

FEDERAL COURT

/lms

B E T W E E N:

ANDRIY VOLODYMYROVYCH PORTNOV

Applicant

- and -

MINISTER OF FOREIGN AFFAIRS

Respondent

HELD BEFORE: Justice Michael D. Manson
HELD ON: December 4, 2018

A P P E A R A N C E S:

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-- for the Applicant

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-- for the Respondent

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1 OPENING REMARKS:

2 THE CLERK: This special sitting of the
3 Federal Court in Toronto is now open. The Honourable
4 Justice Manson is presiding. The court calls
5 registry number T-1689-17 between Andriy
6 Volodymyrovych versus The Minister of Foreign
7 Affairs. Geoff R. Hall, John W. Boscarriol and Robert
8 H. Glasgow are appearing on behalf of the applicant,
9 and Roger Flaim is appearing on behalf of the
10 respondent.

11 JUSTICE MANSON: Good morning, Counsel.

12 MR. HALL: Good morning.

13 JUSTICE MANSON: I have read the file,
14 the challenge to the minister's stay order to remove
15 the applicant's name from the schedule. The question
16 of vires. I am convinced that the regs were
17 intra vires at the time of promulgation, so that is
18 off the table, and I will hear your arguments on
19 whatever remains.
20

21 SUBMISSIONS BY MR. HALL:

22 MR. HALL: Thank you, My Lord. My Lord,
23 where a person is wrongfully subjected to crippling
24 international sanctions on the basis of information
25 that is unreliable and incorrect, or has been shown

1 to be such, it cannot possibly be that this court is
2 powerless to grant a remedy, unless it turns out that
3 the person is not a politically exposed foreign
4 person, which seems to be the position that the
5 minister is asserting before you.

6 In terms of my submissions, I'm going to
7 have two broad topics. First, I'm going to start
8 with what I call two starting points: one legal and
9 one factual. And from that, those two starting
10 points, I'm going to move to the various questions
11 that Your Lordship has already identified. And I
12 hear you in terms of your impression on the nature of
13 the regulations at the time of promulgation. It is
14 certainly going to be my argument that they have
15 become ultra vires, that they...that a regulation can
16 become ultra vires. But that does flow from my two
17 starting points, so let me start with that.

18 In terms of the two starting points, one is
19 legal, as I said, and one is factual. In terms of
20 the legal point, I would like to start with the
21 statute, if I may. You should have the applicant's
22 brief of authorities and the statute is at tab 5.

23 JUSTICE MANSON: I have it.

24 MR. HALL: Thank you, My Lord. And I
25 would like to begin with section 4(1), and I know

1 Your Lordship will have reviewed this, but it's an
2 important basis for my argument. If a foreign state,
3 in writing, asserts to the Government of Canada that
4 a person has misappropriated property of the foreign
5 state or acquired property inappropriately by virtue
6 of their office, then the Governor in Council may
7 make orders or regulations. And then (2) has certain
8 other preconditions to the making of an order or a
9 regulation.

10 But I want to focus on the words "that a
11 person has misappropriated property of the foreign
12 state or acquired property inappropriately by virtue
13 of their office". That language requires that the
14 foreign state assert in writing that misappropriation
15 has actually occurred, not that it is being
16 investigated, not that it is suspected, but that it
17 has occurred.

18 And that is a statutory prerequisite for a
19 regulation to be promulgated, or indeed in our case,
20 to continue to be in place. The prerequisite cannot
21 be ignored. And the minister, I think, will urge you
22 to focus more on (2), which sets some parameters on
23 when an order may be made. But I ask you, with
24 respect, to keep your eye on the precondition, the
25 words that a foreign state has asserted in writing

1 that there has been a misappropriation or
2 inappropriate acquisition of property.

3 With that starting point, I turn to the
4 factual starting point for my analysis, My Lord, the
5 evidence. Now, we have evidence, as you will have
6 seen from your review of the file, from the minister,
7 and that evidence is to the effect that there has
8 apparently been correspondence from Ukraine, but
9 importantly, My Lord, that correspondence has not
10 been disclosed.

11 And it's interesting, we made a request, a
12 317 request for production of the record. We haven't
13 seen it. We've got affidavit evidence from
14 government officials. We do not have the
15 correspondence that has apparently been sent from
16 Ukraine. But let's take a look at the way the
17 evidence is described to us, the evidence that we do
18 not have but which has been described to us. If we
19 look at Mr. Rex's affidavit...this is the minister's
20 first affidavit...and there was a second one filed
21 with you yesterday...

22 JUSTICE MANSON: I have it.

23 MR. HALL: Okay. All right. I'm content
24 to have that filed, but if we look at Mr. Rex's
25 affidavit...and I will go to Ms. Grant's affidavit in

1 a moment because it's to the same effect...paragraph
2 12 asserts that:

3 "...On March 15, 2016, March 6, 2017, and
4 January 11, 2018, Global Affairs Canada
5 received correspondence from the Ukrainian
6 Embassy in Canada. Based on the content of
7 this correspondence [this is the language I
8 want to emphasize] the department was
9 satisfied that there was still an ongoing
10 investigation in regard to the applicant for
11 his suspected role in acquiring state
12 property through the abuse of office..."

13 And I emphasize the words "investigation" and
14 "suspected". Ms. Grant's affidavit filed yesterday
15 is to the same effect. Paragraph 2, she deposes at
16 the end of paragraph 2 that the correspondence that
17 was apparently received on July 10th and also...yes,
18 July 10th...continued to satisfy the department that
19 an investigation remained underway.

20 My Lord, the fact that the government has
21 not shown this correspondence to the court, has not
22 alleged that there is any reason not to show the
23 correspondence to the court, and the way that the
24 correspondence is described in the two affidavits
25 should draw this court to the conclusion that there

1 is not, at the present time, the certification
2 required by section 4(1) that Ukraine asserts that
3 Mr. Portnov has misappropriated or has acquired
4 property inappropriately. The highest that we seem
5 to have is an assertion that he is under
6 investigation, that there is some suspicion.

7 The failure of the government to produce the
8 correspondence, My Lord, is very telling, should draw
9 this court to an adverse inference that the
10 correspondence certainly goes no further than it is
11 described as going, and further, should lead to the
12 further inference that it would not support the
13 minister's position, one would think, that if this
14 correspondence were so helpful to the minister's
15 position, that we would all be seeing it, perhaps in
16 a redacted form, perhaps under some confidentiality
17 restrictions, but we would see them, see the
18 correspondence, not just be faced with a complete
19 vacuum.

20 But even without seeing it, based on the
21 description, there is a disconnect between section
22 4(1) and what the correspondence is described as
23 saying. So we have the minister's evidence on the
24 one hand, and, at the same time, we have from Mr.
25 Portnov significant evidence that his original naming

1 to the list was inappropriate. And I emphasize that
2 the evidence of Mr. Portnov is unchallenged in
3 cross-examination. He was not cross-examined on his
4 evidence. He was not challenged on any of his
5 statements. And the Government's evidence really
6 doesn't squarely take on what he says, instead it
7 says, "Well, Ukraine is telling us there is an
8 investigation, so that's enough."

9 Let's look at Mr. Portnov's evidence. In
10 the application record, tab 1, I know you have read
11 this but I'm going to emphasize just the key portions
12 of my argument. Paragraph 9 of Mr. Portnov's
13 affidavit, at the very...

14 JUSTICE MANSON: You're at tab 2?

15 MR. HALL: Tab 2, yes, sorry. I think I
16 said tab 1. Tab 2, you're exactly right, My Lord.
17 Tab 2, paragraph 9, page 22 of the record.

