

## NewsRoom

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### Canada wants to give a Russian plane it seized to Ukraine. Is that legal?

Amanda Coletta

MISSISSAUGA, Ontario — Three days after Russia invaded Ukraine last year, an Antonov-124 jet landed at Toronto Pearson International Airport here to deliver 77 tons of coronavirus testing kits.

It would be its last trip for some time.

On Feb. 27, 2022, before the AN-124's scheduled departure, Canada barred Russian aircraft from entering or exiting its airspace — stranding the plane at the country's busiest air hub. The government eventually imposed sanctions on its operator, Russia's Volga-Dnepr Airlines.

Visible from a highway, the aircraft — one of the world's largest cargo planes, with a Russian flag painted on its tail fin and a blue stripe running the length of its 226-foot white body — has been a curiosity here, drawing attention for racking up a sky-high airport parking ticket.

Now, it's caught in a larger fight over new legislation through which Canada has claimed authority to seize the frozen assets of entities under sanctions, even if they're not linked to any crime, and use them to the benefit of foreign states "adversely affected" by breaches of international security.

In June, the government ordered the seizure of the plane. Authorities want to work with Kyiv to use it "to compensate victims of human rights abuses, restore international peace and security or rebuild Ukraine."

The new powers are the first of their kind in the Group of Seven industrialized nations, and the government has admitted that the "new regime is untested and will likely face legal challenges." The Kremlin called the seizure "cynical and shameless theft."

As the West looks to use frozen Russian assets to help Kyiv defeat the invaders and rebuild Ukraine, the dispute is being watched closely by allies and foes alike.

"Canada is absolutely pushing the envelope with respect to sanctions law," said William Pellerin, a partner in the international trade group at the business law firm McMillan in Ottawa. "Other jurisdictions have considered doing the same thing and concluded that they could not do so."

John W. Boscarion, head of the international trade group at McCarthy Tétrault in Toronto, said Canada, as a middle power, is "punching above its weight in terms of the scope of these measures." Its allies, he said, "are watching very carefully to see how this proceeds."

The World Bank estimated in March that Ukraine's reconstruction could cost at least \$411 billion. Kyiv's allies in the West want Russia to foot that bill.

U.S. Treasury Secretary Janet L. Yellen last month signaled support for a European proposal to tax the wartime earnings of the \$300 billion in frozen Russian central bank reserves held in the West and transfer the proceeds to Ukraine.

"Countries are facing some of the same issues they faced after World War II," said John E. Smith, a former director of the U.S. Treasury Department's Office of Foreign Assets Control. "How do you take assets that belong to aggressor nations to help rebuild nations that were destroyed or damaged? There are no easy answers to these questions under our legal systems."

U.S. law allows the president to seize and vest some foreign assets when the country is "engaged in armed hostilities or has been attacked by a foreign country or foreign nationals."

The government may also seize and forfeit assets if a court determines there is probable cause that the assets are connected to crime — they're the proceeds of fraud, for example, or sanctions violations or money laundering.

Congress last year approved and President Biden signed legislation that allows the Justice Department in a narrow set of circumstances to direct the proceeds of certain forfeited assets to the State Department to benefit Ukraine.

Some Justice officials have said an expansion of these powers would be helpful.

Attorney General Merrick Garland in February authorized the transfer of \$5.4 million seized and forfeited from the accounts of a Russian oligarch charged with violating U.S. sanctions to the State Department to "support the people of Ukraine."

Canada's new powers, an expansion of its existing sanctions law, are far more extensive.

They allow the government to seize frozen assets that are situated in Canada and are owned, held or controlled directly or indirectly by an entity on its sanctions list. There's no requirement that the assets have a link to a crime.

The government may then petition a court for a forfeiture order, dispose of the property and use the proceeds to rebuild a foreign state or compensate its people.

"We think it's really important to extend our legal authorities because it is going to be really, really important to find the money to rebuild Ukraine," Finance Minister Chrystia Freeland said last year. "I can think of no more appropriate source of that funding than confiscated Russian assets."

Freeland, who has Ukrainian roots, was invited to an April meeting of European finance ministers to explain Canada's approach, according to a Western official who spoke on the condition of anonymity to discuss private meetings. U.K. lawmakers have debated whether to copy it.

Analysts say the new regime faces likely challenges on several grounds, including over whether the expropriation of private property is acceptable under international legal norms, violates constitutional protections against unreasonable search and seizure or breaches bilateral treaties.

But some believe it can survive those challenges. In a June working paper, Dalhousie University law professor Robert J. Currie, World Refugee & Migration Council President Fen Osler Hampson and former Canadian justice minister Allan Rock wrote that Canada has "compelling and persuasive arguments on its side, along with the 'spirit of the law' since the measures in question align entirely with the fundamental purpose of international law."

"Canada's measures may be creative," they wrote, "but they are by no means illegal."

The government has announced the use of the new powers in two cases but has given few updates.

In December, authorities ordered the restraint of \$26 million in a Canadian bank account from Granite Capital Holdings, a company that it says is owned by Russian oligarch Roman Abramovich, upon whom Canada imposed sanctions last year.

Asked by a parliamentary committee about the case in June, Alexandre Lévêque, an assistant deputy minister at Global Affairs Canada, said it's "a complex undertaking" because the law is new and officials are prioritizing maximizing the "chances of successes" over speed.

"Russian oligarchs are quite adept at hiding their assets," Lévêque said. "In this case, a number of international jurisdictions are requesting access to the account. International law and the laws of the respective countries come into play."

Volga-Dnepr said in August it had notified Canadian authorities that it wished to settle the dispute under a provision of a 1989 investment treaty between the two countries that deals with disputes arising from expropriation.

"If the dispute is not resolved within six months ... Volga-Dnepr will formally initiate arbitration proceedings," the company said in a statement. Volga-Dnepr wants its airplane back and "remains open to negotiations."

Volga-Dnepr did not respond to a request for comment. If the government manages to win the plane's forfeiture, Transport Canada has said, it will require maintenance before it can take off.

Global Affairs Canada did not respond to questions about the status of the two cases but defended the regime and said it has several "safeguards."

"Numerous procedural fairness steps for the owner and any affected third parties are included in the asset seizure and forfeiture regime and associated court proceedings," spokesman Jean-Pierre J. Godbout said in a statement to The Washington Post. "Canada believes in the rule of law and will follow court decisions."

The Canadian approach has raised broader questions about the purpose of sanctions.

Sanctions are "like a carrot," said Jessica B. Horwitz, a partner at Bennett Jones in Toronto. "If you stop engaging in the bad behavior, the assets will be unfrozen. ... The problem, potentially, with forfeiture is that if those assets are forfeited, the incentive to change behavior doesn't exist anymore."

Smith, the former Office of Foreign Assets Control director, said countries are striving to balance "a bunch of relatively bad options."

"You're balancing reducing your bargaining chip to change behavior against the need to rebuild Ukraine and really hold those responsible for the damage to Ukraine to account," he said.

Canada has increasingly turned to sanctions as a foreign policy tool.

"There's a collective holding of breath to see how this plays out," said Clifford Sosnow, the chair of the international trade group at Fasken in Toronto. "There's a lot of fog associated with the regime, and because there's fog, there's always the potential for harmful unintended consequences."

---- **Index References** ----

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