A-10-19
Court File No.

FEDERAL COURT OF APPEAL

ANDRIY VOLODYMYROVYCH PORTNOV

Appellant

- and -

THE MINISTER OF FOREIGN AFFAIRS

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appear on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

VANESSA GEORGE
REGISTRY OFFICER
AGENT DU GREFFE

January 8, 2019 Issued by:

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TO: **MINISTER OF FOREIGN AFFAIRS**
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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of the Federal Court under Court File No. T-1689-17 dated December 11, 2018 (the Honourable Mr. Justice Manson), dismissing an application for judicial review brought by Andriy Volodymyrovych Portnov.

THE APPELLANT ASKS that the Court grant:

(a) an order setting aside the judgment of the Federal Court and substituting a declaration that item 9 of the Schedule of Politically Exposed Foreign Persons (the "**Schedule**") to the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations,* SOR/2014-44 (the "**Regulation**") is *ultra vires* its enabling statute, specifically subsection 4(1) of the *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10 (the "**Act**");

(b) costs in this Court and in the Federal Court; and

(c) such further and other relief as this Court considers just.

THE GROUNDS OF APPEAL are as follows:

I. Overview

1. The Act grants authority to the Governor in Council to impose restrictive measures (i.e., sanctions) in respect of the property of officials and former officials of foreign states.

2. The Regulation has been promulgated pursuant to the Act to impose sanctions on certain former officials of Ukraine. The Schedule names the specific individuals who are subject to the Regulation. Item 9 of the Schedule names Mr. Portnov.

3. The statutory authority to enact the Regulation is subsection 4(1) of the Act:

4 (1) If a foreign state, in writing, asserts to the Government of Canada ***that a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship*** and asks the Government of Canada to freeze property of the person, the Governor in Council may	4 (1) Si un État étranger, par écrit, déclare au gouvernement du Canada ***qu'une personne a détourné des biens de l'État étranger ou a acquis des biens de façon inappropriée en raison de sa charge ou de liens personnels ou d'affaires*** et demande au gouvernement du Canada de bloquer les biens de la personne, le gouverneur en conseil peut :
(a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to the person's property that the Governor in Council considers necessary; and	a) prendre tout décret ou règlement qu'il estime nécessaire concernant la restriction ou l'interdiction, à l'égard des biens de la personne, des activités énumérées au paragraphe (3);
(b) by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the person's property situated in Canada. [Emphasis added.]	b) par décret, saisir, bloquer ou mettre sous séquestre, de la façon prévue par le décret, tout bien situé au Canada et détenu par la personne. [Italiques ajoutés.]

4. The evidence before the Federal Court established that Ukraine had asserted to Canada in writing that an ***investigation*** into Mr. Portnov was under way, but not that Ukraine had asserted in Canada in writing that Mr. Portnov had "misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship". There was also substantial evidence before the Federal Court that Mr. Portnov had not in fact misappropriated property or acquired property inappropriately, including findings from courts in the European Union and Ukraine and decisions made by the European Commission, Switzerland and Norway to remove sanctions previously imposed on Mr.

Portnov. Nevertheless, the Federal Court held that item 9 of the Schedule was *intra vires*, and dismissed Mr. Portnov's application for judicial review.

II. The Grounds of Appeal

5. The Federal Court judge made three errors:

(a) He erred in law in his interpretation of subsection 4(1) of the Act.

(b) He made a palpable and overriding error and misapprehended the evidence in concluding that what he referred to as the "March 3, 2014 Letter" satisfied the requirement of subsection 4(1) of the Act even on Mr. Portnov's interpretation of that provision. The March 3, 2014 Letter was not even addressed to Canada – it was addressed to the European Commission.

(c) He erred in law in concluding that if item 9 of the Schedule was *intra vires* at the time the Regulation was promulgated, it could not subsequently have become *ultra vires*.

Error of law in interpretation of subsection 4(1) of the Act

6. The judge erred in law in his interpretation of subsection 4(1) of the Act (an issue reviewable on a standard of correctness).