18 JUSTICE MANSON: All right.

19 MR. HALL: At the very bottom of that
20 page, the sentence that begins "As explained below"
21 on paragraph 9:

22 "...As explained below, Mr. Portnov states
23 clearly and unequivocally, 'This
24 information'..."

25 Referring to the information originally provided by

1 the prosecutor general of Ukraine on March 3rd, 2014,
2 to start the ball rolling on this process.

3 "...He clearly and unequivocally says under
4 oath, 'This information was unreliable and
5 incorrect.'..."

6 He is not challenged on that. He is not
7 cross-examined on that. And, in addition to his
8 unchallenged, unequivocal sort of statement that the
9 information is reliable and incorrect, we have
10 findings of multiple courts, foreign courts, and
11 multiple foreign governments that Mr. Portnov has not
12 done what section 4(1) says he needs to have done to
13 be sanctioned by Canada. And I won't take you
14 through all of the various findings. I know you will
15 have reviewed them, but just to list them, and I will
16 take you to one or two of the key ones, the EU
17 withdrew restrictive measures on March 5th, 2015.

18 JUSTICE MANSON: March 5th or 6th?

19 MR. HALL: I have the 5th, but I...

20 JUSTICE MANSON: I may have the wrong
21 date. The court on October 26th?

22 MR. HALL: Correct. The court is
23 important. Switzerland withdrew its restrictive
24 measures also March 2015. I think the 13th is the
25 date I have. Norway withdrew September 7th, 2015.

1 We also have a judgment of a Belgian court, March
2 8th, 2017. And importantly, My Lord, for the
3 question of vires, we have multiple certifications
4 from Ukrainian authorities that there isn't even an
5 investigation underway in Ukraine. And I'm not going
6 to, again, take you to all of those, but they're in
7 the record in Mr. Portnov's affidavit, Exhibits S
8 through BB, with various different attestations, as
9 you will have seen, from various different branches
10 of the Ukrainian government asserting that there is
11 nothing amiss.

12 The important one from Ukraine that I do
13 want to draw your attention specifically to is at
14 tab UU, which is the letter to the prime minister of
15 Canada, the Office of the Prime Minister of Canada,
16 but importantly, this is from the prosecutor
17 general's office of Ukraine, the very office that
18 apparently levelled the allegations in the first
19 place.

20 And under directive of a Ukrainian court,
21 that office, which in 2014 apparently said something
22 to Canada to result in the sanctions, says
23 unequivocally, and I'm reading from the second
24 paragraph of the English...well, I guess the letter
25 was in English originally, page 249 of the record:

1 "...The said court decision established that
2 the following information provided in the
3 letter of prosecutor general's office of
4 Ukraine, dated March 3, 2014, signed by
5 O. Makhnitsky, the acting prosecutor
6 general, to Stephen Harper, the prime
7 minister of Canada, was unreliable and
8 violating the non-property rights of
9 Mr. Portnov..."

10 So we have, under direction of a Ukrainian court,
11 which, of course, is owed comity and respect by this
12 court, on direction of a Ukrainian court, the very
13 office that started everything rolling in the first
14 place has now said to Canada that the information
15 originally used was unreliable and violated the
16 non-property rights of Mr. Portnov.

17 That package as a whole should lead this
18 court to the finding of fact that the conditions...
19 whether or not they existed in the first place, the
20 conditions required by section 4(1) underlying the
21 order are no longer in place. May never have been in
22 place in the first place, but, as Your Lordship
23 points out, we don't need to go there. We just need
24 to determine the question of vires now. There is,
25 with respect, no other finding that is available in

1 this record, other than that the conditions of
2 section 4(1) are not currently present.

3 So those are my starting points, factual and
4 legal. Let me turn then directly to the vires
5 argument, which I know you honed right in on. I'm
6 not sure whether it matters much. I'm always...I
7 always feel, when I'm in this court, I have a debate
8 over standard of review, and I'm not sure it always
9 accomplishes all that much. But...

10 JUSTICE MANSON: I can tell you that I
11 looked at [inaudible] I don't think it really is
12 applicable to the facts here, but I actually agree
13 with you; whether it's reasonableness or correctness
14 in this matter...

15 MR. HALL: Yes.

16 JUSTICE MANSON: ...isn't going to affect
17 the decision at the end of the day.

18 MR. HALL: Yes, I think that is right,
19 so let me not belabour it. Just so that you've got
20 our position clearly, Mr. Portnov's position is that
21 the standard of review is correctness in the sense
22 that this is a true question of vires. And I'm quite
23 aware that the courts are quick to warn that true
24 questions of vires are rare, and all that sort of
25 thing, but this is one of those rare circumstances

1 where the issue is, does the regulation fit within
2 the statutory authority?

3 JUSTICE MANSON: And I'm inclined to
4 agree with you, but, as I say, I don't think...

5 MR. HALL: I don't think...

6 JUSTICE MANSON: ...the decision is going
7 to turn on it.

8 MR. HALL: Right, exactly. So you have
9 my point. And West Fraser, which is the authority
10 dealt with by the minister, I say, is
11 distinguishable, because the issue there was
12 reasonableness of the regulation, but I think you
13 already have that point, My Lord.

14 So, on that basis, based on the point that I
15 have...the evidence that I have gone through, the
16 simple fact is that the statutory prerequisite for an
17 order against Mr. Portnov is not present at this
18 time, may not have been present at the time the
19 regulation was promulgated, but we don't need to
20 worry about that.

21 And the minister raises the question...I'm
22 going to hand you one authority, just one new one,
23 and I gave it to Mr. Flaim yesterday, of course. The
24 minister raises the question of whether something can
25 become ultra vires if it originally was intra vires.

1 In Mr. Portnov's submission, it clearly can be the
2 case that that can happen, and the best authority for
3 that is one of the Charkaoui decisions, not the one
4 that went to the Supreme Court of Canada, but one
5 that went before Justice Tremblay-Lamer.

6 I apologize that I didn't anticipate this
7 when we wrote the memorandum of fact and law, but
8 just to go through quickly, this case nicely
9 illustrates the proposition that something that
10 is...was at one time intra vires can become ultra
11 vires if the preconditions are no longer present, a
12 position which, frankly, is intuitively
13 straightforward but is well-established here.

14 And let me just go through the key portions
15 of the case that I rely upon. Charkaoui, as you will
16 recall, was someone who was a permanent resident but
17 the government was trying to have him held to be
18 inadmissible on grounds of national security. And
19 the proceedings before Justice Tremblay-Lamer were in
20 connection with the...it was an attack on the
21 certificate that he was inadmissible.

22 And I've sidebarred the provision, the
23 sections in the case which are most pertinent for the
24 present circumstances. As Your Lordship is probably
25 much more familiar than I am, the procedure involves

1 a certification from the minister, or two ministers
2 in this case, which then can be tested, although
3 because of the national security interest, special
4 advocates had to be involved.

5 And what happened in this case was there was
6 a challenge initially to whether the information that
7 was provided should be kept from Mr. Charkaoui. And
8 paragraph 14 indicates that Justice Tremblay-Lamer
9 ordered disclosure of certain of the evidence on the
10 basis that it wouldn't be injurious to national
11 security or safety of the person, and she issued a
12 number of orders requiring disclosure.

13 The ministers responded to that by
14 disagreeing and by withdrawing the evidence. So,
15 instead of complying with the disclosure order, they
16 withdrew the evidence, which they were entitled to
17 do. There is no issue about that. But they withdrew
18 the evidence, and that is paragraph 15.

19 So Justice Tremblay-Lamer goes through the
20 question of whether the certificate, which was valid
21 at the time that it was issued because it was backed
22 by the certificate of two ministers, was,
23 nonetheless, still valid and reasonable. Paragraph
24 25, she writes:

25 "...Now that this information has been

1 withdrawn, the ministers admit that the
2 evidence is no longer sufficient to support
3 the certificate..."

