powers to seize
- Ownership/control will be the challenge
- Canada: no definition/guidance of ownership and control in sanctions context
- US: [OFAC 50% Rule](#)
- UK: Chapter 4 of the [UK FINANCIAL SANCTIONS General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018](#)

Control

UK Approach

- appointing, solely by exercising one's voting rights, a majority of the members of the administrative, management or supervisory bodies of an entity, who have held office during the present and previous financial year;
- controlling alone, pursuant to an agreement with other shareholders in or members of an entity, a majority of shareholders' or members' voting rights in that entity;
- having the right to exercise a dominant influence over an entity, pursuant to an agreement entered into with that entity, or to a provision in its Memorandum or Articles of Association, where the law governing that entity permits its being subject to such agreement or provision;
- having the right to exercise a dominant influence referred to in the point above, without being the holder of that right (including by means of a front company); or
- having the ability to direct another entity in accordance with one's wishes. This can be through any means, directly or indirectly. For example, it is possible that a designated person may have control or use of another person's bank accounts or economic resources and may be using them to circumvent financial sanctions.

Global Alignment and Consistency in Ownership/Control