7. In paragraph 30 of its reasons for judgment, the judge correctly expressed Mr. Portnov's submission to him, specifically that "in order for the Minister to find that the Applicant's assets should be frozen under section 2 of the Regulations, the Minister must have a representation in writing from the Ukraine that the Applicant has misappropriated property inappropriately, not merely that there is an investigation being conducted to ascertain if there

has been such a misappropriation." [Underlining in original.] In paragraph 31, the judge mischaracterized Mr. Potnov's submission – it was never that "the Minister must have been satisfied that there was in fact misappropriation at the outset", rather that the Minister was required to have a representation in writing from Ukraine that Mr. Portnov had misappropriated property before he could be listed in the Schedule. As a result of this mischaracterization, the judge went on to answer a different question than the one Mr. Portnov had posed, and interpreted subsection 4(1) of the Act as requiring "merely that an assertion of impropriety be made by a foreign state" (paragraph 33).

8. This interpretation constitutes an error of law. Applying Driedger's modern approach to statutory interpretation, the judge's interpretation of subsection 4(1) of the Act fails to apply the words of subsection 4(1) in their grammatical and ordinary sense (read in their entire context and harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament). Properly interpreted, subsection 4(1) is satisfied only if a foreign state asserts in writing to Canada that a person ***has misappropriated*** property of the foreign state.

Palpable and overriding error and misapprehension of evidence with respect to the March 3, 2014 Letter

9. In paragraph 33 of his reasons, the judge concludes that a letter he refers to as the "March 3, 2014 Letter" was a sufficient basis to include Mr. Portnov in the Regulation even on Mr. Portnov's interpretation of subsection 4(1). This was a palpable and overriding error and a misapprehension of the evidence.

10. The March 3, 2014 Letter was not addressed to Canada, as the judge erroneously states in paragraph 9 of his reasons, but rather was addressed to the European Commission. It appears that there was another letter dated March 3, 2014 that was addressed to Canada, but that letter was not in evidence (as a result of the failure of the Minister of Foreign Affairs to produce it in response to Mr. Portnov's request under Rule 317 of the *Federal Courts Rules* for the material that was before the Governor in Council when the Regulation was promulgated) and its contents are unknown. The judge's treatment of the "March 3, 2014 Letter" constitutes a palpable and overriding error of fact and a misapprehension of the evidence. There was accordingly no basis for the judge to conclude that the requirements of subsection 4(1) of the Act were met even if his interpretation of subsection 4(1) is correct in law (which is not the case).

Error of law in concluding the item 9 of the Schedule is valid as long as it was intra vires at the time of promulgation, and that it could not subsequently become ultra vires

11. The judge erred in law in his conclusion that item 9 of the Regulation is valid as long as it was *intra vires* at the time the Regulation was promulgated, as a regulation that is *intra vires* cannot subsequently become *ultra vires* (an issue reviewable on a standard of correctness).

12. As a matter of law, a regulation can become *ultra vires* if subsequent events result in a situation in which the statutory preconditions for the regulation no longer exist.

13. That was the case here. If item 9 of the Schedule was *intra vires* on the date of its promulgation, subsequent developments have made is clear that Mr. Portnov has not appropriated property of Ukraine, and also that allegations to that effect are without merit. As

such, even if item 9 of the Schedule was *intra vires* at the time of promulgation, it is now *ultra vires*.

14. In addition to the record that was before the judge, further evidence on this issue has been discovered since the hearing, and Mr. Portnov will seek to place that evidence before this Court by way of a motion to adduce fresh evidence.

Other

15. Mr. Portnov will also rely on such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING LEGISLATIVE PROVISIONS will be relied on at the hearing of the motion:

(a) subsection 4(1) of the Act;

(b) the Regulation, in particular item 9 of the Schedule;

(c) Rule 317 of the *Federal Courts Rules*; and

(d) such further and other provisions as counsel may advise and this Court may permit.

January 8, 2019

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