4 And in paragraph 28, she holds that:

5 "...Since the ministers' admission that the
6 remaining evidence is no longer sufficient
7 to justify it, the certificate has been
8 ultra vires the ministers; it is void..."

9 And paragraph 31 makes the point even more clearly,
10 picking out the last sentence:

11 "...This raises the question about remedies
12 appropriate in view of the inaction of
13 the ministers, who failed to revoke the
14 certificate of Mr. Charkaoui, even
15 though it became ultra vires due to its
16 inconsistency with section 77 of the IRPA
17 when the evidence on which it is based was
18 withdrawn..."

19 So this case nicely illustrates a proposition which,
20 in my respectful submission, is fairly self-evident
21 in any event, that if something is intra vires at one
22 point in time because certain statutory preconditions
23 are met, and those statutory preconditions disappear,
24 then what was intra vires becomes ultra vires. And
25 that is what Mr. Portnov has happened in this case.

1 Mr. Portnov may not concede that it was intra vires
2 in the first place, but, in light of where you
3 started, and I don't need it in any event...

4 JUSTICE MANSON: Well, I'm actually
5 questioning myself on that, so I understand that from
6 the outset, as well as following.

7 MR. HALL: Right, exactly. So that is
8 helpful. My arguments apply equally from the outset
9 and it's perhaps like the standard of review
10 question, that, you know, it may not make much
11 difference one way or the other, because all I need
12 is now to get there. And another way of thinking
13 about this, and this is developed to some extent in
14 our memorandum of fact and law, is that the
15 imposition of restrictive measures by Canada requires
16 a decision by Canada. It's triggered by a request
17 from a foreign state, but it's Canada, not Ukraine,
18 that is the decision-maker.

19 And it is evident, My Lord, from the
20 evidence that the minister has simply relied on the
21 word of Ukraine, the word of Ukraine that there is an
22 investigation, and there is no evidence that the
23 minister has herself, or her officers, of course,
24 assessed the accuracy of the allegations which
25 Mr. Portnov has challenged and which multiple courts

1 have found to be inaccurate.

2 What we seem to have is the government
3 coming to this court and saying, "Well, we asked
4 Ukraine. They said there is still an investigation
5 ongoing. That's it. If we've got it wrong and
6 you're not a PEPF, a politically exposed foreign
7 person, then you can go to court and challenge that.
8 But, otherwise, our hands are tied, we can't do
9 anything." That is not how the statute works.

10 The minister needs to make an independent
11 determination based on the evidence, the clear
12 certification that there has been misappropriation in
13 the foreign state. And just to address one further
14 point, and I'm actually getting close to the end of
15 what I wanted to say...I have tried to be concise,
16 My Lord...is that the minister, with respect,
17 mischaracterizes what Mr. Portnov is seeking.

18 And part of the pitch by the minister is
19 that we are seeking mandamus, an order in the nature
20 of a mandamus. We are doing nothing of the sort.
21 The word "mandamus" doesn't appear in our memorandum
22 of fact and law. Our attack is narrowly focused and
23 a surgical strike, if I can put it that way, on the
24 vires now or at the beginning, the vires of the
25 regulation. And the remedy that is crafted to remedy

1 that, if you find that the regulation is in fact
2 ultra vires, could take the form of a declaration by
3 this court that the regulation is ultra vires to the
4 extent that it applies to Mr. Portnov.

5 That is the probably the easiest and most
6 direct way of doing it. It could also take the form
7 of an order directing the minister to recommend an
8 amendment to the Governor in Council. That achieves
9 the same thing; it's a question of remedy, not a
10 question of mandamus or a different right that we are
11 claiming, and part of it may depend, if Your Lordship
12 is going to grant a remedy, on your views on how this
13 court should interact with a regulation and the
14 Governor in Council.

15 And so, that is really why those two
16 possibilities are there, not so much to make the
17 point that we're seeking mandamus, we're not seeking
18 mandamus, but simply to give some remedial
19 flexibility to this court should it conclude that a
20 remedy is required. So I have been concise, more
21 concise than I expected to be, but I think you have
22 my position and my points. And it is Mr. Portnov's
23 submission that this regulation, even if intra vires
24 at the beginning, is now ultra vires, that is for the
25 minister to come to this court with clear evidence,

1 at least have a clear statement by Ukraine that there
2 has been misappropriation. We have none of that.
3 We have a complete vacuum.

4 And, frankly, from a rule of law perspective
5 and from the perspective of Canada as a leading
6 western democracy, it would be highly troubling if
7 the court is powerless to intervene in this
8 circumstance. And that seems to be, in essence, what
9 the minister is arguing, that there is a complete
10 absence, "our hands are tied". The hands are not
11 tied of this court. Ukraine has not certified what
12 it needs to certify. The minister has not done what
13 the minister needs to do. And it's incumbent on this
14 court to intervene to do what other courts
15 internationally have universally done with respect to
16 Mr. Portnov being listed on international sanctions
17 lists.

18 JUSTICE MANSON: Thank you, Counsel.
19

20 SUBMISSIONS BY MR. FLAIM:

21 MR. FLAIM: Good morning, Justice Manson.
22 I'm just going to take a moment here to organize
23 myself. I'm just debating with myself, Justice
24 Manson, where exactly to begin, because I have to say
25 I'm a little surprised by the suggestion in my

1 friend's argument that the onus to prove the vires of
2 this regulation rests on the minister, and that it is
3 for the minister to call forth evidence that this
4 regulation was intra vires at the time that it was
5 promulgated and continues to be so. I understood
6 that it is the applicant's job to impugn the
7 regulations, since it is the applicant who brings
8 this case.

9 With respect to the vires of the regulation
10 at the point of promulgation, I would direct the
11 court to the regulation itself. If you have the
12 applicant's book of authorities, and if you flip
13 ahead to tab 7, that is the regulation that Mr.
14 Portnov impugns the vires of. And with respect to
15 whether the condition precedents are met, if we look
16 at the preamble, which is on page...well, it's the
17 preamble. It's clearly stated right there:

18 "...Whereas Ukraine has asserted to the
19 Government of Canada in writing that each of
20 the persons listed in the annexed
21 regulations has misappropriated property
22 of Ukraine or has acquired property
23 inappropriately by virtue of their office,
24 or a personal or business relationship, and
25 Ukraine has asked the Government of Canada

1 to freeze the property of these persons..."
2 And then there are a couple of other "whereas", which
3 I won't read. But this is the perfect alignment of
4 the condition precedents for making this regulation.
5 They are set out right there. You can check those
6 boxes. And so, with respect to there being no
7 evidence that the Ukraine has made this request, the
8 evidence is reflected right there in the regulation
9 itself.

10 Now, with respect to that...

11 JUSTICE MANSON: The preamble to the
12 statute, Counsel, I mean, it's not evidence. It's
13 simply a statement in terms of, this is what...I hear
14 what you're saying. It says it has misappropriated.
15 But why is there no evidence in terms of what the
16 allegation is? Why were none of those letters
17 produced?

18 MR. FLAIM: Well, there was a Rule 317
19 request made and there were objections to each of the
20 categories of information that were sought and an
21 objection letter was sent. So the original Notice of
22 Application came in November 2017, within the
23 required time. The minister sent a letter objecting
24 to the production of those records.

25 There was no challenge by the applicant to

1 the basis of those objections. And I will give you
2 an example of the objections. I have the letters but
3 I don't want to produce them. When this was
4 originally filed, it sought an order in the nature of
5 mandamus. And the authority from this court is clear
6 that when you are seeking mandamus, there is no
7 certified tribunal record to be produced because
8 there is no decision that has been made. So that was
9 among the objections that was made at the time.

