



FOREIGN EXTRATERRITORIAL MEASURES ACT (FEMA)

Update on the *Helms-Burton Act* and Canadians doing business in Cuba

As of May 2, 2019, the United States government has fully implemented *Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act* of 1996, commonly known as the *Helms-Burton Act*. This decision could have implications for Canadian companies active in the Cuban market.

The *Helms-Burton Act* is a United States federal law that contains provisions that would prevent foreign countries from engaging in international trade with Cuba by subjecting foreign nationals to travel restrictions and financial liabilities in the United States.

Title III of the Act enables United States nationals to sue for damages any person who “traffics” in property that was expropriated by the Cuban government on or after January 1, 1959, and in relation to which the U.S. nationals have a claim. From 1996 until May 2, 2019, successive United States administrations continuously suspended the application of *Title III*.

Canadian companies and investors in Cuba are encouraged to familiarize themselves with the *Helms-Burton Act* and conduct their own due diligence regarding legal risks, including seeking advice from their legal counsel to assess their particular situation, as appropriate.

Impacted Canadian companies and investors in Cuba are encouraged to contact the Government of Canada should a proceeding under the *Helms-Burton Act* be instituted against them.

About Canada's Foreign Extraterritorial Measures Act (FEMA)

Canada has measures in place under its [Foreign Extraterritorial Measures Act](#) (FEMA) to help protect Canadians and Canadian businesses from extraterritorial application of foreign laws. FEMA protects Canadian sovereignty, including Canada's international trading and commercial interests, by allowing the Canadian government to respond to unacceptable extraterritorial assertions of foreign jurisdiction.

As stated in FEMA, no judgment issued under *Title III* of the *Helms-Burton Act* shall be recognized or enforced in any manner in Canada. FEMA also allows Canadians to use Canadian courts to sue the person who has instituted an action under the *Helms-Burton Act*, even while proceedings are ongoing in the United States. This will allow Canadians to claim any amounts that have been obtained against them, including legal expenses, and losses or damages incurred.

Key provisions of FEMA

- The Attorney General of Canada can make an order prohibiting or restricting the disclosure of records or information in the context of the enforcement of the *Helms-Burton Act* (subsection 3 (1)).
- Any judgment under the *Helms-Burton Act* shall not be recognized or enforceable in any manner in Canada (section 7.1).
- On application, the Attorney General of Canada can make an order authorizing recovery proceedings once a judgment has been rendered against a Canadian party under the *Helms-Burton Act* (section 8.1).
- While proceedings are ongoing, Canadians, with the consent of the Attorney General of Canada, can sue the American plaintiff in Canada to recover all expenses incurred by the Canadian in defending a United States claim, including all solicitor-client costs or judicial and extrajudicial costs (subsection 9 (1.1)).

Process to recover expenses before a final U.S. judgment

Under FEMA (subsection 9 (1.1)), Canadians facing a lawsuit under the *Helms-Burton Act Title III* may be able to recover all expenses incurred by the Canadian in defending a United States claim, including all solicitor-client costs or judicial and extrajudicial costs. To do so, consent must first be obtained from the Attorney General to institute cost-recovery proceedings in a Canadian court.

Applications for consent must be made in writing to the Attorney General of Canada and should include the following:

1. A copy of the originating or other document stating that proceedings have begun.
2. A statutory declaration affirming:
 - The name and address of the applicant
 - That the applicant is a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province, or a person carrying on business in Canada
 - The name, title and address of the agent, where applicable
 - The name of the person(s) who instituted *Title III* proceedings against the applicant and against whom recovery proceedings are to be instituted
 - That no final judgment has been given against the applicant in the *Title III* proceedings

Process to recover damages and expenses after a final U.S. judgment

Pursuant to FEMA (section 8.1), upon final judgment under the *Helms-Burton Act*, Canadians can apply for an order from the Attorney General of Canada authorizing recovery proceedings for any amounts obtained from a Canadian party as well as expenses, losses or damages suffered or incurred.

Applications for an order must be made in writing to the Attorney General of Canada and should include the following:

1. A certified copy of the judgment.
2. A statutory declaration affirming:
 - The name and address of the applicant
 - That the applicant is a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province, or a person carrying on business in Canada
 - The name, title and address of the agent, where applicable
 - The name of the person(s) who obtained a *Helms-Burton Act Title III* judgment against the applicant and against whom recovery proceedings are to be instituted
 - The amounts obtained from the applicant under the judgment, and a list of expenses incurred, and losses or damages suffered that the applicant wishes to recover in Canada

Applications for orders or consent of the Attorney General of Canada can be made in writing to:

Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

To inform the Government of Canada of proceedings instituted under the *Helms-Burton Act*:

Email: mcu@justice.gc.ca

Mailing Address:
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
Canada K1A 0H8

For general questions regarding FEMA:

Email: webadmin@justice.gc.ca

Telephone: **613-957-4222**
TDD/TTY: **613-992-4556**

FAX: **613-954-0811**

Mailing Address:
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
Canada K1A 0H8