

Legal update

Between a rock and a hard place: Canadian companies face increased risks following US decision to implement Title III right of action

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WTO and international trade

On April 17, the Trump administration announced the Title III provisions of the *Helms-Burton Act*, which permit US nationals to bring a damages claim against any person that “traffics” in property nationalized by the Cuban government, will take effect on May 2, 2019. Enforcement of Title IV visa restrictions under the *Helms-Burton Act* will also be stepped up.

The decision generated immediate criticism from the international community, with a number of countries, including Canada and the European Union, vowing to protect the interests of companies doing business in Cuba.¹

Title III has been suspended by presidential order since the *Helms-Burton Act* was enacted in 1996. However, as of May 2, many individuals and multi-national corporations with lawful business or investment activities in Cuba will potentially face significant legal liability in the US. Corporations active in Cuba with no US activities will still have exposure if they operate in a country that will enforce a Title III judgment.

The announcement reflects a retrenchment in US policy toward Cuba, which had recently been progressively normalized, and brings into focus the difficult legal landscape for Canadian companies created by the legislative square off between Canada and the US over Cuba.

Background

Since the 1960s, the US has maintained an economic embargo against Cuba. The embargo has primarily been enforced through the 1963 *Cuban Assets Control Regulations* (CACRs), which generally prohibit individuals subject to US jurisdiction from trading, doing business with, and travelling to Cuba, with limited exceptions. Under the Obama administration, restrictions in the CACRs had been eased. However, in June 2017 President Trump introduced a new “Cuba Policy,”² directing the re-imposition of restrictions. The recent announcement regarding Title III and Title IV of the *Helms-Burton Act* reflects the further implementation of President Trump’s Cuba Policy.

The *Helms-Burton Act*

Title III of the *Helms-Burton Act* permits US nationals with claims to property “confiscated” by the Cuban government on or after January 1, 1959, to bring an action for damages, including treble damages, against any person that “traffics” in such property.

Trafficking is broadly defined to include selling, transferring, distributing, dispensing, brokering, managing, disposing of, purchasing, leasing, receiving, possessing, controlling, using or otherwise holding or acquiring an interest in confiscated property without the authorization of the US national who holds a claim to the property. Trafficking also captures engagement in commercial activity using or otherwise benefiting from confiscated property without authorization.

The terms “confiscated” and “property” are also broadly defined and refer to virtually all real and personal property nationalized, expropriated, seized or, in the case of debts, repudiated, by the Cuban government. Cuba nationalized all foreign-owned businesses and property without compensation, including utility companies, mining operations, hotels, sugar mills and tobacco and other agricultural operations. Virtually any individual or corporation with a commercial connection to such property could be subject to a Title III action.

To date, the US government has certified 5,913 confiscated property claims worth an estimated US\$8 billion, including interest.³ This figure is likely much higher, considering the existence of uncertified claims and the availability of treble damages under the *Act*.

Title IV of the *Helms-Burton Act* restricts the entry into the US of individuals who (1) have confiscated, or have directed or overseen the confiscation of, property; (2) trafficked in confiscated property; (3) are a corporate officer, principal, or shareholder with a controlling interest of an entity that has been involved in confiscating property or trafficking in confiscated property; or (4) are a spouse, minor child, or agent of a such an individual.

Title IV has been enforced in the past against several corporations’ executives and their families, including executives of Sherritt International Corp., a Canadian mining company. STET, an Italian communications firm, averted Title IV sanctions by agreeing to pay a US firm US\$25 million to use the property in issue – the Cuban telephone system – for 10 years.

Canada’s blocking legislation

Canada originally enacted the *Foreign Extraterritorial Measures Act* (FEMA) in 1985 in an effort to protect Canadian defendants against significant damage awards and intrusive discovery procedures associated with US antitrust litigation.⁴

FEMA was amended in 1997 in response to the introduction of the *Helms-Burton Act*, and Title III in particular. As a result of these amendments, judgments given under the *Helms-Burton Act* may not be recognized or enforced in Canada and any Canadian citizen, resident or corporation the subject of such a judgment may, upon obtaining an order from the Attorney General of Canada, seek to recover from the judgment creditor in a Canadian proceeding any sum ordered against it, along with all expenses incurred in defending the proceedings in which judgment was awarded and any loss or damage suffered by reason of the enforcement of the judgment.