10 The point, though, is that there was silence
11 from Mr. Portnov. Mr. Portnov then amended his
12 application and asserted the vires argument and
13 reasserted the request for documents. And we sent
14 a...and the minister sent a second letter objecting
15 on various grounds. The mandamus point was made
16 again. There was a concern for cabinet confidence
17 because part of what they were seeking was the
18 information that was before the GIC. And those
19 objections were set out. Again, silence from
20 Mr. Portnov, no attempt...even though this matter was
21 case managed, no attempt to call that position into
22 question or to litigate that matter.

23 Then we delivered our affidavit, and in the
24 affidavit there is no attachment of documents, but we
25 have the statements from Mr. Rex. Now, that

1 statement, which is...so if you look at the
2 application record of the respondent, at tab 1 we
3 have the affidavit of Kevin Rex, and at paragraph 12
4 is where my friend took you. And that statement was
5 crafted in that way out of recognition for the fact
6 that the letters were not going to be disclosed.

7 And the reason that...let me just read the
8 second sentence there. So there is the
9 acknowledgment of three correspondence from Ukraine,
10 and then Mr. Rex deposes:

11 "...Based on the content of this
12 correspondence, the department was satisfied
13 that there was still an ongoing
14 investigation with regard to the applicant
15 for his suspected role in acquiring state
16 property through the abuse of office..."

17 The reason that was crafted that way was because
18 there was a recognition that the letters were going
19 to be...were not going to be attached. And so, that
20 was the effort to avoid any allegation of hearsay
21 evidence, that what this deposes to is that what the
22 department was satisfied with, not what the Ukraine
23 said, because they were not going to disclose the
24 letters.

25 That affidavit was delivered. There was no

1 challenge made to that paragraph. There was no
2 challenge brought to the lack of the disclosure of
3 the diplomatic notes that have been received, and the
4 opportunity for cross-examination was not taken up.

5 It's for that very reason that Ms. Grant's
6 affidavit tracks the language of Mr. Rex's affidavit
7 perfectly, and I won't ask you to turn it up, but if
8 you match up those paragraphs, they say exactly the
9 same thing. And the reason they say exactly the same
10 thing is because there was no challenge by the
11 applicant that this was in some way deficient, or
12 that this was problematic, or that this would lead to
13 an adverse inference.

14 The opportunities to make requests for this
15 information and to have that issue litigated was
16 available to the applicant, and the applicant did not
17 avail himself of that opportunity. In the course of
18 litigating that issue, Justice Manson, there would,
19 of course, and this goes without saying, have been
20 section 38 concerns. And I think I heard my friend
21 allude to that possibility. He didn't say section 38
22 but he said redaction, there might have been...
23 disclosed in a redacted way.

24 Yes, maybe, but had the demand been made,
25 had the issue been litigated, the section 38 process

1 could have been undertaken, and whatever could be
2 disclosed might have been ordered by this court to
3 be disclosed, possibly, subject, of course, to
4 section 38 concerns.

5 And so, this is why I say I'm a bit
6 surprised by the allegation that the minister has
7 failed to lay an evidentiary foundation for the
8 ongoing vires of this regulation.

9 JUSTICE MANSON: How do you answer that,
10 and let's assume for the moment that when I started I
11 said my initial reaction was that it was intra vires
12 at the outset but the question whether it could be
13 ultra vires after the fact, and your friend said,
14 "Well, if I succeed on that, I succeed, so I'm not
15 overly concerned about whether you find it at the
16 outset or after the fact."

17 How do you answer your friend in terms of
18 all these court decisions, all the foreign
19 jurisdictions, and using the letter from the Ukraine
20 prosecutor's office itself saying that they are no
21 longer concerned with Mr. Portnov, I mean that, when
22 I read the evidence, concerned me very much. And
23 part of it is, why is this inaction by the Canadian
24 government continuing?

25 MR. FLAIM: Sure.

1 JUSTICE MANSON: You know, at some point,
2 there is going to be finality and everything
3 suggests...there is compelling evidence suggesting
4 that he did no wrongdoing, and yet the Canadian
5 government keeps saying, "Well, we understand there
6 is still an investigation in the Ukraine, and
7 therefore everything stays status quo." I have a
8 real problem with that, inactivity and inability of
9 the government to do what every other government
10 seems to be able to do.

11 MR. FLAIM: Okay. I take that point and
12 let me respond to it. My answer is going to have
13 multiple parts to it, but the thrust of the
14 submissions I'm going to make now are going to tackle
15 the point that you make right there. So, the first
16 is that this statute does not require...is not
17 designed to require an assertion that funds have
18 actually been misappropriated, and it does not
19 require the ongoing assertion of that fact.

20 I will quickly take you to the first point,
21 and then I think the second point is more important,
22 but I will quickly take you to the first point. If
23 you take a look at the applicant's book of
24 authorities and you flip open to tab 35, this was the
25 legislative summary that was published in March 2011,

1 and this is from the library of parliament:

2 "...It summarizes government bills currently
3 before parliament and provides background
4 about them in an objective and impartial
5 manner..."

6 That is a quote from the first page of it. But what
7 I want to quickly take you to is, if you take a look
8 at page 2...

9 JUSTICE MANSON: Yes.

10 MR. FLAIM: Yes, and then we have the
11 minister of justice at the time and the minister of
12 foreign affairs at the time:

13 "...The Minister of Justice, the Honourable
14 Rob Nicholson, told the House of Commons
15 Standing Committee on Foreign Affairs and
16 International Development that the
17 authorities in states and situations of
18 internal turmoil, democratic transition may
19 not be able to gather the evidence required
20 to use existing Canadian legal mechanisms
21 that govern asset restraint and recovery.
22 The information and evidence required by
23 Canada may simply not be made available in
24 time to prevent the assets from being
25 diverted or depleted. The Freezing Assets

1 of Corrupt Regimes Act would permit a
2 freezing order without requiring the
3 evidence of criminality or specific
4 identification of assets that now exists
5 under current law..."

6 And then the Minister of Foreign Affairs at the time,
7 Lawrence Cannon, went on to say:

8 "...Recent developments in the Middle East
9 and North Africa have shown the world how
10 important it is to have legislation in place
11 to allow for a quick response to ensure that
12 foreign dictators cannot hide their
13 ill-gotten wealth in a country..."

14 So I want to make that point to counter the
15 suggestion that there has to be a finding of guilt or
16 a clear assertion that something has happened. The
17 statute is not designed that way. There are other
18 restraint and sanctions acts that could be employed
19 if there is compelling evidence of corruption and
20 money laundering, and so on.

21 But the second point...

22 JUSTICE MANSON: You just said compelling
23 evidence yourself. What compelling evidence?

24 MR. FLAIM: Well...so let's...well...so I
25 have taken you to the statement in the preamble to

1 the regulation that the Ukraine had met that
2 standard, okay. And now you have raised the
3 question, "Well, what about all this evidence that
4 Mr. Portnov has brought forward?" And what...in my
5 respectful submission, what Mr. Portnov is attempting
6 to do is precisely what this Act was designed to
7 prevent, and that is to turn Canada into an arbiter
8 of corruption allegations as between a state in
9 turmoil and one of its nationals, who is seen as
10 contributing to that turmoil.

11 The minister does not...the statute is
12 designed in a manner that the minister does not play
13 that role. And I will show...

14 JUSTICE MANSON: Are you suggesting to me
15 that...let's assume at the outset the minister had
16 every best intention to do what this is supposed to
17 protect in terms of foreign governments in turmoil,
18 but after a lot of evidence from other foreign
19 jurisdictions, including courts, saying there is no
20 issue as far as they're concerned, the minister can
21 just continue to wait and hear at some point from the
22 Ukraine that, "Okay, we're going to have a problem,"
23 even...with respect, even in light of the letter from
24 the prosecutor's office in the Ukraine saying there
25 is no continued investigation on a criminal front.

