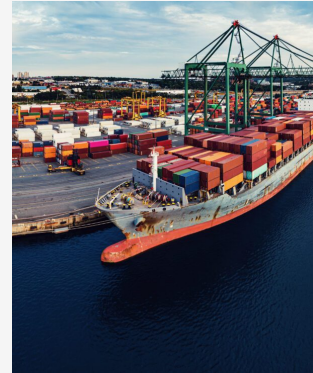


Missed guidance: Canada's new sanctions FAQs offer more questions than answers

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Global Affairs Canada (GAC), which administers Canada's economic sanctions, has quietly updated its "[Frequently Asked Questions](#)" (FAQs) page to provide new guidance on Canada's autonomous economic sanctions, including those related to Russia.

For years, Canada's business and legal communities have sought more meaningful public guidance from GAC on its interpretation of Canada's sanctions, and the demands for that guidance have grown since the major enlargement of Canada's Russia-related sanctions in response to Russia's 2022 invasion of Ukraine. Until now, to the frustration of businesses and legal practitioners, most of GAC's guidance has been anodyne; it has conspicuously avoided addressing the many thorny interpretive issues posed by the wording used in the key legal instruments, particularly the *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act* and the regulations under them.

The new FAQs do address some of these issues. They offer expansive interpretations in several key areas, specifically: the scope of the anti-facilitation provisions; when entities are considered owned or controlled by a sanctioned person; and indirect dealings with sanctioned persons, including the acquisition of goods from a non-sanctioned foreign supplier that uses inputs sourced from a sanctioned entity.

These interpretations do not have the force of law, nor are they necessarily consistent with the plain wording of the provisions they address. Nevertheless, because they can be presumed to reflect the positions of Canada's administrative and enforcement authorities, they change the risk calculations for Canadian businesses with international supply chains and Canadians employed abroad in foreign businesses.

GAC's interpretation of Canada's anti-facilitation provisions

One of GAC's new FAQs addresses the question, "Can I deal with an entity that deals with a designated [i.e., sanctioned] person?" This is a question that goes to the anti-facilitation provisions in Canada's sanctions laws, which aim to prohibit persons in Canada and Canadians abroad from enabling or assisting in other activities prohibited by Canada's sanctions.

Those other prohibited activities, which include dealing in the property of a sanctioned

person, apply only to the activities of persons in Canada and Canadians abroad. Accordingly, it has been a longstanding question as to whether the anti-facilitation prohibitions are themselves limited to the facilitation of prohibited activities by third parties in Canada or Canadians abroad (sometimes called a “double Canadian” requirement) or whether they apply to the facilitation of activities by non-Canadian parties outside of Canada. The new FAQs take the position that at least some of these anti-facilitation provisions apply “regardless of whether the third party is Canadian or situated in Canada, or whether or not any sanctions apply to this third party.”

This interpretation poses risks for Canadian companies that, through their supply chains, do business with non-sanctioned companies, including in friendly countries, that themselves transact with individuals or entities that are sanctioned by Canada but not by those other countries. It also creates risks for Canadian individuals working in other countries for foreign companies that do business with persons sanctioned by Canada but not by the foreign companies’ host countries.

An expansive interpretation of prohibited dealings

In illustrating its interpretation of Canada’s anti-facilitation provisions, GAC’s FAQs provide, by way of example, the following scenario, which highlights the supply chain risk for Canadian businesses:

A Canadian company [CanadaCo] is the end-user of a type of product that it purchases from a non-designated foreign supplier [ForeignCo]. ForeignCo manufactures this product using materials that it sources directly from a company recently designated under the *Special Economic Measures (Russia) Regulations* [SanctionedCo].

GAC’s guidance is that transactions between CanadaCo and ForeignCo involving SanctionedCo’s products are considered prohibited. While the FAQ is not explicit, this is presumably because, in GAC’s view, CanadaCo is engaged in facilitating a prohibited dealing in the property of SanctionedCo, contrary to the anti-facilitation prohibitions. This interpretation not only dispenses with a “double Canadian” requirement, it also means that the use by a third party of inputs sourced from a sanctioned person will taint a downstream product made with those inputs and transactions by Canadian businesses in respect of that downstream product. Effectively, it could operate as a blanket prohibition on buying, selling or dealing in goods that may have been produced, at any stage of the supply chain, with inputs sourced from a sanctioned person, much like Canada’s import ban on goods produced with forced labour.

It is unclear whether GAC has considered the full implications of this interpretation for supply chains in certain sectors where, for example, Russian raw materials or semi-finished inputs may still play a significant role in downstream products.

Ownership and control

Another FAQ addresses the question, “Can I deal with subsidiaries of a designated [i.e., sanctioned] company?” This FAQ addresses the recent amendments to Canada’s economic sanctions, which introduced new rules that deem property of an entity to be the property of a sanctioned person — and therefore subject to dealings prohibitions — when that person owns or controls the entity.

The amendments to Canada’s sanctions laws introduced three criteria, any one of which is sufficient to deem a person to control an entity and therefore deemed to own that entity’s

property:

(i) The person holds, directly or indirectly, 50% or more of the shares or ownership interests in the entity or 50% or more of the voting rights in the entity.

(ii) The person is able, directly or indirectly, to change the composition or powers of the entity's board of directors.

(iii) It is reasonable to conclude, having regard to all the circumstances, that the person is able, directly or indirectly and through any means, to direct the entity's activities.

In addressing these criteria, the FAQ provides the following example (with emphasis added):

A Canadian company is considering the possible sanctions implications of buying goods from a subsidiary of a listed entity. While the designated parent company does not meet the 50% or more ownership criteria of the subsidiary, *it is known to exercise considerable influence over its strategic decision-making. Given that at least one of the deemed ownership provisions applies*, the subsidiary would be deemed to be owned or controlled by the designated parent company. Consequently, it would be prohibited for the Canadian company to purchase of goods from the subsidiary.

The FAQ thus equates the exercise of "considerable influence over strategic decision-making" with the ability of a person to direct an entity's activities. The guidance does not explain what would constitute "considerable influence" nor which decisions of an entity are sufficient to rise to the level of "strategic decision-making". It thereby expands, without clarifying, what is already a vague test in the third criterion. The FAQs do not offer any guidance on the similarly vague second criterion.

Key takeaways

However well intentioned, GAC's new sanctions guidance further complicates compliance efforts for Canadian businesses and Canadians working in foreign companies by signaling that the risks are more expansive than they may have thought. Because the guidance lacks the force of law, real clarity is likely to come only when the interpretation of Canada's sanctions laws receives meaningful consideration by Canadian courts. Due to the scarcity of prosecutions under those laws, that has yet to happen.