

Intelligence MEMOS



From: Lawrence Herman
To: Canadians Concerned About Trade
Date: June 27, 2022
Re: HOW CANADA CAN NAVIGATE THE NEW WORLD OF SANCTIONS

It is becoming increasingly challenging for Canadian businesses to navigate the complex web of economic sanctions imposed on Russian oligarchs and state entities because of the Ukraine invasion.

This note examines how the Canadian government could do a better job by filling an unfortunate gap in the administration of our own sanction measures, taking inspiration from the way other governments are doing things.

First some background.

The coordination of Russian sanctions among western allies is unprecedented in post-Second World War annals. The fact that Russia has been largely frozen out of the US and European banking systems and financial markets gives these sanctions unprecedented reach. Even if hostilities in Ukraine are ended by some kind of stalemate or armistice, these sanctions will be embedded in global trade and capital markets for decades.

Russian sanctions, like sanctions generally, can be categorized in two ways. First, are the prohibitions and asset freezes applied to individuals – oligarchs, political actors, senior officials, listed companies and other entities. The other category is systemic, covering broad economic sectors, freezing out Russia's central bank and other institutions from access to foreign reserves in western banks, to capital and financial markets, to the international banking system at large, to technology and corporate supply chains generally.

Beyond Russia, sanctions apply to an ever increasing percentage of global trade. In all cases, it's US measures that lead the way.

The main laws are the *International Emergencies Economic Powers Act* (IEEPA) and the *National Emergencies Act* (NEA), which are invoked by presidential executive authority. Once proclaimed, the Office of Foreign Assets Controls (OFAC) in the US Treasury Department takes over their administration.

These measures have expansive geographic reach, applying beyond US borders to any person "subject to US jurisdiction," which means they can apply to business transactions outside the US that might not even have an obvious US connection. The prohibitions apply to specific sectors and transactions and also cover dealings in goods, services and technology that have even a small degree of US content. Penalties can be serious, with hefty fines and exclusion from US markets.

The good news is that OFAC is transparent about its operations. Its website provides an array of information, including guidance bulletins on its enforcement policy and a regularly updated [set of answers](#) to frequently asked questions on the types of activities that could run afoul of sanctions against Russia or on the 20 or so other nations under IEEPA prohibitions.

Similarly, the European Union Commission provides readily accessible administrative [guidance](#) on interpretation and enforcement of sanctions to assist enterprises in foreign operations involving sanctioned destinations. And Australia's Department of Foreign Affairs and Trade maintains a help line that answers questions and provides general sanctions assistance and [guidance](#), and also fields queries from individual enterprises.

It's a different story in Canada, where sanctions are issued by order-in-council and administered by the Sanctions Policy and Operations Coordination Division (PER) in Global Affairs Canada.

The federal government provides [virtually nothing](#) in terms of policy guidance or answers to FAQs. Individual queries or requests for guidance will not be answered. The GAC website simply says,

"For specific information about the sanctions regime imposed against countries or individuals, consult the relevant regulations."

And further,

"... that Global Affairs Canada cannot provide legal advice to members of the public. For this reason, we cannot deliver an opinion as to whether or not a specific activity or transaction would contravene sanctions legislation. You should consider seeking legal advice in relation to an activity that may contravene a Canadian sanction law."

In other words, when in doubt, run to your lawyer.

The burden this puts on Canadian operations attempting to navigate increasingly treacherous waters of international sanctions waters is obvious.

Even with GAC's concern about giving legal advice, it could still offer guidance and policy advice about Russia and the other 20 or so other nations where Canadian sanctions apply. Here are some possibilities:

- the nature of records to be kept in regard to sanctioned destinations;
- the levels of inquiry and due diligence expected to ensure sanctions are not transgressed;
- definitions for terms such as: "dealings," "transactions," "financial, technical or other services, and, usefully, for an action that "causes, facilitates or assists" prohibited activities;
- reporting requirements to the government where a proscribed dealing or transaction has inadvertently occurred;
- the interaction between UNA sanctions and SEMA sanctions.

Sanctions are clearly here to stay, an increasingly complex and treacherous element in international business. It behooves the Canadian government to take some inspiration from how other jurisdictions are assisting their own businesses in navigating these waters.

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