1 So where is the justification to continue?

2 MR. FLAIM: The justification is that
3 each and every piece of information that Mr. Portnov
4 has brought forward has been superceded by a
5 representation from the Ukraine indicating that an
6 investigation continues to be underway. Now, you
7 have a clear concern with the weight of the evidence
8 he has brought forward. I'm going to take you to
9 that evidence.

10 Let's look at that evidence that he has
11 brought forward. So you, for example, mentioned,
12 Justice Manson, the EU decision in which he was
13 cleared and ultimately delisted. So let's look at
14 that decision, which is in the applicant's book of
15 authorities, and I'm going to ask my friend...it
16 is...

17 MR. HALL: Tab H.

18 MR. FLAIM: I'm sorry, it's in Mr.
19 Portnov's affidavit, and, yes, it's H. Thank you,
20 Mr. Hall. So I'm going to do now for you exactly
21 what the statute seeks to prevent the minister from
22 having to do. So this is a decision of...a judgment
23 of the General Court, Ninth Chamber, October 26th,
24 2015. There is Mr. Portnov at the top.

25 And what does the judgment teach us? So the

1 judgment shows us that there are both different
2 procedures and different legal standards at play that
3 are not applicable in Canada, and I will give you
4 examples of that. So, with respect to a different
5 procedure, for example, Mr. Portnov had the right
6 under applicable law to challenge his listing, and we
7 see that at paragraph 10:

8 "...According to the notice [this is the
9 notice listing Mr. Portnov], the persons
10 concerned may submit a request to council,
11 together with supporting documentation, that
12 the decision to include them on the list
13 should be reconsidered. The notice also
14 draws the attention of the persons concerned
15 to the possibility of challenging the
16 council's decision for the General Court in
17 accordance with the conditions laid down in
18 Article 275, second paragraph..."

19 So, under Canadian law there is a right to challenge
20 but it's limited to a single ground. Under this law
21 there is a right to challenge more generally, and I
22 will show you where that is. If we go to paragraph
23 38...

24 JUSTICE MANSON: Paragraph 38 of?

25 MR. FLAIM: Of that decision, of the same

1 decision.

2 JUSTICE MANSON: Right.

3 MR. FLAIM: In fact, I'm going to...I
4 really should focus on this, because I understand
5 your concern with the evidence that Mr. Portnov has
6 brought forward. So, starting at paragraph 33,
7 Mr. Portnov in this case brought forward various
8 grounds, five pleas in law. It says in paragraph 33:

9 "...The third plea alleges failure to
10 observe the criteria for designation of
11 persons covered by the restrictive measures
12 at issue, which are laid down in the
13 contested decision and regulation..."

14 And the court says at paragraph 34:

15 "...The court considers it is appropriate to
16 examine the third plea first..."

17 And then in paragraph 35 the plea is laid out. And
18 at paragraph 36:

19 "...On the basis of that line of argument,
20 the applicant disputes, in essence, that the
21 inclusion of his name on the list was
22 justified..."

23 Okay. So, paragraph 38 is where the standard is laid
24 out. And halfway through that paragraph, the first
25 sentence is quite a bit of a long run-on sentence,

1 but it says there, beginning halfway through:

2 "...The courts of the European Union are to
3 ensure that that decision [that is to say
4 the listing decision] which affects that
5 person individually is taken on a
6 sufficiently solid factual basis. That
7 entails a verification of the factual
8 allegations in the summary of reasons
9 underpinning that decision with the
10 consequence that judicial review cannot be
11 restricted to an assessment of the cogency
12 in the abstract of the reasons relied on,
13 but must concern whether those reasons or,
14 at the very least, one of those reasons
15 deems sufficient in itself to support that
16 decision or substantiate it by sufficiently
17 specific and concrete evidence..."

18 So, in the European Union, when they review those
19 regulations, they review the underlying evidence.
20 That is not the standard that is applicable in
21 Canada. So the fact that in the EU Mr. Portnov was
22 able to impugn that concrete evidence, and I will
23 show you where he does that, and is able to succeed,
24 has no bearing on whether or not in Canada the
25 regulation is intra vires or has become ultra vires.

1 And at paragraph 43 the court examines the
2 sufficient proof, which is the standard that applies,
3 and it notes that there is only one piece of
4 evidence, and that was the initial listing request,
5 and the court says:

6 "...It must therefore be established whether
7 the letter of 3 March, 2014 constitutes
8 sufficient proof to support the conclusion
9 that the applicant was identified as
10 responsible for the misappropriation of
11 Ukrainian state funds within the meaning of
12 Article 1 of the contested decision..."

13 JUSTICE MANSON: It seems eminently
14 reasonable.

15 MR. FLAIM: And maybe it is, Justice
16 Manson. If an authority wishes to place itself in
17 the role of arbiter between a state and its national,
18 as it appears the EU has elected to do, then that is
19 for it to do. Canada has made a very different
20 decision, expressly not to do that. It prefers its
21 bilateral relations. It prefers the statutory
22 preconditions that have been set out: an assertion,
23 the identification of an individual, the fact that
24 the government is in turmoil and therefore it needs
25 some time to conduct this investigation, and then,

1 ultimately, the final precondition of...it slips my
2 mind at the moment. Those are the preconditions that
3 matter in Canada.

4 This is an example of a piece of information
5 that Mr. Portnov cites and it's simply...it happens
6 to be that it's not applicable. It doesn't help. It
7 relies on different standards and also different
8 procedures. Now, you said eminently reasonable.
9 Here is what Canada does in an effort to be eminently
10 reasonable. Under the Act, any regulation has a life
11 span of five years.

12 JUSTICE MANSON: I notice it ends next
13 March.

14 MR. FLAIM: It ends in March, and the
15 reason for that is there a...the thinking behind that
16 is, a government in turmoil...a new government that
17 comes to power needs time to conduct its
18 investigation and it can't be given forever. So
19 there should be a deadline and that deadline is five
20 years. Now, at that point, it will be reconsidered
21 by the minister. At that point, the minister will
22 renew correspondence and communications with the
23 Ukraine and a new decision will be made.

24 But, over the course of this five years,
25 there have been four instances where Canada has gone

1 to Ukraine and said...where Canada has consulted with
2 the Ukraine, and the Ukraine has come back every
3 single time, according to the evidence that we've
4 had, and has satisfied the department that there
5 remain ongoing investigations.

6 Simply because an individual is able to
7 produce a letter from a prosecutor general saying
8 that there are no...that he is not the subject of a
9 criminal investigation, that doesn't account for
10 security services, intelligence agencies. I mean,
11 the investigations that could be undertaken in
12 respect of individuals who were aligned with a
13 corrupt regime could take any number of forms, be
14 carried out by any number of agencies, but...

15 JUSTICE MANSON: So you're saying Canada
16 isn't going to go behind whatever those
17 investigations may be?

18 MR. FLAIM: Canada is not best placed to
19 do that. How is the minister of foreign affairs to
20 decide between this...

21 JUSTICE MANSON: So even if there is no
22 evidence forthcoming, simply a statement that "We're
23 still undergoing an investigation," that suffices?

24 MR. FLAIM: No, it doesn't suffice, it
25 doesn't suffice, because this is a discretionary

1 decision.

2 JUSTICE MANSON: Yes.

3 MR. FLAIM: And so Canada has to decide
4 that it is in the interests of its bilateral
5 relations that the individual continues to be a
6 politically exposed foreign person. I mean, it's not
7 simply, "Oh, the Ukraine says, and therefore
8 restrictive measures." No. It is a decision...
9 I think my friend said there has to be a decision by
10 Canada. And there is a decision by Canada, but it's
11 one that prioritizes international relations and it's
12 one that prioritizes the purposes of the Act.