Moreover, a Title III defendant covered by FEMA need not wait until the end of a Title III proceeding before seeking to recoup the costs of defending those proceedings; an action may be commenced, with the Attorney General of Canada’s consent, at any time during the Title III proceeding to recoup all of the costs of defending the proceedings, including extra-judicial costs.

The amendments to FEMA do not, however, provide any recourse for Canadians who are removed from or denied entry to the US under Title IV of the *Helms-Burton Act*.

In addition, the *Foreign Extraterritorial Measures (United States) Order, 1992* (US Blocking Order) issued under FEMA, imposes positive compliance and reporting obligations on Canadian corporations, along with their directors and officers (and in certain circumstances their managers and employees), designed to counter the extraterritorial application of US anti-Cuba laws.

Specifically, Canadian corporations and their directors, officers, managers and certain employees are prohibited from complying with any US extraterritorial measure relating to trade and commerce with Cuba, or any directive, instruction, intimation of policy or other communication relating to such a measure from a person in a position to direct or influence

the policies of the Canadian corporation in Canada. In addition, Canadian corporations and their directors and officers are also required to report any such directives, instructions, intimations of policy or communications to the Attorney General of Canada.

The US Blocking Order applies expressly to the CACRs and any other legislation with a similar purpose that purports to prevent, impede or reduce trade or commerce between Canada and Cuba (such as the *Helms-Burton Act*).

Although there have been no reported prosecutions under FEMA, the penalties for non-compliance are significant: corporations face fines of up to \$1.5 million, and individuals face fines of up to \$150,000 and/or imprisonment for up to five years.

FEMA's compliance and reporting provisions put many Canadian corporations with US parents or affiliates in a difficult position, where compliance with Canadian law could result in non-compliance with US law (attracting potentially significant civil and criminal penalties). While Canada has recently reaffirmed its commitment to "[defending] the interests of Canadians conducting legitimate trade and investment with Cuba,"⁵ it has not taken any further steps to address the business reality faced by many corporations and their executives that compliance with one regime at the expense of compliance with the other entails steep business and personal risks with uncertain outcomes.

Setting aside the possibility of recovering amounts under FEMA associated with Title III judgments, Canadian corporations may be enticed to settle any Title III action or Title IV proceedings against them in order to obtain business certainty, preserve shareholder value, prevent business disruption, minimize reputational damage, and/or prevent protracted proceedings on both sides of the border, among other reasons. However, in certain circumstances a settlement could potentially expose the corporation and its officers or directors to liability under FEMA as evidence of compliance with a US extraterritorial measure.

Conclusion

By requiring non-compliance with US anti-Cuba legislation, the FEMA regime effectively shifts the financial and legal risk of Canada's diplomatic relationship with Cuba onto Canadian businesses. The expiry of the Title III suspension substantially increases the risk to multi-national corporations operating in Cuba of a Title III action and consequent judgment. It also highlights the inadequacy of FEMA as a tool to safeguard Canadian businesses and their executives with legitimate operations in Cuba.

Absent additional measures from the Canadian government and the international community, the Title III announcement is likely to have a further chilling effect on the investment and business activities of Canadian and other foreign companies in Cuba.

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Footnotes

- ¹ Canada, "Joint Statement by EU High Representative/Vice President Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland and EU Commissioner for Trade Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act" (April 17, 2019), available online: <https://www.canada.ca/en/global-affairs/news/2019/04/joint-statement-by-eu-high-representativevice-president-federica-mogherini-minister-of-foreign-affairs-of-canada-chrystia-freeland-and-eu-commissio.html>
- ² "Strengthening the Policy of the United States towards Cuba," National Security Presidential Memorandum, dated June 16, 2017, 82 FR 48875, available online: <https://www.federalregister.gov/documents/2017/10/20/2017-22928/strengthening-the-policy-of-the-united-states-toward-cuba>
- ³ See <https://www.justice.gov/fcsc/claims-against-cuba> and <https://www.cbc.ca/news/politics/us-lawsuits-properties-cuba-1.5101479>
- ⁴ Peter Glossop, "Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba" (Spring 1998) 32:1 International Lawyer 93 at 96.

⁵ Canada, "Statement: Government of Canada will defend interests of Canadians doing business in Cuba" (April 17, 2019), available one: <https://www.canada.ca/en/global-affairs/news/2019/04/government-of-canada-will-defend-interests-of-canadians-doing-business-in-cuba.html>

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