13 Now, my friend didn't talk about the purpose
14 of the Act and he doesn't seem to impugn that the
15 regulation, at least when it was promulgated, was in
16 line with the purpose of the Act, but the purpose of
17 the Act is twofold. You will find that in the
18 evidence of Kevin Rex. Number 1, Canada wants a tool
19 to be able to quickly help new governments fight
20 corruption, and number 2, Canada wants to continue to
21 foster its relationship with its allies and its
22 bilateral relationships.

23 And so, that is why this Act is structured
24 in this way. Canada is not...the minister is not
25 well-placed to judge what Mr. Portnov has versus what

1 they're hearing from the government itself. I don't
2 even know how the minister would or could do that. I
3 think this court...in my submission, this court
4 should take considerable...should pay considerable
5 attention to the fact that Canada has not sat on its
6 hands and said...the minister hasn't said, "Well, too
7 bad, Mr. Portnov." No.

8 In fact, the minister has consulted with the
9 Ukraine on four separate occasions; four separate
10 times, including in July of this year, the Ukraine
11 has come back and satisfied the department...I'm
12 going to choose my words carefully there...satisfied
13 the department that investigations remain ongoing.
14 That was enough at the time of promulgation, based on
15 how the statute is written, and it continues to be
16 sufficient for the vires of this regulation to remain
17 in place.

18 Now, this notion of becoming ultra
19 vires...this is a legal submission that my friend
20 made, that it was intra vires and then became ultra
21 vires. And the only authority for the proposition
22 that a regulation can go from being intra vires to
23 ultra vires is the Charkaoui 2009 decision. What
24 that decision lacks and what I did not bring with me
25 today, but what I've heard you to read, is paragraph

1 77 of the IRPA in force at the time. For whatever
2 reason, it's not reproduced in the decision.

3 But paragraph 77 of the IRPA, under that
4 paragraph, the minister had to...so the minister was
5 directed, it wasn't discretionary. The minister had
6 to submit the certificate that the minister created
7 and the evidence for it to the Federal Court for a
8 ruling on its reasonableness. That had to be done,
9 it was a statutory condition. You couldn't have one
10 without the other.

11 My friend has accurately described the facts
12 of the case and what happened. The minister ended up
13 pulling the evidence, and this is where we get the
14 statement that something that was intra vires became
15 ultra vires. In my submission, this statutory scheme
16 is wholly distinguishable from what we have under
17 FACFOA. The IRPA expressly contemplated an ongoing
18 review of the reasonableness of that certificate.
19 That is not a feature of this Act.

20 And I'm going to take you to the test that
21 applies under this Act. Under this Act, we have to
22 adopt the standard approach or the well-established
23 approach of reviewing a regulation, not a
24 certificate. In fact, I confess I don't even know
25 what a certificate is...in the law, but I couldn't

1 give you a definition for the legislative status of a
2 certificate. I couldn't...I can do it for a
3 regulation, right, a regulation is law.

4 And the approach to reviewing regulations is
5 whether the statutory preconditions were met at the
6 time they were made. And in the cases establishing
7 that point, there is no consideration of what happens
8 following that. And there is no case before you and
9 no case in law that has ever invalidated, as far as I
10 have been able to find or apparently based on their
11 book of authorities that the applicant has been able
12 to find, for a court holding that what was once
13 intra vires had become, in terms of a regulation,
14 ultra vires.

15 And the reason for that is the focus is
16 exclusively on whether condition precedents were met
17 at the time of promulgation. And we see this, and I
18 don't want to belabour this point because you have
19 already said that the...you've suggested that the
20 conditions were met at the time that it was
21 promulgated, but if we look at the Mercier decision,
22 that is in the applicant's book of authorities at
23 tab 26. And this is a 2010 decision from the Federal
24 Court of Appeal. It is written by Justice Nadon.

25 The facts of the case, very easy to

1 summarize, the commissioner of Correctional Services
2 Canada enacted a directive banning smoking on all
3 federal correctional services properties, and the
4 commissioner relied on authority that had been
5 granted to him under the Corrections and Conditional
6 Release Act, sections 97 and 98. And there is a
7 challenge to the vires of that directive. And I'm
8 not going to read it to you, but the court's analysis
9 of vires begins at paragraph 60.

10 The part that I want to take you to,
11 however, begins at paragraph 75. Now, 75 is the
12 analysis of the question that Justice Nadon lays out
13 at paragraph 70:

14 "...I now turn to the question of whether
15 the directive falls within the scope of the
16 powers given to the commissioner and whether
17 the measures found therein find support in
18 the Act or the regulations..."

19 And the core of the analysis begins at 75:

20 "...I am therefore satisfied that the
21 commissioner's directive clearly falls
22 within the ambit of paragraph 97(c) of the
23 Act, in that it purports to take steps to
24 ensure that the living and working
25 conditions of inmates and employees of CSC

1 are safe and healthful. Thus, the directive
2 falls within the scope of the powers given
3 to the commissioner under the Act and
4 regulations..."

5 And then he says, and this is the critical point:

6 "...This conclusion, in my view, is
7 sufficient to dispose of the question of the
8 vires of the directive. As Justice Strayer
9 stated in Jafari, 'It goes without saying
10 that it is not for a court to determine the
11 wisdom of delegated legislation or to assess
12 its validity on the basis of the court's
13 policy preferences. The essential question
14 for the court always is, does the statutory
15 grant of authority permit the particular
16 delegated legislation?'

17 The answer to the question posed by
18 Strayer, J.A. in the present appeal is
19 clearly an affirmative one. Echoing the
20 point of view expressed by Strayer in
21 Jafari, which he quoted with approval,
22 Justice Noel in Canadian Council of
23 Refugees, made the following remarks:
24 'Understanding precisely what is in issue in
25 a judicial review application is important

1 when it comes time to determine the standard
2 of review, as well as the scope of the
3 review that can be conducted by the court.
4 An attack aimed at the vires of a regulation
5 involves the narrow question of whether
6 the conditions precedent set out by
7 parliament for the exercise of the
8 delegated authority are present at the
9 time of promulgation.'..."

10 And then he makes a submission on the standard of
11 review. So I have a note here, "don't read that",
12 but there it is.

13 JUSTICE MANSON: I think he says it in
14 79.

15 MR. FLAIM: Yes, he does, yes, he
16 certainly does. In any event, the key point there is
17 that it involves the narrow question of whether the
18 conditions precedents set out by parliament for the
19 exercise of the delegated authority are present at
20 the time of promulgation.

21 Now, this is also repeated, frankly, by the
22 Supreme Court of Canada itself. This is not just the
23 Federal Court of Appeal speaking. And if we go to
24 the minister's book of authorities, that is the
25 thinner green volume...

1 JUSTICE MANSON: Right.

2 MR. FLAIM: ...and we have the Inuit
3 Tapirisat case, and that is found at tab...

4 JUSTICE MANSON: 3.

5 MR. FLAIM: ...tab 3. And in this case,
6 the CRTC made a decision setting certain rates. And
7 the Inuit Tapirisat appealed the CRTC decision to the
8 Governor in Council pursuant to a statutory provision
9 that allowed for that appeal. The Governor in
10 Council rejected the appeal and approved the CRTC's
11 rate increase without hearing from the objectors.

12 And this is the case that results from that
13 sequence of events. And if we turn to page 12 of 21,
14 we find the condition precedent issue addressed right
15 there at the top of the second paragraph:

16 "...Let it be said at the outset that the
17 mere fact that a statutory power is vested
18 in the Governor in Council does not mean
19 that it is beyond review. If that body has
20 failed to observe a condition precedent to
21 the exercise of that power, the court can
22 declare that such purported exercise is a
23 nullity..."

24 So, in addition to my characterization of Mr.
25 Portnov's attempting to put the minister in a

1 position which this Act expressly seeks to keep the
2 minister out of, I also characterize Mr. Portnov's
3 position, bluntly, as asking you to make new law;
4 declare something that was intra vires at the time
5 that it was promulgated has become ultra vires,
6 notwithstanding that the authority with respect to
7 vires review of regulations focuses on the condition
8 precedents at the time of promulgation.

9 It cannot be that...what would we say,
10 Justice Manson, every 30 days the minister should
11 check in with the Ukraine, every 90 days, every year?
12 It's not feasible for it to work that way. This
13 statute has been crafted with a view to achieving the
14 objective of assisting a government, like Ukraine's
15 new government, in getting its house in order and
16 seeking to recoup what the public record says are
17 billions of dollars of misappropriated funds.

18 Now, I would also like to take you to the
19 minister's letter. That is the letter that was
20 attached to Alison Grant's e-mail...excuse me, not
21 e-mail, affidavit. I do want to point out that the
22 minister is...it states right here that the minister
23 has not given...the minister has sat with this. The
24 minister hasn't given this request short shrift. We
25 see at paragraph 2:

1 "...section 13 of the Act provides a
2 mechanism for a listed person to apply in
3 writing to the minister to cease to be the
4 subject of regulations made pursuant to the
5 Act on the ground that the person is not a
6 politically exposed foreign person..."

7 And then it says:

8 "...The minister has considered the
9 information you have submitted in your
10 various letters, which does not address this
11 issue..."

12 So Mr. Portnov's evidence has been reviewed. The
13 minister has turned their mind to it, but the
14 minister has confined herself to the very thing that
15 the Act allows the minister to turn her mind to,
16 which is, "Are you a politically exposed foreign
17 person or are you not?"

18 Now, in the Gilani decision, that was the
19 issue. The Gilani applicant sought to establish that
20 they were too far removed from the deposed former
21 leader of Tunisia to be a politically exposed foreign
22 person, and that case turned on that issue. And so,
23 here we have the minister properly observing the
24 statutory boundaries of what she is entitled to
25 consider.

1 Then she goes on to say...and, by the way,
2 I'm going to take you to Gilani in a moment, because
3 there is an important point that I want to bring your
4 attention to:

5 "...The minister has also considered..."
6 So, in addition to that, in addition to the evidence
7 that he has submitted, in addition to whether or not
8 he is a politically exposed foreign person:

9 "...The minister has also considered whether
10 she should nevertheless recommend that the
11 Governor in Council exercise its discretion
12 under section 4 of the Act to amend the
13 Ukraine regulations. This included
14 consultations with the Government of
15 Ukraine, as well as correspondence from the
16 Government of Ukraine between 2016 and 2018,
17 indicating that you remain the subject of an
18 ongoing investigation in Ukraine..."

19 Now, in the affidavits of Kevin Rex and Alison Grant,
20 it was stated in a way to be sensitive to the fact
21 that the underlying documents were being disclosed,
22 but here we have it right out of the mouth of the
23 minister, indicating that "you remain the subject of
24 an ongoing investigation in the Ukraine". And then
25 the minister goes on to say:

1 "...Further, considering Canada's bilateral
2 relationship with Ukraine, including
3 Canada's continuous support for
4 accountability, the rule of law and
5 democratic rule in Ukraine, the minister is
6 not recommending an amendment to the Ukraine
7 regulations at this point in time..."

8 Which, I think, foreshadows in March this issue is
9 going to have to be reconsidered. I mention the
10 Gilani decision in passing, and there is an important
11 statement in Gilani that I want to take you to. And
12 this the Gilani 2017 decision and it is found at
13 tab 20 of the applicant's material.

14 JUSTICE MANSON: Right.

15 MR. FLAIM: And I'm going to skip over
16 the facts and the analysis. I will mention it's the
17 only decision decided under FACFOA of this court.
18 It's the only other decision on point. I note in
19 passing that the standard of review in that case was
20 set at reasonableness. But, in any event, the key
21 part I want to take you to is at paragraph 100, and
22 this is under the section "The minister's decision is
23 reasonable".

24 And in case it needs saying, there was a
25 judicial review of the reasonableness of the decision

1 in that case because the decision was pursuant to the
2 minister's authority under section 13. Here, there
3 is no reasonableness review because the minister, in
4 making a recommendation, is acting in a legislative
5 capacity. But at paragraph 100 the court says:

6 "...The applicants also claim that the
7 minister's decision is unreasonable because
8 the property that they wanted to access was
9 legitimately acquired..."

10 This is another way of saying, "We didn't do it,"
11 which is what Mr. Portnov is saying.

12 "...However, it is not the minister's
13 responsibility to verify the lawfulness of
14 the property. The Act was enacted to enable
15 the states faced with an uncertain political
16 situation to ask Canada to freeze property
17 that may have been misappropriated by
18 certain individuals until the situation has
19 been restored and that state can obtain
20 evidence and carry out investigations of
21 these persons or property..."

22 So there we see again a reflection of what the
23 ministers said to the...at the time that the Act was
24 being promulgated. And then the next sentence,
25 closing sentence:

1 "...It seems reasonable that the minister
2 did not assess the lawfulness of the
3 property when making her decisions regarding
4 the application submitted under section 13
5 of the Act..."

6 And that, in my submission, is Justice St-Louis'
7 recognition of what the minister is able to do and
8 not able to do and is directed by parliament not to
9 do under this Act. If I may just have a moment,
10 Justice Manson, please.

11 I want to, as well, suggest that what Mr.
12 Portnov...that...the practical consequences of what
13 Mr. Portnov is suggesting here. So at the outset,
14 there must be an assertion that state property was
15 misappropriated. And in Mr. Portnov's view of the
16 Act, that has to be a continuing condition. Ukraine
17 has to continually...seemingly, continually assert
18 that Mr. Portnov has misappropriated property.

19 Now, I hope I have established for you that
20 the Act is structured in a way to allow foreign
21 states to make that assertion on the basis of
22 suspicions. That is how it's supposed to work.
23 But further to that point...I will put it as a
24 rhetorical question: Would a state that resiles from
25 that initial submission say on four occasions that

1 there continue to be investigations of that
2 individual, that they continue to investigate?

3 What is the magic formula that the Ukraine
4 should say for the regulation to be found to be
5 continually intra vires if we accept that a
6 regulation can go from intra vires/intra vires? They
7 don't. But what is the magic formulation of words?
8 Should they say every time Canada checks in, "We
9 continue to assert that he has misappropriated
10 funds?"

11 In my submission, on four separate occasions
12 spanning 2016 to 2018, a representation from the
13 Ukraine per the minister's letter, and investigations
14 remain underway, satisfy that criteria. It was good
15 enough to satisfy the condition precedent to create
16 the regulation in the first place. And this search
17 for a magic set of words that the Ukraine must utter
18 to protect the vires of this regulation is
19 unworkable.

20 I do want to emphasize as well, Justice
21 Manson, that the representations from the Ukraine
22 supercede those...all of the evidence Mr. Portnov has
23 brought forward are superceded at various points by
24 the four representations, the latest of which was
25 July of 2018.

1 Why is the Ukraine providing this
2 information to Mr. Portnov and saying something else
3 to Canada? That is a curious question. I am not...
4 I don't want to be seen as being blind to it. I have
5 read Mr. Portnov's affidavit, there's a lot in there.
6 This man has worked hard; there is no denying it. He
7 has obtained documents from a variety of officials
8 and sources that build the case that the Gilani
9 applicant sought to build, "I didn't do it." And yet
10 Canada hears from the Ukraine that investigations are
11 underway. Why is that? I can't give you that
12 answer. The minister can't give you that answer.
13 But the minister was entitled and is entitled to
14 prefer Canada's international relations over stepping
15 into the fray as between a foreign government and a
16 former official who has contributed to the turmoil
17 that that government finds itself in.

18 And if there is any...the facts are...we
19 sometimes in these cases, Justice Manson, get lost in
20 the law, but...and I'm not going to ask you to turn
21 it up, but at tab 34 you will find the regulatory
22 impact analysis statement. And we see there in the
23 background to this:

24 "...Rampant corruption and other abuses by
25 senior government officials meanwhile weaken

1 the Ukrainian economy and depleted
2 government coffers. Open-source reports
3 suggest that billions of dollars may have
4 been stolen or diverted..."

5 And that is in addition to allegations of violence,
6 kidnapping, beatings, intimidation by the security
7 services of the Yanukovich government, which fell in
8 2014. To pursue those facts a little further...I'm
9 mindful of the time...Mr. Portnov discloses that he
10 was advisor to President Yanukovich from 2010 to
11 2014, which is exactly the currency of that
12 government.

13 It is my submission that, to the degree that
14 Mr. Portnov finds himself in this position is by
15 virtue of decisions he made between 2010 and 2014,
16 and it doesn't, as a consequence of that, fall on the
17 minister to sort out who is right and who is wrong
18 and who is corrupt and who isn't corrupt. The Act
19 isn't designed that way.

20 Your Honour, subject to questions you
21 have...I seem to have crossed everything off. I
22 don't want in any of my submissions to be seen as
23 resiling from the statements of my factum. I haven't
24 taken you through that factum, but there are
25 submissions in there on how the regulation is within

1 the scope of the Act, but I didn't hear that
2 challenge today, or is consistent with the purpose of
3 the Act. I also didn't hear that directly challenge
4 today, so I am withholding my submissions on that,
5 but we stand by the statements made in our factum.

6 I'm always a little confused about the
7 court's preference with respect to costs. I do have
8 a bill of costs. I have provided it to...

9 JUSTICE MANSON: I always tell counsel
10 I would like to see their bill of costs at the end.
11 It's always more interesting...when you say you can
12 make submissions after the fact, and somebody has won
13 and somebody has lost, it's amazing how costs change.
14 Often we get agreement with counsel, whoever wins,
15 it's easier if we agree to costs, but in the absence
16 of agreement, I'm happy to hear your submissions...

17 MR. FLAIM: Well, my submissions...

18 JUSTICE MANSON: ...bill of costs.

19 MR. FLAIM: Yes. My submissions are as
20 they are laid out in the bill of costs. So, subject
21 to any questions you have, Justice Manson, those are
22 my submissions.

23 JUSTICE MANSON: No. Thank you, Counsel.

24 MR. FLAIM: Thank you.

25

1 REPLY BY MR. HALL:

2 MR. HALL: On the costs point, I must
3 admit I did not bring a bill of costs. I can
4 certainly provide one in the next day or so if you
5 would like one. I have no issue with the minister's
6 bill and...it seems reasonable. Just a few brief
7 points in reply, My Lord. The minister says that
8 Mr. Portnov is trying to turn Canada into an arbiter
9 of allegations, which the statute does not permit.

10 With respect, Mr. Portnov is not trying to
11 turn Canada into an arbiter of the allegations, but
12 instead is seeking to hold the minister to compliance
13 with the statutory prerequisite in section 4(1) that
14 I began with. That is not the same as seeking to
15 turn Canada into an arbiter; it's instead insisting
16 that Canada must have a clear statement from Ukraine
17 that there has been misappropriation.

18 Instead, what we get, and Mr. Flaim pointed
19 to it over and over again, the same message from
20 Ukraine, "There is an ongoing investigation, ongoing
21 investigation." And the point is that is simply not
22 enough for the prerequisite of section 4(1). It's
23 not a question of trying to turn Canada into an
24 arbiter, just trying to get compliance with the
25 statute.

1 Mr. Flaim took you to the Mercier and Inuit
2 Tapirisat cases for the proposition that something
3 that is once intra vires is always intra vires.
4 I urge you to look at those two cases with caution
5 for that proposition, because that issue was not at
6 stake in either of those cases. And when we saw
7 the minister's memorandum of fact and law, we
8 specifically researched the question of whether there
9 has been consideration of the question of something
10 becoming ultra vires because of changing
11 circumstances or changing evidence. The best we came
12 up with was the Charkaoui case that I put in front of
13 you.

14 The other authority, just so that you're
15 aware of what is out there...I don't have a copy of
16 it, but you don't really need to refer to it...but
17 the Supreme Court of Canada looked at the issue on a
18 constitutional level...that's why I didn't bring it,
19 because it's a constitutional issue...in respect of
20 war-time rental controls.

21 So, during the Second World War, the federal
22 government invoked certain federal powers in an
23 emergency to invoke provincial...essentially take
24 over some provincial rent control jurisdiction. And
25 the Supreme Court of Canada said that when the

1 circumstances no longer are there for the national
2 emergency, what was *intra vires* is no longer
3 *intra vires*.

4 Now, the context obviously very, very
5 different, and I'm not relying on it strongly. It's
6 a 1950 reference from the Supreme Court of Canada,
7 but I just wanted you to be aware that the specific
8 question of changing circumstances leading to a
9 situation of *ultra vires* is best addressed in the
10 Charkaoui case, which is why I put it in front of
11 you, and has otherwise not widely been considered,
12 presumably because the circumstances don't arise very
13 much.

14 But importantly, *Mercier* and *Inuit Tapirisat*
15 do not consider the question, so they should not be
16 taken as authority for the proposition that, once
17 something is *intra vires*, it is once and for all time
18 *intra vires*.

19 And finally, My Lord, I wanted to address
20 the somewhat...the surprise at the beginning of
21 Mr. Flaim's submissions with respect to the
22 suggestion that...the surprise that Mr. Portnov takes
23 issue with the fact that the correspondence has not
24 been disclosed to this court. The simple answer to
25 that is that it is not for Mr. Portnov to make the

1 minister's case.

2 The minister has chosen what evidence to put
3 before you. Indeed, we do not agree that it's
4 enough, but it's not for me to go ferret it out
5 through a motion or through cross-examination or
6 anything else. Our position was very clear at the
7 outset: under Rule 317 request, we wanted the full
8 record. The minister has chosen not to disclose the
9 correspondence from Ukraine, and the minister, like
10 every other litigant in this court, has an obligation
11 to prove its case. And this case should be decided
12 on the record that is before you, which is tellingly
13 absent in terms of that correspondence, which is
14 crucial to demonstrate that the preconditions were
15 met in the first place and continue to be met.

16 JUSTICE MANSON: Thank you, Counsel.
17 Thank you both. Obviously I'm going to reserve my
18 decision. I appreciate apt submissions from both
19 sides. I've got some food for thought. So I thank
20 you both.

21 MR. FLAIM: Thank you.

22 JUSTICE MANSON: And on the costs, if you
23 would get it to me in the next two days, that would
24 be...

25 MR. HALL: I will definitely do so,

1 My Lord. Thank you.

2 JUSTICE MANSON: Thank you.

3 THE CLERK: This special sitting is

4 concluded. Thank you.

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I hereby certify the foregoing to be a true and accurate transcription of the above-noted proceedings, transcribed by Verbatim on the 11th DAY OF DECEMBER, 2018, to the best of my skill, ability and understanding.

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) Certified Correct:
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) Chris Orr
) Verbatim Reporter

